IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

CASE NO. J 2578/98

In the matter between:

JOHN DIGWAMAYE Applicant

and

FAVERITE (PTY) LTD Respondent

J U D G M E N T

Basson, J:

[1] This is an application for the rescission of a judgment given by my sister Revelas J on 20 October 1999.

[2] I believe that, in considering the application for rescission, there is enough grounds for concluding that we are dealing with a dilatory litigant who shows scant respect for the Rules of this Court and now seeks an indulgence from the Court for not having complied with bringing the application for rescission within a reasonable time, or as is required in terms of the Rules, if the application was brought under 165(a) of the Labour Relations Act, 66 of 1995 ("the Act"), within the prescribed 15 days.

[3] I pause to add that this appears to be the position as the application for rescission is headed with an indication that it is brought under section 165 of the Act.

[4] However, and this was conceded, section 165(a) of the Act is not applicable as the judgment was clearly not erroneously granted in the absence of the applicant in this matter. In the event the applicant seeks to rely on the common law grounds for rescission.

[5] The applicant, however, on being notified of the order on 20 October 1999, took a totally inexplicable and

indifferent approach to the order of this Court. He did absolutely nothing.

[6] I do not believe that the maxim ignorantia iuris non excusat is applicable, even if the applicant claims to be a lay person, as I believe that the applicant knew that he was being confronted by an order of this Court.

[7] However, for a period of almost six months, which to my mind already amounts to an unreasonably long period, because there is no proper explanation offered, the applicant does nothing, until the applicant is notified of a warrant of execution in April 2000.

[8] I therefore believe that there was an unreasonable period of delay, inordinately long, without any excuse whatsoever. Further, even in April 2000, the matter was dealt with in the following fashion. The Court was not approached on an urgent basis with an application for condonation or rescission, as the applicant was now clearly out of time for lodging a formal application at Court, but time was rather spent in trying to find the representatives for the respondent in this matter.

[9] Eventually, in May 2000, these representatives were found and negotiations ensued. In June 2000 it became clear that these negotiations would not bear fruit and that a formal application should be lodged.

[10] It also needs to be noted that the attachment of the applicant's property had then already taken place (on 2 May 2000) and, as it was put, "the shoe pinched". It was only at this late stage that the applicant decided to not conduct himself in an indifferent fashion any longer.

[11] However, not even at this stage was a proper application for rescission filed. A fatally defective application was namely filed on 20 June 2000. There was also no explanation whatsoever why it was not possible to have filed a proper application for condonation in the rescission application, which was now many months out of time.

[12] It was only in July 2000 (apparently on 17 July 2000) that a so-called supplementary affidavit was filed. It is in terms of this supplementary affidavit that condonation as well as rescission of the order of Revelas J is sought, properly for the very first time.

[13] I am accordingly faced with an application for an indulgence which, in my view, an indifferent litigant has brought before this Court.

[14] As far as the application for rescission is concerned, it is clear that the application is brought in terms of the well-known principles of the common law, in that the applicant is required to give a reasonable explanation of his default and therefore his default must not be willful or due to gross negligence. Second, that the application must be bona fide and not made with the intention of merely delaying the plaintiff's claim and in this regard the applicant is required to set out a bona fide defence.

[15] In applying the well-known principles in an application for condonation as ennunciated in the case of Melane v Santam Insurance Company Limited 1962 4 SA 531 (A) at 532, I believe that there was an inordinately long delay coupled with a almost non-existent explanation for the most of that period, that is, for almost seven months of that period of delay. I also have to weigh this up against any possible prospects of success.

[16] In this regard the applicant has stated that his explanation for his of non-appearance on 20 October 1999 was the fact that he had to appear in the magistrate's court on that day (as it was set out in the so-called supplementary affidavit).

[17] The applicant, however, proceeded in a very strange fashion in not approaching this Court for an indulgence for postponement, but merely sending a faximilee for which, to this day, no slip has been provided. In his affidavit the applicant stated that the faximilee was sent to this Court on 30 September 1999 (or around that date), stating that he would not be able to be present at Court, without really giving a proper explanation.

[18] In the event, in regard to the first requirement in a rescission application, it appears that the indifference of the applicant is once again quite clear, although one could not say that the applicant was wilful, or that it was due to gross negligence. Nevertheless, there was an indication of indifference and this indifference merely reinforces my clear impression that the applicant was indifferent to the Court order granted on 20 October 1999 in his absence.

[19] I have a very wide discretion to decide whether a dilatory litigant, or at the very least, a litigant who has shown indifference to this Court and its Rules, must be granted the further indulgence of condonation in the rescission application.

[20] In this regard it must be stated that, even if there were prospects of success in the rescission application, in that there was a reasonable explanation for the default as well as a bona fide defence or a prima facie case being

made out (and, in my view, it is not certain that such prima facie case has breen made out), I would not be inclined to grant any further indulgence to this litigant.

[21] Even though the applicant was at Court on previous occasions, for reasons left, unexplained, the applicant became indifferent to the proceedings of this Court and also showed an indifference to an order of this Court.

[22] In the event, the application for condonation is refused.

[23] The question arises as to costs. In regard to the previous occasions where costs were reserved as well as today's costs, I find no reason in fairness why costs should not follow the result.

[24] In the event this application is dismissed with costs.

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Basson, J

: 3 August 2000

: 3 August 2000 (*ex tempore*)

plicant : Adv S D Maritz

For Respondent : Adv John Hadiaris