



REPUBLIC OF SOUTH AFRICA

Not reportable

**THE LABOUR COURT OF SOUTH AFRICA,
IN JOHANNESBURG
JUDGMENT**

CASE NO: C 841/2010

In the matter between:

**RAITH GOURMET TRADING (PTY)
LTD**

Applicant

and

DARREN HALLIGAN

Respondent

In Re

CASE NUMBERS:

**C552/2008 and
C553/2008**

FOCSWU OBO REEVA DAVIDS

First Applicant

FOCSWU OBO ADRIANA LOTZ

Second Applicant

FOCSWU OBO FIONA APRIL

Third Applicant

FOCSWU OBO MARGARET ISAACS

Fourth Applicant

and

CONDRAD DE KOCK

First Respondent

**THE COMMISSION FOR
CONCILIATION, MEDIATION &
ARBITRATION**

Second Respondent

**RAITH GOURMET TRADING (PTY)
LTD**

Third Respondent

Heard: 21/04/2011

Delivered: 18 /07/2014

Summary: (Rule 11 application – declarator – *Locus standi* - Alleged perjury by person purporting to be acting as a union official – Contempt of court – Application of Vexatious Proceedings Act 3 of 1956 – Application of s 9 of Justices of the Peace and Commissioners of Oaths Act, 16 of 1963).

JUDGMENT

LAGRANGE, J

Introduction

[1] This matter concerns two interlinked applications. The first is an application to set aside settlement agreements allegedly “handed down” by CCMA Commissioner, C De Kock in disputes previously referred to the this court under case numbers C552/2008 and C553/2008, and thereafter referred back to the CCMA by this court. In response, the third respondent in that application brought a separate application under case number C841/2010. This application brought by the employer party Raith Gourmet Trading (Pty) Ltd (‘Raith’) is for a variety of forms of somewhat uncommon

relief. It is important to note that although it opposed the application ostensibly brought on behalf of the individual applicants in those matters, the relief it seeks is primarily against an individual, one Darren Halligan ('Halligan'). Essentially, Raith accuses Halligan of instituting litigation on behalf of purported members of a union in circumstances where he had no authority to do so and in which he allegedly falsely held himself out to be a union official. The applicant seeks an order in essentially the following terms:

- 1.1 Ordering that that the notice of motion and founding affidavit of the respondent, filed under case numbers C552/2008 and C553/2008, be set aside in its entirety is an irregular step.
- 1.2 Declaring that the respondent has no *locus standi* to act on behalf of or to launch any proceedings whatsoever on behalf of individual applicants in the matters under case numbers C552/2008 and C553/2008.
- 1.3 Finding that the respondent committed perjury under oath in alleging that he is an official of FOCSWU and all that he has a mandate to represent the individual applicants under case numbers C552/2008 and C553/2008.
- 1.4 Finding that the respondent is guilty of contempt of the Labour Court and imposing an appropriate sanction.
- 1.5 Declaring the respondent a vexatious litigator in so far as proceedings in the Labour Court are concerned and prohibiting him from launching proceedings of any nature whatsoever in the Labour Court, without the express and written permission of the Judge President of the Labour Court, or any other judge should the court deem it appropriate.
- 1.6 Ordering the respondent to pay the costs of the application on a punitive scale.

[2] The respondent opposed the application and filed a counter-application to set aside the application as an irregular step.

- [3] This matter was heard some time ago, but it was only when correspondence was received from the applicant's attorneys of record this month that it became apparent that judgement was still outstanding in the matter. The matter had erroneously not been recorded as reserved and the case files associated with the matter had not been stored with other reserved case files when it was despatched from Cape Town.

Background

- [4] On 24 April 2009 the honourable Mr Acting Justice Soni, set aside the statements of case in respect of the individual respondents, which had been filed under cases C552/2008 and C553/2008. He referred the disputes in both cases to the CCMA for arbitration and costs were reserved for the CCMA to determine after it had established the nature of the disputes. Both cases involved claims under the Employment Equity Act, 55 of 1998 ('the EEA') and claims of automatically unfair dismissal under section 187 of the labour relations act, 66 of 1995 ('the LRA').
- [5] The applicant had applied for the dismissal of the referrals on the basis that the referral was made to the Labour Court outside the 90 day period for referring an automatically unfair dismissal dispute to the court following the expiry of the conciliation period or the issuing of a certificate of outcome. Another ground on which it applied for the dismissal of the referrals was that the disputes had never been referred to the CCMA for conciliation in the first place.
- [6] At that stage, the union purportedly acting on behalf of the individual respondents was the Western Cape Agricultural and Allied Workers Union ('WCAAWU'). Halligan was cited as the person to whom legal process to the union should be directed at an address of WCAAWU in Parow. Although the citation of the union remained the same at the time Soni, AJ handed down his *in limine* ruling, in a condonation application filed earlier by the applicants on 17 and February 2009 *inter alia* for the late filing of the union's answering the affidavits and heads of argument, the union citation was altered from 'WCAAWU' to 'SAPTU'. From Halligan's

answering affidavit and the annexures thereto it appears that SAPTU is an acronym for the South African Parastatal and Tertiary Institutions Union.

- [7] In a service affidavit deposed to by Halligan 9 February 2009 under case number C552/2008, he still identified himself as a union official 'at WCAAWU'. Just over two weeks later, on 26 February 2009, in a service affidavit bearing the citation of both cases, namely C552/2008 and C553/2008, the he identified himself as a trade union official 'at SAPTU' with an address "c/o Godla & Partners" situated in Cape Town. The postal address appeared to be that of a firm of attorneys. In the notice of motion dated 16 February 2009 in the application to condone the late filing of the answering affidavit to Raith's *in limine* objection, it was stated that "WCAAWU and SAPTU have amalgamated and have collective agreements with their members-respectively." This statement was not confirmed in the supporting affidavit.
- [8] From the case documentation it would appear that when Soni, AJ handed down his judgement, Halligan immediately filed a notice of leave to appeal. Be that as it may, there were no further proceedings in the Labour Court until the new application to set aside the settlement agreements was filed on or about 23 July 2010, incorrectly using the same case numbers C552/2008 and C553/2008 which had been used for the referrals that had been set aside on 24 April 2009.
- [9] In Halligan's founding affidavit in support of the application to set aside the settlement agreements he stated:
- "The Confederation of trade unions for FOCSWU have subsequently taken over all of the applicants[] memberships from their previous trade union and therefore I am designated to continue to represent the applicants as the trade union official for FOCSWU in this matter and in various other matters in this Honourable Court."*
- (Emphasis added)
- [10] Halligan goes on to state in the affidavit that he cannot comprehend how the applicants would have wanted to settle their claim for an estimated

sum of only R 6,000-00 when they stood to succeed in obtaining substantially greater compensation in the Labour Court proceedings. This presumably was a reference to the ruling against which he had lodged an appeal, and if successful in the appeal, the applicants would ultimately be able to pursue their claims in the Labour Court. He further claimed that the Commissioner who presided over the settlement was the same advocate who had represented Raith in an application for an order of costs against the applicants in the Labour Court. Additionally, Halligan claims to have been barred by the Director of the CCMA, Ms N Khan, from representing the applicants at the CCMA. In explaining how the applicants came to enter into the settlement agreement he stated that they were induced to enter into the settlement agreement by a misrepresentation made by the Commissioner and Raith's representative to the effect that they no longer had a claim in the Labour Court. It is important to note that no confirmatory affidavit from any of the applicants who had allegedly been induced by this misrepresentation was furnished to confirm Halligan's hearsay account of events at the CCMA.

- [11] Had he been present, Halligan contends he would have been able to correct the misrepresentation and the individual applicants would not have settled.

Raith's challenge to Halligan's locus standi

- [12] Raith raises a fundamental challenge to Halligan's *locus standi* to act on behalf of the individual applicants or the union FOCSWU¹ in attempting to set aside the settlement agreements which it concluded with the individual applicants on 26 February 2010 at the CCMA. In terms of the settlement agreements attached to the application,

12.1 the first individual applicant, Ms R Davids, received a settlement of R9,640-00;

12.2 the second individual applicant, Ms A Lotz, received a settlement of R9,000-00, and

¹ Food Cleaning and Security Workers Union

12.3 the fourth individual applicant, Ms M Isaacs, received a settlement of R8,860-00.

- [13] Further, Raith's employer organisation representative who, unlike Halligan, did attend the conciliation proceeding confirmed that in fact it was not Mr C de Kock who presided as the Commissioner, but a Commissioner Bhana. He refers also to the signature of the Commissioner on the settlement agreements attached to his affidavit which appear to confirm this. Raith correctly contends that the application to set aside the settlements was defective in any event because the wrong Commissioner was cited.
- [14] The applicant also produced an affidavit from one Ms E Thom ('Thom'), the general secretary of FOCSWU at the time. In her affidavit Thom denies Halligan was ever appointed as a union official or ever given authority to represent the union in any proceedings either verbally (by which I understand her to mean orally) or in writing. She further claimed no knowledge that any of the individual applicants at any stage became members of the union. Further, she denied Halligan's assertion that the union had taken over any of the individual applicant's membership from their previous union.
- [15] In Halligan's affidavit in support of his own application to dismiss Raith's application for want of compliance with rule 30 of the High Court rules, he claims that on or about 1 October 2009 the union's regional secretary at the Bellville branch 'per Guffey Ngalo and Wilson Adams', invited him to join their regional office in Bellville 'as a trade union official', which he accepted. He further claims that Thom was aware of that mandate and authorised Ngalo and Adams to pay him for drafting applications and representing the union in the Labour Court. In view of Thom's alleged repudiation of that mandate Halligan claims to have issued a summons against the union for breach of contract for failing to assist him with the payment of his outstanding study fees. He then details other alleged instructions he received to appear on behalf of the union as further evidence of his ostensible authority to act.
- [16] He also disputes Thom's claim that the membership of WCAAWU was not transferred to FOCSWU because she received all of the membership fees

and furthermore paid the regional branch employees including himself “monies and bonuses to authorise the membership’s transfers”. Halligan blames Raith’s employer organisation Representative and their advocate for disrupting “the fairness for all of WCAAWU and FOCSWU’s disputes”, and cites this as the reason why his mandate was cancelled by SAPTU. Attached to Halligan’s affidavit was a letter dated 1 January 2009, confirming his appointment to represent SAPTU in the Labour Court apparently signed by the Secretary General of that union.

- [17] According to Halligan, FOCSWU was supposed to assist him with the payment of his university fees in exchange for him acting for the union and he accuses Thom of accepting bribes from Raith to cancel his mandate. More than once in his affidavit, Halligan refers to Ngalo and Adams as employees at the Bellville branch of the union but he attached no confirmatory affidavit from either of them to that effect. At the hearing of this matter an affidavit by Ngalo was handed up by the applicant. In the affidavit Ngalo confirmed the contents of Thom’s affidavit and expressly denied Halligan’s allegations, stating that in his capacity as branch organiser he had no mandate to employ Halligan, nor was he aware of him being employed or hired to represent FOCSWU’s members. He further points out that it is customary that all employment of staff is resolved by the executive Council of the union.
- [18] Halligan sought to support his claim that he was employed as a union official by FOCSWU by attaching a confirmatory affidavit deposed to by one Asa Isaacs, who confirms Halligan’s claim that he was employed at the union office in Bellville and that she had met with Wilson Adams, Deon Adams and Halligan at the union offices when she was seeking advice concerning her employment contract. Isaacs also confirms Halligan’s claim that Wilson Adams, Dion Adams and Halligan transferred all the membership of WCAAWU to FOCSWU. However, other than identifying herself as an adult female, she provides no clue as to her status in relation to either union, nor the basis of her knowledge of membership transfers.
- [19] Secondly, at the hearing Halligan submitted an affidavit deposed to by Mr Dody Nkondo, who states that he worked as a security employee at the

Boston Centre where FOCSWU's office was located on the first floor. He states categorically that, during his two years of employment as 'the security' at the centre, Halligan was employed by the union, because he had to administer the policy of entering all personnel into the centre. He does not state during which years he was employed in that capacity, so the period he refers to is indeterminate.

- [20] Evaluating the conflicting claims about his status, I have grave difficulty with Halligan's version. Firstly, he is vague about the nature of his employment relationship with FOCSWU and how he was supposedly remunerated. At best he seems to suggest his remuneration was a mixture of a payment for his university fees coupled with other payments which seem tantamount to legal fees for performing legal services and the payment of bonuses for transferring members. No evidence of any such payment was tendered by him, nor was a shred of documentary evidence provided in support of how the quantum of any of these various forms of remuneration was supposedly determined. Further, he would have the court believe that he was casually invited to work for the union as an official without a single written document being issued relating to his employment.
- [21] Halligan did not produce any corroboratory evidence of any other employee of FOCSWU to support his claim. Oddly, he also does not have any confirmatory affidavit from any of the individual applicants, confirming his status as an official, nor is there anything to support his contention that they are members of the union, except his own say-so. If he was an official, it would surely have been easy for him to obtain access to the membership records of the individual applicants, especially if he had been instrumental in transferring their membership to FOCSWU he claims. It is telling that he only sources affidavits from persons who cannot claim direct knowledge of his employment status with FOCSWU, but who can only provide vague circumstantial support for it. The lack of any union correspondence of FOCSWU supporting Halligan's claims is also noteworthy.

- [22] Against Halligan's account that he was employed as a union official of FOCSWU there is the express and unequivocal denial that he was employed in any capacity made by the General Secretary and confirmed by Ngalo, the very person whom Halligan alleges recruited him. Ngalo also refers to the need for any appointments to be made in terms of certain processes and asserts his own lack of authority as a branch secretary to have appointed Halligan. Both Thom and Ngalo are persons who ought to be able to pronounce with some authority on his employment status, unlike the persons who deposed to affidavits in support of Halligan's claim.
- [23] What is also revealing is Halligan's vague knowledge of what transpired at the CCMA when three of the individual applicants settled their disputes. He was wrong about the figures they accepted, and did not even know the true identity of the presiding commissioner. This, coupled with the complete absence of any supporting affidavit from any of the persons on whose behalf and in whose interest Halligan claims to be acting, supports the applicant's claim that Halligan was acting on his own initiative when he launched the application to set aside the settlement agreements. It is troubling that Halligan did not see the need to obtain confirmation from them that he was acting as a union official of FOCSWU on their behalf, or at least some endorsement by them of his initiative in launching the application, particularly in circumstances where they have ostensibly settled their disputes. It is also a matter of concern that, despite his lack of knowledge about what transpired at the CCMA, he readily made sweeping and serious allegations of improper conduct on the part of the CCMA Commissioner and the applicant's representative.
- [24] On the evidence, I am satisfied that the only reasonable conclusion to draw on a balance of probabilities is that Halligan embarked on a reckless frolic of his own in launching the proceedings to set aside the settlement agreements and he was neither authorised by FOCSWU to do so, nor were his actions even endorsed by those he is purporting to assist. Consequently, he was not appearing or acting in these proceedings as a union official or office-bearer of FOCSWU in terms of s 161(c) of the LRA and he has no *locus standi* to act in the matter. This applies not only to his

appearance in court, but his authority to initiate these proceedings on behalf of FOCSWU or the individual applicants in the first place.

Contempt and related unlawful acts

[25] An essential feature of the crime of perjury is that it is a false statement made in the course of judicial proceedings.² A false statement made in the course of judicial proceedings has been held to include an affidavit “...which the law permits to be used in judicial proceedings as evidence, for example, in motion proceedings or in actions where the Court or the law permits evidence to be given by means of affidavits” (emphasis added).³ On this basis, since Halligen’s affidavits clearly are intended to provide the evidentiary basis for setting aside the settlement agreements or set out the evidence pertaining to his representative status, statements of fact in those affidavits which he can be proved to have made knowing them to false, would seem to satisfy the requirement of the common law offence of perjury.

[26] Essentially, the papers indicate that the applicant has probably committed perjury in misrepresenting his status as a union official and his authority to act on behalf of it or the individual applicants, but that is not *per se* contempt of court⁴, which is a crime relating to acts of disrespect towards a presiding officer, or defiance of the court’s orders.

[27] However, his apparently false statements may well also infringe s 9 of the Justices Of The Peace And Commissioners Of Oaths Act, 16 of 1963 which states:

“9. *Penalties for false statements in affidavits and certain other declarations.—Any person who, in an affidavit, affirmation or solemn or attested declaration made before a person competent to administer an oath or affirmation or take the declaration in question, has made a false statement knowing it to be false, shall*

² See *Rex v. Ah Chee* 1912 AD. 231 at

³ See *Rex v Beukman* [1950] 4 All SA 214 (O), at 217-8

⁴ See *S v Mamabolo (E TV and Others Intervening)* 2001 (3) SA 409 (CC) on the concept of contempt *ex facie curia*

be guilty of an offence and liable upon conviction to the penalties prescribed by law for the offence of perjury.”

(emphasis added)

- [28] Nevertheless, neither of these matters, which are criminal in nature can be determined by this court, but are matters for the criminal courts.

Declaring Halligen a vexatious litigant.

- [29] Section 2(1)(b) of the Vexatious Proceedings Act, 3 of 1956 provides that:

“If, on an application made by any person against whom legal proceedings have been instituted by any other person or who has reason to believe that the institution of legal proceedings against him is contemplated by any other person, the court is satisfied that the said person has persistently and without any reasonable ground instituted legal proceedings in any court or in any inferior court, whether against the same person or against different persons, the court may, after hearing that person or giving him an opportunity of being heard, order that no legal proceedings shall be instituted by him against any person in any court or any inferior court without the leave of the court, or any judge thereof, or that inferior court, as the case may be, and such leave shall not be granted unless the court or judge or the inferior court, as the case may be, is satisfied that the proceedings are not an abuse of the process of the court and that there is prima facie ground for the proceedings.”

- [30] The applicant alludes to a number of other instances in which Halligen has allegedly embarked on speculative litigation apparently with a view to Halligan was allegedly trying to extract a settlement from the respondent parties in question but these are not pleaded in sufficient particularity for the court to conclude a pattern of persistent. It is simply insufficient to establish a case for declaring Halligan a vexatious litigant for the applicant to rely on the factual basis it sets out in its founding affidavit, viz:

“12... [Halligan] has a history of filing applications of a similar nature against employers, which I verily believe he does in order to frustrate employers and to cause them to unnecessarily engage legal representatives to respond to his tactics. This he does in an attempt to extort monies from employers.

13. I am advised that the Applicant’s legal representative will provide to the above Honourable Court, in submitting heads of argument, numerous other Court applications where [Halligan] has engaged in these tactics.”

At the very least the applicant should have provided details of some of these other proceedings in its founding papers. See by contrast the factual detail available to the court in ***Absa Bank Ltd v Dlamini***⁵

- [31] It may well be that Halligan is predisposed to litigate profligately and with little regard for the merits of the litigation he initiates, but the history of that litigation within the applicant’s knowledge must be properly set out in a supporting affidavit, before this court would consider declaring him a vexatious litigant.

Halligan’s counter-application do set aside the applicant’s in limine application as an irregular step

- [32] As mentioned above, Halligan sought to set aside the application raising *in limine* objections to the application to set aside the settlement agreements on the basis that Raith’s application also amounted to an irregular step. The basis for Halligan’s claim is that Raith did not comply with Rules 30 (1) and 30A of the Uniform Rules of the High Court. Rule 30 (1) permits a court to set aside an irregular step taken by a party on application and rule 30 (A) sets out the procedure to be followed by an applicant making such an application.

- [33] He claims that the irregular step committed by Raith was its failure to comply with rule 18 (1), erroneously referred to by Halligan as Rule 18(10), which states:

⁵ 2008 (2) SA 262 (T) at 275ff

“(1) A combined summons, and every other pleading except a summons, shall be signed by both an advocate and an attorney or, in the case of an attorney who, under section 4(2) of the Right of Appearance in Courts Act, 1995 (Act No. 62 of 1995), has the right of appearance in the Supreme Court, only by such attorney or, if a party sues or defends personally, by that party.”

- [34] Halligan claims that it is not possible, with reference to the provisions contained in the notice of motion, to determine if the applicants have just cause to proceed with their *in limine* application. Further he claims that it is not possible to determine how Raith properly filed an action in terms of the rules of service and that the application was not signed by an advocate and an attorney in terms of the rules of the court. Lastly he complains that the quantum of the costs claimed by Raith is impossible to determine.
- [35] The reference to rule 18(1) is completely misplaced as the rule relates to pleadings initiating a trial and not motion proceedings. It is not a prerequisite that an application must be signed by an attorney and advocate. Halligan's other grounds of objection appear to relate to other principles of pleadings. Thus, his first ground of objection appears to be in the form of an exception to the applicant's *in limine* objections on the basis that the objections do not disclose a cause of action. It seems perhaps that Halligan had Rule 18(4) in mind when raising this issue. However, it is apparent from the analysis above that Raith did demonstrate justifiable grounds for the *in limine* objections it raised. As the *in limine* application was not initiating an action, the rules of service of pleadings in a trial matter do not apply. In any event, the Labour Court has its own rules of service for applications and referrals which are the ones that ought to be followed. Lastly, in relation to the quantum of costs, that is not a matter for determination by the court in any event. The court merely determines the scale of costs should be ordered and the determination of the quantum of costs is done by means of the taxation procedure set out in rule 25 of the Labour Court rules.

[36] In light of the above, I am satisfied that there is really no merit in Halligan's objection that the application by Raith raising *in limine* issues was an irregular step. It is clear from the notice of motion that the main thrust of the application was directed at Halligan's *locus standi* and he was correctly cited as a respondent. It is also clear from the notice of motion that it was, in substance, an interlocutory application brought in relation to Halligan's application under case numbers C552/2008 and C553/2008, even if it did not use the full citation of parties in those matters. It must also be remembered that Halligan's own application should not have been brought under those case citations.

Costs

[37] Although the applicant has not set out sufficient facts to warrant a declaration that Halligan is a vexatious litigant for the purpose of future litigation, it cannot be said that his application to set aside the settlement agreements is not vexatious. It is based on Halligan's own speculation about the validity of those agreements, without any independent verification by those whom he purports to be acting for as a union official. Further, he has no *locus standi* to launch the proceedings, which are not even supported by those who concluded those agreements. Moreover, he persisted with the matter even after having had sight of Thom's affidavit. Such reckless and speculative litigation must be discouraged and there is no reason why the applicant should be out of pocket as a result of having to defend itself against the proceedings incorrectly launched under case numbers C 552/2008 and C553/2008.

Order

[38] In light of the analysis above, the following order is made:

38.1 the notice of motion and founding affidavit of the respondent in case number C841/10 filed under case numbers C552/2008 and C553/2008, are set aside in their entirety as an irregular step.

38.2 The respondent in case number C841/10 has no *locus standi* to act on behalf of or to launch any proceedings whatsoever on behalf of

individual applicants in the matters under case numbers C552/2008 and C553/2008.

38.3 The Registrar is directed to serve a copy of this judgment on the Regional Director of Public Prosecutions with a request to consider whether or not to prosecute the respondent in case number C841/10 for allegedly acting in breach of s 9 of the Justices Of The Peace And Commissioners Of Oaths Act, 16 of 1963 when he stated on affidavit that he was acting as a union official of FOCSWU and was duly authorised or mandated to initiate the proceedings he filed on 08 November 2010 under case numbers C552/2008 and C553/2008 and, or alternatively, if he committed perjury in making such a statement.

38.4 The respondent in case number C841/10 must pay the applicant's costs on the attorney own client scale including the costs of counsel.



R LAGRANGE, J
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT: C de Kock instructed by CK Attorneys

RESPONDENT: In person