



REPUBLIC OF SOUTH AFRICA

Not reportable

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

CASE NO: JR 1537/11

In the matter between:

PORTAPA (PTY) LTD T/A SUPABETS

First Applicant

and

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

First Respondent

**COMMISSIONER ADV THABANG
SERERO (N.O.)**

Second Respondent

ELSPETH MUTIZE

Third Respondent

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

LAGRANGE, J

Introduction

- [1] The citation of the parties in this application is the same as it was in the review application.
- [2] On 08 December 2014, the following order was made when judgement in this matter was handed down:
- 2.1 The default judgment of this Court on 16 April 2013 dismissing the application to rescind the judgment dismissing the review application handed down on 9 May 2012 is rescinded.
- 2.2 On reconsideration of the application to rescind the default judgment in the review application, handed down on 9 May 2012, that judgment is also rescinded including the order making the arbitration award in case number GAJB3266-11, dated 15 March 2011, an order of Court, which was made consequent to the dismissal of the review application.
- 2.3 On re-consideration of the review application of the rescission ruling of the second respondent issued on 6 June 2011 in case number GAJB3266-11, and the application to make the award an order of Court, the review application is dismissed and the award is once again made an order of Court.
- 2.4 The applicant must pay the third respondents costs incurred in opposing the review application, but not the costs incurred in opposing the rescission applications heard on 16 April 2013 and 24 October 2013.”
- [3] The applicant now applies for leave to appeal against the court’s dismissal of the original review application it brought.
- [4] The fundamental reason for the review application been dismissed is that the applicant did not set out a competent ground of review in the founding affidavit nor did it rectify the deficiency in its supplementary affidavit.

Grounds of appeal

[5] The applicant's grounds of appeal as set out in its written submissions dated 18 December 2014 are:

- 5.1 The Court ought to have found that the arbitrator's decision to refuse the rescission application was unreasonable, and
- 5.2 The Court did not consider the legal points 'that were evident from the papers notwithstanding that they had not been raised in the applicant's founding affidavit'.

Evaluation

[6] In its submissions the applicant confined itself to the following argument:

- 6.1 The point of law that was plainly evident from the papers was that the arbitrator's rescission ruling should have been reviewed because the arbitrator failed to convene a hearing to consider oral argument during which the disputed authority of the contracted HR Manager ('Paddock') to launch the application could have been addressed. This amounted to a gross irregularity.
- 6.2 There was no rational basis on the papers for the arbitrator to doubt that the applicant had authorised Paddock to act on its behalf given that it had an order of compensation amounting to R 72,000 against it. The failure to file a resolution confirming the Paddock's authority was not fatal to the claim of proper authorisation.

Evaluation

[7] It is true that during the review proceedings the applicant argued that a reason why the ruling should be set aside is that it was a gross irregularity on the part of the arbitrator not to enroll the rescission application for an oral hearing. It is also true this was a legal issue. Nonetheless it was a ground of review and ought to have been set out in the applicant's founding papers and not simply raised in argument.

While it may be so that a jurisdictional question, which a Court itself may even raise *mero motu*, can be raised at the hearing of a matter even if not prefaced in a party's founding papers, this ground of review based on an alleged gross irregularity should have been pleaded as a ground of review in the applicant's founding papers or, with the leave of the Court, by filing a supplementary affidavit supplementing its grounds of review.

[8] The judgments relied on by the applicant to suggest the Court has some kind of overriding discretion to intervene by considering other non-pleaded grounds of review if flaws in the arbitration process or the award come to its attention were either decided before the LAC decision in ***Comtech (Pty) Ltd v Commissioner Shaun Molony N.O. and others***¹, or the judges in those matters were clearly unaware of the LAC. I note that the applicant simply ignores this decision in its submissions even though it was prominently raised in my judgment preferring to rely on judgments of the Labour Court which it believes support its argument. The authority of the LAC judgment remains binding.

[9] In light of the above, I do not believe there is a reasonable prospect that another Court would come to a different conclusion and the application for leave to appeal should be dismissed.

Late filing of submissions on leave to appeal

[10] I accept the grounds advanced for the late filing of the applicant's submissions on leave to appeal and noting that its application for condonation is not opposed, the late filing of its submissions should be condoned.

Order

[11] Accordingly it is ordered that:

11.1 the applicant's late filing of its submissions in support of its application for leave to appeal is condoned, and

¹ [2007] ZALAC 35 (DA 12/05) (21 December 2007)

11.2 the application for leave to appeal is dismissed with costs.



R LAGRANGE, J

JUDGE OF THE LABOUR COURT

(In chambers)

4 March 2015

LABOUR COURT