



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

Of interest to other judges

**CASE NO: JS 458/09**

In the matter between:

**ELLENISE SEPTOO**

**Applicant**

and

**CITY OF JOHANNESBURG**

**Respondent**

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**JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL**

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**LAGRANGE, J**

- [1] At the close of the applicant's case in this matter an order of absolution from the instance was sought by the respondent, which the court granted. The applicant now applies for leave to appeal against that judgment. The applicant's application for leave to appeal was late and she has sought condonation for this. The condonation application is not opposed. In the absence of any material prejudice occasioned by the late filing of the application, condonation should be granted.
- [2] The applicant had sued the respondent for specific performance of an initial employment contract entered into in early June 2008. Her statement of case also included the usual residual prayer for 'further and/or alternative relief'.

- [3] At the commencement of proceedings, applicant's counsel submitted that the contract on which the applicant relied had been cancelled. Counsel for the respondent confirmed that the case was simply a case in which the applicant sought specific performance of the contract and was not seeking damages. Under cross-examination, the applicant confirmed in her evidence that the first contract had been cancelled. No leave to amend her statement of case was brought during the proceedings despite respondent's counsel also emphasizing that her claim was confined to a claim for specific performance.
- [4] In my judgment I concluded, *inter alia*, that the applicant's own claim that the contract on which the claim of specific performance is based has been cancelled was logically incompatible with a claim for such relief. I also found that a claim for further and/or alternative relief was not sufficient for her to pursue an alternative claim of damages premised on the cancellation of the contract, when this had never been specifically pleaded.
- [5] The applicant contends in effect that this conclusion entailed a finding that she had waived her right to pursue a claim for damages and because waiver is a matter that the respondent had to prove, the onus fell on it to establish this through evidence which was not done and absolution should not have been granted. The respondent argues that waiver does not arise: the issue is that the applicant failed to establish a *prima facie* case for specific performance because she failed to establish the existence of a binding contract on account of her own contentions and that of her counsel to the effect that the contract she relied on had been cancelled.
- [6] At the hearing of the interlocutory application for absolution, the applicant argued that she was still entitled to pursue a claim for damages arising from the cancelled contract. She did not argue that the Court should not construe the concession of her counsel which she confirmed under cross examination as an acknowledgment that the contract had been terminated and therefore could not be enforced. In my recollection, the contention which she now advances that the Court was effectively deciding whether or not she had waived her right to enforce the contract was not

raised in argument. As I understand it, the applicant is now saying the Court ought to have realised that waiver was the issue rather than a failure to prove an essential element of her claim.

- [7] Although I am very sceptical that the applicant can reframe the matter in this way, and though I believe the reasons for the judgment given at the time were correct in relation to the arguments presented, it might be possible that another Court could have seen the matter as entailing a waiver and accordingly leave to appeal should be granted.

**Order**

- [8] The applicant's late filing of her application for leave to appeal is condoned.
- [9] The application of leave to appeal is granted.
- [10] Costs shall be costs in the appeal.



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**R LAGRANGE, J**

**Judge of the Labour Court**

(In chambers)

8 September 2015