THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: J1420/17

In the matter between:

KARE SHEET METAL PRODUCTS (PTY) LTD **Applicant**

and

ERIK BREYTENBACH **Respondent**

Heard: **25 October 2017**

Delivered: **1 November 2017**

Summary: A return day to make a contempt order final. The requirements of contempt considered. Section 18 of Superior Courts Act[1] did not alter the common law rule and its purpose. Absent requirements to grant a contempt order, the application must fail. Held (1): The interim order of contempt is discharged. Held (2): Each party to pay its own costs.

JUDGMENT

[1] Act 10 of 2013.

MOSHOANA, J

Introduction

[1] Before me is an application to finally find that the respondent is in contempt of an order of this Court issued on 30 June 2017. The court ordered that the respondent is interdicted and restrained from being engaged directly or indirectly and in any capacity in any business venture competitive or in conflict with the applicant for a period of one year from 7 June 2017. The interdict and restraint endures for a period of one year from 7 June 2017 to and including 7 June 2018 and applies to the provinces of Gauteng, Mpumalanga, Free State, Limpopo and the North West. The order was obtained in default. In fact, a draft order was adopted by this Court to be its order.

[2] On 3 August 2017, the applicant launched an urgent *ex parte* application for contempt of court. On this day, the Court issued an interim order in line with what the Practice Manual decrees[2]. On the same day, the Deputy Sheriff served a copy of the court order on the respondent.

Background facts

[3] Punctilious recount of the facts may not be necessary for the purpose of this judgment. The respondent was employed by the applicant on 17 August 2015 as a sales consultant. On 29 May 2017, the respondent resigned from his position. On 2 June 2017, the respondent was suspended and subjected to a disciplinary charge arising from the breach of the restraint. Subsequently he was dismissed. On 19 June 2017, he commenced employment with the competitor. The respondent had accepted employment with the competitor of the applicant already. Despite attempts to dissuade the respondent, the respondent refused to withdraw the acceptance of the competitor's offer. The applicant held a view that by accepting an offer with the competitor, the respondent was in breach of the Restraint of Trade. On 30 June 2017, it approached this

[2] Clause 13.2 of the Practice Manual of the Labour Court of South Africa 2 April 2013.

Court, which approach culminated in a draft order being adopted by this Court.

[4] Despite the order, the respondent continued employment with the competitor. On 1 August 2017, the respondent in a letter through his attorneys expressed to the applicant that as a low level employee at the time of being employed by the applicant, he has no intention to breach any other confidentiality obligations. He poses no threat to the business operations or existing customer base. He undertook not to approach any of the existing customers of the applicant, divulge any confidential information and not to cause the applicant financial loss. The respondent reserved his rights to challenge the order obtained by the applicant.

[5] This letter was not respondent to but was met with an application under consideration. As pointed out earlier, the applicant obtained an interim order. Subsequent thereto, the respondent launched an application for rescission of the order obtained in default. The application is pending in this Court. On 24 October 2017, the respondent filed an opposing affidavit. The applicant chose not to file any reply. On 25 October 2017, the application was argued before me.

Evaluation

[6] It is common cause that the order allegedly being breached by the respondent was obtained in the absence of the respondent. The order seeks to take away his constitutionally guaranteed right.[3] A judgment or order erroneously sought or erroneously granted in the absence of any party affected by that judgment or order may be rescinded.[4] One of the issues arising out of this matter is whether the launching of a rescission application suspends the operation of the order granted on 30 June 2017. I shall deal with this issue later.

[7] In showing cause as directed by this Court on 3 August 2017, the respondent presented uncontested evidence to the following effect:

[3] Section 22 of the Constitution of South Africa.

[4] Section 165 (a) of the Labour Relations Act 66 of 1995 as amended.

'[4.6] I have never unlawfully competed with the respondent, approached any of the respondent's existing customers, divulged any of its confidential information or caused any financial loss to the respondent. I also do not intend to do so in future.

[4.13] As a result of the aforementioned, I proceeded to apply for the rescission of the Court order that was obtained erroneously in my absence.

[5.6] I thus submit that my non-compliance with the court order was neither deliberate, nor *mala fide* for the reasons set out herein above as well as in my *bona fide* application for rescission.' [My underlining]

[8] One of the important elements of contempt applications is that the party to be held in contempt must be in willful disobedience and resistance to lawful court orders[5]. Accordingly, in order to succeed, the applicant must demonstrate willful disobedience on the part of the person to be held in contempt. In the light of the undisputed evidence I am unable to find that the respondent is in willful disobedience. The Constitutional Court in *Pheko* refers to lawful orders. It is doubted by me that orders granted erroneously are lawful. Section 165 (a) of the Labour Relations Act[6] (LRA) provides that such orders are to be rescinded.

[9] It is undisputed before me that the order was obtained erroneously in the absence of the respondent. As a matter of law such orders are susceptible to be rescinded. To my mind the lawfulness of such orders ought to be doubted particularly in the context of the contempt proceedings. The object of contempt proceedings is to impose a penalty that will vindicate the court's honour, consequent upon the disregard of its previous orders, as well as to compel performance in accordance with the previous order. A court ordinarily does not honour erroneously obtained orders. On the contrary it tends to set them aside as opposed to compelling performance.

[5] See *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) and *Pheko and others v Ekurhuleni Metropolitan Municipality and another* [2015] JOL 33198(CC).

[6] Act 66 of 1995 as amended.

[10] Accordingly, I am not persuaded that the respondent should be held in contempt and for this reason alone the application should fail. I may in passing refer to what the LAC said in *Labournet (Pty) Ltd v Jankielsohn and another*[7]. It said:

> '[61] As pointed out earlier-even if an employer spent time and effort and money to train or skill an employee in a particular area of work, the employer has no proprietary hold on the employee, his or her, knowledge, skills and experience, even if those acquired at that employer.'[8]

[11] Might I add that it is about time that practitioners should begin to consider applications to enforce restraints against the lowly ranked employees with greater care. They must come to court against such employees when there is cogent evidence that they are actually in breach. The purpose of restraints is to protect and not to punish. Why should a lowly ranked employee loose job security simply to uphold a restraint that he or she cannot be employed by a competitor? This stifles competition in an unfair manner.

Does launching of a rescission application suspends the operation of the order?

[12] The applicant's representative relied on the judgment of the high court in *Erstwhile Tenants of Williston Court and another v Lewray Investments (Pty) Ltd and Another*[9]. In this judgment, Meyer J sitting alone concluded that applying contextual interpretation section 18(1) excluded rescission application from the suspension of an order or decision.

[13] Section 39 (2) of the Constitution enjoins every court when interpreting any legislation and when developing the common law to promote the spirit, purport and objects of the bill of rights. Proper reading of the

[7] [2017] 38 ILJ 1302 (LAC).

[8] *Basson v Chilwan and others* 1993 (3) SA 742 (A)

[9] 2016 (6) SA 466 (GJ)

Constitution suggests that the common law should not be ignored but must be developed instead.[10]

[14] In *South Cape Corporation (Pty) v Engineering Management Services (Pty) Ltd*[11],the late Corbett JA said:

> 'It is today accepted common law rule of practice in Courts that generally the execution of a judgment is automatically suspended upon the noting of an appeal…The purpose of this rule as to suspension of a judgment on the noting of the appeal is to prevent irreparable damage from being done to the intending appellant, either by levy under a writ of execution or by execution of the judgment in any other matter appropriate to the nature of the judgment appealed from.' [My Underlining]

[15] To my mind, even though the learned judge was dealing with the noting of an appeal, it is my considered view that the common law rule should not be confined to noting of an appeal only. Launching a rescission application serves the purpose of the rule as well-prevent irreparable damage being done. Like an appellant, an applicant for rescission, if successful stops as it were the operation of the order. In both instances the order ceases to exist.

[16] In *Khoza and Others v Body Corporate of Ella Court*[12] Notshe AJ correctly held that at common law application for rescission supports an automatic suspension of an order. It is indeed so that Rule 49 (11) of the Uniform Rules carried such a provision and the Rule has been repealed. The repealing of the Rule does not mean repeal of the common law. It is indeed so that the text of section 18(1) does not refer to a rescission application. To my mind application for leave to appeal stands on the same footing as application for rescission. All are aimed at reversing an

[10] Section 8 (3) provides that when applying a provision of the Bill of Rights. A court may develop rules of the common law to limit the right provided that limitation is in accordance with section 36(1).

[11] 1977 (3) SA 534 (A).

[12] 2014 (2) SA 112 (GSJ).

order. Equally such applications bear the same purpose-to prevent irreparable damage.

[17] One of the fundamental principles of statutory interpretation is that legislation is to be considered in the light of the common law. Where the language of the statute is subject to reasonable doubt, reference to common law principles may provide a valuable clue as to whether a particular situation is controlled by the statute, and all legislation must be interpreted in the light of the common law. The common law, which has been moulded into a logical classification of subject matter provides one of the most reliable backgrounds upon which an analysis of the purpose and objectives of the statute can be determined.[13]

[18] Legislations are not presumed to make any alterations in the common law, unless the legislation expressly declares so[14]. **Meyer J** applied what he termed contextual read. It is clear to me that he did not take into account the common law rule and its purpose. He finds that if the legislature intended to include rescission applications, it should have expressly included it. Notably, the legislature only included an application for leave to appeal. Does it mean that noting of the appeal itself has been excluded? To my mind not. He raises concern about unmeritorious applications. What about unmeritorious applications for leave to appeal? Is the suggestion that the legislature catered for meritorious applications only?

[19] Accordingly, I am of the view that the purposive interpretation[15] of the section in the light of the common law position means that an application for rescission also suspends the operation of the order. The rescission application has the same effect as the application for leave to appeal –to prevent irreparable damage. Just applying logic, why should an

[13] Sutherland, Statutory Construction 3 (3rd Ed, Horrack 1943).

[14] Gordon N.O v Standard Merchant Bank 1983 (3) SA 68 (A) at 73A-B

[15] In Bertie Van Zyl (Pty) Ltd and another v Minister for Safety and Security and others Case CCT 77/08 decided on 7 May 2009 (CC), Mokgoro J writing for the majority said:

"[21] Our Constitution requires a purposive interpretation to statutory interpretation.

application for rescission be excluded. What could be the policy considerations if any for that conclusion? To my mind there is none.

[20] In my judgment, a rescission application still suspends the operation of the order. Even if **Meyer J** is right in his interpretation, I conclude that his interpretation is confined to section 18 of the Superior Courts Act, the common law position has not been altered by section 18.

[21] In summary, the application fails to meet the requirements for contempt. The application for rescission has in any event suspended the operation of the order. The applicant's representative rightly conceded that the suspension of the order implies that the application for contempt cannot be confirmed.

[22] Regarding costs, I am of a view that an appropriate order is for each party to bear its own costs.

[23] In the results I make the following order:

Order

1. The interim order issued on 3 August 2017 is hereby not confirmed and is discharged.

2. Each Party to pay its own costs.

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GN Moshoana

Judge of the Labour Court of South Africa

Appearances

For the Applicant:	Mr H Barnardt
Instructed by:	Daan Buekes Attorneys, Pretoria
For the Respondents:	Mr B L Roode
Instructed by:	Nicole Ross Attorneys, Woodmead.