



REPUBLIC OF SOUTH AFRICA

Not reportable

Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 181/15

In the matter between:

PROFESSIONAL SECURITY CC

Applicant

t/a PROSEC

and

E KARORERO & 8 OTHERS

Respondents

Delivered: 9 November 2016

Summary: Default judgment not appealable.

RULING ON LEAVE TO APPEAL

STEENKAMP J

Introduction

[1] The applicant, Prosec, seeks leave to appeal against a default judgment granted against it on 9 September 2016.

Default judgment

- [2] Prosec did not oppose the referral to this Court by the employees. Judgment was granted by default.
- [3] On the only evidence before the Court – that of nine former employees – it was found that their dismissal was substantively and procedurally unfair.
- [4] The employees led evidence as to their remuneration at the time of their dismissal. The Court ordered Prosec to pay them compensation equivalent to twelve months' remuneration, based on the evidence before the court. It translated to R51 600 each.
- [5] Despite judgment having been granted by default, Prosec seeks leave to appeal rather than to have the judgment rescinded.
- [6] Prosec claims in its heads of argument – absent any evidence – that it had settled its dispute with the third respondent, Mambombo; and that the amounts on which the compensation order was based are incorrect. It also complains that the compensation of 12 months' remuneration is not just and equitable. It now seeks to lead further evidence on appeal, not having used the opportunity to do so in the court *a quo*.
- [7] In terms of s 166(1) of the LRA, only final judgments and orders are appealable.
- [8] In *Pitelli*¹ the SCA made it clear that a default judgment is ordinarily not appealable:

“An order is not final, for the purposes of an appeal, merely because it takes effect unless it is set aside. It is final when the proceedings of the court of first instance are complete and that court is not capable of revisiting the order. That leads one ineluctably to the conclusion that an order that is taken in the absence of a party is ordinarily not appealable (perhaps there might be cases in which it is appealable but for the moment I cannot think of one). It is not appealable because such an order is capable of being rescinded by the court that granted it and it is thus not final in its effect.

¹ *Pitelli v Everton Gardens Projects cc* [2010] 4 All SA 357 (SCA) ; (2010) 5 SA 171 (SCA) paras 27, 31, 34 and 36 (my underlining).

“It seems to me that the appealability of an order must be dependent on the nature of the order and not upon what the litigant chooses to make of it. An order made by default is by its nature not final in its effect because it is capable of being revisited, albeit that condonation might be required for the delay. It is true that once rescission has been refused, and an appeal against that order has been dismissed, the order is then not capable of being revisited. But that order of the court of appeal brings the proceedings as a whole to an end and it is not then open to a litigant to return to an order that was made midway in the proceedings.

“It also seems to me that the default judgment of the court *a quo* is not appealable – it is not final in effect in that the default judgment of the court *a quo* is theoretically capable of being revisited in the form of an application for rescission of judgment.

“I am mindful of the considerable hurdle that would need to be overcome by a litigant who seeks to have an order rescinded when he or she deliberately allowed it to be taken by default, bearing in mind that in order to succeed the litigant will need to provide a ‘reasonable and convincing explanation’ for the default. But the appealability of the order is dependent upon whether it is capable of being revisited and not upon whether such an application will succeed. And if a litigant deliberately chooses to permit an order to go by default then he or she can hardly complain if a court refuses to allow the matter to be re-opened. A litigant cannot expect to blow hot and cold depending on what is most advantageous at the time.

“The orders that were made in this case were clearly susceptible to rescission. In those circumstances they are not appealable.”

- [9] The same considerations apply in this case. The judgment is not appealable.
- [10] The applicant asked for costs to be costs in the appeal. It was unsuccessful. The respondents, who are workers, asked for the applicant to pay the costs. I see no reason in law or fairness to disagree. The applicant did not defend its case when it had the opportunity. The workers had to incur further legal costs to oppose the application for leave to appeal.

Order

The application for leave to appeal is dismissed with costs.

A J Steenkamp
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT: Adiel Nacerodien
Instructed by Dirk Kotze.

RESPONDENTS: C J May of Adams & May.