REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Reportable

Case no: D1026/12 & D978/12

In the matter between**:**

Q-PET (PTY) LTD **Applicant**

and

RUDOLPH MALAN **First Respondent**

COMMISSIONER G. JENKEN **Second Respondent**

COMMISSIONER A PILLAY **Third Respondent**

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **Fourth Respondent**

Considered in Chambers.

Delivered on: 17 April 2014

JUDGMENT- LEAVE TO APPEAL

TLHOTLHALEMAJE AJ

Introduction:

[1] On 16 October 2013, I issued an order in the following terms;

1.1 The application for postponement is denied.

1.2 The Respondent's (Applicant in this application) review application under case number D978/12 and D1026/12 is dismissed for lack of timeous prosecution.

1.3 The Applicant's (Second Respondent in this application) application in terms of section 158 (1) of the LRA is granted, and to this end, the award issued by Commissioner A Pillay under case number KNPM 2344/12 dated 26 November 2012 is hereby made an order of this Court.

1.4 The Respondent (Applicant in this application) is ordered to pay costs of this application

[2] On 23 October 2013, the Applicant (Q-pet) had filed its Notice of Application for leave to appeal. The application is opposed by the First Respondent (Malan).

Grounds of appeal and evaluation:

[3] In considering whether to grant or refuse leave to appeal, the question a court has to answer is whether there are reasonable prospects that another court may come to a different conclusion[1].

[4] Q-Pet in its grounds of appeal dealt at length with issues that are clearly irrelevant for the purposes its application for leave to appeal. In some instances it even went as far as levelling certain unsubstantiated accusations against me which I take umbrage to.

[5] It has become a past-time for parties, who are clearly encouraged by their legal representatives in the face of adverse orders to blame everyone but

[1] *Minister of Safety and Security and Another v Madyibi* (1034/2004) [2008] ZAECHC 180 (30 October 2008) at para 20.

themselves. Instead of taking stock of what could have gone wrong in the process of litigation, the legal representatives would absolve themselves from any form of incompetence, negligence or dilatoriness and make unsubstantiated allegations against judges and presiding officials in general. In the face of all this unwarranted aggravation, judges and presiding officials are expected to keep sombre faces and dispassionately deal with the facts before them. In this case, the Applicant and its legal representative were quick to make the following allegations;

5.1 "*The Learned Judge erred in that he had assumed facts which were not before the Court and assisted the First Respondent's case"*.[2]

5.2 *"The learned Judge did not read the Court papers had he read it he would have applied his mind to the following….."* [3] (Sic)

5.3 *"Had the Learned Judge read the papers, he would have granted a postponement to file the CCMA records"*[4]

[6] This case also represents a scenario where the Applicant showed total disregard and disrespect for established rules and procedures governing proceedings before the CCMA and this Court, and yet had the audacity to blame the Court for an adverse order against it. The material background to this application shows this pattern;

The Conciliation process:

[7] Malan was allegedly dismissed on 17 September 2012. He referred a dispute to the fourth respondent (CCMA) on 20 September 2012. On 20 September 2012, the parties were notified of a conciliation hearing scheduled for 9 October 2012. On 8 October 2012, a day before the conciliation process, Q-Pet, through its erstwhile attorneys, Azgar Ally Khan & Associates caused a letter to be sent to the CCMA, wherein they sated that the CCMA lacked jurisdiction to conciliate the dispute; that Malan was not dismissed but

[2] at para 3.5 of Notice of Application
[3] at paragraph 3.6
[4] at paragraph 8

remained absent from employment; and further that the CCMA *must inform* Malan that a Disciplinary Hearing scheduled has been postponed and to contact his employer, until such time the internal procedures are exhausted, he remained an employee. It is clear from the tone of the letter that Q-Pet thought that the CCMA is its messenger, and it is not clear as to the reason the letter was not copied to Malan. It would have been expected of Q-Pet to accord some respect to the CCMA process by attending the conciliation meeting and explain why it lacked jurisdiction. Instead, Q-Pet chose not to attend that meeting, resulting with a certificate of outcome being issued by the Second Respondent.

[8] It is further of significance to note that the conciliation meeting was initially scheduled as a con/arb hearing. Malan however objected to that process. In its letter, Q-Pet had also indicated its objection to that process. However, in view of its objections to the jurisdiction of the CCMA to conciliate the dispute, had Q-Pet been properly advised, it would have known that it could have filed a substantive application in terms of Rule 31 of the CCMA Rules, or alternatively attended the conciliation and raised its objections, which the Commissioner could have dealt with in accordance with Rule 31 (10) of the CCMA Rules.

The arbitration process:

[9] Malan then requested the matter to be arbitrated, and it was set-down for arbitration by way of notices of set-down sent to the parties on 23 October 2012. The arbitration hearing was set-down on 22 November 2012. Q-Pet in turn had then on 18 November 2012, some four days before the arbitration hearing, filed an application with this court to review and set aside the CCMA certificate of outcome and to stay the arbitration hearing. Clearly this application was ill-conceived as there would have been no basis in law to set aside that certificate of outcome, if the only issue was that Malan had not been dismissed as alleged. Be that as it may, it appears that this application fizzled out on its own.

[10] Q-Pet failed to attend the arbitration proceedings held on 22 November 2012. Malan in his affidavit in support of the Rule 11 application averred that the Second Respondent (Commissioner Pillay) had in his presence telephonically contacted Ziyaad Moosa, the Human Resources Manager of Q-Pet. Moosa informed the Commissioner that the matter had been referred to the Labour Court, and that there would be no appearance on its behalf. Again, had Q-pet been properly advised, it would have attended the arbitration proceedings and presented its arguments as to the reason the CCMA lacked jurisdiction to arbitrate the matter. Instead it chose to disrespect the CCMA process and neglected to attend the arbitration proceedings at its own peril.

[11] Commissioner Pillay heard the matter in default, resulting in an award issued on 26 November 2012. The Commissioner found that Malan was dismissed, and that the dismissal was unfair. Q-Pet was ordered to pay to Malan, three months' salary equal to R32 550.00, outstanding salary in the amount of R5 008 .07 and an additional R5 008.07 in respect of notice pay. In total, the amount came to R42 566.15. Given the nature of litigation Q-Pet instituted and the resultant legal costs, I would not be surprised to learn that such legal costs now exceed the compensation amount ordered in the award.

The review application:

[12] Ordinarily, in cases where a default award has been granted under circumstances contemplated in section 138 (5) (b) (i) of the Labour Relations Act, any labour law practitioner should know that the next legal step to take is to invoke the provisions of section 144 of the Labour Relations Act to seek rescission of an adverse arbitration award. Azgar Ally Khan and Associates were clearly not aware of these provisions, and approached this court with a review application under case number D1062/12.

[13] There is a dispute as to whether the review application was served on the Second and Fourth Respondents. However, according to Malan, it appears that an application was made on Form 1 for a case number by Azgar Ally Khan & Associates. Malan filed a notice to oppose on 12 December 2012.

Furthermore, Malan established that the CCMA on 15 October 2012 confirmed that it did not have a record of receiving the application for review.

[14] On 22 January 2013, the CCMA sent a fax to Azgar Ally Khan & Associates, informing them that the record of proceedings has been dispatched to the Labour Court and further informing them of what Rule 7A (5), (6) and (9) of the Rules of this Court required of them to do. This was in respect of the review application of the certificate of outcome under case number D978/12.

[15] On 12 February 2013, the Registrar of this court sent a letter to Azgar Ally Khan, informing them that the record in respect of D978/12 was ready for uplifting. On the same day, Azgar Khan served on Malan and his attorneys of record, a notice of withdrawal as Q-Pet's attorneys of record. On 12 March 2012, the Registrar of this court had sent out a directive in respect of D978/12 indicating that unless the original Notice of Motion was filed together with proof of service on all the parties within 5 days, the matter will archived or be referred to a Judge for direction. On 15 March 2013, a new set of attorneys, Arishna Lutchman & Associates placed themselves on record as Q-Pet's attorneys of record, and they were served with the correspondence from the Registrar as above.

The Rule 11 application:

[16] No steps were taken to prosecute the review application until on 3 May 2013 when Malan launched an application to have the application for review dismissed for non-prosecution, and to have the award issued on 26 November 2012 made an order of the Labour Court. Q-Pet through Moosa conceded that this application was served on Arishna Lutchman & Associates, who withdrew as Q-Pet's attorneys of record on 27 September 2013.

[17] The application in terms of Rule 11 was launched when Malan realized that in respect of case number D1062/12, nothing had been filed but the Form 1 application for a case number and a notice of intention to oppose filed by Malan's attorneys. Malan had also realized that Q-Pet had not filed a notice in terms of Rule 7A(8) despite the record having been made available by the

CCMA in January 2013, and also despite the Registrar having informed its attorneys of record that a record under D978/12 was available.

[18] Despite the notice in terms of Rule 11 being served on both Q-Pet and its attorneys of record, nothing was done, and the Registrar had sent out notices of set-down on 29 August 2013. The application was set-down for a hearing on 16 October 2013 on the unopposed roll. On 7 October 2013, Q-Pet's new attorneys of record, Ozayr Latiff & Associates filed a Notice of Intention to oppose, followed by an opposing affidavit some four court days before the hearing scheduled for 16 October 2013.

[19] Q-Pet's attorneys had also approached the CCMA on 15 October 2013 and dispatched the record of the arbitration hearing to court. On 16 October 2013, Mr. Latiff, of Ozayr Latiff and Associates who had allegedly only received instructions on 7 October 2013 had made an appearance and requested a postponement, which was declined. This had resulted in the court order as indicated in paragraph 1 of this judgment. The basis of the request for a postponement was that Q-Pest required time to put its house in order in view of the errors committed by Q-Pet's erstwhile attorneys.

[20] The Rule 11 application was filed on 9 May 2013, and Q-Pet filed its opposition on 11 October 2013, some six days before the hearing of the application and some five months after the application was filed. No attempt was made whatsoever to seek condonation in respect of the late filing of opposition to the Rule 11 application. Scant reference is made by Moola to the fact that indeed an application for condonation was required, and to this end, some submissions related to the requirements of a condonation application were made. In essence, there is no proper opposition before the court.

[21] Malan through his attorneys of record on 11 October 2013, filed an application to strike out the purported opposition to the Rule 11 application. In his affidavit in respect of the application to strike out, Wynford Compton, Malan's attorney of record averred that prior to the hearing of the application on 16 October 2013, Ozayr Latiff & Associates had proposed an out of court settlement,

which Malan rejected. Secondly, on 9 October 2013, Ozayr Latiff & Associates sent him correspondence requesting that Malan agree to an adjournment in order to recover the files from Azgar Ally & Associates and Arishna Lutchman. Compton further averred that Ozayr Latiff went on record as far back as 27 September 2013 and had thus known about the matter. In that application, Compton also indicated that if Q-Pet sought a postponement, it had to file a substantive application in that regard. Despite pointing out that there was a need to file an application for condonation in respect of the filing of the opposition or a postponement, none was forthcoming.

[22] In response to the application to strike out, Moosa confirmed that a tender of cost was made when Q-Pet sought an adjournment on the grounds that its attorneys would be attending to Muslim rites on the hearing date. He confirmed that Ozayr Latiff was appointed in July 2013 but had difficulties in obtaining the files. In his view, when an adjournment was sought and Malan had refused the attorneys were pushed into Court by Malan's attorneys to deal with the matter. Moosa conceded that an application for condonation in respect of the opposition should be filed. In this regard, and within the opposition to the application to strike out, he blamed the CCMA and the court for the delay in respect of not prosecuting the review application. He conceded that the review record still needed to be filed, and it was only on 11 October 2013 that they were informed that the file was misplaced.

[23] The application for leave to appeal turns on the crisp issue as to whether the application for a postponement, which was made from the bar, should have been granted. As already indicated elsewhere in this judgment, Q-Pet's approach to these proceedings has been accompanied by a litany of blunders, clear and irregular legal steps, a complete disregard for CCMA processes and rules, coupled with an equally complete disregard for the provisions of the LRA, and the Rules of this Court. In my view, Q-Pet has abused the court process and such conduct cannot be countenanced.

[24] Notwithstanding the fact that in the application to strike out Compton had pointed out all of the possible flaws in Q-Pet's approach, the latter instead blames the CCMA and the Court for the quackmire it finds itself in. Petse,

ADJP in *Minister of Safety and Security and Another v Madyibi*[5] considered the approach in respect of applications for leave to appeal in the following terms:

> "In giving consideration to the issues at hand I am enjoined by judicial authority to take due cognisance of the test which is of application in matters of this nature. Judicial authority requires of a Judge considering an application for leave to appeal to reflect dispassionately upon the decision sought to be appealed against and decide whether or not there is a reasonable prospect that the Appeal Court may come to a different conclusion. This necessarily requires of me to disabuse my mind of the fact that I was of the view when I delivered my judgment that it was supportable both on the facts of the case and the law applicable thereto".

[25] In reflecting dispassionately upon the order I issued on 16 October 2013 in terms of which I refused to postpone the matter, the question that needs to be asked is whether any other court will come to a different conclusion in the following circumstances;

26.1 Where a party has willingly and with clear knowledge of the consequences of its actions;

26.1.1 Failed to attend both the conciliation process and arbitration proceedings at the CCMA.

26.1.2 Failed to invoke the provisions of section 144 of the Labour Relations Act by seeking a rescission of the default award.

26.1.3 Approached the court with an ill-conceived application to review a certificate of outcome and to stay arbitration proceedings.

26.1.4 Failed to bring a proper application for a review in terms of section 145 (1) read together with the Rules of this court.

26.1.5 Failed to timeously prosecute that review application.

[5] *Supra*

26.1.6 Failed to timeously oppose an application brought in terms of Rule 11 of the Rules of this Court.

26.1.7 Failed to bring a proper application for condonation in respect of the late filing of the opposition to the Rule 11 application.

26.1.8 Failed to bring a substantive application for a postponement, and merely sought such an application from the bar on the basis that it needed to "clean up its house".

[26] I find it extremely improbable and unlikely, that any other court would have come to a different conclusion in the light of the factors listed above. In fact, it is more likely that another court will find that Q-Pet's approach to these entire proceedings constitutes an abuse of the court process, and that its conduct is frivolous and vexatious in the extreme. It is also in the context of these factors, that considerations of law and fairness dictate that a punitive cost order should be made.

Order:

i. The application for leave to appeal is dismissed.
ii. The Applicant is ordered to pay the costs of this application on attorney and own client scale.

Tlhotlhalemaje AJ

Acting Judge of the Labour Court of South Africa