

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 5/04

LILIAN DUDLEY

Applicant

versus

THE CITY OF CAPE TOWN

First Respondent

IVAN TOMS

Second Respondent

Decided on : 15 June 2004

JUDGMENT

THE COURT:

[1] A few minutes before judgment was due to be delivered in this matter, the Court received documents from the City of Cape Town, the respondent herein, stating that its opposing affidavit, copy of which was attached, had been lodged with the Court on 27 February 2004 by telefax transmission. As a result of these developments, when the matter was called in Court, it was stood down to enable the Court to consider the opposing affidavit.

[2] Apart from opposing the grant of leave to appeal, the respondent in its opposing affidavit sought an order for costs. Having considered the opposing affidavit we were

satisfied that there was no reason to alter the order that we had proposed to make. The Court accordingly made an order refusing leave to appeal and made no order as to costs. These are the supplementary reasons for the order made.

[3] On their face the documents filed by the respondent indicate that the opposing affidavit was sent by telefax transmission to the office of the Registrar on 27 January 2004. Enquiries to the office of the Registrar, however, revealed no record of receiving the opposing affidavit. The opposing affidavit appears to have been sent at the time when the Court was moving to the new premises. There is also no record of the original opposing affidavit having been lodged with the office of the Registrar. Nor does the respondent say that it subsequently lodged the hard copy of the opposing affidavit with the Registrar. As a result, the opposing affidavit was not brought to the attention of the Court until a few minutes before it was due to deliver judgment.

[4] The lodging of the documents by telefax transmission is governed by Rule 1(4) of the Rules of this Court which provides:

“Notices, directions or other communications in terms of these rules may be given or made by registered post or by facsimile or other electronic copy: Provided that, if a notice or other communication is given by electronic copy, the party giving such notice or communication shall forthwith lodge with the Registrar a hard copy of the notice or communication, with a certificate signed by such a party verifying the date of such communication or notice.”

[5] It is plain from this rule that the respondent was required to lodge with the Registrar a hard copy of the opposing affidavit. The importance of the proviso needs

to be stressed. The purpose of the proviso is to ensure that if the documents sent by facsimile do not reach the Court for any reason, at least there is a hard copy in the Court file bearing the date stamp of the Court reflecting the date on which it was received. There is no indication in the letter by the respondent's attorneys that they lodged the hard copy as required by the proviso.

[6] In addition, there was no compliance with Rule 1(3) which provides:

“Any reference in these rules to a party having to sign documents shall be construed as including a reference to a legal representative representing such party, and a reference to lodging documents with the Registrar as including prior service of such documents on other parties and the lodging of 25 copies of all relevant documents and an electronic version thereof that is compatible with the software used by the Court, with the Registrar.”

This sub-rule requires the party to lodge 25 copies of the documents to enable all judges to have access to documents when lodged. This was also not done. So even if the opposing affidavit was sent by telefax transmission, it was not lodged with the Court.

[7] Thus, it is clear from these rules that the sending of a document by telefax transmission does not relieve the party of the obligation to lodge hard copies of the document concerned. In these circumstances there was no compliance with the rules of this Court.

[8] In any event, the Court was and remains satisfied that this is not an appropriate case to award costs against the applicant. The applicant is an individual who is seeking to vindicate her rights. She raises an important issue concerning the proper interpretation of the Employment Equity Act.¹ The decision on that issue may have an impact beyond the applicant. In these circumstances it is undesirable to award costs against the applicant. Accordingly, the Court, refused to award costs against the applicant.

Chaskalson CJ, Langa DCJ, Mokgoro J, Moseneke J, Ngcobo J, O'Regan J, Sachs J, Skweyiya J, Van der Westhuizen J, Yacoob J.

¹ Act 55 of 1998.