Court of Appeal for Saskatchewan
Docket: CACV4220

Citation: *Soldan v PLUS Industries Inc.*, 2024 SKCA 90
Date: 2024-09-19

Between:

Birgit Soldan

Applicant/Appellant
(Plaintiff)

And

PLUS Industries Inc.

Respondent/Respondent
(Defendant)

Before:	Caldwell, Tholl and Kalmakoff JJ.A.
Disposition:	Application dismissed
Written reasons by:	The Court
On application from: Application heard:	2024 SKCA 29, Regina September 9, 2024
Counsel:	Birgit Soldan on her own behalf Drew Ikert for the Respondent

The Court

I. INTRODUCTION

[1] Birgit Soldan's appeal from a Court of King's Bench judgment was dismissed by this Court on March 13, 2024: *Soldan v Plus Industries Inc.*, 2024 SKCA 29 [*Appeal Decision*]. Ms. Soldan applies, pursuant to Rule 47(1) of *The Court of Appeal Rules*, for an order granting a re-hearing of the appeal. For the reasons that follow, her application is dismissed.

II. BACKGROUND

[2] The background of this matter is comprehensively presented in the *Appeal Decision* at paragraphs 4 to 18. As such, we will provide only a brief description for the purposes of context.

[3] PLUS Industries Inc. [PLUS] terminated Ms. Soldan's employment, asserting that she had abandoned her position. She filed a complaint with the Saskatchewan Human Rights Commission alleging discrimination on the basis of disability. The matter was resolved after mediation and PLUS paid Ms. Soldan $20,000. Ms. Soldan then launched an action against PLUS in the Court of King's Bench based on the same subject matter. PLUS successfully applied to have the bulk of the claim struck. Ms. Soldan appealed to this Court and PLUS cross-appealed. In the *Appeal Decision*, the Court dismissed the entirety of Ms. Soldan's appeal and allowed PLUS's cross-appeal. As a result, Ms. Soldan was left with a potential claim in defamation.

[4] Ms. Soldan applies to the Court seeking an order for a re-hearing of her appeal. She has not explicitly asked for a re-hearing of the cross-appeal, but, given her submissions, we will address the matter as if she were seeking a re-hearing of the entire matter. Her grounds are as follows:

> a. In its decision favoring the Respondent's cross-appeal over the Appellant's appeal, the Court addressed the settlement of the Appellant's Human Rights complaint at several paragraphs, including 9, 11, 15, 40, and 42;
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> b. This Honorable Court should reconsider the implications of paras. 9, 11, 15, 40, and 42, as this Honorable Court respectfully erred in understanding the nature and reasonableness of the Respondent's settlement offer;

c. The Court's decision on the appeal hinges on a correct understanding of the settlement offer. The conclusion of an "all-inclusive settlement" and the upholding of the lower court's decision appear to rest on a misapprehension of the facts such as but not limited to the absence of any settlement agreement, the Respondent's breach of the SHRC terms, stipulation of damages, and the Commissioner's breach of privity of contracts;

d. It is exceptionally unlikely that the Supreme Court of Canada would grant leave to appeal to the Appellant on this ground, which raises a question that is in the nature of a palpable and overriding factual error requiring correction but which would not, on its face, raise issues of broad public importance;

e. A failure to remediate the issue by a re-hearing at this stage of the litigation will preclude the Respondent from seeking any further relief in the action;

f. The issue on re-hearing is discrete and limited in scope, although the implications will require re-consideration of the appeal proper; [and]

g. There will be no prejudice to the Appellants by having the matter re-addressed by the Court at this stage of the proceeding.

III. ANALYSIS

[5] The relevant rule is as follows:

Re-hearing

47(1) There shall be no re-hearing of an appeal except by order of the court as constituted on the hearing and determination of the appeal.

(2) An application requesting a re-hearing shall be by notice of application, served and filed before the formal judgment is issued.

(3) The notice of motion shall:

(a) state the grounds for the application; and

(b) be supported by a memorandum of argument.

(4) The notice of application and memorandum shall be served on all other parties that appeared on the appeal.

(5) Within 10 days after the service of the notice of application and memorandum, the other parties to the appeal may serve and file a memorandum in writing in response to the application.

(6) The formal judgment shall not be issued until an application requesting a re-hearing has been disposed of.

[6] As a preliminary matter, we note that Ms. Soldan appended 14 documents to her memorandum filed in support of her application. Of these documents, only 4 of them were filed in the Court of King's Bench and included in the appeal book in this Court. Many of the 10 new documents were letters and emails that pre-dated the application in the Court of King's Bench. There was no affidavit attesting to the authenticity of these documents or explaining why they

were not tendered on the original application in the Court of King's Bench. The issues to which they may be relevant were squarely in front of the Chambers judge. Based on the test from *Barendregt v Grebliunas*, 2022 SCC 22, 469 DLR (4th) 1, and *R v Palmer*, [1980] 1 SCR 759, these 10 documents would not be admitted as additional evidence if the appeal were to be re-heard. As a result, these 10 documents will not be considered on this application.

[7] In *Storey v Zazelenchuk* (1985), 40 Sask R 241 (CA), this Court delineated two separate tests for a re-hearing under Rule 47. Where the judgment has been perfected, the Court has limited discretion to re-hear a matter and may only do so to determine "whether the judgment entered truly represents the intention of the court or whether there has been a slip in drawing up the judgment" (at para 2). Where the formal judgment has not been issued, the Court can only re-hear the matter "in special or unusual circumstances" (at para 5).

[8] A formal judgment was not obtained by either party before Ms. Soldan filed her application, so there is no impediment in that regard. This leaves the Court to determine whether special or unusual circumstances exist. This test was recently considered in *Korf v Canadian Mortgage Servicing Corporation*, 2024 SKCA 28 [*Korf*]:

> [8] A long line of authority holds that, for reasons that include considerations of cost and finality, the power to order a re-hearing is to be exercised only in "special and unusual circumstances" (*Borowski v Stefanson, Prisiak and Emerald (Rural Municipality)*, 2015 SKCA 140 at para 9, 472 Sask R 107; see also: *Double Diamond Distribution Ltd. v Garman Turner Gordon LLP*, 2021 SKCA 152 at para 3; *Storey v Zazelenchuk* (1985), 40 Sask R 241 at para 5; *Michel v Saskatchewan*, 2017 SKCA 5 at para 3; *Whatcott v Canadian Broadcasting Corporation*, 2016 SKCA 51 at para 1; and *HDL Investments Inc. v Regina (City)*, 2008 SKCA 59 at para 3). While the question of what constitutes special or unusual circumstances is determined on a case-by-case basis, the requirement to demonstrate the existence of such circumstances means that a party applying for a re-hearing generally "has a significant hurdle to overcome" (*101115379 Saskatchewan Ltd. v Saskatchewan (Financial and Consumer Affairs Authority)*, 2019 SKCA 50 at para 11, [2019] 7 WWR 700).

[9] Reflective of how challenging it is to demonstrate special or unusual circumstances, re-hearings have been described as an *indulgence* and an *extraordinary remedy*: see *Double Diamond Distribution Ltd. v Garman Turner Gordon LLP*, 2021 SKCA 152 at para 3 [*Double Diamond*], and *Armco Canada Ltd. v P.C.L. Construction Ltd.* (1986), 33 DLR (4th) 621 (CanLII) (Sask CA) at para 6. This high hurdle for the granting of a re-hearing is necessary because "there must be finality to litigation" (*Double Diamond* at para 3, referencing *Shaw v Regina (City)*, [1944] 2 DLR 223 (WL) (Sask CA) at para 36).

[10] In *101115379 Saskatchewan Ltd. v Saskatchewan (Financial and Consumer Affairs Authority*), 2019 SKCA 50, [2019] 7 WWR 700, this Court listed some of the circumstances that have been considered sufficient or insufficient to warrant a re-hearing:

> [14] A rehearing has been granted: (i) where a relevant point of law involving the construction of a statute was not argued (*Shaw v Regina (City)*, [1945] 1 WWR 433 (Sask CA)); (ii) where a subsequent decision of a higher court might affect the outcome (*Harrison v Harrison*, [1955] 1 Ch 260); and (iii) when a relevant statutory provision that governs the case was not brought to the Court's attention (*Glebe Sugar Refining Company, Limited v Trustees of Part and Harbours of Greenock*, [1921] 2 AC 66).
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> [15] A re-hearing was not granted: (i) on the basis the decision was wrong (*Storey* at para 8; *Borowski* [2015 SKCA 140] at para 9; *Whatcott v Canadian Broadcasting Corporation*, 2016 SKCA 51, 395 DLR (4th) 294 [*Whatcott*]; *HDL Investments Inc. v Regina (City)*, 2008 SKCA 59 at para 3); (ii) where counsel sought further interpretation of a contract on a question already covered in the judgment (*Canadian Utilities Ltd. v Mannix Ltd*. (1960), 21 DLR (2d) 269 (Alta CA)); (iii) on the ground the decision was not warranted on the evidence (*Metx v Marshall* (1922), [1923] 1 DLR 367 (Sask SC)); (iv) where there was a dissent or split decision of the Court (*Armco* at 625); (v) because of the public importance of the decision (*Storey* at para 10; *Armco* at 626); (vi) on the basis the judgment created uncertainty in the law (*Storey* at para 9); (vii) where the decision established new facts giving rise to other claims (*Peter Ballantyne Cree Nation v Canada (Attorney General)*, 2017 SKCA 5, [2017] 5 WWR 84); or (viii) where there was an alleged error in the judgment (*Chutskoff Estate v Ruskin Estate*, 2011 SKCA 47).

[11] An application for a re-hearing will be denied where the applicant only seeks to offer submissions on points that were already before the Court but are asserted to have been wrongly decided: *Yashcheshen v Teva Canada Ltd.*, 2022 SKCA 121 at paras 12–13, [2022] 12 WWR 189.

[12] Overall, it is abundantly clear that a request for a "do-over", based on an assertion that a judgment was wrong, will not amount to a special or unusual circumstance that justifies the granting of a re-hearing. In the matter at hand, a second chance to present the same arguments on the same issues, with some nuances and perhaps a different emphasis, is exactly what Ms. Soldan seeks.

[13] In her written material, Ms. Soldan does not address the Rule 47 test or refer to any relevant case law in that regard. Instead, she simply argues why, in her view, the *Appeal Decision* was wrong. Ms. Soldan submits, inter alia, that the Court relied on false premises, misinterpreted the evidence regarding the settlement and whether it was all-inclusive, misapplied the case law, and misunderstood the nature of the Saskatchewan Human Rights Commission's adjudicative authority. She alleges a miscarriage of justice and seeks a re-hearing "to finally expose the truth and ensure a just resolution". All the arguments presented by Ms. Soldan on this application

address issues that were before this Court and determined in the *Appeal Decision*. There is no evidence or submission aimed at establishing that special or unusual circumstances exist. Her assertions in the hearing of this application confirm that Ms. Soldan's position boils down to an argument that the *Appeal Decision* was wrong, so it should be redone and decided in her favour. As noted above, requesting a re-hearing simply so that the appeal can be reargued in the hope of obtaining a different result does not constitute special or unusual circumstances.

[14] Ms. Soldan has not satisfied the Court that special or unusual circumstances exist. The matter at hand is not one in which a re-hearing should be ordered. As a result, the application must be dismissed.

IV. CONCLUSION

[15] The application is dismissed. Ms. Soldan shall pay costs of this application to PLUS, fixed in the amount of $1,000.

"Caldwell J.A."

Caldwell J.A.

"Tholl J.A."

Tholl J.A.

"Kalmakoff J.A."

Kalmakoff J.A.