



**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG**

Not Reportable

Case no: JA 85/2015

In the matter between:

**BAFOKENG RASIMONE PLATINUM MINE (PTY) LTD**

**Appellant**

and

**COMMISSION FOR CONCILIATION, MEDIATION**

**AND ARBITRATION**

**First Respondent**

**COMMISSIONER MASHOODA PATEL NO**

**Second Respondent**

**RYK BOTHA**

**Third Respondent**

**Heard: 19 August 2016**

**Delivered: 22 September 2016**

**Summary: Review of arbitration award – Labour Court finding that the failure by the commissioner to allow the employer to call an additional witness amounted to a reviewable irregularity – Labour Court setting aside the arbitration award on that basis and remitted the matter back to the CCMA but limited the hearing to the witness that was not called. Court finding that remitting the matter for a part-heard unfair as new commissioner not having the opportunity to hear other evidence. Court also rejecting employer's contention on the refusal by the Labour Court to admit further affidavit and costs granted against it. Appeal partly upheld – Labour Court's order**

substituted with an order that the matter be heard *de novo* in accordance with the *Blue Financial Services* Judgment.

Coram: Tlaletsi DJP, Ndlovu JA et Coppin JA

---

## JUDGMENT

---

COPPIN JA

- [1] This is an appeal against the judgment of the Labour Court (Lagrange J), *inter alia*, reviewing and setting aside an arbitration award of the second respondent (the commissioner) in terms of which third respondent (“the employee”) was reinstated in his employment with the appellant. The Labour Court also referred the matter back to the first respondent, the Commission for Conciliation, Mediation and Arbitration (the CCMA) for it to be considered afresh by a commissioner, other than the second respondent, after hearing such further evidence, which the employee and employer may wish to adduce.
- [2] The appeal essentially concerns two issues raised by the appellant. Firstly, whether the court *a quo* erred by not referring the matter back for a hearing *de novo*, but merely referring it back for fresh consideration, “on the basis of the record in the first arbitration hearing.” Secondly, whether the court *a quo* erred in refusing to allow the appellant to file an additional affidavit in the review proceedings before it and in ordering the appellant to bear the costs of the application for the admission of the additional affidavit, including ordering such costs to be on an attorney and own client scale.
- [3] Before dealing with the issues in detail, I propose to give a brief background. The facts in that regard are largely common cause or not disputed.
- [4] The employee was charged with bringing his employer, the appellant, into disrepute by using its resources in an improper manner. The charges arose from the employee’s unauthorised use of the company’s e-mail facility, which included its name, logo and address, to transmit sexually explicit, or

pornographic, messages to a third person who was not employed by the appellant.

- [5] Following a disciplinary process, the employee was dismissed by the appellant. He referred the matter to the CCMA for conciliation. When the conciliation process failed, the dispute was arbitrated before the commissioner. In her award, the commissioner found that the employee's dismissal was procedurally and substantively unfair and reinstated him retrospectively in his employment with the appellant.
- [6] The appellant brought an application in the Labour Court to review the award of the commissioner. After delivering its review application, including its founding papers, the appellant filed supplementary papers in December 2012 following the delivery of the record of the arbitration proceedings in about October 2012. The employee, who opposed the review, filed answering papers and the appellant delivered its replying affidavit on or about 14 February 2013. However, about five months later, on 12 July 2013, the appellant delivered an "*additional*" affidavit in which it raised further grounds of review and made further submissions in support of its application for review.
- [7] In its application for review, the appellant submitted, *inter alia*, that the commissioner had been biased in favour of the employee; that she was a friend of the employee's legal representative, Mr Parsons; that she had failed to disclose that fact when she had been under a duty to do so; and that such failure was material and, therefore, vitiated the entire arbitration proceedings.
- [8] The appellant also contended that the commissioner had committed a material irregularity by refusing to grant the appellant a postponement to enable it to call a material witness, Mr A Mbule. The witness was to give evidence on the issue of consistency in the disciplinary process of the employee and concerning the alleged breakdown of the employment relationship between the appellant and the employee.
- [9] Other grounds raised related to the alleged refusal by the commissioner to allow the appellant legal representation at the arbitration. I need not say

anything more on this ground. It was weak and correctly dismissed by the court *a quo*. It is not pursued by the appellant any further.

[10] The court *a quo* refused to admit the appellant's additional affidavit and, in essence, ordered the appellant to pay the employee's costs of opposing the admission of that affidavit on an attorney and own client scale.

[11] As regards the merits of the review, the court *a quo* made short shrift of the appellant's contentions of bias and non-disclosure, concluding as follows in that regard:

*'It appears to me that the confirmatory affidavit of Botha's attorney of record was more than adequate in dealing with Mr Khonous' vague and unsupported allegation.<sup>1</sup> It also would be somewhat surprising if professionals in the labour law community of a town the size of Rustenburg were not reasonably familiar or even well-acquainted with each other. But without more such an association does not warrant a justifiable perception of bias requiring disclosure.'*

[12] The court *a quo* however found, regarding the refusal of the postponement to allow the appellant to call Mr Mbule that the commissioner had not acted rationally and reasonably and, consequently, that the award had to be set aside. The court *a quo* stated the following in that regard:

*'In the circumstances, despite doubts about the applicant's ultimate prospects and despite the time which has elapsed the award must be set aside to permit the additional evidence of Mbule and any evidence in rebuttal thereof to be entertained.'*

[13] The court *a quo* went on to make an order setting aside the commissioner's award; directing that within 30 days of receipt of the judgment, the CCMA must set the matter down before a different commissioner to consider it afresh "on the basis of the record in the first arbitration hearing", including the e-mails B1, B2 and B3, referred to in the typed transcript of the arbitration hearing, but which were omitted from the record before the court *a quo*, and after having

---

<sup>1</sup> Mr Khonou stated in the founding papers "I have also since ascertained that the Commissioner and the employee's legal representative are friends. The Commissioner failed to disclose this relationship to me before or during the arbitration proceedings".

heard the evidence of Mr Mbule and any evidence the employee may want to adduce in rebuttal thereof. The court *a quo* also ordered that the additional affidavit was not admitted and that each party should pay their own costs of the review, save that the appellant had to pay the employee's costs for opposing the application to admit the additional affidavit on an attorney and own client scale.

- [14] The court *a quo* dismissed the appellant's application for leave to appeal against part of its order. However, leave to do so was granted on petition to this Court on 26 November 2015.
- [15] The appellant is pursuing the appeal in respect of two points. It contends that the court *a quo* ought to have referred the matter back to the CCMA for hearing *de novo* before a different commissioner, because (so it contends) the failure of the commissioner to disclose her relationship with the employee's legal representative was material and had the effect of it vitiating the entire arbitration proceedings before her. In this regard, the appellant relied extensively on this Court's decision in *Sasol Infrachem v Sefafe Daniel and Others* ("*Sasol Infrachem*")<sup>2</sup> and the Supreme Court of Appeal's decision in *Ndimeni v Meeg Bank Ltd (Bank of Transkei)* ("*Ndimeni*").<sup>3</sup>
- [16] The appellant also contends, in essence, that the court *a quo* exercised its discretion wrongly in refusing to admit the appellant's additional affidavit in respect of the review proceedings before it and, in particular, contends that the court *a quo* ought not to have penalised the appellant with costs and particularly, with punitive costs and contends that the court *a quo* should merely have regarded the additional affidavit as "*pro non scripto*", because none of the respondents filed any affidavits to oppose the admission of the additional affidavit and the argument for its admission was not raised separately from the contentions on the merits.
- [18] I shall now consider these issues in detail starting with the issue of the admission of additional affidavits and the costs order made in respect thereof.

---

<sup>2</sup> (2015) 36 ILJ 655 (LAC).

<sup>3</sup> 2011 (1) SA 560 (SCA).

Admission of the additional affidavit

[19] Before us, the appellant's argument was mainly directed at the costs order made by the court *a quo* in relation to the order excluding the additional affidavit.

[20] In my view, the court *a quo* cannot be faulted in its reasoning and conclusion that the additional affidavit had to be excluded. The rules, including Rule 7A of the Labour Court, do not provide for such an additional affidavit to be delivered by an applicant for review and the leave of the court must be sought in that regard. It is recognised that the court will only allow additional affidavits in exceptional circumstances and that the applicant, who asks for the admission of such affidavits, is seeking an indulgence.

[21] It is essentially a question of fairness to both sides. The following factors are material considerations, namely, the reason why the evidence or matter contained in the additional affidavit was not produced timeously or earlier in the founding and supplementary affidavits; the relevance or materiality of the evidence contained in the additional affidavit; the nature of the prejudice that may result if the additional affidavit was allowed and whether the prejudice could be dealt with by an appropriate order of costs; the stage in the proceedings when the additional affidavit was sought to be admitted and the importance of finality of proceedings. This is not a closed list of factors.

[22] The court *a quo* appropriately considered the different factors and appropriately concluded that the additional affidavit should not be admitted. The appellant did not bring a prior, substantive application for its admission, but sought to move for its admission when the review matter was before the court for argument. No reasons were furnished why the evidence, or matter, or grounds contained in the additional affidavit, were not and could not be included in the initial founding affidavit or in the appellant's supplementary affidavit. Pure remissness is not an excuse.

[23] This Court can only interfere with the costs order made by the court *a quo* if it is satisfied that the court *a quo* misdirected itself in that regard, or otherwise failed to exercise its discretion in a proper manner. I cannot find any basis to come to that conclusion in the present instance. It would be manifestly unfair

to make an order in respect of the admission of the additional affidavit, which would result in the other party bearing some of the costs in opposing its admission. A party and party costs order would have had such an effect. The order of the court *a quo* was clearly intended to avoid such an inequitable result.

- [24] In the broader scheme of things, the effect of the costs order, made in respect of the admission of the additional affidavit, is minimal. There was no substantial application for admission of that affidavit and there were no opposing papers filed. There was argument and opposing argument on the issue but it was not dealt with in a separate hearing from the merits. In my view, this “*ground*” relied upon by the appellant ought to be dismissed.

#### The referral back to the CCMA

- [25] As regards the referral for reconsideration, neither the court *a quo*, nor the parties, referred, or took into account the decision of this Court in *Blue Financial Services Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (“*Blue Financial Services*”).<sup>4</sup> There this Court held that the failure to allow the employer an opportunity to call a further “*material*” witness was unfair and irregular to the extent that it did not only justify the setting aside of the award but also a referral back to the CCMA for a hearing *de novo* before a different commissioner. At the hearing before us, we drew the parties’ attention to that decision.

- [26] The point of bias and non-disclosure was raised by the appellant in support of its argument for a referral back to the CCMA for a hearing *de novo*. In light of the decision in *Blue Financial Services*, this point of non-disclosure is now academic and does not have to be dealt with. I, nevertheless, add briefly that the point is bad and was rightly dismissed by the court *a quo*. The appellant’s reliance on the decision in *Sasol Infrachem* was misplaced. That the commissioner did not disclose to the parties that she was a friend or acquaintance of the employee’s attorney, was not a material non-disclosure and does not result in the vitiation of the entire arbitration proceedings.

---

<sup>4</sup> [2014] 10 BLLR 935 (LAC), especially para 31 at p 944.

- [27] The employee's counsel tried to distinguish the *Blue Financial Services* decision, but in my view unsuccessfully so. The basic facts are the same. In the present matter, the court *a quo*, in essence, as in *Blue Financial Services*, found that the commissioner's failure to allow the appellant to call a material witness justified a setting aside of the award and a remittal of the matter back to the CCMA.
- [28] To refer the matter back as a part-heard matter, merely to be reconsidered by a different commissioner after having heard the evidence of the excluded witness and any evidence in rebuttal thereof, is in my view not ideal and could possibly be unfair. A new commissioner would not have seen or heard the other witnesses whose evidence he, or she, would nevertheless have to evaluate and make findings on. This is clearly not acceptable. On the other hand, a referral back for a hearing *de novo* would be fair in all the circumstances. The order of the court *a quo* thus requires substitution with an order for a hearing *de novo* before a different commissioner.
- [29] The appellant's counsel contended that if that was the outcome, it would have been substantially successful and entitled to the costs of the appeal. The employee's counsel, on the other hand, submitted that his client was entitled to costs. Taking all circumstances into account, the most appropriate order is that there ought to be no costs in respect of the appeal.
- [30] In the result, the following order is made:
- 30.1 The appeal is partly upheld but no costs order is made in respect of the appeal.
- 30.2 The order of the court *a quo* is set aside and is replaced with the following order:
- '1. *The additional affidavit filed on 12 July 2013 by the applicant is disallowed.*
  2. *The second respondent's arbitration award dated 2 August 2012 under Case Number NWRB882/12 is reviewed and set aside.*



3. *The matter is referred back to the Commission for Conciliation, Mediation and Arbitration for a hearing de novo before a different Commissioner.*
4. *No costs order is made in respect of the review, save that the applicant must pay the third respondent's costs for opposing the admission of the additional affidavit on the attorney and own client scale.'*

---

P Coppin

Judge of the Labour Appeal Court

Tlaetsi DJP and Ndlovu JA concur in the judgment of Coppin JA

APPEARANCES

FOR THE APPELLANT:

P G Seleka SC

Instructed by Webber Wentzel Attorneys

FOR THE THIRD RESPONDENT:

Mr C Goosen with him Mr Jacques Parsons

Instructed by Parsons Attorneys