

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT CAPE TOWN

CASE NO.: C372/06

In the matter between :

THE NATIONAL UNION OF MINE WORKERS
JANTJIE DITSIETSI RAMAISA

First Applicant
Second Applicant

and

**THE COMMISSION FOR CONCILIATION, MEDIATION,
AND ARBITRATION**
COMMISSIONER SHIRAZ MAHOMED OSMAN N.O.
CHRISTIAAN FREDERICK POTGIETER
t/a SONOP DELWERY

First Respondent
Second Respondent

Third Respondent

JUDGMENT DELIVERED ON 28 NOVEMBER 2007

[1] This is an application in terms of section 158(1)(c) of the Labour Relations Act No. 66 of 1995 ("the LRA") to make the award issued by Second Respondent on 2 February 2005 an order of Court. Third Respondent is opposing the application on the basis that the proceedings should be stayed pending finalisation of the application instituted by Third Respondent to have the relevant award of Second Respondent reviewed and set aside.

- [2] The background to the matter briefly is that Second Applicant was in the employ of Third Respondent. Disciplinary proceedings were brought against Second Applicant on two counts of absenteeism without official leave on 22 July 2004 and 12 September 2004 resulting in his dismissal. The dismissal eventually led to the arbitration proceedings before Second Respondent on 1 February 2005. The arbitration was conducted in the absence of Third Respondent who failed to attend the proceedings.
- [3] Second Applicant testified at the arbitration that on 22 July 2004 the work bus left nine employees including himself behind. He was consequently unable to report for duty. On 12 September 2004 he was arrested as a suspect in a criminal charge in Delportshoop. He was subsequently released after the police had apprehended the real perpetrator. When he arrived at work he informed the foreman of the incident and was told to return to his post. The remaining employees who were absent with him on 22 July 2004 were given warnings, while Second Applicant had to attend a disciplinary hearing which resulted in his eventual dismissal.
- [4] In view of the uncontraverted evidence of Second Applicant, Second Respondent found that Second Applicant's dismissal was procedurally and substantively unfair and ordered his reinstatement with retrospective effect.
- [5] Third Respondent became aware of the arbitration award when it came to his attention on 2 February 2005. Third Respondent thereupon launched a rescission application on 5 February 2005. This application was heard on 15 April 2005 by Second Respondent who dismissed the application on 26 April

2005 on the basis that Third Respondent was given proper notice of the arbitration hearing. Third Respondent was dissatisfied with the award and proceeded to investigate the matter further. This resulted in the discovery that the notice of set down in respect of the arbitration hearing was forwarded to an incorrect address, which explains why the notice never came to Third Respondent's attention. Third Respondent thereupon sought the assistance of the Senior Convening Commissioner of First Respondent in Kimberley who advised that the matter should be referred back to Second Respondent. Third Respondent then launched a second rescission application on 10 May 2005 which was heard by Second Respondent on 30 June 2005. Second Respondent made a ruling on 13 July 2005 rescinding the arbitration award.

[6] First Applicant successfully challenged the second rescission ruling in this Court. The matter was concluded on 26 April 2006 when the Court reviewed and set aside the rescission ruling of Second Respondent. Third Respondent then launched an application to review Second Respondent's original award on 19 June 2006. That application is presently still pending.

[7] Ordinarily an application in terms of section 158(1)(c) of the LRA will not be finalised prior to the decision in a pending review application to have the relevant arbitration award reviewed and set aside. It was, however, argued on behalf of Applicants that the review had been preempted. This argument is based on the submission that by electing the remedy of an application for rescission instead of review proceedings (which are two mutually exclusive remedies) Third Respondent preempted the review. It was submitted that

Third Respondent should be barred from pursuing the review on the basis of acquiescence and election to pursue the contradictory remedy of rescission.

[8] In my view, there is no merit in the contention that Third Respondent had perempted the review. It is readily apparent that Third Respondent had taken immediate steps to pursue the possible remedies open to it as soon as the default award came to Third Respondent's attention.

[9] Applicants furthermore submitted that there was an unreasonable time lapse prior to the launching of the review application and that Third Respondent failed to apply for condonation. As pointed out above, Third Respondent had acted with due despatch in the circumstances and has not unreasonably delayed in bringing the review application. The issue of condonation as well as Applicants' further submission that the review was brought under the wrong section of the LRA are matters which need not be decided for present purposes. In any event these issues are not determinative insofar as the present application in terms of section 158(1)(c) is concerned.

[10] None of the other issues raised by the Applicants such as non-citation, defective service, the prospects of success and that the award had acquired factual validity likewise justifies, in my view, the granting of the present application notwithstanding the pending review application.

[11] It follows that the present application should be stayed pending finalisation of the review application instituted by Third Respondent.

[12] I have raised the prospects of directing that the review application be expedited with the legal representatives of both Applicants and Third Respondent. Third Respondent was agreeable to an abridged and expedited timetable for hearing the review application in order to resolve the issue between the parties which had been outstanding for a very considerable period of time. Applicants' legal representative, however, indicated that it would be undesirable to pursue the matter. In the result this issue was not pursued any further.

[13] In the circumstances, I make the following order :

- (a) The application in terms of section 158(1)(c) of the Labour Relations Act 66 of 1995 is stayed pending the determination of the review application instituted by Third Respondent under case number C262/06;
- (b) Costs stand over for later determination.

DENZIL POTGIETER, A.J.

For the Applicants: Mr Neville Cloete of Neville Cloete Attorneys.

For the Respondent: