



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Case no: JR 3019/2012

In the matter between:

NUMSA obo SAMUEL RABOTHATHA

APPLICANT

and

**THE METAL AND ENGINEERING
INDUSTRIES BARGAINING COUNCIL**

FIRST RESPONDENT

COMMISSIONER TSHEPO MASHIGO N.O.

SECOND RESPONDENT

NORCO CABLES (PTY) LTD

THIRD RESPONDENT

Heard: 19 December 2014

Delivered: 25 March 2015

Summary: Review Application - deponent having no personal knowledge - no factual basis set out in founding affidavit - no reference to record of proceedings - attorney and own client costs.

JUDGMENT

VENTER, AJ

Introduction

- [1] This matter concerns an application by the applicant to review and set aside an arbitration award of the second respondent in his capacity as commissioner of the first respondent. The Application is brought in terms of section 145 of the Labour Relations Act¹ ("the LRA").

Background facts

- [2] The third respondent is in the business of manufacturing cables.
- [3] Samuel Rabothatha ("Rabothatha") was employed by the third respondent in the capacity of quality controller.
- [4] Rabothatha was found guilty of two offences namely signing a production sheet giving the operator the go ahead for the run who made 118.5kg of scrap and failing to carry out instructions of management in that he organised a meeting without management's permission. Rabothatha was summarily dismissed on 10 June 2011.
- [5] Rabothatha referred an alleged unfair dismissal dispute ("the Dispute") to the first respondent which was arbitrated before the second respondent on 6 March, 17 July and 3 October 2012.
- [6] Rabothatha placed both the procedural and substantive fairness of the dismissal in dispute.

¹ Act 66 of 1995, as amended.

- [7] After analysing the evidence, the second respondent found that Rabothatha's version that he had obtained permission to hold the meeting was more probable than that of the third respondent's witnesses and found him not guilty of the charge related thereto.
- [8] On the issue of Rabothatha signing the production sheet giving the operator the go ahead to run the machine which manufactured 118.5kg scrap, the second respondent found it to be common cause that scrap was manufactured and accepted, the third respondent's version that in light of the discrepancies between Rabothatha's and the operator's time entries on the production sheet Rabothatha did not check the machine and had he checked the machine he would have picked up that it was making scrap. The second respondent found Rabothatha guilty of the second charge and held that as the third respondent had suffered a financial loss in a period of economic downturn dismissal was an appropriate sanction.

Grounds of review

- [9] The applicant's grounds of review which are set out in the founding affidavit deposed to by an official of the applicant, Prudence Gqoba ("Gqoba") are scant and lacking in any particularity.
- [10] The grounds for review are simply that the second respondent committed reviewable irregularities in failing to appreciate the fact that the applicant was dismissed based on only one witness's testimony at the disciplinary hearing, in finding that the conduct amounted to a dismissible offence and in failing to apply his mind to the evidence of one of the third respondent's witnesses, Mr Johannes Petrus Strauss ("Strauss").²
- [11] In conclusion, the applicant submits that a reasonable decision maker in the position of the second respondent faced with the same evidence would have

² Paras 16 - 18, page 10 of the pleadings.

found on a balance of probabilities that the applicant's dismissal was substantively unfair.³

[12] In its answering affidavit, the third respondent has raised two points namely that the founding affidavit is to be disregarded by the court as hearsay as the deponent does not have personal knowledge of the facts contained therein and the founding affidavit does not set out a factual basis upon which the applicant bases its grounds of review.⁴

[13] On the merits of the review application, the third respondent denies that the second respondent committed any misconduct, gross irregularity or exceeded his powers.

The relevant test for review

[14] The test applicable to review proceedings has been enunciated by the Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*⁵ and more recently in *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others*⁶ with reference to *Herholdt v Nedbank Limited*⁷ and *Herholdt v Nedbank Ltd and Others*⁸.

[15] The review test is a narrow one. This court may set an arbitration award aside only if the award represents a decision that is so unreasonable that no reasonable commissioner could make. An applicant in a review application must show that the commissioner's conduct resulted in an unreasonable decision. This Court may no longer set aside an award only on account of a process related irregularity. The function of the reviewing court is limited to a determination as to whether the commissioner's decision is one that could not be reached by a reasonable decision maker on the available material before

³ Para 11, page 11 of the pleadings.

⁴ Paras 6 - 14, pages 25 - 27 of the pleadings.

⁵ (2007) 28 ILJ 2405 (CC) at paras 105 - 112.

⁶ (2014) 35 ILJ 943 (LAC).

⁷ (2012) 33 ILJ 1789 (LAC).

⁸ (2013) 34 ILJ 2795 (SCA).

him/her. This Court must decide whether the commissioner's conduct in the proceedings and which conduct is called into question had the result of an outcome that falls outside the bands of decisions to which a reasonable decision maker could come to on the available material.

[16] The first step in a review is to consider whether the commissioner has committed an irregularity. In doing so, the court must consider the evidence as it appears from the record and compare it to the award and reasoning of the commissioner. Once an irregularity has been identified, the materiality of the irregularity becomes relevant. An irregularity is material if it is a material departure from the principles of law or a material failure to consider and determine the evidence or the case. In order to satisfy the first enquiry the irregularity must be material.

[17] If this court finds that a material irregularity exists, then the next step is to determine whether another reasonable decision maker, in the absence of the irregularity and considering the evidence and issues as a whole, could still arrive at the same outcome. If this Court is satisfied that the same outcome could not reasonably follow, then the review must succeed.

Merits of the review application

[18] Before dealing with the merits of the review application, I will deal with the two points raised by the third respondent namely, that the founding affidavit should be disregarded as it contains hearsay evidence and the founding affidavit fails to set out any factual basis for the review of the award.

Personal knowledge by deponent

[19] Advocate Kela who appeared for the applicant argued that as a review application is premised on the arbitration award and the record of proceedings the deponent to the founding affidavit does not have to have personal knowledge as he/she can get information from reading of the award and the record of proceedings.

[20] Mr Van Niekerk who appeared on behalf of the third respondent argued that as the deponent did not attend the arbitration proceedings in absence of a confirmatory affidavit by Rabothatha, the whole founding affidavit is hearsay and as hearsay is inadmissible I must disregard the founding affidavit in its entirety.

[21] In *Maharaj v Barclays National Bank*⁹ Corbett JA in considering the requirement of a deponent to an affidavit having personal knowledge stated as follows:

'Where the affidavit fails to measure up to these requirements, the defect may, nevertheless, be cured by reference to other documents relating to the proceedings which are properly before the Court....The principle is that, in deciding whether or not to grant summary judgment, the Court looks at the matter "at the end of the day" on all the documents that are properly before it.'

[22] In *Barclays National Bank v Love*¹⁰ it was stated as follows:

'...We are concerned here with an affidavit made by the manager of the very branch of the bank at which overdraft facilities were enjoyed by the defendant. The nature of the deponent's office in itself suggests very strongly that he would in the ordinary course of his duties acquire personal knowledge of the defendant's financial standing with the bank. This is not to suggest that he would have personal knowledge of every withdrawal of money made by the defendant or that he personally would have made every entry in the bank's ledgers or statements of account; indeed, if that were the degree of personal knowledge required it is difficult to conceive of circumstances in which a bank could ever obtain summary judgment.' [My emphasis]

[23] In *Shackleton Credit Management v Microzone Trading 88 CC and Another*¹¹ it was held that:

'...[f]irst-hand knowledge of every fact which goes to make up the applicant's cause of action is not required, and that where the applicant is a corporate

⁹ 1976 (1) SA 418 (A) at 423H.

¹⁰ 1975 (2) SA 514 (D) at 516G-H.

¹¹ 2010 (5) SA 112 (KZP) at para 13.

entity, the deponent may well legitimately rely on records in the company's possession for their personal knowledge of at least certain of the relevant facts and the ability to swear positively to such facts...'

- [24] These judgments deal with affidavits deposed to by persons employed by financial institutions in support of applications for summary judgment, however, the principles enunciated therein are in my view equally applicable to affidavits deposed to by union officials on behalf of their members in support of applications for the review and setting aside of arbitration awards.
- [25] Review applications are generally based on the award and the record of proceedings which consists of the bundles of documents before the commissioner and the transcript of the evidence of the witnesses who testified at the arbitration proceedings. This Court is required in considering a review application to decide whether the award on the evidence before the commissioner is reasonable. This Court considers the question of whether the award is reasonable by considering the grounds of review set out in the founding and supplementary affidavits, the award and the evidence before the commissioner.
- [26] It is in my view not necessary that the deponent to the founding affidavit have personal knowledge of the allegations contained therein to the extent that the deponent should actually have been present at the arbitration proceedings.
- [27] The fact that a deponent to the founding affidavit was not present at the arbitration proceedings which is the subject matter of the review application will not necessarily be fatal to a review application, particularly where the grounds of review are that the conclusions reached by the commissioner on the evidence before him/her are not reasonable and are not related to the conduct of the commissioner at the arbitration proceedings.
- [28] Where an applicant's grounds of review are that the commissioner committed misconduct during the arbitration proceedings which misconduct cannot be established on the record of proceedings, the requirement that the deponent should have personal knowledge to the extent that he/she was actually present at the arbitration proceedings would apply.

- [29] As the grounds of review in this application are not that the second respondent committed misconduct during the course of the arbitration proceedings which would require evidence on affidavit by a person who was present at the arbitration proceedings, it was not necessary for Gqoba to have been present at the arbitration proceedings in order for her to depose to the founding affidavit in support of the review application. A confirmatory affidavit by Rabothatha was also not necessary in light of the applicant's grounds of review.
- [30] Accordingly, I am of the view that the allegations contained in the founding affidavit do not constitute hearsay and I will not disregard the allegations contained therein.

Founding affidavit lacks basis for review

- [31] Mr Kela argued that what is of paramount importance in a review application is the material that is before the court and that is that the court must be in possession of the award and the evidence that was before the commissioner. Mr Kela submitted that failure of an applicant to point out each and every aspect in the founding affidavit cannot prevent this Court from scrutinising the award and the reasons given for the award.
- [32] Mr Van Niekerk submitted that the founding affidavit fails to set out any facts establishing misconduct or an irregularity on the part of the second respondent and makes no reference to the evidence or any portion of the record in support of the applicant's submissions that the award is reviewable. Mr Van Niekerk argued that the founding affidavit appears to be a simple generic affidavit and does not provide any basis for the review of the award. Mr Van Niekerk's argument further state that failure to refer to the record in the founding affidavit in effect means that there is no record before the court and that what the applicant required the third respondent and this court to do was to read the entire record and to tell the applicant where the reviewable irregularities are as the applicant has not done so.
- [33] I agree with Mr Van Niekerk. The applicant's founding affidavit fails to set out any factual basis to support the allegations that the second respondent

committed irregularities, misconducted himself or exceeded his powers. No reference has been made to the record of proceedings at all in support of the grounds of review. I agree with Mr Van Niekerk that it appears that the applicant wanted this Court to read the entire record of proceedings for it and to determine whether the second respondent committed any irregularities, misconduct or exceeded his powers.

- [34] This is not the function of this Court. An applicant cannot simply place a founding affidavit with general or generic grounds of review which are not supported by facts together with the award and the entire record of proceedings before this Court and then request the court to scrutinize the record of proceedings, the award and reasons given for it to determine whether the award is one a reasonable decision maker could have arrived at on the evidence before him/her. The applicant is obliged to set out in its founding and supplementary affidavits the facts, with reference to the record of proceedings, in support of the allegations that the award is not reasonable or the commissioner committed misconduct or gross irregularities in the conduct of the proceedings. It is not sufficient for an applicant to simply allege in general terms that the award is unreasonable with no reference whatsoever, to the facts and record of proceedings on which these allegations are based.
- [35] A general statement by an applicant that an award is unreasonable in the founding affidavit may be sufficient where such applicant has supplemented the grounds upon which it is alleged the award is unreasonable in a supplementary affidavit. The purpose of a supplementary affidavit is for an applicant, once in receipt of the record of proceedings to amplify the grounds of review raised in the founding affidavit with reference to the record or add new grounds of review not raised in the founding affidavit which become apparent to an applicant after considering the record.
- [36] The applicant did not file a supplementary affidavit in the application and has not supplemented or amplified its general and scant grounds of review with reference to the record.

[37] It is trite that an applicant is bound by the grounds of review contained in the review application unless the grounds have been amended or supplemented.¹²

[38] In *Comtech (Pty) Ltd v Molony N.O. and Others*¹³, the LAC stated as follows:

'The difficulty with the appellant's case in this regard relates to whether the founding affidavit contains the factual grounds required by Rule 7A (2)(c) of the Rules of the Labour Court. Rule 7A (2)(c) of the Rules of the Labour Court requires a party who applies for a review, such as the appellant in this matter, to deliver a notice of motion that must be supported by "an affidavit setting out the factual and legal grounds upon which the applicant relies to have the decision or proceedings corrected or set aside." Rule 7A requires the notice of motion to call upon, in this case, the commissioner "to show cause why the decision or proceeding should not be reviewed and corrected or set aside."

In my view, the contents of par 15 of the founding affidavit relate to conclusions of law. There is nothing either in par 15 or anywhere else in the founding affidavit which sets out the factual grounds upon which the appellant sought to base its legal grounds of review. In par 15 of the founding affidavit the deponent said that the commissioner erred in his award in that he "failed and or neglected and/or refused to apply his mind to the evidence led at the arbitration proceedings" but did not motivate this bald allegation by reference either to the evidence or the award.

The deponent to the founding affidavit also said in par 15 thereof that the commissioner "furthermore did not apply his mind to the relevant case law, applicable to the facts of the matter which was presented to him, and therefore exceeding his powers as commissioner in not applying the relevant statutory authorities to the applicable facts of the case." He did not say what case law he was referring to that the commissioner failed to apply nor did he specify the so-called "relevant statutory authorities" applicable to the case that he complained that the commissioner failed to apply. There is absolutely no factual basis advanced for these complaints.'

¹² See *Cusa v Tao Ying Metal Industries and Others* 2009 (2) SA 204 (CC).

¹³ Unreported judgment - case number DA12/05 dated 21 December 2007 at paras 15 - 17.

- [39] An applicant is obliged to set out the factual basis for the allegation that the award is unreasonable and must stand or fall by his founding affidavit.¹⁴
- [40] The deponent to the founding affidavit makes the bald allegation that the second respondent committed a reviewable irregularity/gross misconduct by finding that the applicant's conduct amounted to a dismissible offence under the circumstances. The deponent does not set out the factual basis for this conclusion and there is no motivation for this allegation by reference to evidence before the second respondent or the award itself.
- [41] The deponent to the founding affidavit makes further bald allegation that the second respondent failed to apply his mind to the facts and had he done so he would have realised on the strength of Strauss' evidence alone that the applicant would not have been dismissed.
- [42] The applicant has not advanced any factual basis for this bald allegation and has not referred to the portions of Strauss' evidence the second respondent is alleged to have failed to apply his mind to.
- [43] It certainly does appear that what the applicant intended was for this Court to scrutinise the entire record and to tell the applicant if and in what respects the award is unreasonable.
- [44] As stated above this is not the function of this Court. The applicant is required to make out a case in the founding affidavit, which it has hopelessly failed to do.
- [45] In argument Mr Kela submitted that the second respondent should have been alerted to the biasness of Grove who was the chairperson of the disciplinary hearing and a witness at the arbitration. Mr Kela further submitted that the second respondent failed to identify the issues before him, misdirected himself in finding that the fact that Rabothatha was informed about the scrap was a common cause fact, did not appreciate that the third respondent's

¹⁴ See *National Union of Mineworkers and Another v CCMA and Others* (2010) 31 ILJ 703 (LC) and *Harmony Gold Mining Co Ltd (Target Mine) v National Union of Mineworkers and Others* (2012) 33 ILJ 2609 (LC).

witnesses, Mr Ueckermann and Strauss contradicted each other and did not appreciate the discrepancies in all the witnesses' versions, did not consider whether evidence was led as to the breakdown of the trust relationship, failed to apply the correct test in assessing the credibility of the witnesses and probabilities and came to conclusions not supported by the evidence.

- [46] None of these submissions of Mr Kela were set out in the founding affidavit. An applicant cannot simply make bald allegations in the founding affidavit in support of the review application and then attempt to argue a case at the hearing of the review application. This not only prejudices the respondent opposing the review application as the respondent has no idea what the applicant's case is and is unable to answer thereto but also causes the respondent to incur costs in opposing the application and defending the award in circumstances where it does not know what case it has to meet.
- [47] Accordingly, in absence of any factual basis for the bald and general grounds of review set out in the founding affidavit, I find that the applicant has failed to make out a case for the review of the award and the application falls to be dismissed.
- [48] As I have found that the applicant has failed to set out any factual basis for the review of the award, it is not necessary for me to consider the merits of the review application. I do, however, feel that I must address the one ground of review raised by the applicant namely that the second respondent allowed the third respondent to call witnesses at the arbitration proceedings not called at the disciplinary hearing.
- [49] In *Sidumo v Rustenburg Platinum Mines Ltd*¹⁵, the Constitutional Court held that the arbitration under the auspices of the Commission for Conciliation, Mediation and Arbitration ("CCMA") is a *hearing de novo*.
- [50] In *Country Fair Foods (Pty) Ltd v CCMA and Others*¹⁶ the LAC held that:

¹⁵ *Supra* at para 8.

¹⁶ (1999) 20 ILJ 1701 (LAC) at para 11.

'...However, the decision of the arbitrator as to the fairness or unfairness of the employer's decision is not reached with reference to the evidential material that was before the employer at the time of its decision but on the basis of all the evidential material before the arbitrator. To that extent the proceedings are a hearing *de novo*.'

[51] It is trite that arbitration proceedings are hearings *de novo* and that the arbitrator is not only bound to consider the evidence before the disciplinary hearing, but is in fact obliged to consider all the evidentiary material placed before him at the arbitration proceedings. In my view the second respondent would have committed a gross irregularity had he refused to allow the third respondent to call other witnesses to give evidence to establish the fairness of Rabothatha's dismissal.

[52] In my view there is no merit to this ground of review.

Costs

[53] Mr Van Niekerk submitted that in light of the fact that the applicant failed to set out any factual basis to support the grounds of review, made no reference at all to the record of proceedings and simply filed the record which meant that the third respondent's legal representative had to read the entire record to oppose the application, the application is frivolous and vexatious and warrants a special costs order being granted against the applicant.

[54] On the other hand, Mr Kela argued that the applicant is obliged in law to place the entire record before the court to place the court in the position to consider the review and a special costs order is accordingly not warranted.

[55] In *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic and Others*¹⁷, the High Court, Western Cape Division in considering the award of attorney and own client costs stated the following:

'The applicant has achieved substantial success in the application and is entitled to costs against the respondent company. The applicant has sought a

¹⁷ 2014 (1) SA 381 (WCC) at para 61.

costs order on the scale as between attorney and client. It has also sought an order directing that the respondent's liability for the applicant's costs should not be paid by the respondent 'out of any funds that are attributable to [the applicant] as a shareholder'. These special orders are sought because it is contended that the respondent's conduct has been vexatious. In this regard the applicant's counsel called in aid the judgment in *In re Alluvial Creek Ltd* 1929 CPD 532 in which it was held (per Gardiner JP) that an attorney and client costs order might properly be made where the proceedings had had 'the effect of being vexatious, although the intent may not have been that they should be vexatious. There are people who enter into litigation with the most upright purpose and a most firm belief in the justice of their cause, and yet whose proceedings may be regarded as vexatious when they put the other side to unnecessary trouble and expense which the other side ought not to bear'. It is an approach that has since been endorsed in a number of subsequent cases. I think it is apposite in the current matter.'

[56] In *Lutchman v Pep Stores and Another*¹⁸ this court held as follows:

'I have expressed very strong views about whether this Court's time should have been wasted by it having to entertain what I respectfully consider to have been a frivolous and vexatious application. Courts usually express their displeasure by imposing an appropriate order as to costs - an attorney and client costs order. I am strongly inclined to show my displeasure by making such an order of costs against Roshni. Having said that, however, it seems to me she was not properly advised. It would be inequitable, I think, for me to visit what may well be the indiscretions of her advisors, on a litigant who was unemployed at the time of the launching of this application.'

[57] The applicant in this matter is a trade union well versed in litigation before this Court. The applicant should know that to come to this Court on a founding affidavit which fails to lay any basis for the review of the award is undesirable. The applicant should also know that it is obliged to only file the relevant portions of the record of proceedings and not the entire record.¹⁹ I am aware that cost orders on an attorney and own client scale should not be granted

¹⁸ [2004] 4 BLLR 374 (CC) at para 25.

¹⁹ Paragraph 11.2.6 of the Practice Manual of the Labour Court of South Africa (2 April 2013).

lightly, however, I am of the view that this Court should show its displeasure with having to read the entire record in order to properly adjudicate the application in circumstances where the applicant failed to make out a case in the founding affidavit. The third respondent and this Court were put through considerable inconvenience and trouble as the applicant had failed to properly motivate its general grounds of review. The third respondent in my view should not be responsible for these costs and I accordingly award costs against the applicant on an attorney and own client scale.

Order

[58] The review application is dismissed.

[59] The applicant is ordered to pay the third respondent's costs on an attorney and own client scale.

Venter AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant: Advocate Kela

Instructed by: Ndumiso Voyi Incorporated

For the Respondents: Mr Van Niekerk of Van Niekerk Attorneys

LABOUR COURT