THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR 1864/11

NATIONAL UNION OF MINEWORKERS	**First Applicant**
REUBEN VAN DONDER	**Second Applicant**
and	
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**First Respondent**
COMMISSIONER JACOB DANIEL SELLO NO	**Second Respondent**
SA EARTHWORKS LTD	**Third Respondent**

Heard: **12 June 2014**

Delivered: **22 July 2015**

JUDGMENT

TLHOTLHALEMAJE, AJ

Introduction:

[1] The applicants seek to review and set aside the arbitration award dated 4 July 2011, issued under case number GATW7166-10 by the second respondent (Commissioner), acting under the auspices of the first respondent (The

CCMA). In the award, the Commissioner had found that the dismissal of the second applicant (Van Donder) was substantively fair, and had dismissed his referral. The application is opposed.

Preliminary points:

[2] Both parties had raised preliminary points. The applicants contended that the third respondent lost the right to oppose the application on a variety of grounds including *inter alia*, that it had filed its answering affidavit out of time without an application for condonation. Other than this issue, the applicants had further alleged that the deponent to the answering affidavit, DN van der Westhuizen had committed perjury in that he had denied being properly served with documents pertaining to the review application, and further that he had made misrepresentation to this court

[3] The third respondent on the other hand raised a similar point in regards to the applicants' replying affidavit, and further lamented the fact that the applicants had not attended to the pagination and indexing of documents prior to the hearing.

[4] The Notice of Motion and the founding affidavit to the review application were filed and served on the third respondent on 5 August 2011. The third respondent's attorneys of record, Louw Pienaar Attorneys (LPA) had on 12 August 2011, filed a notice of opposition.

[5] The CCMA had filed its Rule 7A (3) compliance on 12 August 2011, in terms of which the record of proceedings was dispatched to the Registrar of this Court. Notwithstanding the LPA being on record, the applicants had filed a notice to stand by the notice of motion dated 30 November 2011 on 8 December 2011, together with the transcribed record on the third respondent.

[6] On 24 January 2013, LPA had sent correspondence to the applicants, noting that since its notice of opposition was filed, no further pleadings were filed in prosecution of the review application. The applicants were further informed that having inspected the Court's file, it was noticed that a Rule 7A (8) (b) notice and annexures were served on the Registrar on 30 December 2011 but

that there was no such service on the attorneys. The applicants were accordingly implored to serve the notice on the attorneys in order for them to act.

[7] The applicants did not respond to the above correspondence. An answering affidavit to the review application was nevertheless filed and served on 21 February 2013. This was followed upon by the applicants' replying affidavit on 1 March 2013, wherein the issue of condonation was raised.

[8] The third respondent's contention was that in the notice of opposition, the address (LPA's) at which it would receive all further notices and processes in the matter was expressly recorded, and it was further indicated that the answering affidavit in terms of Rule 7A (9) would be delivered after the receipt of the notice of amendment or notice that the applicants stood by its notice of motion. Notwithstanding this recordal, 17 months went by with without the attorneys receiving any documents.

[9] It was further submitted on behalf of the third respondent that notwithstanding the fact that LPA was on record since 11 August 2011, the applicants' Mr. Zwane had nevertheless delivered the Rule 7A (8) (b) notice directly on the third respondent on 1 February 2012. The applicants' replying affidavit filed on 1 March 2013 was further deemed to be out of time by 13 days (between 4 February 2013 and 1 March 2013), and it was pointed out that no application for condonation had been filed in that regard.

[10] The applicants submitted that the transcribed record was delivered by hand to the third respondent on 8 December 2011, with a notice advising that it stood by its notice of motion. They had done so being fully aware that the third respondent had appointed LPA, but that service was nevertheless accepted with the understanding that the documents would be forwarded to LPA. The record was again delivered to the third respondent on 1 February 2012 which was again accepted and accordingly, service of all documentation pertinent to the review application was delivered in accordance with Rule 4 (1) (a) read with sub-rule (2) (c). Despite this service, the third respondent had only filed

its answering affidavit some 358 days late and had not filed an application for condonation.

Evaluation:

[11] Rule 7(2) of the Rules of this Court require a notice of application to substantially comply with Form 4 and must be signed by the party bringing the application. The application must be delivered and must contain the following information-

(a) the title of the matter;

(b) the case number assigned to the matter by the registrar;

(c) the relief sought;

(d) an address of the party delivering the document at which that party will accept notices and service of all documents in the proceedings.

[12] In terms of Rule 7 (4), (c) a notice of opposition and an answering affidavit must respectively contain, with the changes required by the context, the same information required by sub-rules (2) and (3).

[13] In terms of Rule 7A (9), any person wishing to oppose the granting of the order prayed in the notice of motion must, within 10 days after receipt of the notice of amendment or notice that the applicant stands by its notice of motion, deliver an affidavit in answer to the allegations made by the applicant.

[14] A variety of issues arise in this application. The first is that it is trite that once attorneys are on record as it had happened in this case with the notice of opposition filed on 12 August 2011, for the purposes of compliance with the provisions of Rule 7 (2), all subsequent documentation should be served on those attorneys.

[15] For the purposes of service in terms of Rule 7, and where attorneys are on record, the provisions of Rule 4 (1) (a) read with those of Rule 4 (2) (c) are not pertinent, in that service must be effected on those attorneys. There can therefore not be proper service on a party if the serving party simply ignores

the method of service the other party had preferred. To this end, it is not sufficient for the applicants in this case to merely allege that such service was willingly accepted by the third respondent, and that there was therefore compliance with the rules pertaining to service. In the light of this conclusion, there is no merit in the applicant's contention that van der Westhuizen or the third respondent made a misrepresentation to this court, in that it was correct that the applicants had not effected service of further documents in terms of Rule 7 after the notice of opposition was served on them.

[16] A further difficulty with this application is that having improperly served the notice to stand by the notice of motion and the transcribed record on the third respondent instead of on LPA, no action was taken on the matter, including after the third applicant's attorneys of record's correspondence of 24 January 2013. Only after the answering affidavit was filed on 21 February 2013 were the applicants prompted into action with the filing of the replying affidavit.

[17] In the light of the background as above and further having considered the provisions of Rule 7 and 7A, it is my view that the third respondent's failure to timeously file an answering affidavit was as a direct result of the applicant's unreasonable service of documents directly on the third respondent despite LPA being on record. There is nothing to gainsay the third respondent's attorneys' contention that they could only have filed an answering affidavit after having inspected the court's file on 23 January 2013. To the extent that they had immediately done so, it is my view that it would be iniquitous to bar the third respondent from opposing the matter, let alone require it to seek condonation.

[18] The applicants have further not sought condonation for the late filing of the replying affidavit. It is appreciated that the delay in that regards was not significant and in the light of the protracted history of this matter, and further having had regard to considerations of expediency, no purpose will be served in further postponing the matter in order for the applicants to file a condonation application.

[19] I further do not deem it necessary to deal with the third respondent's contentions that despite written and repeated notification to the applicants of the need to re-index and repaginate the review papers in compliance with this Court's Practice manual, they had failed to do so. Non-observations in this regard with the provisions of clause 10.5 of the Practice Manual should be condoned. In regards to the issue of the incomplete record as raised by the third respondent, clause 11.2.6 of the Practice Manual provides that;

> *"Parties are reminded that Rule 7A (5) requires an applicant in a review application to copy and deliver only those portions of a record that are necessary for the purposes of the review. The filing of unnecessary portions of a record is a factor that may be taken into account for the purposes of any order of cost"*

[20] In the light of the above provisions, and further to the extent that the third respondent had not indicated which portions of the record that are missing had disadvantaged it in opposing the main application, it is concluded that there is a proper record before the court to enable it to deal with the review application.

The review application:

[21] The above preliminary points having been disposed of, it is my view that no purpose will be served in postponing the matter any further for further oral submissions to be made in regards to the merits of the review application. The court is satisfied that based on the record of proceedings, the parties' pleadings and written heads of argument, it is in the position to deal with merits of the review application.

Background:

[22] Van Donder was in the employ of the third respondent with effect from August 2006. He held the position of Excavator Operator when he was dismissed by the third respondent on 15 June 2010 following a disciplinary enquiry into allegations of misconduct pertaining to;

(i) *"Failure to comply with a lawful instruction;*

(ii) Fraud or forgery, or attempts of forgery, of any nature. Guilty of corruption or acceptance of a bribe

(iii) *Any conduct affecting the employer/employee relationship detrimentally*" (Sic)

The above allegations related to Van Donder allegedly having refused to work three hours per day despite instructions to that effect; alleged attempted fraud in that he had booked himself on duty for 9 hours per day whilst he had in fact refused to do any work, and claims in regards to sick leave.

The arbitration proceedings:

[23] A dispute referred to the CCMA came before the Commissioner for arbitration. Evidence was presented on behalf of the third respondent by its Site Agent, Arend von Wielligh Treurnicht. His evidence as summarised by the Commissioner was that Van Donder had previously sustained an eye injury and had taken leave for about eight months. As a result of his injury, the third respondent had decided that Van Donder should work a maximum of three hours with full pay for a full shift pending a further medical assessment.

[24] On 3 May 2010, Van Donder had raised some dissatisfaction with his working hours with Treurnicht. Van Donder was informed by him that if he refused to work the stipulated hours he would not be remunerated. On the same date, an accident occurred on site resulting in damage being caused to an excavator. When Treurnicht enquired about the whereabouts of Van Donder, it was discovered that he had went back to his room (living quarters on site).

[25] Following the accident, Van Donder had refused to report for work and stayed in his room. Notwithstanding the fact that he had failed to report for duty, Van Donder had submitted daily time sheets in which he had claimed that he had worked 9 hours between April and May 2010. Treurnicht had nevertheless refused to authorise payment based on the time sheets, as Van Donder had not reported for duty.

[26] Van Donder's testimony during the arbitration proceedings was to confirm that having returned from paid sick leave, there was an agreement that he would only work for three hours per shift. Despite this agreement, Treurnicht had refused to work with him or to allocate any work to him. He had made attempts to raise the matter with Treurnicht without success.

[27] Van Donder further confirmed that he had claimed nine hours in his time sheets because his contract of employment required him to work nine hours per shift. He had denied having stayed in his room instead of reporting for duty after the accident on site and testified that it was common for employees to be paid their salary even if they had not tendered their services.

The award:

[28] In his award, the Commissioner had found that Van Donder had not rendered any services after 3 May 2010. Van Donder had made a false representation by submitting time sheets for the full nine hours when he did not perform any duties in April and May 2010. The Commissioner concluded that Van Donder had accordingly committed fraud, and that the misconduct was serious as it went to the core of the employment trust relationship. The Commissioner further found that Van Donder's conduct amounted to dishonesty.

Grounds for review:

[29] As per the founding affidavit, the applicant's ground of review appears to relate to the fact that the Commissioner had afforded the third respondent the right to legal representation. Further grounds of review related to the Commissioner allegedly having committed misconduct, 'poor and negligent performance'; and exceeding his powers.

[30] The basis upon which this Court can intervene with a Commissioner's award as per the test enunciated in *Sidumo & another v Rustenburg Platinum Mines Ltd & others*[1] is to pose the question whether the decision made by a Commissioner is so unreasonable that no reasonable decision-maker could

[1] (2007) 28 ILJ 2405 (CC)

come to that decision. In answering this question, the conduct of the Commissioner is assessed, in addition to determining whether there is a basis to conclude that the Commissioner failed to apply his or her mind to issues which are material to the determination of the case. Furthermore, it is determined whether the commissioner misconceived the true nature of the enquiry, or whether the commissioner's conduct resulted in an unreasonable outcome[2].

[31] In regards to the issue of legal representation, the Commissioner in the light of the application before him had taken into account that the third respondent's Human Resources Manager who had dealt with the matter internally and all the other witnesses relevant to the case had since left its employ, and that the only witness available to deal with the matter was a lay person, who could also not act as its representative. The Commissioner took into account the comparable abilities of the representatives and then concluded that legal representation should be allowed. Significantly, the Commissioner also offered to adjourn the proceedings in order for the applicants, who were represented by Mr Zwane, to seek legal representation. This offer was not taken despite Mr. Zwane expressing his dissatisfaction with the ruling.

[32] Rule 25(1)(c) of the CCMA Rules provides that;

> 'If the dispute being arbitrated is about the fairness of a dismissal and a party has alleged that the reason for the dismissal relates to the employee's conduct or capacity, the parties, despite subrule 1(b) are not entitled to be represented by a legal practitioner in the proceedings unless –
>
> 1) the commissioner and all the other parties consent;
>
> 2) the commissioner concludes that it is unreasonable to expect a party to deal with the dispute without legal representation, after considering –
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> (a) the nature of the questions of law raised by the dispute;
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> (b) the complexity of the dispute;
>
> (c) the public interest; and

[2] See *Herholdt v Nedbank* [2013] 11 BLLR 1074 (SCA) and *Goldfields Mining South Africa v CCMA & others* [2014] 1 BLLR 20 (LAC)

(d) the comparative ability of the opposing parties or their representatives to deal with the dispute.'

[33] In *CCMA v Law Society, Northern Provinces*[3], the Supreme Court of Appeal in endorsing the constitutionality of Rule 25 (1) (c) held that;

> *"….The subrule indeed allows the commissioner considerable latitude in allowing legal representation. It may be allowed where the commissioner and all the parties agree. In addition, the commissioner may allow it in exercising his or her discretion when he or she considers that it is 'unreasonable to expect a party to deal with the dispute without legal representation' after consideration of the listed factors…."*[4]

[34] The applicants' contention in regards to the Commissioner's ruling in regards to legal representation was that in looking at the comparative abilities of the parties' representatives, he had not made an enquiry into the skills and experience of the third respondent, and in particular, its Mr. Treunicht.

[35] The applicant's arguments in this regard are clearly misplaced. When a Commissioner exercises his or her discretion based on the comparative abilities it can only be in reference to the comparative abilities of the representatives of the parties at the proceedings at the time, and not those of any other persons. In this case, the comparative abilities enquired into would have been those of Mr. Pienaar who had appeared on behalf of the employer, and those of Mr. Zwane, who had appeared on behalf of Van Donder.

[36] I am in agreement with the applicant's contention that there is no absolute right to legal representation in arbitration proceedings where a party has alleged that the reason for the dismissal relates to the employee's conduct or capacity. Be that as it may, ultimately, it is for the Commissioner to exercise his or her discretion in allowing legal representation. Only in circumstances where it is alleged that the discretion was not properly exercised or was exercised in a capricious manner can there be cause to intervene with the Commissioner's ruling.

[3] *CCMA v Law Society, Northern Provinces* (005/13) [2013] ZASCA 118
[4] At para [21]

[37] In this case, I did not understand the applicants' case to be that based on the comparative abilities of the parties' representatives, Mr. Zwane, who had appeared on behalf of Van Donder in both these and arbitration proceedings was at a disadvantage comparatively. Furthermore, the Commissioner had afforded the applicants an election to secure legal representation if they wished, which offer was not taken. To this end, I am satisfied that upon a consideration of the provisions of Rule 25 (1) (c) of the CCMA Rules, and in particular, the comparative abilities of Messrs Zwane and Pienaar, the Commissioner properly exercised his discretion in allowing the applicant legal representation.

Findings on the merits:

[38] In the applicants' written arguments, reference was made to the Commissioner having acted 'grossly irregular on the grounds of having allowed and being influenced by hearsay evidence'. This was in relation to the allegation that the Commissioner had relied on the evidence led at the internal disciplinary enquiry.

[39] There is no merit in this contention in the light of the evidence proffered by Van Donder himself. On his own version he did not do any work as he was not instructed to do any[5]. Furthermore, in claiming the hours he had not worked, he had relied on his contract[6]. The Commissioner had upon a consideration of the evidence before him, concluded that Van Donder's evidence to the effect that he had submitted the time sheets stating that he worked 9 hour shifts in April and May as his contract of employment required him to work those hours was preposterous. He had found that Van Donder had not worked the full shifts or the three hours agreed upon when he returned from sick leave.

[40] The essence of this finding was that Van Donder could not have claimed the full 9 hour shifts as per his time sheets as he had not worked the full hours or

[5] P129 of the record of proceedings
[6] P130 of the record of proceedings

the three hours agreed upon, and this according to the Commissioner formed the basis of the conclusion that Van Donder had committed fraud and had acted dishonestly. In the light of this reasoning on the common cause facts, I fail to appreciate how it can be said that the conclusions reached by the Commissioner were unreasonable.

[41] Contrary to the applicants' contentions, it cannot be said that the Commissioner failed to apply his mind to the full facts of the case, or misconceived the nature of the enquiry in relations to the material before him. There is no basis therefore to conclude that the Commissioner had relied on factors not placed before him in that fraud, which in itself amounts to dishonesty was one of the charges preferred against Van Donder.

[42] The applicants complained that the Commissioner had failed to consider Van Donder's contract of employment in arriving at the conclusion that he had committed fraud. There was no need for the Commissioner to consider the contract as a Van Donder, who had placed reliance on that contract had not produced in the arbitration proceedings. The issue ultimately was whether Van Donder had committed misconduct or not in relation to the submission of the time sheets. Once it was established that Van Donder was not entitled to claim for the full 9 hours on account of his absence from the workplace, that would have been the end of the enquiry, and little significance was to be attached to the contract of employment in any event.

[43] I have had regard to the record and noted that in the course of making closing arguments, the Commissioner further with a view of seeking clarity on certain issues, not only engaged with the parties but also went as far as asking Van Donder questions. It is accepted that this was indeed irregular on his part, but this in itself did not render the ultimate outcome reached unreasonable.

[44] To conclude then, there is no basis for any finding to be made that the Commissioner misconstrued the nature of the enquiry before him or failed to take any relevant material into account in reaching his conclusions. Having concluded that the misconduct related to fraud and dishonesty had been

proven, the Commissioner had further considered the fact that the misconduct in question impacted on the trust relationship. I am satisfied that on the material placed before the Commissioner, the award is unassailable, and no basis has been laid for a conclusion to be reached that the decision reached was not that of a reasonable decision-maker. I have further had regard to the issue of costs, and in my view, considerations of law and fairness militate against such an order. In these circumstances, the following order is made;

Order:

i. The preliminary points raised by the applicants are dismissed.
ii. The late filing of the replying affidavit in the review application is condoned.
iii. The application to review and set aside the award issued by the second respondent is dismissed.
iv. There is no order as to costs.

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Tlhotlhalemaje, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

On behalf of the Applicants:	Mr. B Zwane (NUM Official)
On behalf of the Third Respondent:	Mr JL Pienaar of Louw Pienaar Attorneys