



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR1103/2009

In the matter between:

SOUTH AFRICAN STATE AND ALLIED WORKERS' UNION

First Applicant

T L KATI

Second Applicant

and

GENERAL SERVICE PUBLIC SECTOR

BARGAINING COUNCIL

First Respondent

ROBERT J C N.O.

Second Respondent

THE EASTERN CAPE PROVINCE:

TREASURY DEPARTMENT

Third Respondent

Heard: 1 July 2015

Delivered: 7 August 2015

Summary: Review application – s 145 of the LRA – delay in prosecuting review application - application to dismiss – set down of both applications– grounds of review set out in application abandoned – raising new ground of review in argument – new ground of not pleaded – Rule 7A(2)(c) -

JUDGMENT

MALAN AJ,

Introduction

- [1] At the commencement of the hearing of this matter, Mr Rautenbach SC, who appeared on behalf of the applicants in the review application, raised the point that *ex facie* the notice of set down (dated 29 May 2015) the applicants received from the office of the Registrar of this court, only the review application had been set down for hearing, and thus there was no proper notice of set down for the third respondent's application to have the applicants' review application dismissed (*the dismissal application*). Consequently, so he argued, the dismissal application was not properly before the court and it should therefore not be considered. Only the review application should be considered and determined.
- [2] On the other hand, Mr Ramdaw, who appeared on behalf of the third respondent, did not seriously challenge the fact that the notice of set down made no mention of the dismissal application. The notice of set down only advised the parties that the review application had been set down for hearing on 1 July 2015. Nevertheless, he urged the court to consider both applications. In support of the aforesaid, my attention was invited to the supplementary heads of argument and practice note delivered by Mr Ramdaw on 25 June 2015. In the aforesaid, he raised the dismissal application as a preliminary issue for determination.
- [3] In the interest of justice and having regard to the fact that labour disputes be brought to finality in good time in line with the spirit of the Labour Relations

Act, 66 of 1995 (as amended) ('LRA'),¹ I requested both parties to address me on the dismissal application as well as the review application and reserved my judgment on both in order to give further consideration to the question whether or not the dismissal application was indeed properly before me.

- [4] Having considered the notice of set down, I am not satisfied that the dismissal application was set down by the Registrar for hearing on 1 July 2015. The notice makes no mention of the dismissal application nor does it contain any reference or wording from which the parties could reasonably infer that the dismissal application was also set down for hearing on 1 July 2015. It does not automatically follow that the dismissal application would be heard simultaneously with the review application.
- [5] It would be unreasonable to expect of a party to assume that any one or more or all interlocutory applications will also be heard along with the review application, despite no mention having been made of such by the Registrar in the notice of set down. The very purpose of the notice of set down is to inform the parties of the date of the hearing and the nature of the hearing. The prejudice that a party will suffer in the absence of a proper notice of the case he or she has to meet is far too severe and so are the potential consequence.
- [6] The fact that Mr Ramdaw raised in his supplementary heads of argument and practice note the determination of the dismissal application as a preliminary issue does not cure the fact that no notice of set down for the hearing of such application was dispatched from the office of the Registrar, or even from Mr Ramdaw's offices, for that matter. Any uncertainty in this regard could easily have been addressed and cleared up timeously with the Registrar. However, this was not done.

¹ *Khumalo & another v MEC Education KZN* (2014) ILJ 613 CC at 42; *NEHAWU v UCT* (2003) 24 ILJ 95 (CC) at 31.

[7] In the premises, I find that the dismissal application was not properly before me and consequently does not require determination.

[8] I now turn to deal with the review application.

The review application and grounds of review

[9] Before me is an opposed application in terms of which the applicants seek to have the arbitration award (case number PSGA 838-07/08) dated 23 March 2010 (*'the award'*) handed down by the second respondent (*'the Commissioner'*) on 27 March 2009 under the auspices of the first respondent (*'the Bargaining Council'*) reviewed and set aside (*'the review application'*) in terms of s 145(1) of the LRA.

[10] The grounds upon which the applicants contend the award falls to be reviewed and set aside are contained in their founding affidavit as well as their supplementary affidavit. However, I was informed by Mr Rautenbach during his argument that I should disregard these grounds of review as *'these grounds have no prospects of success and go too far.'* In the circumstances, it will serve no purpose to burden this judgment by merely recording these grounds as no reliance was placed on them or any argument put forward in support of them. In their stead, Mr Rautenbach sought to rely on the following ground of review, namely *'Each and every incidents was properly explained but the arbitrator ignored this. If he took her [the second applicant's] evidence into account, no arbitrator would have come to the conclusion that her dismissal was fair.'*

[11] This raises the question whether or not the review application can and should be considered and determined on this 'new' ground of review.

[12] The relevant provisions of s 145 of the LRA reads as follows:

(1) *Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award—*

...

(2) *A defect referred to in subsection (1), means*

(a) *that the commissioner –*

- (i) *committed misconduct in relation to the duties of the commissioner as an arbitrator*
- (ii) *committed a gross irregularity in the conduct of the arbitration proceedings; or*
- (iii) *exceeded the commissioner's powers; or*

(b) *that an award has been improperly obtained.'*

[13] Rule 7A(2)(c) of the Rules of the Labour Court requires a party who applies for a review, such as the applicants 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.'*

[14] In the circumstances, the applicants were legally required in terms of Rule 7A(2)(c) read in conjunction with s 145 to set out in its founding affidavit (or supplementary affidavit in terms of Rule 7A(8)(a)) the factual and legal grounds upon which they rely to have the award corrected or set aside. Put differently, the applicants were required to set out the factual and legal grounds in order to bring them within the ambit of s 145(2). The rationale behind this is quite clear, namely the papers should properly apprise a respondent of the case to be met.²

[15] The applicants have abandoned the grounds set out in their founding affidavit and supplementary affidavit. The new ground on which they now seek to rely, is not set out in their papers, as they were legally required to

² If the original papers do not cover the point to be argued, the supplementary papers should properly apprise the respondent of the case to be met. *Moleah v University of Transkei* 1998 (2) SA 522 (Tk HC) 533. Cf the general approach discussed in *Naude v Fraser* [1998] 3 All SA 239 (SCA) 260, 1998 (4) SA 539 (SCA).

do.³ This new ground of review was raised for the first time during argument. The applicants' founding affidavit and supplementary affidavit does not provide any factual and legal grounds to support this new ground of review. This ground has simply not been pleaded.

- [16] In *County Fair v CCMA*⁴ Landman J remarked that failure to set out 'the factual and legal grounds upon which the applicant relies' will normally be fatal.⁵
- [17] During argument, I was also not referred to any facts or evidence contained in the record and transcript of the arbitration proceedings (comprising some 900 pages), even if that would have been permitted, to support or motivate the bald ground of review, especially in the light of the fact that it is both vague and wide in the extreme. It simply lacks sufficient particularity to sustain any reasonable challenge to the award. It is not for the court to mine the record and transcript in search for evidence to find factual and legal grounds that might fall under this general ground of review, which ground is in any event nothing short of a conclusion. This approach or practice cannot and should not be condoned.
- [18] In *Naidoo v NBCC*⁶ it was held that it is incumbent on an applicant in a review application to establish the grounds for review with reference to the award and the evidence. An applicant's bald statement that an arbitrator has failed to apply his/her mind is insufficient. The factual basis for the allegation must be given.⁷

³ *National Union of Mineworkers & another v Commission for Conciliation, Mediation & Arbitration & others* (2010) 31 ILJ 703 (LC) at [13].

⁴ [1998] 6 BLLR 590 (LC) at 580E–F.

⁵ See also *MIT Tissue v Theron & others* [2000] 8 BLLR 947 (LC) at [23]; *Moraka v National Bargaining Council for the Chemical Industry & others* (2011) 32 ILJ 667 (LC) at [21] – [23].

⁶ [2012] 9 BLLR 915 (LC).

⁷ *Minister of Law and Order v Dempsey* 1988 (3) SA 19 (A) 40; *Davies v Chairman, Committee of the Johannesburg Stock Exchange* 1991 (4) SA 43 (W).

[19] In the unreported case of *Comtech (Pty) Ltd v Mohony NO & others*,⁸ the Labour Appeal Court, in dealing with the factual grounds required by Rule 7A(2)(c) of the Labour Court Rules held at paragraphs 15-17 as follows:

[15] *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 proceedings should not be reviewed and corrected or set aside".*

[16] *In my view, the contents of para 15 of the founding affidavit relate to conclusions of law. There is nothing either in para 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 para 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.*

[17] *The deponent to the founding affidavit also said in para 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 exceeded 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.'*

[20] Based on what is set out above, I conclude that the review application cannot succeed. The applicants have failed to, as they are legally required to do, provide the factual and legal basis upon which they seek to rely to have the award reviewed and set aside.

Costs

⁸ DA12/05. See also *Hamandawana v Dispute Resolution Centre & others* (2014) 35 ILJ 1312 (LC) at [8] – [10].

- [21] In terms of the provisions of ss 162(1) and (2) of the LRA, I have a wide discretion where it comes to the issue of costs.
- [22] In essence, the applicants have not only, at the proverbial eleventh hour, abandoned their grounds of review upon which they brought the third respondent to court, but then persisted with the review application premised on a new ground of review which had not been pleaded and is vague and wide in the extreme.
- [23] I do not believe that it is just and equitable to burden the third respondent with the costs in the specific circumstances of this case, especially in the light of the fact that it is entrusted with public funds.
- [24] Given the circumstances of this specific case, I deem it just and equitable that the applicants must pay the costs.

Order

- [25] In the premises, I make the following order:
1. The review application is dismissed with costs.

L M Malan, AJ

Acting Judge of the Labour

Court of South Africa

APPEARANCES:

For the applicant:

J G Rautenbach SC

Instructed by Cheadle Thompson & Hayson Inc.

For the third respondent:

Mr A Ramdaw

Instructed by Ramdaw & Associate Inc.

Labour Court