



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case No: JR 639/2012

In the matter between:

BLOEM WATER (PTY) LTD

APPLICANT

And

**SOUTH AFRICAN MUNICIPAL WORKERS
UNION (SAMWU)**

FIRST RESPONDENT

MS C SEBUDI

SECOND RESPONDENT

HELEN HLATSHWAKO N.O

THIRD RESPONDENT

SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL (SALGBC)

FOURTH RESPONDENT

Date heard: 10 July 2015

Date delivered: 06 November 2015

Summary: Permission to file the explanatory and confirmatory affidavits. Review- the Commissioner did not take into consideration of fairness and did not act reasonably in her heavy-handed approach.

JUDGMENT

COOK AJ;

Introduction

- [1] The Applicant seeks to review and set aside the arbitration award of the First Respondent ("the Commissioner") and remit the matter to the Fourth Respondent for a hearing *de novo*. The Second and Third Respondents oppose the application and seek consent to introduce an explanatory affidavit and confirmatory affidavits of Joseph Ndi Tshabalala, Sheaks Hash and Michelle Botes.
- [2] At the conclusion of the matter the parties agreed that the Court should listen to the audio recording of the arbitration proceedings to be in a better position to determine the context and tone of certain remarks made. Unfortunately the recordings could not be found, and the parties agreed that the court decide the matter in their absence.

The interlocutory application to admit the additional affidavit

- [3] It was common cause that the deponent to the answering affidavit, Joseph Ndi Tshabalala was not present at the arbitration hearing and did not represent the employee at the arbitration hearing. Sheiks Hash represented the employee.
- [4] In terms of a confirmatory affidavit Sheiks Hash states:

'3. I was previously employed by the Third Respondent South African Municipal

Workers Union as a shop steward and I represented the Second Respondent C Sebudi in the arbitration proceedings which were held under the auspices of the Third Respondent at Bloemfontein on 23 January 2012 wherein Second Respondent acted as Commissioner.

4. I have read the answering affidavit deposed to by Joseph Ndi Tshabalala on 22 July 2013, a copy of which is appended hereto and which I initial for identification purposes. I confirm the correctness of the allegations contained therein insofar as they relate to the arbitration proceedings, particularly emphasising the correctness of the allegations after conciliation had failed and the arbitration proceedings resumed shortly after 14:00 on 23 January 2012 until the finalisation of the matter’.

[5] The Court has a discretion to permit further affidavits.

‘...This discretion must be exercised judiciously, having considered whether a proper explanation for its late filing exists, whether the material contained in the affidavits are relevant and whether the filing of such affidavits would be prejudicial to the other party’.¹

[6] The Court is of the view that the Third Respondent has provided a satisfactory explanation as to why the affidavit was filed, and that the filing of the affidavit does not constitute new material but is filed in order to cure a defect.

[7] The Court is furthermore of the view that the balance of prejudice favours the filing of the affidavits, as if the explanatory affidavit is not allowed, it would mean that the review application would only be based on the affidavit of the Applicant and the Second and Third Respondents would be denied the opportunity of putting forward their opposition.

[8] The Court is also mindful that the affidavit was filed prior to the hearing of this matter and that the litigation had not reached such a state of finality that it would cause undue prejudice. Furthermore there has been a tender for any wasted costs occasioned by the circumstances set out and the filing of the affidavit and the

¹ *Misa v SAMWU on behalf of Members v Madikor Drie (Pty) Limited* [2006] 1 BLLR 12 (LC) at para 18.

introduction thereof in the proceedings.

- [9] Accordingly, the Court shall allow the filing the explanatory affidavit and the Court is further of the view in light of the confirmatory affidavit that the cause of complaint in respect of the personal knowledge in regards to the answering affidavit has been cured.

The review application

- [10] From the record the following appears:

10.1 'Madam Commissioner: How would you be proving what you have just said? Documentary evidence, oral evidence?

Mr Mkhosana: By leading oral evidence.

Madam Commissioner: Oral evidence?

Mr Mkhosana: Yes'.²

'Mr Mkhosana: Yes, I must also furthermore mention Madam Commissioner that the other witness that the employer wants to call he is not available today. I have spoken to him about a week ago and he indicated that on this day he will be scheduled in another matter, he will not be available but if there is a later date he will try his level best to make himself available. That is all for now'.³

10.2 'Madam Commissioner under case number FSD101102 the parties are SAMWU on behalf of Sebudi v Bloem Water. My name is Helen Hlatswako. I am going to be the Commissioner today. The date is 23rd of January 2012, the time is 14:57. I am going to hand over to the parties to introduce themselves from left to right'.⁴

10.3 'Madam Commissioner: Okay and there are no other documents which are going to be admitted into evidence, only those documents which are before you as I have

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³ page 66

⁴ Page 65

stated in my ruling. You may call your witnesses.

Mr Mkhosana: Yes Mr Tshwane has gone to call the witnesses.

Madam Commissioner: I do not have time your witnesses are supposed to be here. They are not supposed to be A-WOLLING somewhere else, because my ruling was very clear that 14:00 the arbitration is starting.

Mr Mkhosana: Yes inaudible. Commissioner: He has gone to call them, I do not know how inaudible

Madam Commissioner: Okay Ntati we will pass you then, we will proceed with the other side. I cannot assist you in terms of your evidence. If time comes and they have not finished, well there is nothing I can do about it. You may proceed Ntati, you may call your first witness.⁵

“Madam Commissioner: Thank you. Do you want 2 minutes and then you can do your closing sir?

Mr Hash: Yes Madam.

Madam Commissioner: Okay we'll take 2 minutes then.

Mr Hash: Thank you.

HEARING ADJOURNS⁶

10.4 'Madam Commissioner: Actually Mr Mkhosana is supposed to start and not you. Can you proceed?

Mr Mkhosana: Okay should I put it next to me?

Madam Commissioner: Please.

Mr Mkhosana: Yes thank you Madam Commissioner.

Madam Commissioner: Right go on, thanks. Proceed.

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⁶ page 121

Outside enquiry around when how much longer proceedings to last.

Madam Commissioner: Alright proceed.

Mr Mkhosana: Thank you Madam Commissioner. Number one the employer wants to place the following on record that the employer wanted to all witnesses and at the time when we started the employer indicated to the Commissioner the position of the witnesses and the employer also.

Madam Commissioner: Ntati please do not misinform because this meeting was – you were fully aware that the arbitration is going to start at 14:00 and your witnesses were supposed to be here. So do not mislead.

Mr Mkhosana: Can I be on record Madam Commissioner.

Madam Commissioner: You decided for some or other reason at 14:00 your witnesses were not here.

Mr Mkhosana: Can I?

Madam Commissioner: So do not mislead.

Mr Mkhosana: Madam Commissioner, with due respect – with due respect.

Madam Commissioner: Proceed.

Mr Mkhosana: Cannot be on record whatever the Commissioner is opposed to, it is okay, can I just be on record. Can I just be given that opportunity?

Madam Commissioner: I will not allow you to mislead the record.

Mr Mkhosana: Well Madam Commissioner.

Madam Commissioner: Proceed.

Mr Mkhosana: I repeat that the employer stated that the position of the witnesses to the Commissioner and the employer further requested that the other party should start which was not granted and the other party also did not agree, until when the Commissioner took a decision that we should proceed.

We proceeded up until around 16:30. The employer also indicated

Madam Commissioner: But are you doing closing or are you stating your case for the purpose of your witnesses? If you are not going to talk about the evidence that was led here today then give the other party an opportunity to do so.

Mr Mkhosana: The employee indicated that the witnesses are here.

Madam Commissioner: No you are going to.

Mr Mkhosana: The Commissioner indicated to the employer that the case is closed. I am going to the facts.

Madam Commissioner: Ntati you may proceed with your closing. You may leave the room Ntati. Proceed'.

[11] The Commissioner in her award states:

'The Respondent did not submit any evidence to prove that the reason for the dismissal was fair. Therefore, the Respondent failed to show that the Applicant contravened a rule and the contravened rule was a valid or reasonable rule, which the Applicant was aware or could reasonably be expected to be have been aware. Further, the Respondent failed to show that the contravened rule was consistently applied and the sanction of dismissal was fair'.⁷

Analysis

[12] The record demonstrates that the Commissioner was more concerned about concluding the matter on the day than ventilating the issues. The Commissioner was over zealous and placed too much emphasis on expedience as opposed to conducting a meaningful arbitration. The Commissioner did not take into consideration of fairness and did not act reasonably in her heavy-handed approach.

[13] The Court is in agreement with the Applicant that the Commissioner committed

⁷ page 47 and 48

misconduct in denying the employer an opportunity to call its witnesses and to apply for a postponement and that the arbitration award does not deal with the important issues such as the exclusion of the employer's witnesses from the arbitration.

[14] As a result of the Commissioner's misconduct, the Applicant was deprived of the opportunity of presenting evidence. The Commissioner even went further by not allowing the representative of the Applicant to place his concerns on record and asked the representative to leave the arbitration.

[15] The Court is of the view the opposition of the review was unreasonable in the circumstances and accordingly the Court finds no reason in law and fairness that costs should follow the result.

[16] Accordingly the arbitration award should be reviewed and set aside.

[17] The Court makes the following order:

1. The Third Respondent is granted permission to file the explanatory and confirmatory affidavits of Joseph Ndi Tshabalala, Sheaks Hash and Michelle Botes marked as "FA1", "FA2" and "FA3".
2. The Third Respondent is to pay the costs of the application to file the explanatory and confirmatory affidavits and the incidental costs incurred by the Applicant as a result of the introduction of Annexures "FA1", "FA2" and "FA3" into the record of the main application.
3. The arbitration award dated 20 January 2012 under case number FSD101102 is reviewed and set aside.
4. The alleged unfair dismissal dispute of the Second Respondent is remitted to the Fourth Respondent for a hearing *de novo* to be conducted by any Commissioner other than the First Respondent.
5. The Third Respondent is to pay the costs of the review application.

Cook AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES.

For the Applicant: Advocate Y Saloojee

Instructed by: Sunil Narian Incorporated

For the Respondent: S Grubler

Instructed by: J Nortje