

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT BRAAMFONTEIN

CASE NO: JR14/15

DATE: 2017-08-16

In the matter between

SAMWU obo BONGANI NDABA

Applicant

and

EKURHULENI METROPOLITAN MUNICIPALITY

First respondent

SALGBC

Second respondent

A KRIEL N.O.

Third respondent

J U D G M E N T

EX TEMPORE

STEENKAMP J:

This is an application by SAMWU acting on behalf of its member, Mr Bongani Ndaba, to have a condonation application and an accompanying rescission application by the third respondent, to whom I shall refer as the arbitrator, under the auspices of the South African Local Government Bargaining Council dated 11 November 2014, reviewed and set aside. It arises from the dismissal of the employee by his employer, the Ekurhuleni Metropolitan Municipality.

The employee was a supervisor at a swimming pool run by
10 the municipality and was dismissed after he had been drinking alcohol

whilst on duty at the swimming pool. The union referred a dispute to the bargaining council. And although the municipality attended the conciliation, it did not attend the arbitration. Having heard the testimony of only the employee, the arbitrator made an award in his favour and ordered the municipality to reinstate the employee retrospectively.

When the award came to the attention of the municipality, it filed an application for rescission, which was 15 days late. It applied for condonation at the same time. The arbitrator considered the
10 application and ruled that the municipality had shown good cause why both condonation and rescission should be granted. He or she – I am not sure of the gender – took into account that the municipality, once it had received the award, had to investigate the matter internally before instructing its attorneys to proceed with the application for rescission; and that it was not in wilful default and that it had shown good cause as it had a *bona fide* defence, having dismissed the employee for gross misconduct.

The union essentially raised two grounds of review, although set out in fairly lengthy terms. The first is that the arbitrator failed to
20 consider the versions of both parties before making the ruling. And secondly, that he should have found the municipality to be in wilful default.

In his predecessor's heads of argument and also in his oral argument today Mr *Hilita* also raised the spectre of the bargaining council agreement and submitted that the disciplinary hearing did not

conform to the prescripts of that agreement. I will first deal with that aspect.

Mr *Hilita* could not point me to any evidence in that regard that served before the arbitrator. Ms *Saunders*, who appears for the municipality, conceded that it had been raised in the answering affidavit filed by the union in the rescission application, but pointed out that that was the first time it had been raised; that it did not serve in the initial disciplinary enquiry or in the arbitration; and in any event, that the municipality did have a *bona fide* defence to that attack. In
10 that regard, she referred to *SAMWU obo Dlamini v Mogale City Local Municipality* [2014] 12 BLLR 1236 (LC) where the court expressed the view that clause 6.3:

“...contemplates the date when the alleged misconduct is brought to the attention of the municipal manager in such a written form so as to enable the manager to be *prima facie* satisfied that specific misconduct exists so that disciplinary proceedings can then forthwith be instituted on that basis.”

20 She submitted that it is not simply a matter of strictly applying the three-month rule.

Mr *Hilita* countered in reply that that case is distinguishable from the present one. Whatever the case may be, that is an argument that raises at least a *prima facie* defence for the municipality, and that is something that can be canvassed fully at arbitration. The element of

good cause that is applied to rescission applications under section 144 of the Labour Relations Act, namely a *prima facie* defence, has been established by the municipality.

The other question is whether there is an explanation for the default; in other words, whether the default is not wilful. The arbitrator considered the explanation of the municipality; i.e. that its administrative processes, being a big organisation, left it in the lurch and that the notice of set-down at the bargaining council did not come to the attention of the relevant people as plausible and acceptable.

10 This court may have decided otherwise, but that is not the test. The test is whether the conclusion reached by the arbitrator is so unreasonable that no other arbitrator could have come to the same conclusion, or put differently: whether the conclusion of the arbitrator falls within a range of reasonable conclusions as set out in *Sidumo v Rustenburg Platinum Mines* 2008 (2) SA 23 (CC).

 Although the ruling does not set out much detail, it does set out the reasons why the commissioner comes to the conclusion that the employer, i.e. the municipality, has shown good cause. And on the evidence before her or him it appears to me that that is a reasonable
20 conclusion, or at least a conclusion that another reasonable arbitrator could have reached, especially since in deciding on the prior issue of condonation, the commissioner exercised a discretion.

 That leaves the question of the answering affidavit filed by the union. That aspect of the review application did concern me greatly. At first glance, one is tempted to simply find that the *audi alteram partem*

principle has not been complied with and to refer the matter back to another arbitrator. I have been persuaded otherwise, firstly because of the lengthy time period that has already lapsed in this matter.

The employee was dismissed almost five years ago. The ruling on rescission was handed down in November 2014 -- almost three years ago. Mr *Hilita* submitted that his client, namely the individual employee, is being prejudiced by the long delay. The short answer to that is that this matter could have been finalised three years ago, had both parties simply gone back to arbitration as the arbitrator
10 had ruled.

I have perused the answering affidavit filed by the union carefully. I should add that it was left up to the court to do that as neither the union's attorney nor its counsel had perused the pleadings at all before coming to court today – more of that later.

I am persuaded by Ms *Saunders's* submission that the answering affidavit does not cast any real doubt on the version of the municipality that served before the arbitrator; i.e. that it was not aware of the date of the arbitration. It is simply met with a bald denial and the union pointing out that the notice of set-down had been faxed to the
20 municipality. It is highly unlikely that the municipality, having gone to the conciliation and having pursued the rescission application diligently immediately after the award had come to its notice, would simply have wilfully stayed away from the arbitration, especially where *prima facie* it seems to have had good reason to dismiss the employee for gross misconduct.

In those circumstances and taking into account holistically all of the evidence, I am persuaded that the conclusion reached by the arbitrator, both on condonation and rescission, is not so unreasonable that no other arbitrator could have come to the same conclusion, even having considered all of the affidavits that were filed by both parties. The award is not open to review.

That leaves the question of costs. Ms *Saunders* submitted that the union should be held liable for the municipality's costs. With regard to the period up to the 11th of August 2017 I am not persuaded.

10 There is, firstly, an ongoing relationship between the union and the municipality. Secondly, the employee had an award in his favour. And the municipality did exhibit some negligence in its own administrative processes by not being able to bring the rescission application timeously before the bargaining council, and instead doing so 15 days late.

The costs since then are of a different nature. The union was represented when it brought this application and, as far as the court was aware, until today by Thulisile P Malimela Attorneys. Its heads of argument delivered on the 24th of August 2015 were drafted by N Ntuli

20 who appears to be an advocate. When the matter was called today, Mr *Hilita*, an advocate from the Johannesburg Bar, appeared for the union. I asked him whether he intended to file supplementary heads or whether he would argue from the heads of his predecessor, and he indicated that he would do the latter.

It was only once he was already about 15 minutes into his argument and he referred to a certain document that the Court asked Mr *Hilita* to point the court to the page on which that document appears. And he then, to the Court's surprise, indicated to the Court that he had no pleadings or record or transcript whatsoever before him. The only thing he had was his predecessor's heads of argument. He had absolutely no paginated papers on which to argue.

The Court asked Mr Hilita's attorney to explain himself. It was only then that a Mr Mxolisi Maome got up and said that he is now
10 representing the union. He had not filed any notice that he had come on record; nor had his predecessors filed a notice of withdrawal as attorneys of record. The Court accepted his word as an officer of the court that he came on record on the 11th of August 2017.

Despite that fact, he did not have the pleadings either. It rapidly became apparent that neither Mr Maome nor his counsel had even read the pleadings that served before this Court or that had served before the arbitrator. Nevertheless, they persisted in accepting instructions and a brief and charging a fee to come and argue before this Court today a review application without even knowing on what
20 that application or the ruling which they seek to review rests, not having read those papers.

The Court had to adjourn in order for SAMWU's legal team to get a copy of the papers on which they attempted to argue their client's case before court today, thus wasting an hour and a half of both the court's and the respondent's time.

I forewarned Mr *Hilita* that I would ask him to address the court why a cost order *de bonis propriis* should not be made against him and his attorney, and asked him to use the time to get instructions and to address the Court in that regard. The only submission he could make is that his attorney was unable to obtain the pleadings. Neither he nor his attorney could explain why. There is no explanation before the Court why they could not obtain it from their client from whom they ostensibly received instructions; nor why they did not obtain a copy from the court.

10 The attorney said from the bar that he had come to court on Friday the 11th August to obtain a copy of the court file, and the registrar or another official indicated to him that it had already gone to the presiding judge. The presiding judge has been in chambers since eight o'clock on Monday morning – that was the 14th of August – until this matter was called this morning, the 16th of August at ten o'clock. And at no stage did Mr Maome make any attempt to either retrieve the court file from the presiding judge or to have the courtesy to come to the judge's chambers and explain the predicament in which he found himself or on what basis he accepted the union's instructions.

20 In those circumstances, I cannot see in law or fairness why the union should be held responsible for today's costs in circumstances where its legal team came to court wholly unprepared and without having considered the pleadings and record on which it purports to base its argument on review. I, therefore, make the following order:

ORDER

1. The application for review is dismissed.
2. The matter is remitted to the South African Local Government Bargaining Council for arbitration on the merits before a panellist other than the third respondent.
3. There is no order as to costs until 11 August 2017.
4. The applicant's attorney, Mr Maome, and its counsel, Mr Hilita, are ordered to pay today's costs *de bonis propriis* jointly and severally;
10 the one paying, the other to be absolved.

Counsel for Applicant: Adv Xolani Hilita
Instructed by Mxolisi Maome.

Counsel for Respondent: Adv Sarah Saunders

Instructed by Ivan-Davies Hammerschlag.

Date of Judgment: 2017-08-16



**DIGITAL AUDIO
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