



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: J3053/14

In the matter between

RAJANDRAN REDDI

1st Applicant

FURTHER APPLICANTS

(Identified in Annexure "RR1" to the founding affidavit)

2nd to 130th Applicants

and

MERCEDES-BENZ SOUTH AFRICA LIMITED

1ST Respondent

DFM (PTY) LIMITED

2ND Respondent

MERCEDES-BENZ FINANCIAL

SERVICES SOUTH AFRICA (PTY) LTD

3RD Respondent

Heard: 04 May 2017

Delivered: 28 September 2017

Summary: [Motion proceedings-Rule 6(5), Rule 18(6) of the Uniform Rules-Failure to annex a contract relied upon to the founding affidavit—Rule 7(3) of the Rules of this Court-The importance of confirmatory affidavits]

JUDGMENT

MABASO, AJ

Introduction

- [1] Recently, the Supreme Court of Appeal in the matter of *Mashamaite and others v Mogalakwena Local Municipality and others, Member of the Executive Council Coghsta, Limpopo and another v Kekana and others*¹ in re-emphasising the applicable principles in motion proceedings held that:

*“It is trite that an applicant in motion proceedings must, in the founding papers, disclose facts that would make out a case for the relief sought, and sufficiently inform the other party of the case it was required to meet.”*²

- [2] Those “disclose[d] facts” may either be primary or secondary facts. Secondary facts do not constitute evidential material that one might conclude that there is a cause of action if the primary facts are not in the papers, either by way of a founding affidavit or confirmatory affidavit, as such secondary facts will remain the deponent’s views.³
- [3] In January 2015 the applicants lodged this application⁴, by way of notice⁵, they seek the following order:

“1. A declaratory order in terms of which it is declared that the unilateral amendments by the first, second and third respondent, alternatively intended amendment by the first, second and third respondent of the clause in the employment contracts between the applicants(identified in Annexure “RR12”) and the aforementioned respondents in terms of which the applicants are entitled to a company car and a fuel allocation of 33,000 km each calendar year..., without the consent and/or

¹ [2017] 2 All SA 740 (SCA).

² Ibid, at para 21. See also Rule 7(3)(b) of the Rules of this Court.

³ Zuma v Democratic Alliance and others [2014] 4 All SA 35 (SCA), at para 26; Radebe v Eastern Transvaal Development Board 1988 (2) SA 785 (A), 793C-E.

⁴ In terms of the provisions of ss 77(3) of the Basic Conditions of Employment Act 55 of 1997(the Act).

⁵In terms of Rule 7 of the Rules of this Court. These prayers are as contained in the amended notice of motion, which was delivered on the date of the hearing.

signatures constitutes an unlawful breach of the aforementioned clause in the aforementioned contracts of employment;

2. An order in terms of which the car scheme implemented, alternatively, announced, as a substitution of the aforementioned terms and conditions is declared to be unlawful and invalid substitution.
3. An order in terms of which the respondents are ordered to reinstate the status *quo* in respect of the applicant's contractual rights (entitlement to a company car and fuel allocation) prior to the aforementioned breach;
4. Alternatively to paragraph 3: an interdict in terms of which the first to third respondents are prohibited from changing the aforesaid terms and conditions in the applicant's contract of employment and substituting it with a new car leasing..."

[4] The applicants are as per Annexure "RR1" of the founding affidavit⁶, with the exception of seven applicants who delivered notice of withdrawal of their involvement in this application. The first respondent is Mercedes-Benz South Africa Limited, and the second respondent is DFM (PTY) LIMITED and Mercedes-Benz Financial Services South Africa (Pty) Ltd is the third respondent. All the respondents are firms within Mercedes-Benz South Africa,⁷ and they would be collectively referred to hereinafter as the respondents.

Relevant Background

[5] The founding affidavit (the first affidavit) is deposed to by one of the applicants, Ms Rajendran Reddi (Ms Reddi), in respect of her authority to bring this application on behalf of further applicants, Ms Reddi avers that,

⁶ Changes to the number of applicants were further made as the proceedings before this court progressed.

⁷ Answering affidavit, page 32.

“ My authorisation appears from the confirmatory affidavits by the 2nd to 156th applicants. I have been advised in order not to overburden the papers before the court, not to attach the confirmatory affidavits to the founding affidavit. Copies of the confirmatory affidavits will be made available to the respondents on the request and the original confirmatory affidavits will be available for inspection. Due to the fact that many of the applicants have left on holiday, I have not been able to collect all the confirmatory affidavits. The facts and/or circumstances set out hereunder fall within my personal knowledge, unless the contrary is explicitly stated or where it appears from the context hereof, and are true and correct”.

[6] Ms Reddi further asserts that all the contracts of employment of the applicants contain terms and conditions in respect of a company car and the annual allocation of fuel and that these terms and conditions can only be varied or altered by two conditions. Namely, there must be consultation with the employee concerned, and if an agreement is reached in respect of change of any term, it must be in writing and signed by both parties. This clause reads thus: *“Any alterations or variations in terms of this contract will be handled through consultations and must be put in writing and be duly signed to be effective”*.⁸ It is further stated that *“Some of the contracts of employment (see for example the contract of employment between SG Cooper...and the first respondent , dated 16 October 2013, contain additional information such as “Car policies are subject to periodic revision in line with prevailing circumstances.”*⁹

[7] The importance of this excerpt is that the respondents raised the point *in limine* that since the genesis of this application is one of breach of contracts allegedly entered into between the applicants and the individual respondents, Ms Reddi’s statement cannot be correct as it will appear below. In this affidavit, Ms Reddi states *inter alia*, that the applicants concluded written contracts of employment with the respondents, however, such contracts are not attached to this affidavit.

⁸ First affidavit, page 14.

⁹ Ibid.

- [8] In the same vein, she says not all applicants were able to submit copies of their respective contracts of employment nor letters of appointment from the respondents. Moreover, that those available copies of contracts of employment were to be made available “in a separate bundle provided with an index and paginated contents” , and that in any event, the respondents are in possession of the contracts of employment. Indeed, later some 16 copies of contracts of employment were delivered to the Registrar of this Court.
- [9] The affidavit continues to provide that there were consultations between the respondents and the applicants in respect of the new changes by the respondents and that these changes were anticipated and subsequently implemented. However, according to the applicants, the reason for not accepting these changes is because they did not consent in writing. Therefore, the bone of contention is that they did not consent to the changes.
- [10] Following the delivery of this application, the respondents delivered a notice of intention to oppose, later, on 30 January 2015 dispatched a letter to the applicants’ attorneys raising their concerns regarding the way this application has been prepared, partly this letter reads as follows:

“While there are various issues that stand to be raised in due course, we are constrained to raise the issue of the identity of the further applicants were properly before court.

In this regard we commence by pointing out that the notice of motion refers to a total of 130 applicants. However, Annexure “RR1” lists a 129 individuals. Furthermore, paragraph 1 of the founding affidavit records that the confirmatory affidavits by the 2nd to 256th applicants (i.e. a total of 157 applicants)

The matter is complicated by the fact that our client is satisfied that a “number of those who you have identified as applicant have expressly agreed to and or accepted the new scheme.

Under the circumstances we must insist that we be favoured with the proper schedule of the applicants and be favoured with confirmatory affidavits from those individuals before we are required to reply.

We also note that you acknowledge that employees have different contracts of employment. This is correct. However you failed to identify which applicant is employed on which contract and have failed to favour as the copy of each different contract. In order for us to respond we are entitled to know each applicant is employed on what contract and by which respondent.¹⁰

- [11] In response to the letter, on 12 March 2015, Ms Reddi delivered a first supplementary affidavit (the second affidavit) wherein in answering the issue of contracts of employment as requested by the respondents, she again avers that some of the applicants were in possession of the contracts of employment and others were not, and that copies of those contracts of employment *“will be provided to the respondents’ attorney of record”*.¹¹
- [12] Instead of submitting confirmatory affidavits as requested, the applicants made an undertaking that the confirmatory affidavits were to be delivered by the attorneys¹², and in respect of that some of the applicants have expressly agreed and accepted the new scheme, as per the letter, the second affidavit states that “according to my instructions all the applicants mentioned in annexure RR12 are persisting with the objection against the new scheme which had been implemented unilaterally”.¹³ That those who had entered into new employment agreements with the respondents have done so under protest and are not abandoning the application. Ms Reddi further made the assertion that the respondents are in possession of the contracts of employment.
- [13] On 14 May 2015, a further supplementary affidavit (third affidavit) was delivered on behalf of the applicants.¹⁴

¹⁰ Index, page 322.

¹¹ Second affidavit.

¹² Second affidavit.

¹³ Own emphasis.

¹⁴ Third affidavit, page 21-25.

[14] On 17 July 2015 the respondents delivered the answering affidavit wherein the following preliminary points were raised:

14.1 that the applicants delivered the founding affidavit, thereafter two supplementary affidavits were delivered without the leave of this court and that the latter two affidavits should not be taken into account as the applicant had failed to ask for the leave of this Court for the submittal of these affidavits.¹⁵**(Rule 6(5) point-Point 1)**

14.2 that the matter before this Court is the one that should have been dealt with regarding the provisions of the Labour Relations Act¹⁶ (LRA), as it is an issue which involves allegations of a unilateral change in the terms and conditions of employment.**(Point 2)**

14.3 that the founding affidavit does not adequately disclose the cause of action taking into account that the reliance in this matter is the one of breach of contract. Therefore failure to attach the same contract for every employee falls foul of the trite law that calls for the attachment of a contract of employment of an applicant. Even if some documents were delivered to the Registrar of this Court, it does not assist the applicants' case as, according to the respondents, the applicants should have attached them to the founding affidavit.¹⁷ **(Rule 18(6) point-Point 3)**

14.4 the identity of the applicants herein.¹⁸**(Point 4)**

14.5 the full details of the parties are not mentioned in the papers. Therefore, it is against rule 7(3). **(Point 5)**

¹⁵ Answering affidavit, pages 37-38.

¹⁶ Act 66 of 1995 as amended.

¹⁷ Ibid, at page 39 -41.

¹⁸ Ibid, page 42

14.6 the details of the respondents, specifically the third respondent and its involvement in this matter is not clear. **(Point 6)**

14.7 authority of the deponent in respect of bringing this application on behalf of further applicants. **(Point 7)**

14.8 failure to attach the same policy that the applicants rely on. **(Point 8)**

The applicants before this Court (points 4 and 5).

[15] Counsel for the Applicants, Mr Van Graan SC, has asked this Court to make an order as prayed for in the amended notice of motion in respect of those who had signed similar contracts of employment as one by A E Mtemeni- which are Gubushe, Nomvhethe, Mokoena, Ngwebo, Steel, Williams, Msezane, Simpson, Nonkomo, Oberley, Cooper, Mabashua and van Rooyen (for the sake of convenience this list is hereinafter referred to as the *Ntemeni's group*). Below I state as to what happened to the remaining applicants.

[16] Mr Van Graan confirmed that seven of the applicants; namely; E Mutseura, YZ Zitumane, PP Ndhlovu, N Sook, BSE Yam, D Keller, Ramokoka had withdrawn their involvement in this application as they are no longer employed by the respondents.

[17] Mr Van Graan further submitted that he can only proceed with the case in respect of those applicants whose contracts have been incorporated into the application, taking into account that the application is based on what is contained in the founding affidavit. Therefore it is not necessary for this Court to consider the case for those who have not pleaded the contractual terms. Therefore, their case may be dismissed.¹⁹

¹⁹ *CUSA v Tao Ying Metal Industries and Others* 2009 (1) BCLR (CC), at para 28.

[18] During submissions, the applicants Counsel submitted a list of 32 applicants, which I proceeded to mark as "S", and I was advised that this list is for those whose contracts of employment were later delivered to the Registrar. Out of this 32 applicants, only 16 wherein the clause that they were relying on is a condition in terms of the contracts of employment, whereas the other remaining 16 rely on the policy of the respondents, to which according to Mr Van Graan , correctly conceded, that the respondents may change their policy without consultation with its employees. Therefore the remaining 16 applicants, under those circumstances, do not have a claim against the respondents.

Ntemeni's group

[19] In respect of Point 4; following the delivery of the confirmatory affidavits by this group, the respondents during argument confirmed that they were no longer pursuing the status of these individual applicants. Therefore, the individual applicants in Ntemeni group are the only group of applicants which were properly before this Court.

Are the terms of contracts properly placed before this Court (point 3)?

[20] Mr Van Graan's submission in respect of this aspect was as follows: according to the first affidavit it is stated that the terms which the applicants were relying on were incorporated therein and contracts of employment were to be submitted in a separate bundle, the reason for this was to not overburdened the court. Indeed, later contracts of employment were delivered, although without being accompanied by an affidavit(s) from the *Ntemeni group* confirming that those contracts of employment were theirs.

[21] Mr *Myburgh SC*, on behalf of the respondent submitted that: since the contracts of employment were not annexed to the founding affidavit, as required by Rule 18(6) of the Uniform Rules there is no cause of action, taking into account that the contracts of employment are crucial documents in this case. Despite the fact that the applicants in the *Ntemeni group* delivered their

confirmatory affidavits, according to him, nowhere did this group say that “*my contract is, in fact, my contract, as the copy*”. Moreover, he regards this is a quagmire for the respondents, as according to him, without the contracts of employment, this matter should be dismissed.

[22] In urging this point, both Counsels, put their respective emphasis on Rule 18(6) of the Uniform Rules, which I deal with in the following paragraphs.

[23] A party who is approaching this Court has a choice of either delivering a statement of case (equivalent to summons) or by way of notice (notice accompanied by an affidavit)²⁰. Rule 18 of the Uniform Rules deals with “generally pleading”, referring to the **summons**, and sub-rule (6) provides that:

“a party who in his pleading relies upon a contract shall state whether the contract is written or oral and when, where and by whom it was concluded, and if the contract is written a true copy thereof or of the part relied on in the pleading shall be annexed to the pleading.”

[24] On the face of it, this sub-rule is specific as to what happens when a person is not relying on the entire contract, but only on a particular clause therein, however is not clear as to what is the procedure where such applicants’ cause of action is based on a clause in contract which is common cause between the parties. This subrule does not deal with employment contracts which are governed by specific legislation such as Section 29²¹ of the Basic Conditions

²⁰ Rule 7 of the Rules of the Labour Court.

²¹ Written particulars of employment 29. (1) An employer must supply an employee, when the employee commences employment, with the following particulars in writing— (a) the full name and address of the employer; (b) the name and occupation of the employee, or a brief description of the work for which the employee is employed; (c) the place of work, and, where the employee is required or permitted to work at various places, an indication of this; (d) the date on which the employment began; (e) the employee’s ordinary hours of work and days of work; (f) the employee’s wage or the rate and method of calculating wages; (g) the rate of pay for overtime work; (h) any other cash payments that the employee is entitled to; (i) any payment in kind that the employee is entitled to and the value of the payment in kind; (j) how frequently remuneration will be paid; (k) any deductions to be made from the employee’s remuneration; (l) the leave to which the employee is entitled; (m) the period of notice required to terminate employment, or if employment is for a specified period, the date when employment is to terminate; (n) a description of any council or sectoral determination which covers the employer’s business; (o) any period of employment with a previous employer that counts

of Employment Act²² (BCEA). Therefore, as to what would happen where such an employee is aware of a particular clause in a contract but for whatever reason he is not in possession of such contract of employment, and he is of the belief that such clause will not be disputed by the employer; or the employer is in violation of section 29 (1) of the Act, by failing to provide him with a copy of such employment contract.

- [25] Where an applicant approaches this Court in terms of notice of motion, the provisions of Rule 7(3) of the Rules of this Court will apply where an affidavit is used - where such applicant will have to present an affidavit which will ***“sufficiently particular to enable any person opposing the application to reply to the document”***,²³ and where there is no clarity then provisions of Rule 6 of the Uniform Rules will have to be consulted. In this approach, affidavits are equal to “pleadings” and evidence,²⁴ in that an applicant has to set out the grounds upon which he relies on. Taking into account that he may not have a benefit of presenting oral evidence as compared to an action process, as the only opportunity to give *viva voca* evidence is when the provisions of Rule 6(5)(g)²⁵ of the Uniform Rules apply.

- [26] In expounding on Rule 18(6) in Law of South Africa,²⁶ provides that,

towards the employee's period of employment; (p) a list of any other documents that form part of the contract of employment, indicating a place that is reasonably accessible to the employee where a copy of each may be obtained. (2) When any matter listed in subsection (1) changes— (a) the written particulars must be revised to reflect the change; and 15 5 10 15 20 25 30 35 40 45 50 55 (b) the employee must be supplied with a copy of the document reflecting the change. (3) If an employee is not able to understand the written particulars, the employer must ensure that they are explained to the employee in a language and in a manner that the employee understands. (4) Written particulars in terms of this section must be kept by the employer for a period of three years after the termination of employment.

²² Act 75 of 1997.

²³ See also sub-rule 18(4) of the uniform rules.

²⁴ *Transnet Ltd v Rubenstein* 2006 (1) SA 591 (SCA), at para 28: “in motion proceedings the affidavits constitute not only the evidence, but also the pleadings”

²⁵ “Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as [to it seems meet] it deems fit with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the foregoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for [him] such or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise.”

²⁶ LAWSA, Vol 4, 3rd Edition, para 172

“Where a document is the very foundation of the cause of action or defence, it is good practice, and a legitimate and perfectly proper method of pleading, to annex a copy of the document to it. If only portions of the document are material, the pleader may either annex to or incorporate in the pleading the portions he alleges are material or set out particulars sufficiently identifying the documents relied upon.”

- [27] In this matter the *Ntemeni group* incorporated the relevant clauses of the contracts of employment, as per the submission before me. The respondents are disputing the incorporated provisions.
- [28] The applicants incorporated the terms that they are relying upon, therefore, what needs to be looked at is what Rule 18(6) means by saying “ **the part relied on...**” and that such part should be “**annexed**”. In interpreting the entire rule one has to take into account that the rules are there for the administration of justice.
- [29] The then Appellate Division, in the matter of *James Brown and Hamer (Pty) Ltd (Previously Named Gilbert Hamer and Co Ltd v Simmons, NO*²⁷, in explaining as to what the judicial officer has to be guided by in interpreting the Rules of Court, held that:

“It is in the interest of the administration of justice that the well-known and well-established general rules regarding the number of sets in the proper sequence of the affidavit in motion proceedings should ordinarily be observed. That is not to say that those general rules must always be rigidly applied: some flexibility; controlled by the presiding judge exercising his discretion in relation to the facts of the case before him; must necessarily also be permitted.”²⁸

²⁷ [1963] 4 All SA 524(A).

²⁸ Ibid, at 530.

As much as the *Brown's* matter refers to affidavits, I opine that in respect of the application of the rules generally, flexibility would be the key. A presiding officer in interpreting the rules, has to take into account that they should not be read in a formalistic way which fails to consider the administration of justice, which might lead to matters been disposed of due to a party's failure to comply with the procedural step, instead of dealing with the merits of each case.. *In casu*, it is important to take into account that the clauses that are relied upon, are incorporated in the first affidavit. Therefore, the question is how this hampers the administration of justice if it is not physically "annexed".

[30] The relevant paragraphs in the first affidavit read thus:

"8.5 All the aforementioned contracts of employment contain a term and condition relating to the company, and annual allocation of fuel, which relates more or less as follows:

"you will be able to select one company car from the range of vehicles applicable to your band (as per the company Policy), which a fuel allocation of 30,000 km each calendar year (pro rata from the date of appointment)"

However, see the relevant terms of available contract of employment reflected in Annexure "RR1" hereto."

[31] The question that is triggered by the circumstances of this case, specifically the aforecited paragraphs, is whether the applicants were correct in incorporating the clauses in the founding affidavit instead of annexing those contracts of employment to the affidavit. I share the same approach as in *LAWSA* that the party can incorporate "the part relied upon".I, therefore, conclude that the relevant clauses of the contract of employment that the *Ntemeni* group is relying upon has been properly presented before this Court, however, as to whether they "*disclose facts that would be made out a case for the relief sought*"²⁹ is another issue which is dealt with below.

²⁹ See fn 1 above.

Supplementary affidavits and confirmatory affidavits, and cause of action

[32] Counsels for the respondents, in their heads of argument referred this Court to the judgment by Lagrange J, in the matter of *Bafokeng Rasimone Platinum Mine (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and others*,³⁰ whereby he held that further affidavit after the close of the pleadings would only be accepted if there are exceptional circumstances that have been shown. However, I have noted that in that matter the court was dealing with a review application where an applicant wanted to submit further affidavit after an answering affidavit had been delivered. I disagree with the respondents in this regard as *Bafokeng's* case is not similar to the matter in *casu*. I am in agreement with their submission that the Rules of this Court do not allow submittal of the further affidavit, as they are specific as to how many sets of affidavits should be delivered.

[33] The aspect of the delivery of the further affidavits is covered by Rule 6 (5) of the Uniform Rules, which requires such party to ask for a leave of court in delivering further affidavits.³¹

[34] In the matter of *Hano Trading CC v JR 209 Investments (Pty) Ltd and another*³² the court held as follows, regarding the delivery of further affidavits,

“[10] ...Should a litigant decide to proceed by way of application, Rule 6 of the Uniform Rules of Court applies. ...Unlike actions, in application proceedings the affidavits take the place not only of the pleadings, but also of the essential evidence which would be led at a trial... **It is, therefore, not surprising that the rule 6(5) (e) provides that further affidavits may only be allowed at the discretion of the court.**”

[11] Rule 6(5) (e) establishes clearly that the filing of further affidavits is only permitted with the indulgence of the court. A court, as arbiter, has

³⁰ [2015] 36 ILJ 3045 (LC), at paras 2 and 5.

³¹ Fn 26 above, at para 143.

³² [2013] 1 All SA 142 (SCA).

the sole discretion whether to allow the affidavits or not. A court will only exercise its discretion in this regard **where there is good reason for doing so.**” (*Own emphasis*)

- [35] *Brown’s matter*³³, mentioned in paragraph 27 above is applicable herein, in that rules should not be rigidly applied, some flexible control by a judge exercising his discretion prevails.
- [36] I have taken into account that in the matter of *Hano*³⁴, the SCA was dealing with the issue whereby a court *a quo* was referring to a situation of filing of a further affidavit out of sequence, and there was no service on the other party of such affidavit. Therefore, *in casu*, I need to take into account that the reason for these two affidavits to be delivered was necessitated by the letter, dated 30 January 2015, which *inter alia* called upon the applicants to clarify its papers. Taking into account that at the time when these affidavits were served and filed, the respondents had not delivered their answering affidavit. Therefore pleadings had not been closed.
- [37] Taking into account Rule 6(5)(e) where it deals with further affidavit, I am of the view that it refers to a situation whereby a respondent had already delivered an answering affidavit and/or a replying affidavit had been delivered by an applicant, and thereafter any of the parties in such application upon realising that it needed to supplement either the founding affidavit, answering and/or replying affidavits, that is when such party will be expected to bring an application, asking for the leave of the court, for such affidavit be taken into account, as that affidavit will be clearly a separate “sets of affidavit”.
- [38] Based on the above, I am of the view that the second and third affidavits cannot be disregarded as there is no prejudice suffered by the respondent by the delivery of such affidavits.

³³ *Ibid*

³⁴ *Fn 31 above.*

- [39] In respect of contracts of employment, the applicants should have asked for leave of this Court for the delivery of these contracts of employment, taking into account what Ms Reddi's affidavit says about the contract of employment, in that they did not want to overburden the Court with the documents, however at the same time they decided to deliver some documents for this Court to look at. I am of the view, also taking into account what the respondents are saying that none of the applicants has confirmed that those copies belong to them, that this is a step that required an application for leave to deliver these contracts of employment.
- [40] Further, the contracts of employment that were delivered to the Registrar without being accompanied by an affidavit and /or an application cannot be taken into account, as none of the applicants confirmed that those contracts of employment were theirs, and even their confirmatory affidavits do not say anything about the contracts of employment, other than confirming the "founding affidavit" of Ms Reddi.
- [41] Moreover, I must mention that the confirmatory affidavits are dated December 2014, whereas the first and second supplementary affidavits are dated 11 March 2015 and 13 May 2015 respectively. Therefore, the applicants are not confirming what was served and filed from March 2015 to the date of the hearing of this matter, especially the contracts of employment delivered in 2015. As to whether these are the same contracts of employment that were referred to by Ms Reddi, Counsel for the applicants could not make any persuasive submission in this regard. Therefore, the applicants stand or fall with their founding affidavit.³⁵ The applicants did not follow the correct procedure in delivering the contracts of employment.³⁶

³⁵ *Netherburn Engineering CC t/a Netherburn Ceramics and Others* (2009) 30 ILJ 269 LAC, at para 26: "When you are a party to a dispute or when you were the arbitrator or presiding officer in some proceedings and one of the parties brings a review application, you, of course, read the papers to understand what the applicant's case is and to decide whether to oppose or to consent to the order sought or to abide the decision of the Court. What you do will depend partly upon the view you take of the applicant's case as disclosed in the papers. If, after reading the applicant's papers, you conclude that there is absolutely no case for you to answer in the light of the contentions or the grounds of the application as disclosed in the founding affidavit and you decide to abide the decision of the Court, you would feel legitimately aggrieved if you subsequently learn't that the award was set aside by the Court not on the grounds contained in the founding affidavit but on grounds that were advanced in

[42] The respondents in answering the issue in respect of the terms of contracts that were being relied upon by the applicant had this to say:

“44.1 allegations in these paragraphs are denied.

44.2 annexure RR1 is a list of the purported applicants. The alleged terms applicable to only 39 of the identified person is summarised in the table, with no summary provided for the remainder of the so-called applicants.

44.3 in any event, in the absence of the applicant providing the contract of employment, relied upon, the respondents deny that the summaries an accurate reflection of the contractual terms in each instance”.

This assertion, was preceded by the letter mentioned in paragraph 10 above, and is also supported by the respondents assertion that the first affidavit does not identify the firm in which each of the applicants entered into a contract of employment with, except to say they reached agreements with Mercedes and DFM, which is being denied by the respondents.

[43] The respondents in responding to the above, at the beginning of their affidavit capitalised on what the applicants had said in paragraph 8.7 of the first affidavit, where they acknowledged that their respective contracts of employment were not the same. I am in agreement with the respondents that the case for the applicants is not properly pleaded, as they admitted that there were differences in their respective contracts of employment. Therefore failure

oral argument which were not foreshadowed in the founding affidavit and without you being afforded an opportunity to oppose the new case. On my understanding the rule that in motion proceedings the applicant must make his case in his founding affidavit and that you stand or fall by your papers has not been abolished and still applies. It serves a very useful purpose in terms of fairness”

³⁶ Hano Trading CC, at para 7 , “the appellant filed with this document seemingly with the registrar and placed them on the court file without leave of the court as envisaged in rule 6(5)(e) of the Rules of Court.”

to present the contracts of employment makes the “disclose[d] facts” not supporting the relief sought.³⁷ Based on the above, I conclude that the applicants have failed to prove their case.

[44] In view of the conclusion arrived at in this matter, it is not necessary to deal with the other points that have been raised by the parties.

I make the following order:

Order

1. The applicants application is dismissed.
2. There is no order as to costs.

S. Mabaso

Acting Judge of the Labour Court of South Africa

³⁷ Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd, [1957] 1 All SA 123 (C), at page 124, the Court held that: “. It seems to me that where there is a dispute as to the facts a final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant's affidavits justify such an order.”

Appearances

For the Applicant: Advocate Van Graan SC

Instructed by: Dayson Inc.

For the Respondent: Advocate Myburgh SC with Advocate Engelbrecht

Instructed by: Kirchmann's Inc.

LABOUR COURT