IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Of interest to other Judges

Case No: JR 2768/2017

In the matter between:

OSHO STEEL (PTY) LTD **Applicant**

And

EVA NGOBENI *N.O* **First Respondent**

THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **Second Respondent**

MAHOMAD RAFIQ QUERESHI **Third Respondent**

Heard: **22 August 2019**

Delivered: **27 August 2019**

JUDGMENT

TLHOTLHALEMAJE, J

Introduction:

[1] The First Respondent (Commissioner), issued an award on 26 October 2017 in terms of which it was found that the resignation of the Third Respondent (Quereshi) from the employ of the Applicant amounted to a constructive dismissal within the meaning of section 186 (1)(e) of the Labour Relations Act (LRA)[1]. The Applicant was ordered to pay to Quereshi, compensation in the amount of R150 000.00 which equated to five months' salary.

[2] The Applicant seeks an order reviewing and setting aside the above arbitration award. Quereshi opposed the application, and further raised preliminary points, which he contended were dispositive of the review application if upheld.

Non-compliance with Rule 7A(5), 7A(6) and 7A(8) of the Rules of this Court:

[3] Rule 7A of the Rules of this Court provides as follows;

> **"7A Reviews**:
>
> (1) A party desiring to review a decision or proceedings of a body or person performing a reviewable function justiciable by the court must deliver a notice of motion to the person or body and to all other affected parties.
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> (2) The notice of motion must-
>
> (a) call upon the person or body to show cause why the decision or proceedings should not be reviewed and corrected or set aside;
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> (b) call upon the person or body to dispatch, within 10 days after receipt of the notice of motion, to the registrar, the record of the proceedings sought to be corrected or set aside, together with

[1] Act 66 of 1995 (as amended)

such reasons as are required by law or desirable to provide, and to notify the applicant that this has been done; and

(c) 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.

(3) The person or body upon whom a notice of motion in terms of subrule (2) is served must timeously comply with the direction in the notice of motion.

(4) If the person or body fails to comply with the direction or fails to apply for an extension of time to do so, any interested party may apply, on notice, for an order compelling compliance with the direction.

(5) The registrar must make available to the applicant the record which is received on such terms as the registrar thinks appropriate to ensure its safety. The applicant must make copies of such portions of the record as may be necessary for the purposes of the review and certify each copy as true and correct.

(6) The applicant must furnish the registrar and each of the other parties with a copy of the record or portion of the record, as the case may be, and a copy of the reasons filed by the person or body.

(7) The costs of transcription of the record, copying and delivery of the record and reasons, if any, must be paid by the applicant and then become costs in the cause.

(8) The applicant must within 10 days after the registrar has made the record available either-

(a) by delivery of a notice and accompanying affidavit, amend, add to or vary the terms of the notice of motion and supplement the supporting affidavit; or

(b) deliver a notice that the applicant stands by its notice of motion.

(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.

(10) The applicant may file a replying affidavit within 5 days after receipt of an answering affidavit."

[4] In this case, after the arbitration award was issued, the Applicant served its Notice of Motion together with the founding affidavit on Quereshi on 12 December 2017, and delivered same on 19 December 2017. On the same date, the Applicant filed and delivered its Rule 7A(6) Notice (as well as the transcribed record of arbitration proceedings).

[5] In a response dated 15 January 2018, Quereshi's attorneys of record addressed correspondence to the Applicant's erstwhile attorneys of record (L Botha Attorneys), advising and requesting compliance with Rule 7A(6) and 7A(8) of the Rules of this Court and that upon compliance, an answering affidavit would be filed.

[6] L Botha Attorneys' response *via* email was that there was compliance with the Rules, further contending that since a notice of opposition was noted, the answering affidavit was out of time as the *dies* expired on 28 December 2017.

[7] Quereshi's attorneys of record's response on 18 January 2018 was to reiterate that the service of Rule 7A(6) and the transcript was not in compliance with the Rules. In this regard, it was pointed out that the Second Respondent, the Commission for Conciliation Mediation and Arbitration (CCMA) still had to serve and file the record, and for the Applicant to comply with Rule 7A(5). It was further pointed out that such a notice had still not been received. The Applicant was reminded that it had failed to serve and file the record consisting of the bundle as would have been provided by the CCMA; that it had not furnished security in accordance with section 145(8) of the LRA, and further that the review application was defective as the CCMA had still not filed a record. It does not appear that there was a response to this correspondence.

[8] In his answering affidavit filed and served on 22 January 2018, Quereshi again raised the above preliminary points. The CCMA delivered its notice of

compliance in terms of Rule 7A(3) on 2 February 2018. It is not clear from the pleadings as to whether and when the Rule 7A(5) was issued. In a replying affidavit served and filed on 5 February 2018, the Applicant's contentions were that Rule 7A(8)(b) of the Rules was complied with as the Notice of Motion and the transcribed record were filed and served on Quereshi on 12 December 2017. The Applicant instead contended that the answering affidavit was filed out of time without an application for condonation. It regarded the preliminary points as *'little more than a poorly constructed attempt to excuse the substantial delay in filing the answering affidavit'*. Again, the Applicant was steadfast, contending that the transcribed record was properly filed and served, and that there was therefore compliance with the Rules of this Court.

[9] In a further answering affidavit filed and served on 2 February 2018, Quereshi *inter alia* reiterated that the review application in the light of non-compliance with the provisions of Rule 7A was irregular and defective.

[10] L Botha Attorneys withdrew from the matter on 20 February 2018. The Applicant's new attorneys of record (Higgs Attorneys) came on board on 14 March 2018. On the same date, the Notice in terms of Rule 22B was filed and served. This was followed by written heads of argument on 30 April 2018, and a request for a hearing date on 3 May 2018. Nowhere in the written heads of argument are the preliminary points raised by Quereshi dealt with.

[11] At these proceedings, Ms Jajbhay on behalf of Quereshi persisted with the preliminary points, contending that the review application was not properly before the Court and ought to be dismissed. Ms Jajbhay had further submitted that as a result of these irregularities and defects, the Applicant was advised to withdraw the application and to relaunch it with an application for condonation, but that it persisted with the application. She further contended that even if it were to be accepted that a transcribed record was filed, the Court would not be in a position to make a determination in respect of the review application, in the light of the defective nature of that record.

[12] Ms Bensch for the Applicant however submitted that there was a proper record before the Court, and further that Quereshi had not raised any disputes in that regard in the pleadings. She confirmed that the record was transcribed from recordings made during the arbitration proceedings by the Applicant, and was properly transcribed and served on Quereshi.

[13] The starting point is a consideration of the objectives behind the Rules of this Court. It cannot be doubted that these Rules are premised on the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a Court as set out in section 34 of the Constitution of the Republic.[2] The Rules of this Court emanate from the provisions of section 159 of the LRA, which makes provision for the establishment of the Rules Board for this Court. The Rules Board in turn is tasked with making rules to regulate the conduct of proceedings in this Court, including the process by which proceedings are brought before the Court, the form and content of that process.

[14] The rules of any Court are put in place for multiple purposes, chief amongst which is to prescribe the procedure, the time limits, and the forms to be used in the Court; to promote access to the court and to ensure the right to have disputes resolved and determined expeditiously and with minimum costs; to enable the business of the Court to be carried out in an orderly, uniform and consistent manner; and to set guidelines on the standards of conduct expected of those who practise in the Court.

[15] Rule 7A of the Rules of this Court in regards to the service and filing of the record in review proceedings is supplemented by the Practice Manual of this Court, and under its clause 11.2 it is provided that;

> "11.2.1 Once the registrar has notified an applicant in terms of Rule 7A (5) that a record has been received and may be uplifted, the applicant must collect the record within seven days."

[2] The Constitution of the Republic of South Africa, 1996 (Act 108 of 1996)

[16] As it was correctly pointed out by Prinsloo J in *Sol Plaatjie Local Municipality v South African Local Government Bargaining Council and Others*[3], the purpose of the Practice Manual is to promote uniformity and consistency in practice and procedure, to set guidelines on standards of conduct expected of those who practise and litigate in the Labour Court, and to further promote the statutory imperative of expeditious dispute resolution. This is line with the objectives of the Court rules as already alluded to.

[17] In line with the provisions of the Rule 7A and the Practice Manual, it follows that any reference to the record, can only be a record obtained by means of the provisions contemplated in 7A(2)(b) of the Rules, and furnished to the applicant party by the Registrar as contemplated in Rule 7A(5), and which must in turn be transcribed and copies thereof be furnished to the Registrar and each of the other parties as contemplated under Rule 7A(6). This process of securing and delivering a transcript, is clearly meant to preserve the integrity of the record of proceedings, and to avoid instances of disputes about the authenticity of that record.

[18] In this case, clearly the provisions of Rule 7A were not followed, and it is not correct as argued on behalf of the Applicant, that the issue of non-compliance with the Rules was not raised in the answering affidavit. It is unheard of in review proceedings for an applicant party to file its review application, the transcribed record, and Rule 7A(8) Notice at the same time. As it was readily conceded by Ms Bensch, the transcribed record was from the Applicant's own recording of the arbitration proceedings. As it were, Ms Jajbhay had immediately pointed out the problems identified by the transcribers with the recording. There can be no doubt therefore that this blatant breach of the Rules of this Court cannot be countenanced, as it goes against the grain of the very purpose of the Rules. Applicant parties cannot set their own rules in regards to review proceedings. Any record of proceedings other than that provided by the CCMA or Bargaining Councils as further obtained through Rule 7A(5) cannot be regarded as an official and legitimate record for the purposes of compliance with Rule 7A(6).

[3] Unreported Case No: PR 192/15, 13 June 2017 at para 19

[19] Obviously private recordings of arbitration proceedings may come in handy where the CCMA or Bargaining Council is not in a position to provide a record for whatever reason. Even then, the acceptance of such a record for the purposes of review proceedings would be subject to reconstruction under the auspices of the CCMA[4]. In the end however, it would lead to an untenable position for the Court and the parties to a dispute, where unofficial transcribed records are simply filed and served, when there are clear rules governing that process.

[20] The Applicant was warned from the time that it served and delivered its review application in the manner that it did, that the whole process was flawed and defective. The most logical step to have taken under the circumstances would to have been to withdraw the transcribed record and the Rule 7A(8) Notice. This was however not to be so, and it is my view that it should suffer the consequences of its intransigence.

Non-compliance with the provisions of section 145(8) of the LRA

[21] In the light of the conclusions reached in regards to non-compliance with Rule 7A of the Rules of this Court, the review application ought to be dismissed on account of it being defective. However, for the sake of completeness, I will proceed to deal with the second preliminary point upon which Ms Jajbhay had argued the review application also ought to be dismissed.

[22] The relevant provisions of section 145 of the LRA are;

> (7) The institution of review proceedings does not suspend the operation of an arbitration award, unless the applicant furnishes security to the satisfaction of the Court in accordance with subsection (8)
>
> (8) Unless the Labour Court directs otherwise, the security furnished as contemplated in subsection (7) must—

[4] See Clause 11.2.4 of the Practice Manual which provides:

> "If the record of the proceedings under review has been lost, or if the recording of the proceedings is of such poor quality to the extent that the tapes are inaudible, the applicant may approach the Judge President for a direction on the further conduct of the review application. The Judge President will allocate the file to a judge for a direction, which may include the remission of the matter to the person or body whose award or ruling is under review, or where practicable, a direction to the effect that the relevant parts of the record be reconstructed."

(a) in the case of an order of reinstatement or re-employment, be equivalent to 24 months‘ remuneration; or

(b) in the case of an order of compensation, be equivalent to the amount of compensation awarded.

[23] The above provisions received the attention of the Labour Appeal Court in *City of Johannesburg v SAMWU obo Monareng and Another*[5], where Kathree-Setiloane AJA stated the following;

> “[7] The Labour Court has a discretionary power under section 145(3) of the LRA to stay the enforcement of an arbitration award pending its decision in the review application. It may stay the enforcement of an arbitration award pending finalisation of a review application against the award with or without conditions. It may in terms of section 145(8) of the LRA dispense with the requirement of furnishing security. Properly construed, section 145(3) read with section 145(7) and (8) should be interpreted to mean that where an applicant in a review application furnishes security to the Labour Court in accordance with section 145(8) of the LRA, the operation of the arbitration award is automatically suspended pending its decision in the review application. In other words, the employer need not make an application in terms of section 145(3) of the LRA to stay the enforcement of the arbitration award pending the finalisation of the review application.
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> [8] However, should the employer wish to be absolved from providing security or to provide security in an amount less than the threshold in subsections (8) (a) and (b), then it is required to make an application to the Labour Court, in terms of section 145(3), for the stay of the enforcement of the arbitration award pending its decision in the review application. The employer must make out a proper case for the stay as well as for the provision of security in accordance with section 145(8) to be dispensed with or reduced.
>
> [9] The words “unless the Labour Court directs otherwise” in section 145(8) of the LRA must be construed broadly to mean that the Labour Court is afforded a discretion to either: (a) exempt the employer from paying security on the stay of the enforcement of an arbitration award pending its

[5] (JA120/2017) [2019] ZALAC 54; (2019) 40 ILJ 1753 (LAC)

decision on review or (b) reduce the quantum of security to be furnished by the employer to an amount below the threshold in sections 145(8)(a) and (b) of the LRA.

[10] Although section 145(8) of the LRA makes specific reference to "the applicant", it effectively applies to only employers. It makes no provision for an employee who brings a review application to furnish security. The purpose of sections 145(7) and (8) is essentially to dissuade employers from bringing frivolous review applications with no prospects of success and ensure that they are timeously and expeditiously prosecuted" (Citations omitted)

[24] A reading of these provisions and as further explained by Kathree-Setiloane AJA indicates that in the absence of an application in terms of section 145(3) of the LRA, in terms of which the employer is required to make out a proper case for the stay as well as for the provision of security in accordance with section 145(8) to be dispensed with or reduced, the mere institution of review proceedings does not on its own suspend the operation of an arbitration award. Effectively, contrary to Ms Bensh's contentions, there is an obligation on a reviewing party to furnish security, unless this Court directs otherwise under the provisions of section 145 (8) of the LRA. Properly read, it can be implied from these provisions that in the absence of an application to stay and/or the furnishing of security, employees with favourable awards can, despite the review application, still seek to enforce and execute the award.

[25] It is further my view that the practice of filing a Notice of Motion encompassing prayers to review and set aside an award, a stay of execution, and exemption from furnishing security, is clearly at odds with the purpose of section 145(7) of the LRA. This specifically so since review applications are placed on the ordinary roll and heard long after a favourable award was obtained. This practice in effect results in a stay of execution and exemption from furnishing security being obtained by default, and this is clearly a circumvention of section 145(7) of the LRA.

[26] The purpose of section 145(7) of the LRA is to ensure that a security is furnished immediately upon an application for a review, unless the Court

directs otherwise. It is my view that a reviewing party seeking to be exempted from payment of security needs to bring a proper application in that regard, and for the Court to make a determination before it can be said that the review application is properly before the Court and ripe for a hearing. This is so in that these are ordinarily issues of jurisdiction under the provisions of section 145 of the LRA.

[27] The manner with which this application was brought before the Court illustrates the concerns and need for an approach as advocated above. Since October 2017 to date, Quereshi was unable to enforce his favourable award, pending the determination of this review application. The Applicant on the other hand has by default, been exempted from furnishing security in terms of section 145(7) of the LRA. The prejudice to Quereshi is clearly evident, more particularly when the facts and grounds upon which an exemption was sought in this case are analysed.

[28] The Applicant seeks an exemption on the basis that it is a part of a group of approximately 30 companies forming the OSHO Group of Companies involved primarily in the mining industry. It contended that it was certainly able to settle its liabilities in terms of the arbitration award should the review application fail. It nonetheless contended that there would be a strong likelihood of irreparable prejudice and harm to it should Quereshi be paid the amount awarded in the award, in that he would not be able to repay it should the review application succeed. The Applicant further submitted that should it be forced to place the money in a trust, it would be denied access to those funds, thus having a negative effect on its business.

[29] The Applicant's arguments clearly lack merit. The amount payable as security is not ordinarily paid to the employee pending the determination of the review application. In the absence of clear guidelines as to how this security ought to be furnished, this Court has accepted security deposited in a trust account of legal representatives or the Sheriff of this Court, or even held in trust and guaranteed by banks.

[30] The contention that payment of security would prevent access to such funds and therefore negatively impact on the Applicant's business is clearly self-serving. Good cause in the context of motivating a departure from the security provisions prescribed in section 145(7) and (8) would involve a proper explanation why this request should be entertained, with particular emphasis on any material prejudice the applicant may suffer if it is not granted this relief.[6]

[31] On its own version, the Applicant is capable of making the payment. It however seeks an exemption because the only prejudice it would suffer is lack of access to those funds. This is but one aspect of the alleged material prejudice, which in my view cannot be sustainable in circumstances where it is not clear how the business of a group of 30 companies cannot survive with a shortfall of R150 000.00 which will be held in trust. It is further not clear from these grounds as to how the payment would have a staggering impact upon its ability to continue with its business. Nothing is said about the Applicant's financial stability, its assets and income base, to demonstrate its ability to satisfy the arbitration award in the event of not succeeding with the review

[6] *City of Johannesburg v SAMWU obo Monareng and Another supra,* where it was held that;

"[18] In *Rustenburg Local Municipality*, the Labour Court held as follows in relation to what good cause entails:

'Good cause in the context of motivating a departure from the security provisions prescribed in s145(7) and (8) would involve a proper explanation why this request should be entertained, with particular emphasis on any material prejudice the applicant may suffer if it is not granted this relief. I will illustrate the point by way of an example. A small manufacturing business with 20 employees dismisses 10 employees for group misconduct. A CCMA commissioner then reinstates all these employees. The required security would be 24 months' salary for each of these ten employees, which would then wipe out the entire operating cash flow of the undertaking for several months. This is the kind of prejudice I am referring to. Simply described, the explanation cannot be that it will be hard to set security, but the explanation must be that it would be unduly onerous and harmful to be required to set the prescribed security.'

[19] Material prejudice to the employer is but one factor that the Labour Court must give consideration to – it is by no means decisive. In exercising its discretion, the Labour Court must have regard to the particular circumstances of the case as well as considerations of equity and fairness to both the employer and the employee. A factor that the Labour Court must take into consideration is whether the employer is in possession of sufficient or adequate assets to meet an order of the review court upholding the arbitration award; the principal concern being that the dismissed employee should not be left unprotected if the Labour Court decides the review application in his or her favour.

[20] The *onus* is on the employer seeking an exemption from furnishing security under section 145(8) of the LRA to establish that it has assets of a sufficient value to meet its obligations should the arbitration award be upheld by the Labour Court on review…"

application. A mere say-so that the Applicant is capable of satisfying the arbitration award is not enough.

[32] In the replying affidavit, the Applicant had changed tune on the issue of security, contending that it was *'currently in the process of obtaining a bank guarantee for the purpose of providing security to the value of the arbitration award'*[7]. That undertaking was made on 5 February 2018 when the replying affidavit was delivered. As at the hearing of this application, the security had not been furnished. This in my view raises questions about the Applicant's *bona fides* when initially seeking exemption. It is demonstrative of the fact that any allegations of prejudice to it should it furnish security was mere red-herring. The Applicant was clearly in a position to furnish security, but did not do so for reasons best known to it.

[33] To exempt large employers who are able to furnish security, but who for reasons best known to themselves refuse to do so, would circumvent and render redundant, the objectives of the provisions of section 145(7) of the LRA. These provisions are meant to ensure that this Court is not burdened with review applications that have no merit, and is to prevent employers from pursuing review proceedings at their own pace for the simple reason that they can, irrespective of the merits. In the end, the Applicant has not placed compelling reasons before the Court or shown good cause why it should be exempted from furnishing security. At the opposite end, it had undertaken to furnish such security but had still failed to do so some one year and six months later.

Conclusions:

[34] In the light of the above conclusions, and those reached in regards to non-compliance with Rule 7A of the Rules of this Court, it is my view that the review application ought to be dismissed.

[35] In regards to the issue of costs, it has already been stated that as early as when the defective review application was launched, Quereshi's attorneys of

[7] At paragraph 25 of the Replying Affidavit

record had repeatedly advised the Applicant's erstwhile attorneys to comply with the rules of this Court. The latter's stance throughout was that there was compliance when there was none. The new set of attorneys upon taking over the matter did not even deem it necessary to reflect on whether the pleadings were in order, and had simply proceeded from where the erstwhile attorneys left. A simple withdrawal of the review application, or of the Rule 7A(8) Notice as Ms Jajbhay had suggested, and the re-launching of the review application which is in compliance with the rules of this Court should have been seriously considered. This however was not the case, and I fail to appreciate why upon a consideration of the requirements of law and fairness, the Applicant should not be burdened with the costs of this application.

[36] Accordingly, the following order is made;

Order:

1. The preliminary points raised by the Third Respondent are upheld.

2. The Applicant's application to review and set aside the arbitration award issued on 26 October 2017 under case number GATW12973-17 by the First Respondent is dismissed with costs.

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Edwin Tlhotlhalemaje

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: Ms C. Bensch of Higgs Attorneys

For the Third Respondent: Ms N Jajbhay of Yusuf Nagdee Attorneys