

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JR448/17B

In the matter between:

MINISTER OF WATER AND SANITATION

Applicant

and

OLIPA MASEKO

First Respondent

NEHAWU

Second Respondent

THOMAS NTIMBANA N.O.

Third Respondent

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

Fourth Respondent

Heard: 16 January 2020

Delivered: 29 January 2020

JUDGMENT

HARDIE, AJ

[1] This is an opposed application for review brought in terms of section 145 of the Labour Relations Act¹ (the LRA) on 17 March 2017, in which the Applicant seeks to review and set aside an arbitration award made by the Third Respondent (the Commissioner) under the auspices of the Fourth

¹ No. 66 of 1995, as amended.

Respondent, the Commission for Conciliation, Mediation and Arbitration (CCMA) on 13 December 2016 under case number MP6433/16 (the award). The dispute forming the subject matter of the arbitration is one brought in terms of section 6 of the Employment Equity Act² (the EEA) in which the First and Second Respondents claim that the Applicant has committed an act of unfair discrimination by not upgrading her from the first notch of level five like her work colleagues who are on that notch and doing the same work of equal value.

- [2] The Commissioner found that the Applicant had unfairly discriminated against the First Respondent and ordered the Applicant to upgrade her from the first notch to the last notch of salary level five, and that this was to take effect within 14 days upon receipt of the award. The thrust of the Applicant's case both at the arbitration and in this review, is that the First Respondent's work colleagues were upgraded as a result of an administrative error and that this was in the process of being corrected.
- [3] At the hearing of the matter, there was no appearance on behalf of the Applicant. Advocate Sekhethela instructed by Thaanyane Attorneys, appeared on behalf of the First and Second Respondents, who were appointed as their attorneys of record on 14 February 2019. Up until that point, the Second Respondent through its in-house paralegal, one Mr Nyiko Blessing Nkuna, had represented the First Respondent in these proceedings. Having heard Advocate Sekhethela, I made an *ex-tempore* order to dismiss the application, with reasons to follow. I also indicated that once I had handed down my judgment, I would be giving the Applicant's attorneys an opportunity to make written submissions as to why in dismissing the application, I should also not order costs *de bonis propriis*.
- [4] The review application was launched late on 23 March 2017. In its founding affidavit to its review application, the Applicant set out the reasons for the lateness, being that they were on skeleton staff during the period between 15 December 2016 and 15 January 2017, the decision to initiate the review

² Act. 55 of 1998.

proceedings was only taken by head office management during the second week of February 2017, and once that decision was made, a procurement process had to be undertaken to secure the services of an attorney and counsel. It is instructive that prior to the review application having been launched, there was no communication from the Applicant with the Second Respondent, indicating that a review was being considered and that there were logistical issues it was having in getting to the point where the review could be undertaken. I do not deem it necessary to decide whether or not to grant condonation for the lateness of the review, for the reasons that will follow.

- [5] In terms of Rule 7A (5) of the Labour Court Rules (the Rules), once the Registrar of the Labour Court has made available to the Applicant, the CCMA record of the arbitration proceedings sought to be reviewed, the Applicant must make copies of such portions of the record as may be necessary for the purposes of the review. In this instance, no such record was prepared or furnished. As part of its review application, the Applicant put up a lengthy founding affidavit, making references to some 14 annexures, without indicating whether any of them served before the Commissioner in the arbitration proceedings under review. On 7 April 2017, the Applicant served and filed a notice in terms of Rule 7A (8) (b), stating that it stood by its notice of motion.
- [6] On 23 May 2017, the First and Second Respondents served and filed their answering affidavit. It raised two preliminary issues in that affidavit relating to the “defectiveness” of the review application. Firstly, that rather than the Applicant having launched a review application in terms of section 145 of the Act, it should have brought an application to appeal the arbitration award in terms of section 10 (8) of the EEA, as amended, within 14 days of receipt of the award. Whilst I am of the view that the Applicant had the choice to appeal, which for best reasons known to itself, it didn't, section 10 (8) does not take away its right to institute review proceedings in terms of section 145 of the Act. The second issue raised was that the application “*was not in line with the Labour Court Rules specifically Rule 7A (6) which indicates that the applicant*

must file records within 60 days, it is submitted that the applicant has not complied with rule 7A (6) of the Labour Court rules as the court will be expected to decide the case based on what transpired during the arbitration and consider if it is reviewable or not”.

[7] In their answering affidavit, the First and Second Respondents indicated that certain evidentiary material which the Applicant sought to introduce and rely upon in its founding affidavit to succeed in its review application, was not before the Commissioner in the arbitration. One such example, is a legal opinion which was sought by the Applicant, which is annexed as “LP13” to the founding affidavit and which is quoted extensively at paragraph 87 thereof. In its answering affidavit, the First and Second Respondents deny that this legal opinion was ever presented during the arbitration. The Applicant also chose not to serve and file a replying affidavit to rebut this averment, and I therefore must accept that it is true.

[8] The Applicant's legal representatives having been alerted through the First and Second Respondent's answering affidavit, that this Court was being asked to decide a review on evidence that did not serve before the Commissioner, called and held a pre- trial conference on 28 September 2018 with the First and Second Respondents, a copy of which minute is in the court file. There was no need to do so, as review proceedings are not trial proceedings. However, in doing so, the Applicant who was represented there by both its attorney and advocate, was once again alerted to issues that the First and Second Respondents had with it in not providing a record of the arbitration proceedings within 60 days as required. This issue is raised not once, but twice in the pre- trial minute, and answered similarly by the Applicant's legal representatives, on both occasions as follows: *“Rule 7A (5)-(6) require only the necessary portions of the record for purposes of the application need to be furnished. The record of proceedings did not provide any new facts/evidence to add or amend the Applicant's founding affidavit which was already dealt with in the founding affidavit; hence the Applicant served and filed its Notice to abide in terms of Rule 7A (8) (b). Therefore, the Applicant will not be serving and filing a record of proceedings as all the*

issues in dispute have been dealt with at length in the Founding Affidavit and it is not necessary to file the record of proceedings. There is no prejudice suffered by the Respondent by the Applicant electing not to file the record of proceedings as it is not necessary for the review application.”.

- [9] The Applicant was also asked at the pre- trial conference, whether it had filed a replying affidavit, to which it responded that it had not.
- [10] Whilst it is apparent from a reading of Rule 7A (5) that the Applicant must exercise a discretion in the compilation of the review record, and only provide those portions that are necessary for the review, the test is not that as set out by the Applicant’s legal representatives at the pre- trial conference, that it only needed to have provided the record insofar as it provided “new facts/evidence to add or amend the Applicant’s founding affidavit which was already dealt with in the founding affidavit”. The record does not have to be compiled only if it benefits the Applicant; it needs to be compiled so that this Court can decide whether based upon all the evidence that was before him, the Commissioner committed a reviewable irregularity/ies which ought to be reviewed and set aside in terms of the application brought by the Applicant.
- [11] Were an Applicant to be permitted to base its decision on what portions of the record to include, based upon whether it suited or bolstered its case, and its case alone, it would render the review proceedings a complete waste of the court’s time, which these proceedings have thus become. What exacerbates the situation, is that not only in their answering affidavit, but also in the pre-trial conference, the Applicant’s legal representatives were alerted to the absence of a record. Had these legal representatives read the answering affidavit, they would have seen that the First and Second Respondents were telling them that their client was bringing a new case before this Court, that was not before the Commissioner, and that the new evidence relied upon in the review, did not serve before him. Had they read this affidavit and applied their minds to the answering affidavit, they would not only have advised their client, that a replying affidavit needed to be served and filed, but also that necessary portions of the record needed to be compiled, to rebut this allegation and remedy the defects in the review application. They did not do

so, but instead persisted with a self- centred approach, that the Applicant only needed to compile a review record if it bolstered or suited its case.

[12] The Applicant's review application is therefore stillborn and falls to be dismissed.

[13] I now turn to deal with the question of costs. In doing so, I make reference to *Telkom SA Soc Ltd vs Ezekiel Mashaba*³ which reads as follows:

"It has to be made clear: attorneys are not expected to interpret legislation, that is the function of the Courts. Attorneys are expected to read legislation and case law and to advise their clients accordingly."

[14] I am of the view that unless the Applicant's legal representatives can persuade me otherwise, which opportunity I will give them to do, they did not properly read the legislation relating to Labour Court reviews, nor the case law relating to it. Had they done so, they would have filed the portions of the CCMA record necessary for this Court to decide the review. That they didn't in the circumstances described above, and particularly in the face of the defence raised by the First and Second Respondents, that they were presenting a different case to this court than that which served before the Commissioner, appears to smack of negligence of a serious degree.

[15] I therefore make the following order:

Order

1. The Applicant's review application is dismissed with costs, the scale of which has yet to be determined.
2. The Applicant's attorneys are given 10 court days from the date of fax transmission of this judgment to them, to make written submissions *via* email as to why costs *de bonis propriis* should not be awarded against them.

³ (2019) 40 ILJ 629 (LC) at para 47.

S B Hardie

Acting Judge of the Labour Court

Appearances

For the Applicant: No Appearance

For the First and Second

Respondents: Advocate M Sekhethela

Instructed by: Thaanyane Attorneys