JR813/08

***Not reportable/ Not of interest to other judges***

**IN THE LABOUR COURT OF SOUTH AFRICA**

**HELD AT BRAAMFONTEIN**

**Case no: JR813/08**

**In the matter between:**

**MJ MOSWANE** **APPLICANT**

**and**

**SOUTH AFRICAN POLICE SERVICES** **1ST RESPONDENT**

**TS MANAMELA** **2ND RESPONDENT**

**FJ VAN DER MERWE** **3RD RESPONDENT**

**SAFETY AND SECURITY BARGAINING**

**COUNCIL** **4TH RESPONDENT**

**IN RE**

**SOUTH AFRICAN POLICE SERVICES** **1ST APPLICANT**

**TS MANAMELA** **2ND APPLICANT**

**and**

**MJ MOSWANE** **1ST RESPONDENT**

**FJ VAN DER MERWE** **2ND RESPONDENT**

**SAFETY AND SECURITY BARGAINING**

**COUNCIL** **3RD RESPONDENT**

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**JUDGMENT**

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**AC BASSON, J:**

**INTRODUCTION**

[1] This is an application for an order dismissing the review application filed by the applicant in the main application (Mr. Moswane – hereinafter referred to as "Moswane"). In the main application (which I will also consider hereinbelow) Moswane is seeking to review and set aside the arbitration award rendered by the 3rd respondent in the main application (hereinafter referred to as "the arbitrator").

[2] When Moswane filed his review applicant he only cited the Commission for Conciliation, Mediation and Arbitration and the 1st respondent in the main application (the South Arfrican Police Services – hereinafter referred to as "the SAPS") as respondents. No other respondents were cited. When the applicant filed his supplementary affidavit he cited in addition the arbitrator and the

4th respondent in the main application (the Safety and Security Sectoral Bargaining Council (hereinafter referred to as "the SSSBC". The supplementary affidavit is, however, not properly commissioned.

[3] The State attorney had a meeting with Moswane applicant during which these shortcomings with the affidavits were discussed with him. Moswane was afforded 10 days within which to rectify the defects. He failed to do so.

[4] On 12 December 2008 the SAPS filed a notice in terms of Rule 11 requesting Moswane to remedy the founding as well as the supplementary affidavit. Moswane ignored the Rule 11 Notice and merely filed further Heads of Argument on 2 February 2009.

[5] The SAPS argued that Moswane, who is *dominus litis* in the review proceedings has caused a considerable delay in prosecuting the review application and consequently argued that the review must be dismissed.

[6] It was further argued that it is clear from the papers that Moswane did not comply with Rule 7A of the Rules of the Labour Court in taking the matter on review.

[7] In terms of Rule 7A, an applicant in review proceedings must place such facts before the Court that will enable this Court to decide the review. Rule 7A(2)(c) reads as follows:

> *"The Notice of Motion must –*
>
> *(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."*

[8] In essence what is required is that the parties must set out the facts chronologically and should set out the facts clearly. The correct (interested) parties should also be cited as respondents. See in this regard the decision of

the Court in *Die Dros (Pty) Ltd & Another v Telefon Beverages CC & Others* 2003 (4) SA 207 (C) at 217 paragraph 28:

> "It is trite law that the affidavits in motion proceedings serve to define not only the issues between the parties, but also to place the essential evidence before the Court. (See *Swissborough, Diamond Mines (Pty) Ltd & Others v Government of the Republic of South Africa & Others 1999 (2) SA 279 (W) at 323G) for the benefit of not only the court but also the parties. The affidavits in motion proceedings must contain factual averments that are sufficient to support the cause of action on which the relief that is being sought is based. Facts may be either primary or secondary. Primary facts are those capable of being used for the drawing of inferences as to the existence or non-existence of other facts. Such further facts, in relation to primary facts, are called secondary facts. (See Willcox & Others v Arbitrator for Inland Revenue 1960 (4) SA 599 (A) at 602A; Reynolds NO v Mecklenberg (Pty) Ltd 1996 (1) SA 75 (W) at 781.) Secondary facts, in the absence of primary facts on which they are based, are nothing more than deponent's own conclusions (see Radebe & Others v Eastern Transvaal Development Board 1988 (2) SA 785 (A) at 793C–E) and accordingly do not constitute evidential material capable of supporting a cause of action."*

[9] Having said this, one should, however, never lose sight of the fact that Courts (especially the Labour Court) often deal with lay litigants who are not converse with court proceedings. The Labour Court in particular should be accessible to those that do not have access to legal representation. Although the Rules of this Court should be adhered to, the Labour Court should not be

unduly formalistic when evaluating a review application brought by a lay person even if it means that the Court will sometimes have to construe papers drafted by an individual more generously and in a manner that is more favourable to the lay litigant. However, having said this, the Court must also be mindful of the fact that the founding papers should contain sufficient facts that would enable the respondent to formulate a response. See *Xinwa and Others v Volkswagen of South Africa (Pty) Ltd* 2003 (4) SA 390 (CC):

> *"[13] Pleadings prepared by laypersons must be construed generously and in the light most favourable to the litigant. Lay litigants should not be held to the same standard of accuracy, skill and precision in the presentation of their case required of lawyers. In construing such pleadings, regard must be had to the purpose of the pleading as gathered not only from the content of the pleadings but also from the context in which the pleading is prepared. Form must give way to substance. While the applicants' notice of motion does not seek leave to appeal, what the applicants are seeking is quite clear. They are seeking to appeal against the finding by the LAC that their dismissal was procedurally fair and the consequential relief…… "*

***The application to dismiss***

[10] The arbitrator rendered the award on 16 March 2008. The review was launched on 27 March 2008. As already pointed out, from the beginning there were problems with the papers in the review application: The founding affidavit did not cite all the interested parties and the subsequent supplementary affidavit was no properly commissioned. Despite having been afforded an opportunity to

rectify the defects and despite the fact that a notice was served in terms of Rule 11 to rectify the shortcomings, Moswane simply ignored the problems.

[11] Moswane opposed the application to dismiss. His main contention is that the State Attorney tries to delay the matter and to prejudice him. I have perused the papers. There is no basis for this contention. The applicant, who is *dominus litis* been granted an opportunity to rectify the shortcomings but decided to ignore that. I must point out that Moswane state in the answering affidavit that his papers are in order despite the fact that it was pointed out to him that there are shortcomings. In the alternative, Moswane states that he be afforded an opportunity to amend his papers. I can find no reason why Moswane should be afforded a further opportunity to supplement his papers. The fact of the matter is that he was afforded such an opportunity twice. He decided to ignore the opportunity. It will, in my view, therefore serve no purpose to grant Moswane a further third opportunity to amend and supplement his papers. In the event the review is dismissed.

***The review***

[12] In the interest of finality I will now proceed to the main application and consider whether or not there is, in any event, merit in the review.

[13] The arbitrator was called upon to decide whether or not the SAPS committed an unfair labour practice in promoting the second respondent (Mr Malemela – the second respondent in the main application) and not Moswane. The arbitrator, after considering the facts that were place before him held that an arbitrator should interfere with circumspection with a decision to promote and that it will only be inclined to interfere if there was a procedural irregularity; where the employer violated own policy and procedure or where the employer acted in bad faith or arbitrarily or in circumstances where the panel did not apply its mind. The arbitrator expressly recognised that it is not the task of the

arbitrator merely to second guess the decision of and employer. The arbitrator in a fairly detailed award evaluated the evidence and concluded that the SAPS did not commit an unfair labour practice.

[14] The gist of Moswane's complaint before the arbitrator was that he had applied to be appointed as a Captain for the Johannesburg Central CSC post and that he was not short listed. He also cited the fact that the interviewing panel did not apply their minds when deciding not to appoint him and that they were bias in appointing Malemela.

[15] Moswane, in the founding affidavit in the review application, merely lists certain problems that he has with the award. They range from the arbitrator was bias ("He took side") to the fact that the arbitrator did not consider certain facts. No reference whatsoever is made to the record or to findings made by the arbitrator. I have perused the award of the arbitrator in light of the record despite the fact that Moswane's papers are of little assistance. I can find no reason why I should interfere with the award. The arbitrator clearly was mindful of the legal principles against which a failure to promote should be measured. The arbitrator further took into account the evidence and arrived at a well-reasoned conclusion as to why the SAPS did not commit an unfair labour practice. It was, inter alia, considered that the interviewing panel took into account the period of service in rank, the length of total service, experience in the CSC and the place where the respective job applications were stationed. The interviewing panel took into account all of these factors and arrived at the conclusion that Malemane had longer overall service and longer service in rank and longer experience in the Johannesburg CSC. The arbitrator found that the panel did not act unfairly in taking these factors into account. No evidence was

placed before the arbitrator of favouritism or of bad faith towards Moswane. I am therefore of the view that the conclusion arrived at by the arbitrator was reasonable. In the event the review, on the merits, is also dismissed. In the interest of fairness I have decided not to make a cost order against Moswane.

In the event the following order is made:

1. The application to review is dismissed.

2. No order as to costs.

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**AC BASSON, J**

**Date of hearing: 16 February 2010**

**Date of order: 16 February 2010**

**Date of judgment: 20 October 2010**

**For the applicant: Adv Mosam.** Instructed by The State Attorney.

**For the respondent:** In person.