REPUBLIC OF SOUTH AFRICA

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THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 08/2012

In the matter between:

STARS AWAY INTERNATIONAL AIRLINES (PTY) LTD	**Applicant**
t/a STARS AWAY AVIATION	
and	
JOSEPH THEE N.O.	**First Respondent**
CCMA	**Second Respondent**
ANTHONY BAXTER	**Third Respondent**

Heard: **29 August 2012**

Delivered: **18 September 2012**

Summary: Review – constructive dismissal – no evidence by employer – question whether award improperly obtained.

Interpretation of rule 7A(8) – requirement of "notice".

JUDGMENT

STEENKAMP J

Introduction

1] This application raises the question of the requirement of a "notice" in rule 7A(8) of the Rules of the Labour Court. It also considers the question whether an arbitration award has been improperly obtained in circumstances where the employer elected not to attend the arbitration proceedings. The employer alleges that the employee's evidence on the basis of which the arbitration award was made, was false.

2] The interpretation of rule 7A(8) arises in the context of an application for condonation. I shall first deal with that application and the interpretation of the rule. I shall then deal with the review application in the context of the applicant's prospects of success and, if necessary, on the merits.

Background facts

3] The applicant entered into an employment agreement with the third respondent, Tony Baxter ("the employee") on 22 February 2011. The applicant conducts an airline business and the employee is a pilot. They did not enter into a written contract of employment, other than an "offer fof employment" from the applicant that was accepted by the employee on the same day. In terms of that offer, the employee would be employed as the captain of a freighter aeroplane. The terms and conditions of his employment were set out as follows:

> "1. Salary 6000 USD[1] per month.
>
> 2. You will operate on a month on month off basis (this however can change e.g. sickness of a crew member etc).
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> 3. While in the DRC you will receive 70 USD S&T per day.
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> 4. You will be based in Kinshasa.
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> 5. Accommodation and positioning flights will be paid for by the

1United States Dollars.

company.

6. The aircraft will operate internally in the DRC.

7. Anticipated flying hours per month +- 80 hrs.

8. Start date – mid March subject to SACAA approval of maintenance away from base and pilot re-currency training."

4] On the same day, the employee sent the applicant a further email in these terms:

"1. Please find attached License, Medical and passport photos.

2. How, when and where, is the remuneration to take place?

3. You will have to advise me as to the certificates required for operation in the DRC."

5] He received no response. According to his evidence at arbitration, he received no payment (other than to cover disbursements) since his appointment. On 17 August 2011 he sent a letter to the applicant in these terms:

"**RE: TERMINATION OF SERVICE**

Further to the fact that I have not been paid any salary since the appointment to your staff as per your letter dated 22nd February 2011, I am no longer able to continue on this basis. The situation has become completely intolerable, and with inadequate response from your administration, I therefore find myself with no option other than being forced to resign.

I hereby resign with immediate effect.

I shall be declaring a dispute at the CCMA."

6] The employee then did, indeed, refer a constructive dismissal dispute to the CCMA on 22 August 2011. The applicant – that was represented by its attorneys of record – elected not to attend the arbitration proceedings after conciliation had failed. Having heard only the employee's evidence, the

arbitrator found that he had been constructively dismissed; that it was unfair; and ordered the applicant to pay him the equivalent of twelve months' remuneration, amounting to $72 000 (R612 000 at the prevailing exchange rate).

7] The applicant wishes to have that award reviewed and set aside.

The condonation application and the interpretation of rule 7A(8)

8] The arbitration award was handed down on 4 December 2011. The applicant delivered its review application on 10 January 2012, i.e. within the six-week period prescribed by section 145(1)(a) of the Labour Relations Act.[2] On 12 January 2012 the employee's attorneys delivered a "notice of intention to oppose". The applicant delivered a supplementary affidavit on 10 February 2012. The affidavit was not accompanied by a notice. A filing sheet to which the affidavit was attached, did not mention any rule in terms of which the affidavit was filed, but it is apparent that it was intended to have been a supplementary affidavit delivered in terms of rule 7A(8).

9] Rule 7A(8) and (9) provides as follows:

> "(8) The applicant must within 10 days after the registrar has made the record available either—
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> (*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
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> (*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] In this case, the employee's attorneys did not deliver an answering

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2Act 66 of 1995 ("the LRA").

affidavit within 10 days after receiving the applicant's supplementary affidavit. They only did so on 7 May 2012, i.e. almost three months after the supplementary affidavit had been delivered. The question is whether the employee has to apply for condonation. He says no condonation is required, as the applicant never delivered a "notice" as required by rule 7A(8). The applicant argues that it is implicit in the wording of the rule that, once the applicant delivers a supplementary affidavit, the respondent has to deliver an answering affidavit within 10 days.

11] The first part of rule 7A(8) is peremptory. The applicant must do one of two things: either it must "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"; orit must deliver a notice that it stands by its notice of motion.

12] If an applicant wishes merely to stand by its initial notice of motion and founding affidavit, the rule is simple: the applicant must still deliver a notice (without an accompanying affidavit), but it will merely state that the applicant stands by its notice of motion. It is similarly clear if the applicant wishes to amend the notice of motion and supplement the founding affidavit. Then it has to file a notice to that effect, together with the supplementary affidavit.

13] In this case, the applicant has not amended its notice of motion; it has, however, elected to supplement the founding affidavit. Was it necessary to deliver a "notice" accompanying that supplementary affidavit?

14] The wording of rule 7A(8)(a) must, it seems to me, be read conjunctively. I read it to mean that, should the applicant wish to supplement its founding affidavit, it has to deliver a notice together with the accompanying supplementary affidavit. The rules board could not have contemplated that it would require a notice from the applicant where it does not intend to supplement, add to or vary anything (i.e. where it stands by its notice of motion), yet it does not require a notice that the applicant wishes to add to its founding affidavit.

15] On a very broad purposive reading, it may well be argued that it should be obvious from the supplementary affidavit itself that the applicant wishes to supplement the founding affidavit. But the rule provides that the applicant must "by delivery of notice and accompanying affidavit ... supplement the supporting affidavit." The purpose of this requirement may be to make it clear that the applicant has perused the record of the proceedings it intends to review, and has elected to either amend or supplement the notice of motion, or the founding affidavit, or both; or to stand by its notice of motion and founding affidavit. It may well be that an applicant wishes to deliver a supplementary affidavit – for example a confirmatory affidavit that was not delivered initially due to the unavailability of a witness – outside and independent of the time periods contemplated by rule 7A.

16] I conclude, therefore, that it is a peremptory requirement of rule 7A(8) that the applicant must deliver a notice together with a supplementary affidavit, and that the mere delivery of a supplementary affidavit without an accompanying notice will not trigger the time period in rule 7A(9).

17] The common sense approach would of course be for the attorney who receives a supplementary affidavit in the context of a review application, to contact his or her counterpart and to clarify whether it was intended to have been delivered in terms of rule 7A(8); nevertheless, for the sake of clarity and to cater for the odd occasion where some confusion may arise, legal representatives acting for the applicants in review applications would be well advised to adhere strictly to the rule.

18] Given the view I have taken of the interpretation of the rule, the employee did not need to apply for condonation. And even if I am wrong in this regard, the evident confusion around the proper interpretation of the rule constitutes good grounds for condonation.

19] Neither party is held liable for the other's costs in respect of the condonation application.

The review application

20] The applicant wishes to have the arbitration award reviewed and set aside in terms of s 145(2)(b) and s 145(2)(a)(iii) of the LRA. Its argument is that, even though it did not attend the arbitration, the employee tendered false evidence and the award was improperly obtained.

21] Because the finding that the employee was constructively dismissed goes to the jurisdiction of the CCMA, the *Sidumo* test[3] does not apply.[4] The question is simply whether the arbitrator was right or wrong.

22] In coming to the conclusion that he did – i.e. that the employee had been constructively dismissed – the arbitrator was, of course, confined to the evidence that the employee gave. The applicant was well aware of the date of arbitration and it was legally represented; why it chose to simply ignore its opportunity to be heard, boggles the mind. Nevertheless, this Court now has to consider whether the arbitrator correctly found, based on the evidence before him, that the employee had been constructively dismissed and that it was unfair.

23] The applicant's argument goes further, though: it argues that the evidence that the employee gave was false, and therefore the award was improperly obtained.

24] It is necessary, then, to examine the evidence. It is common cause that the employee was offered and accepted employment with the applicant. There can be no doubt that an employment relationship came into existence, despite the applicant's earlier protestations to the contrary: it attempted to argue, based on evidence that never served before the arbitrator, that the agreement was subject to a suspensive condition between it and a third party known as Armi. The employee was not a party to that agreement. There is no evidence that the employee was even

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3i.e. whether the conclusion reached by the arbitrator was so unreasonable that no other arbitrator could have come to the same conclusion: *Sidumo& another v Rustenburg Platinum Mines Ltd & others* (2007) 28 *ILJ* 2405 (CC).

4*South African Rugby Players' Association & others v SA Rugby (Pty) Ltd*(2008) 29 *ILJ* 2218 (LAC); *Asara Wine Estate v Van Rooyen.*

aware of the agreement. It certainly did not serve before the arbitrator. That argument has no merit.

25] The applicant's alternative argument appears to be that, even if an employment contract did come into existence, there was no constructive dismissal. The employee, it maintains, was not entitled to any payment because a further suspensive condition had not been fulfilled: that is "SACAA approval of maintenance away from base and pilot re-currency training."

26] It is common cause that the employee did undergo re-currency training and that it was approved. That condition was therefore fulfilled. However, the applicant has now placed evidence before the court – that it chose not to place before the arbitrator – that the South African Civil Aviation Authority (SACAA) did not provide approval to maintain the aircraft that theemployee was to pilot in the DRC. SACAA denied that application in August 2011.

The award

27] The arbitrator took into account that an employment relationship came into being in February 2011 and that the employee did not get paid for six months, leading to his resignation. He had contacted the applicant on numerous occasions, to no avail. This led to his employment conditions becoming intolerable. The arbitrator came to the conclusion that the employee had exhausted internal remedies and that could no longer be expected to endure circumstances where he was not being paid.

Award improperly obtained?

28] Section 145(2)(b) of the LRA specifically lists as a ground of review the fact that an award had been improperly obtained. What does this mean?

29] It seems to me that the clear-cut cases would be where the successful party had improperly influenced the arbitrator, for example by bribing him or her; or where the successful party, knowing that the other party was

unaware of the arbitration date, convinced the arbitrator to proceed and obtained an award based on perjured evidence.

30] The circumstances in this case are by no means clear cut. The applicant was well aware of the arbitration but chose not to use the opportunity to place any evidence before the arbitrator. The only basis on which it could impugn the award, is if the version put up by the employee is patently false. That much was accepted by the court in *Moloi v Euijen NO*[5], although that was not the basis for the allegation that the award had been improperly obtained in that case.[6]

31] In *Van Schalkwyk v Vlok*[7] the court held that, in order to set aside an award of an arbitrator on the ground that false evidence was presented at arbitration, it is necessary to show that the evidence was material in the decision-making process and that it influenced the arbitrator in making his decision.

32] The court in *Graaff-ReinetMunicpality v Jansen*[8] set aside an arbitration award where the successful party presented false evidence.

33] Did the employee in the current case place false evidence before the arbitrator in order to obtain the award in his favour?

34] Apart from his *viva voce* evidence, the employee also placed documentary evidence in the form of correspondence – mainly by email – between him and the applicant. The veracity of these emails is not in dispute. What could be gleaned from them?

35] Firstly, the employee accepted the offer of employment. The monthly salary would be $6000 per month. Neither party queried this amount. On the same day that he accepted the offer, the employee asked: “How, when

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5(1997) 18 *ILJ* 1372 (LC); [1997] 8 BLLR 1022 (LC).

6The court in *Moloi v Euijen* found that the mere allegation that there had been a “secret meeting” between the arbitrator and the employer’s representative did not amount to an allegation that the arbitrator had been bribed or improperly influenced in making his award.

71914 CPD 999.

81917 CPD 604.

and where, is the remuneration to take place?" This cannot be construed as an acceptance that the employee was not entitled to any remuneration at that stage, as the applicant would have it; on the contrary, on the plain language of the query, the employee simply sought clarification as to how, when and where he would be paid; certainly not "how much" or whether he would be paid at all. Surely the arbitrator cannot be faulted to have accepted that the employee was entitled to payment in circumstances where, firstly, the applicant did not put up any version to the contrary; and secondly, the applicant did not bother to respond to the employee's query at the time. Neither can it be said that the employee's understanding – that he was entitled to payment as per the offer and acceptance of employment – was false or misleading.

36] The employee met with the applicant's operations manager, Tubby McLoughlin, on 3 May 2011. On 10 My 2011 he sent McLoughlin an email referring to the meeting and recording the following:

> "1. Your email of 22nd February 2011, regarding the offer of employment on the DC9.
>
> 2. My email of the 22nd, accepting the offer.
>
> 3. My email of the 22nd, requesting remuneration details. To date I have not received a reply.
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> ...
>
> As I feel that I (and others) have gone the extra mile, since the 22nd February, to get this contract operational, the lack of appreciation by Stars Away to answer or reply to this matter of remuneration, since that date, does not engender feelings of confidence in this area. We after all have been on standby footing since then, and as human beings are unable to go into hibernation, or suspend monthly accounts, costs and disbursements in the interim.
>
> Would you be so kind as to reply to this email, as to the manner in which Stars Away intends to address the concerns expressed?"

37] The applicant made much of the reference to "standby footing" in its oral

argument before this Court; but there is nothing in that reference to suggest that the employee was under the impression that he was not entitled to remuneration while he was on standby footing. And if that was the applicant's case, why did it not take up the employee's numerous – almost desperate – exhortations to respond to his queries?

38] Instead, the employee was met with silence, prompting him to write to McLoughlin again a week later, on 17 May 2011, in these terms:

> "My email dated 10th May 2011 refers.
>
> As it has been a week now and having not been privileged [*sic*] the courtesy of a reply, am I to assume that my services are no longer required and that the offer of employment has been terminated?
>
> The lack of response on the issue of remuneration does not bode well for the future of relations, if any, between management and crew, in this most basic of contractual obligations.
>
> I believe that I have acted in good faith and goodwill in all of my dealings with Stars Away, and now request that Stars Away return such with equal respect and consideration."

39] The applicant eventually bothered to respond on 20 May 2011.McLoughlin told the employee:

> "At a meeting on Wednesday evening it was agreed[9] that all the DC-9 crew will be on the Stars Away pay-roll as of 1 May 2011. I realise this is no the outcome you were hoping for, but under the present situation we ahve no alternative. Your monthly salary will be $6000, 00 USD."

40] The employee responded promptly on the same day, stating that he found this offer unacceptable.

41] On 7 June the employee consulted his attorneys. The attorney, Michael Bagraim, wrote to the applicant in these terms on 17 June 2011:

> "We act on behalf of Tony Baxter who has not received his salary and has not had his query answered.

9Hedos not say between whom.

We reserve all his rights.

Unless we hear from you within 7 days we shall be obliged to take further action without any recourse to you and reserve our rights to claim all our legal costs."

42] Various telephone conversations between Bagraim and McLoughlin ensued. Eventually the employee – without his attorney – met McLoughlin on 11 August 2011. The meeting was inconclusive.

43] Further attempts to resolve the situation also went nowhere, prompting the letter of resignation on 17 August 2011 in which the employee stated that "the situation has become completely intolerable". He then referred the dispute to the CCMA.

44] It appears to me that the arbitrator properly came to the conclusion that the employee resigned because the employer had rendered his continued employment intolerable, based on the uncontested evidence before him; and I am not persuaded that the evidence was patently false.

45] It is clear from the employee's evidence and from the contemporaneous correspondence that he constantly attempted to get clarification about his remuneration from the applicant, but it was not forthcoming. It is not apparent that the employee's evidence that he was under the impression that he was entitled to be paid $6000 per month was false. His repeated queries about remuneration called for an explanation; it is inexplicable that the applicant did not respond to him with the explanation that it now attempts to put up in a review application and that it did not offer to the employee in response to his queries or at arbitration.

46] In these circumstances, the award is not open to review. Both parties asked that costs should follow the result. I agree.

Order

47] The application for review is dismissed with costs.

Steenkamp J

APPLICANT:	HC Nieuwoudt of Norton Rose.
THIRD RESPONDENT:	Michael Bagraim attorney.