REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Not Reportable

Case no: D861/13

In the matter between**:**

MISTY BLUE TRADING 286 CC **Applicant**

~~and~~And

NATIONAL BARGAINING COUNCIL FOR THE

ROAD FREIGHT AND LOGISTICS INDUSTRY **First Respondent**

WAYNE STEPHENS N.O. **Second Respondent**

M. THWALA **Third Respondent**

N.S. MKHWANAZI **Fourth Respondent**

M.G. MDINGI **Fifth Respondent**

S.M.MABELE **Sixth Respondent**

J.R. MNIKATHI **Seventh Respondent**

M.S. DLAMINI **Eight Respondent**

Heard: 8 January 2015

Delivered: 29 July 2015

Summary: **Review application – arbitration hearing proceeding in the absence of the applicant after applying for postponement but before pronouncement thereon – all grounds of review to be foreshadowed in the founding affidavit – applicability of s 62 (3) of the Labour Relations Act.**

JUDGMENT

MGAGA AJ

Introduction

[1] This is an application in terms of s 145 of the Labour Relations Act[1] to review and set aside an enforcement arbitration award ("the arbitration award') dated 31 January 2013 issued by the second respondent under the auspices of the first respondent. In the arbitration award the second respondent had ordered the applicant to comply with the first respondent's collective agreement(s) by paying various amounts and levies totaling R233 239.93. The applicant has also applied for condonation for the late filing of the review application. The condonation application is incorporated in the founding affidavit of the review application. Both the review and condonation applications are opposed by the respondents, except the second respondent who abides by the Court's decision.

[2] The first respondent is a bargaining council established under the LRA for the road freight and logistics industry. It is, as such responsible for the enforcement of compliance with its own collective agreements. The first respondent's collective agreements are obviously binding on the parties thereto. However, in terms of s 32 of the LRA the first respondent's collective agreements can be extended to non-parties who are operating within the

[1] 66 of 1995 ("LRA")

registered scope of the first respondent. It is not disputed that the first respondent's collective agreement has been duly extended to non-parties who are operating within its registered scope[2] which includes "the hiring out by temporary employment services of employees for activities or operations which ordinarily fall within the transportation or storage of goods".[3]

[3] The applicant is a Close Corporation which conducts business as a temporary employment service provider. One of the applicant's clients is Aqua Transport & Plant Hire (Pty) Ltd ("Aqua Transport"). According to the applicant Aqua Transport is involved in the construction, not transport industry, despite its name which suggests otherwise. The respondents claim that the applicant is operating within the scope of the first respondent and it is bound by the collective agreement by virtue of the extension thereof to non-parties.

[4] The third to eight respondents are drivers of heavy duty vehicles who are or were employed by the applicant and hired out to Aqua Transport. According to these respondents at Aqua Transport they were driving vehicles transporting goods and products such as chemicals; cooking oil; crude oil; sand; quarry and water to many destinations throughout South Africa.[4]

Salient background facts

[5] Following a claim by the third to eight respondents emanating from the applicant's failure to pay certain monies and levies prescribed by the collective agreement the first respondent issued a compliance order against the applicant in terms of s 33A (3) of the LRA.[5] The compliance order which was apparently served on the applicant on 31 May 2012 required the

[2] See paragraph 7(c) of the first respondent's answering affidavit – Pleadings page 37.
[3] See the definition of "Road Freight and Logistics Industry" in the certificate of registration dated 29 September 2010 – Pleadings page 59.
[4] See third to eight respondents' answering affidavit paras 18.6 and 19.3 – Pleadings pages 71 and 72.
[5] See Compliance Order – Record pages 8 to 9.

applicant to pay at the time a sum of R86 985.99 to the first respondent within 14 days from the receipt thereof. It also provided the applicant with an opportunity to object by submitting representations within 14 days. It is common cause that the applicant did not file any objection and neither did it comply with the compliance order.

[6] The first respondent referred the applicant's non-compliance with the compliance order to arbitration which was subsequently set down for 29 November 2012. The notice of arbitration was served on the applicant via telefax on 9 November 2012.

[7] On 16 November 2012 the applicant wrote to the first respondent requesting a postponement of arbitration on the basis that the applicant was "extremely busy" with its December shutdown. Unsurprisingly, on 20 November 2012 the first respondent notified the applicant in writing that its request for postponement had been declined.[6]

[8] The arbitration hearing took place as scheduled on 29 November 2012. The applicant was represented by its Human Resources Manager Mr Poobalan Govender ("Govender")[7] who is also a deponent to the applicant's founding affidavit and replying affidavits. The first respondent was represented by its designated agent Ms. S. Sabela. What actually took place at the arbitration hearing is in dispute and will be dealt with more fully below.

[9] The second respondent issued the arbitration award on 31 January 2013. There is no indication that the arbitration award was duly served on the applicant.

[6] Pleadings pages 42-43
[7] Govender signed the attendance register as "V. Govender" – Record page 20.

[10] On 27 June 2013 the first respondent served on the applicant an application to make the arbitration award an order of this Court in terms of s 158 (1) (c) of the LRA. The arbitration award was apparently attached to the s 158 (1) (c) application papers.

[11] On 23 July 2013 the applicant brought an application before the CCMA to rescind the arbitration award. It is not clear why the rescission application was brought before the CCMA whereas the arbitration award was issued by the second respondent under the auspices of the first respondent.

[12] On 19 August 2013 the applicant was courteously advised in writing by the first respondent's attorneys that the rescission application was an incorrect process to challenge the arbitration award. The applicant wisely accepted the advice because on 12 September 2013 it delivered this review application. The founding affidavit in support of the review application was apparently signed before the commissioner of oaths on 22 August 2013[8] and the notice of motion is dated 6 September 2013.

The condonation application

[13] From the sequence of events outlined above, in particular paragraphs [9] to [12], it is clear that the review application was filed out of time by about five weeks from the date the applicant became aware of same i.e. 27 June 2013 which is the date on which the s 158 (1) (c) application was served on the applicant.

[8] Pleadings page 22

[14] The length of the period of delay (five weeks) is not insignificant but it is also not excessively long having regard to the circumstances of this case. The Court finds the applicant's explanation for the delay to be reasonable and acceptable. There is nothing to gainsay the applicant's allegation that the arbitration award was not served on it as it was supposed to be. It first became aware of the arbitration award when it received the s 158 (1) (c) application. The applicant's knee-jerk reaction, less than a month thereafter, was to apply for the rescission of the arbitration award. Despite the defectiveness of that rescission application, it is an indication that the applicant took steps within a reasonable period to challenge the arbitration award. When the applicant was correctly advised by the first respondent's attorneys that its rescission application was ill-advised and doomed to fail, it candidly accepted the advice and brought this review application within a reasonable period of time after receiving the advice.

[15] It is trite that the applicant's prospect of success in the review application remains an important consideration in the condonation application. But it is not necessarily decisive in every case. Despite the negative view I take of the applicant's prospect of success in the review application, as it will appear later in this judgment, I am of the view that condonation ought to be granted mainly because the period of delay is not excessively long and the applicant has provided a reasonable and acceptable explanation for the delay.

[16] Therefore the condonation for the late filing of the review application will be granted. I now turn to deal with the merits and demerits of the review application.

The review application

[17] In the applicant's founding affidavit Govender confirms that he attended the arbitration hearing on 29 November 2012 on behalf of the applicant. He further states that he informed the second respondent that he was applying

for postponement because the applicant had a similar matter pending at a bargaining council in Johannesburg. The Johannesburg matter involving one employee had been set down for 13 December 2012[9] and the applicant had already instructed a labour law specialist to represent it. Govender reasoned that a ruling in the Johannesburg matter would have enabled the applicant to properly assess its options regarding the Durban matter.

[18] Govender further states that:

> "[The second respondent] thanked me and advised us that he will come back with a decision. I accordingly believed that he had agreed to adjourn the matter and I left the hearing. To my knowledge and belief the hearing was not going to proceed any further on that day."[10]

In so far as the ground of review is concerned, Govender concludes by stating that:

> "**I submit that the Second Respondent has clearly committed a gross irregularity in proceeding with the hearing and making a decision in my absence, without warning me that he would do so**."[11] (My emphasis)

[19] Both Ms. Sabela, who represented the first respondent at the arbitration hearing, and the second respondent deny that Govender applied for postponement on behalf of the applicant on 29 November 2012.[12] Indeed there is nothing recorded in the arbitration award which suggests that there was an application for postponement and the ruling thereon. The applicant has not placed before this Court a transcript of the arbitration proceedings which could have shared more light on this issue.

[9] The date '13 December 2013' at paragraph 16 of the founding affidavit (Pleadings page 9) is an obvious typographical error.
[10] Paragraph 17 of the founding affidavit – Pleadings page 9.
[11] Paragraph 25 of the founding affidavit – Pleadings page 12.
[12] See first respondent's answering affidavit, paragraph 6, in particular 6(e) - Pleadings page 35, and the verifying affidavits of the second respondent and Ms Sabela - Pleadings pages 62 to 65.

Evaluation

[20] Ms. *Allen*, who appeared on behalf of the applicant, readily admitted that there is a clear irreconcilable dispute of facts on the papers.[13] It follows that the application of the well-known *Plascon-Evans* rule[14] is against the applicant.

[21] Even if Govender's version were to be accepted as more probable on the basis that the arbitration award makes reference to the first respondent's submissions only, this Court is of the view that the applicant has only itself to blame for the continuation of the arbitration hearing in its absence.

[22] On Govender's own version, when he left the proceedings on 29 November 2012 the second respondent had not yet pronounced on his postponement application. There is no justification whatsoever for Govender's assumption and belief that the postponement had been granted. More so, because the applicant's first timeous and written postponement application had already been rejected by the first respondent. The second application was on more shaky grounds than the first application, both procedurally and substantively.

[23] According to Govender the second respondent indicated that he would come back with a decision about the postponement application. It is probable that the second respondent could have stood the matter down in order to consider the postponement application. At the very least Govender had to ascertain the fate of the postponement application before he decided to up and leave. His failure to do so was at the applicant's peril and there is no irregularity committed by the second respondent in this regard.

[13] Paragraphs 4-6 of the applicant's heads of argument.
[14] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634 E – 635 C and *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at para [26]

[24] In *Steelcor (Pty) Ltd v Mokwena NO and others*[15] Snyman AJ had the following to say about the practical application of the review test:

> "[21] In my view, and with the view to encapsulate a practical application of the review test in line with the principles set out above, the first step in a review enquiry is to consider or determine if an irregularity indeed exists where it comes to the arbitration award or the arbitration proceedings.
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> …
>
> Once an irregularity is identified, the materiality of the irregularity then becomes relevant and must be considered.
>
> …
>
> If the review court in conducting this first step enquiry should find that no irregularity exists in the first instance, the matter is at an end, no further determinations need to be made, and the review must fail."

[25] On the basis of the above evaluation this review application ought to be dismissed. However, in its heads of argument the applicant raised two issues masquerading as additional grounds of review i.e.:

25.1 "Whether or not the First Respondent, as a matter of fact, had the requisite jurisdiction to determine the dispute; and, if so,

25.2 Whether there was sufficient evidence before the Second Respondent upon which he could rationally have concluded that the Applicant was obliged to comply with the compliance orders which had been the subject matter of the arbitration."

[26] Ms. *Allen* submitted that the first respondent did not have jurisdiction to arbitrate the dispute because the applicant is not bound by the first

[15] (JR 812/2012) [2014] ZALCJHB 1 (17 January 2014**)**

respondent's collective agreement. In the alternative, she submitted that no reasonable decision maker could have arrived at the decision arrived at by the second respondent on the evidence before him. I do not agree with both contentions.

[27] The applicant's first insurmountable hurdle is that these additional grounds of review were not raised in its founding affidavit. As indicated above, the applicant relied only on one ground of review i.e. the contention that the second respondent proceeded with the arbitration hearing and made a decision in its absence without warning the applicant that he would do so.

[28] It is trite that the applicant's case should be made out in its founding affidavit. In *Netherburn Engineering CC t/a Netherburn Ceramics v Mudau NO & Others*[16] Zondo JP as he then was, put it thus:

> …"Accordingly, a party which brings a review application is bound by the grounds of review set out in his founding papers. He cannot in oral argument argue on the basis of different grounds of review except if such ground can be said to be apparent from the review application. In this case the applicant does not pursue the grounds of review contained in the founding affidavit but seeks to argue the case on the basis of grounds which are nowhere to be found in the review application. The grounds it seeks to pursue are not grounds of review that can be said to be apparent from its review application. That cannot be allowed."[17]

[29] In any event, in terms of s 33A of the LRA, in particular s 33A (4) (a) thereof, the first respondent does have jurisdiction to arbitrate any unresolved dispute

[16] (2009) 30 ILJ 269 (LAC) **at para 30**
[17] See also *Northam Platinum Ltd v FGanyago NO & Others* (2010) 31 ILJ 713 (LC) at paras. [27] to [29];*Tao Ying Metal Industry (Pty) Ltd v Pooe NO & Others* (2007) 28 ILJ 1949 (SCA) at par. [98] and *Footwear Trading CC v Mdlalose* (2005) 26 ILJ 443 (LAC) at par. [10].

concerning compliance with any provision of its collective agreement. In this case the first respondent had issued a compliance order against the applicant alleging that it had "not complied with the indicated clauses of Council's Collective Agreement".[18] The statement of contraventions refers to the main collective agreement and that it has been extended to non-parties by various published government notices.[19] If the applicant was of the view that it was not bound by the first respondent's collective agreement it was entitled to lodge an objection within 14 days of the receipt of the compliance order. Such objection could have triggered a demarcation dispute envisaged in s 62 (3A). In its wisdom the applicant did not lodge an objection, neither did it refer a demarcation dispute to the CCMA.

[30] Before the second respondent there was nothing to suggest that the first respondent did not have jurisdiction to arbitrate the dispute about the applicant's non-compliance with the compliance order. It is axiomatic that the compliance order would have been issued on the basis that the applicant was bound by the first respondent's collective agreement based on the extension thereof to non-parties. In the absence of any submissions or evidence to the contrary and the applicant's failure to justify its non-compliance with the compliance order the second respondent's decision was probably correct, if not, at the very least, such decision fell within the range of reasonableness.

[31] The only issue that remains for determination is whether s 62 (3), read with s 62 (1) of the LRA finds application in this case, as submitted by Ms. *Allen* during the hearing of this matter. It is important to reproduce s 62 (3) in full:

> "(3) In any proceedings in terms of this Act before the Labour Court, if a question contemplated in subsection (1) (a) or (b) is raised, the Labour Court must adjourn those proceedings and refer the question to the Commission for determination if the Court is satisfied that –

[18] Record page 8
[19] Record page 13

(a) the question raised-

(i) has not previously been determined by arbitration in terms of this section; and

(ii) is not the subject of an agreement in terms of subsection (2); and

(b) the determination of the question raised is necessary for the purpose of the proceedings."

[32] It is clear that both requirements (a) and (b) must be met. Put differently, the Court must be satisfied that the question raised has not previously been determined by arbitration and is not the subject of an agreement in terms of subsection (2) [requirement (a)], and that the determination of the question raised is necessary for the purpose of the proceedings [requirement (b)].

[33] I am satisfied that the phrase 'in any proceedings in terms of this Act' is wide enough to include review proceedings before the Labour Court. However, regarding the first requirement, I have difficulty in comprehending how can the question contemplated in subsection (1) (a) or (b) be properly raised for the first time in the review proceedings when it was not raised before the second respondent and the applicant has not even referred a demarcation dispute to the CCMA for determination. In *Building Industry Bargaining Council (East London) v Naidoo t/a Dev's Construction Trust & another*[20] the following was said:

> "I am enjoined by s 62 (3) when a demarcation is raised to adjourn these proceedings and refer the matter to the CCMA for determination. However, I agree with applicants this means properly and genuinely raised. For it to have been properly raised the basis for the defence should have been laid at the outset…"

Nevertheless, due to the view I take regarding the second requirement it is not necessary for me to decide whether this first requirement has been met.

[20] (2000) 21 ILJ 2253 (LC) at para 33

[34] Requirement (b) requires that the determination of the question contemplated in subsection (1) (a) or (b) must be necessary for the purpose of the proceedings. This is a review application based on a narrow ground of review as set out above. In order to determine the reviewability of the arbitration award this Court does not have to decide whether the applicant is bound by the first respondent's collective agreement. The issue before this Court is whether the second respondent committed an irregularity by proceeding with the arbitration hearing and made a decision in the absence of the applicant without warning it that he would do so. The determination of the question contemplated in subsection (1) (a) and (b) may very well be necessary to decide whether or not to make the arbitration award an order of court in terms of s 158 (1) (c) but it is not necessary to decide this review application.

[35] For the sake of completeness I mention that at the hearing of this matter Mr *Mbatha*, who appeared on behalf of the third to eight respondents, referred this Court to the judgment of the LAC in *Johannesburg City Park v Mphahlani NO & others*[21] wherein Zondo JP, as he then was, held that s 62 (3A) did not find application in that case and, therefore, the arbitrator was not compelled to adjourn the arbitration pending the determination of the demarcation dispute before the CCMA. In reply Ms *Allen* correctly pointed out that that LAC judgment was overruled by the SCA in *Johannesburg City Park v Mphahlani NO & others*.[22] I have considered the SCA judgment which is obviously binding on this Court but I found it to be clearly distinguishable from this case. In *Johannesburg City Park* case the applicant had written a letter to the bargaining council objecting to its jurisdiction to arbitrate an unfair dismissal dispute on the basis that the applicant did not fall within its jurisdiction. A demarcation dispute was already pending before the CCMA. In this case, as alluded to above, the applicant did not object to the compliance order issued by the first respondent and at arbitration the jurisdiction of the first respondent was never challenged.

[21] [2010] 6 BLLR 585 (LAC)
[22] (2011) 32 ILJ 1847 (SCA)

[36] For the above reasons I conclude that s 62 (3) does not find application in this case.

Conclusion

[37] For the reasons stated above the applicant has failed to demonstrate that the second respondent committed a reviewable irregularity by proceeding with the arbitration hearing in its absence. It is not proper for the applicant to raise additional grounds of review which are not foreshadowed in its founding affidavit. However, even those additional grounds of review cannot assist the applicant in this case. Lastly, having found that s 62 (3) of the LRA is not applicable in this case, the applicant's request to adjourn these proceedings and refer the matter to the CCMA for determination cannot be acceded to.

[38] With regards to the question of costs, it seems to me that it would accord with the requirements of the law and fairness that the applicant should pay the respondents' costs of opposing the review application. The future of the review application was bleak from inception. The review application did not even get off the starting blocks of proving an irregularity, let alone a gross irregularity envisaged in s 145 of the LRA. The hopelessness of the review application on the grounds of review relied upon was, in essence, also conceded in the applicant's heads of argument, albeit too late.

Order

[39] In the result I make the following order:

1. The condonation for the late filing of the review application is granted.

2. The review application is dismissed with costs.

S.B. Mgaga, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

For the applicant	:	Advocate K. Allen
Instructed by	:	Naicker & Naidoo Attorneys
For the first respondent	:	Attorney A.J. Prior of Prior and Prior Attorneys
For 3rd to 8th respondents	:	Attorney M. Mbatha of MAS Mbatha and Company