

166336IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)

CASE NO: **J1929/99**

In the matter between:

LOUIS ANTHONY ROTHSCILD

Applicant

and

AMT CONSTRUCTION

Respondent

JUDGMENT

STELZNER AJ

1. This matter came before me in terms of the provisions of section 158(1)(c) of the Labour Relations Act 66 of 1995 (“the Act”). The applicant sought to have the arbitration award granted in his favour by the CCMA on 3 May 1999 made an order of this court.

2. The arbitration award was made in the absence of the respondent party. The Commissioner, in her award, indicates that on the day of the hearing two telephone calls were made to “the employer party”. The award states further that neither a person by the name of Tony, a contractor, or Mr Marco Tavares, a director, could explain satisfactorily why they had failed to arrive

except for alleging that they were not aware of the proceedings. It does not appear from the face of the award but one assumes that the Commissioner, in accordance with normal CCMA practice, would have satisfied herself that the notice of set down of the arbitration proceedings had been properly served. In any event, I am not being called upon to review the decision of the CCMA to proceed in the absence of the employer party nor was an application for rescission of the award brought on that basis.

3. The Commissioner went on to consider the applicant's evidence and found his dismissal to have been both substantively and procedurally unfair. Applicant was awarded compensation in the sum of R96 000.00 being the equivalent of 12 months' remuneration. The amount was to be paid within 14 days of the date of the award.

4. In his application in terms of section 158(1)(c) of the Act the applicant made use of the standard form notice of motion and supporting affidavit (apparently supplied by the Registrar of the Court or by the CCMA to assist parties who seek to have arbitration awards made an order of this court). In the application the respondent is simply cited as AMT Construction without any further description of the nature or status of the entity. It would appear that these further particulars were

unknown to the applicant. The applicant supplied a physical address, a telephone number and a telefax number for the respondent and annexed an affidavit in support of proof of service of both the arbitration award and the founding papers in respect of the section 158(1)(c) proceedings.

5. The respondent as cited in these proceedings has not filed any opposition thereto. An answering affidavit was, however, filed by one Alberto Jose de Oliviera Tavares, who states that he is a director of AMT Placements (Pty) Limited, a company duly incorporated in terms of the laws of South Africa. Without stating so overtly Tavares, on behalf of AMT Placements (Pty) Limited, seeks leave to intervene in these proceedings on the basis that it has an interest therein. Tavares indicates that AMT Placements (Pty) Limited has been served with the arbitration award granted by the CCMA on 3 May 1999 and has also been served with a copy of the application to make that arbitration award an order of court, the application before me in these proceedings.

6. Tavares goes on to say that at no time was AMT Placements (Pty) Limited the employer of the applicant. (This accords with what the applicant says in his founding papers where he avers that the respondent is an entity known as AMT Construction. The arbitration award was also issued against AMT Construction, cited

as “the employer party”.) Tavares states further that to the knowledge of AMT Placements (Pty) Limited there is no such entity as AMT Construction and certainly no such entity sharing premises with AMT Placements (Pty) Limited. He does not deny that such an entity could exist, a denial which it appears could not have been made in the absence of some form of proper search to that end. Tavares, however, expresses concern on behalf of AMT Placements (Pty) Limited that, given that both the arbitration award and the section 158(1)(c) papers have been served on AMT Placements (Pty) Limited, there is a risk that should this application be granted an attempt might be made by the Sheriff to attach property belonging to AMT Placements (Pty) Limited in executing such order ostensibly against AMT Construction, the respondent in this matter.

7. Tavares also avers that although he was overseas at the time he is aware that AMT Placements (Pty) Limited was contacted on the morning of the arbitration of 3 May 1999. Because he, Tavares, was overseas at the time he could not attend at the CCMA to clarify the confusion regarding the identity of the applicant’s employer.

8. Tavares then argues in his affidavit, as was argued by Mr Leech, appearing for AMT Placements (Pty) Limited, that it is the

duty of the applicant in legal proceedings to ensure the correct citation of all parties. He submits that should this court grant the application in terms of section 158(1)(c), AMT Placements (Pty) Limited as well as its directors could be severely prejudiced and, in the circumstances, requests that the application be dismissed.

9. The applicant then filed a replying affidavit. Given that the founding papers were really nothing more than pro forma documents and having read the answering affidavit filed by AMT Placements (Pty) Limited, the applicant seeks to cast further light on the situation. This court was called upon to consider the attitude which it ought to take regard to evidence tendered in reply in similar circumstances in *Jeremiah v National Sorghum Breweries* (1999) 20 ILJ 1055 (LC), in particular at 1058I to 1059B, where it was held as follows:

“While it is normally so that an applicant must make out its case in the founding papers, and may deal with new issues only if the respondent raised them in answer, the facts of this case are somewhat peculiar. It is customary for applicants to approach this court using the pro forma affidavit issued by the CCMA. While this would not excuse an applicant from making essential disclosures, applicants can perhaps generally be forgiven if they assume that the bare allegations in the pro forma affidavit will

suffice, at least until the respondent files its detailed answer. While I am aware that this court must generally treat pleadings as they are treated in other superior courts, I am of the view that in the present circumstances it would not be in accordance with the objectives of the Act to place undue technical hurdles before the applicant. I accordingly deal with the matter on the basis of the factual contentions contained in all the pleadings presently before me, but applying the usual principles to determine which averments I should accept.”

I agree with this approach and propose deciding this matter on the same basis.

10. In the replying affidavit applicant, *inter alia*, confirms that when he was employed by AMT Construction this took place after he responded to an advertisement placed in the newspaper, a copy of which advertisement is attached to the replying affidavit. The advertisement clearly identifies the potential employer as AMT Construction and contains the telefax and telephone contact numbers which have been used by applicant throughout his proceedings against the respondent. He also confirms that he has on numerous occasions telephoned respondent at that telephone number and has never been told that he has the incorrect telephone number. Furthermore, he

has on many occasions attended at the offices at the physical premises cited by him in these proceedings and was at all times under the impression that he was attending at the premises of the respondent. Tavares in his answering affidavit, however, indicates that all of the documentation in regard to this matter has, in fact, been received by AMT Placements (Pty) Limited. Of course he does not deny that the documents have or may have also been received by an entity known as AMT Construction, being the respondent. Indeed, as he states that he is unaware of the existence of such an entity it seems that he cannot state on behalf of that entity whether it has or has not received such documentation.

11. As a result it is apparent that (at least after the filing of the answering affidavit by AMT Placements (Pty) Limited) the impression has been created in the mind of the applicant that AMT Construction, the respondent, and AMT Placements (Pty) Limited are at the very least connected or, as he puts it, are “one and the same” in that AMT Placements (Pty) Limited is trading as AMT Construction from the cited premises. In his replying affidavit he sought to suggest therefore that an order be made against AMT Placements (Pty) Ltd and its directors.

12. Mr Kujawa, who appeared on behalf of the applicant in

the proceedings before me, conceded that, on the papers as they stand, the applicant is not entitled to an order against any entity other than the respondent as cited, being AMT Construction, despite the averments made to the contrary by the applicant in his replying affidavit and whether the respondent and AMT Placements (Pty) Ltd are in fact one and the same entity or not. The respondent and AMT Placements (Pty) Limited may or may not be one and the same entity but I am not required to make a finding on that issue in dealing with the application before me nor, in my view, does this dispute affect my ability to make the order sought in these proceedings.

13. Mr Kujawa submitted, and I accept, that there was no fatal defect in regard to the citation of respondent as it is permitted in terms of rule 20 of the Rules of this Court to cite a partnership, firm or association without alleging the names of the partners or owners. Indeed, rule 20(3)(a) provides that *“at any time after a partnership or firm becomes a party to any proceedings, the party acting against it may notify the partnership or firm to provide it with the names and addresses of the partners or owners, within 7 days of service of the notice.”* Rule 20(4) provides that if a partnership has been dissolved then the proceedings continue against the persons who were partners at the time of service of the document initiating the proceedings

against the partnership. Rule 20(5)(a) makes a provision similar to that contained in rule 20(3)(a) in respect of proceedings against an association.

14. At common law unless each individual member of an association, firm or partnership was cited and joined in proceedings, a summons would be bad for misjoinder. Rule 20, however, enables the association, firm or partnership to be cited in its own name or *“the name which the body normally bears and which is descriptive of it”*. The fact that an association, firm or partnership may be cited as such in terms of the rule does not mean that the substantive law relating to the liability of members, proprietors or partners has been affected. (See *Landman & Van Niekerk : Practice in the Labour Courts*, 1998 edition, the annotation which appears at pD-59 thereof). The same authors in the annotation in regard to sub-rule (3) at page D-60 consider the question of whether a notice can be issued to a partnership or firm in terms of the Labour Court rules after a judgment by the court, and conclude that there is nothing either in the wording of the rule or in its context that limits the issue of such a notice to pending proceedings. They comment further that presumably a party who disputes the status of partner or owner which is sought to be conferred by the notice would have to bring an application in terms of rule 11 to set it aside.

Alternatively, if it appears in due course that there is in fact no such association, firm or partnership as AMT Construction then application could be made in due course on notice to have the citation amended or the correct party substituted as respondent in terms of the provisions of Rule 22.

15. On the facts of the matter before me and on the basis that the applicant seeks an order against the respondent as cited, being AMT Construction, it would appear that the applicant has made out a case for the granting of an order in terms of section 158(1)(c). This court has a discretion in deciding whether or not to grant such an order but has previously tended to exercise that discretion in favour of granting an order in the absence of good reason not to do so.

"The court has a discretionary power when considering an application in terms of section 158(1)(c). One of the purposes of the Act is the effective resolution of labour disputes. An important facet of this object is finality. It seems that it might be contrary to the purposes of the Act if this court was simply to refuse to make an award an order of the court and not refer it back to the CCMA for any reason." (Ntshangane v Speciality Metals CC (1998) 19 ILJ 584 (LC) at 588I-J)

And:

"The power to make an award an order of court is a discretionary power. This power is exercised judicially. Generally this court will be in favour of lending enforceability to an award. Inherent in the power to make an award an order of court is the power not to make an award an order of court either for a limited or unlimited period. A court will however generally be disinclined to let an award hang in the air." (Deutsch v Pinto & another (1997) 18 ILJ 1008 (LC) at 1016E-F)

16. Nothing which has been stated by Tavares on behalf of AMT Placements (Pty) Limited in the affidavit in which AMT Placements (Pty) Limited seeks to intervene in these proceedings persuades me that I should exercise my discretion against making the award an order of court as against the respondent. An order against AMT Construction cannot in law be executed against the corporate entity of AMT Placements (Pty) Limited unless and until a proper application for substitution of AMT Placements (Pty) Limited as the respondent in these proceedings were brought and granted. This has not been done. If such an application were to be brought AMT Placements (Pty) Limited would have the opportunity of opposing such an application.

17. AMT Placements (Pty) Limited sought leave to intervene in these proceedings when, on its version, it had in fact and in law nothing to do with the proceedings. It sought to justify its intervention on the basis that it has an interest in seeking to avoid an erroneous attempt to execute an order against it in the event of such order being granted against respondent, AMT Construction. Were such an erroneous attempt to be made in due course AMT Placements (Pty) Limited would then be able to exercise its rights in law. The conduct of AMT Placements (Pty) Limited in intervening in these proceedings has resulted in an opposed application and the appointment by the applicant of an attorney to assist him. Until such time as AMT Placements (Pty) Limited filed an answering affidavit it is apparent that the applicant was representing himself. In my view having sought leave to intervene, and having in fact intervened, in the proceedings AMT Placements (Pty) Limited lays itself open to the possibility of a costs order being granted against it.

18. In the circumstances I am satisfied that I ought to grant the application in terms of section 158(1)(c) and that AMT Placements (Pty) Limited should be ordered to pay applicant's costs occasioned as a result of the intervention by AMT

Placements (Pty) Limited in the proceedings.

19. Accordingly I make the following order:

19.1 The arbitration award of 3 May 1999 under case number GA42154 in terms of which the respondent was ordered to pay to the applicant compensation in the sum of R96 000.00 within 14 days of the date of the award, is hereby made an order of this court.

19.2 The intervening party, AMT Placements (Pty) Limited, is ordered to pay the costs of the applicant occasioned by its intervention in the proceedings.

S STELZNER

Acting Judge of the Labour Court of South Africa

DATE OF HEARING: 12 August 1999

DATE OF JUDGMENT: 19 August 1999

APPEARANCE FOR Mr R Kujawa
APPLICANT:

INSTRUCTED BY: Rossouws

APPEARANCE FOR AMT
PLACEMENTS (PTY) LIMITED:

Mr B Leech

INSTRUCTED BY: