IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT DURBAN

D 501/09

Reportable

In the matter between

SAMWU **FIRST APPLICANT**

J. MADONSELA **SECOND APPLICANT**

And

UMLALAZI MUNICIPALITY **RESPONDENT**

JUDGMENT

Conradie AJ

Introduction

1. This is an application in terms of Section 158(1)(c) of the Labour Relations Act 66 of 1995 in which the Applicants seeks to make an award issued by the South African Local Government Bargaining Council (SALGBC) an order of Court.

2. This matter was set down on the basis that it was unopposed. However, on the day that the matter was to be heard, a Mr Monk appeared on behalf of the Respondent. I deal with this more fully later.

Background

3. The Respondent charged the Second Applicant with failing to conduct himself with honesty and integrity. After a disciplinary hearing was held the Second Applicant was dismissed in August 2007. The Applicants thereafter referred an unfair dismissal dispute to the SALGBC. The panelist

appointed by the SALGBC found that the dismissal was unfair and ordered the Respondent to reinstate the Second Applicant retrospectively and to pay "arrear wages" of R94 877,20.

4. After the Respondent received the award it instituted review proceedings in this court under case number D771/2008. The review application is opposed by the Applicants.

5. On 31 October 2008 the Respondent obtained, on an urgent basis, a rule *nisi* staying the enforcement of the award pending the determination of the review. The return date was scheduled for 5 December 2008. This was subsequently extended to 23 March 2009 and thereafter again extended to 15 June 2009. On the latter date none of the parties were present in court and the rule *nisi* was discharged.

6. According to the Applicants they agreed to the extension of the rule *nisi* in order to allow the Respondent time to compile the record in the review application. The Applicants further claim that at all material times they constantly reminded the Respondent's attorneys to furnish them with a copy of the record, without success.

Only Version Before This Court

7. The only version which I have before me is that of the Applicants. As previously stated Mr Monk put in an appearance on the day that this matter was heard. He raised several issues which in effect amounted to him giving evidence from the bar. Clearly I cannot accept this "evidence" presented by Mr Monk suffice it to say that he could not offer any explanation as to why the Respondent had not seen it fit to oppose this application when it had an opportunity to do so. Had the Respondent done this then I would have been in a position to properly evaluate whether there were good reasons why the record in the review had not been compiled after such a long period of time.

8. Mr Monk also tried to scupper this application by arguing that the matter before me was defective because the founding affidavit was deposed to by the Provincial Secretary of the First Applicant and not by the Second Applicant. He argued that this amounted to hearsay evidence being placed before me. I do not agree with Mr Monk that the Second Applicant had to depose to the affidavit. One of the very functions of a trade union is to bring disputes on behalf of its members. Further this is not the type of matter which turns on facts which can only be deposed to by the person directly affected by the facts. In my view it was perfectly in order for the First Respondent's Provincial

Secretary to state the obvious objective facts which relate to this matter. These include the fact that the employee was dismissed for misconduct, successfully challenged the dismissal in the SALGBC, agreed to stay the award pending the review and that to date no review record has been filed.

Undue Delay

9. I am of the view that in a case such as this where an employee's right to relief in terms of an arbitration award is put on hold pending the outcome of a review application, then everything that is required to finalise the review application must be done without any undue delay. If this is not possible then the least that can be expected is that a proper explanation is given to this court for the delay. In this case there is simply no explanation before this court as to why to date only a founding affidavit has been filed.

10. The arbitration award is dated 6 October 2008. The stay was obtained on 31 October 2008. The review application must have been launched somewhere in between these two dates or it may have been launched after 31 October 2008. This is not clear from the papers before me but what is clear is that either way more than a year has passed since the review application was launched. This is an unacceptable delay and I can see no reason why the Second Applicant should bear the brunt of this unexplained delay.

11. It is also significant that on 15 June 2009, the last of several return days, that the Respondent did not appear in court to ask for a further extension. I would have expected this to be the case where a party is genuinely struggling to compile a record for the review. What this also means is that since 15 June 2009 the Respondent has not been clothed with protection against an enforcement order in the normal course and notwithstanding this made no attempts that this court is aware of to sort out the formalities relating to its review application.

12. The Second Applicant cannot be expected to endure this unexplained delay. To allow such unexplained conduct to persist is grossly unfair in respect of an employee in the position of the Second Applicant and could amount to the abuse of review proceedings by employers who are not willing to accept the outcome of an arbitration. The fact that the Respondent may ultimately be successful in the review and find itself in a difficult position, insofar as it has already made payments

to the Second Applicant, is something which the Respondent should have taken into account when it failed to explain to this court why its review application is no further than it was a year ago.

Costs

13. As far as costs are concerned, although the Respondent did not formally oppose this application, it nonetheless arrived at court on the day that this matter was heard and sought to argue against the granting of the relief. In any event had the Respondent diligently pursued its review application there would be no need for the applicants to launch this application.

14. In the circumstances I make the following order:

    1. The award under case number KPD 100703, dated 6 October 2008, is made an order of court.

    2. The Respondent is to pay the Applicants' costs in this matter.

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Conradie AJ

Date of Hearing: 30 November 2009

Date of Judgment: 3 December 2009

Appearances:

For the Applicant: Shanta Reddy – Shanta Reddy Attorneys

For the Respondent : Roy Monk – Livingstone Leandy Inc