THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable/Not Reportable

Case No: JR 2738/13

In the matter between:

TRANSPORT AND ALLIED WORKERS' UNION OF SOUTH AFRICA OBO SYDWELL EDMUND MAPHOSA **Applicant**

And

SOUTH AFRICAN ROAD PASSENGER BARGAINING COUNCIL **First Respondent**

KHUTSO MPAI N.O. **Second Respondent**

GREAT NORTH TRANSPORT (PTY) LTD **Third Respondent**

Heard: **04 SEPTEMBER 2017**

Delivered: **21 November 2017**

JUDGMENT

THOMPSON, AJ

Introduction.

[1] This is an application to review and set aside the arbitration award under case number RPNT1391 issued on the 25th of April 2013 under the auspices of the South African Road Passenger Bargaining Council.

[2] The Applicant has also logged an application for condonation of the late filing of the review application. The Third Respondent is also seeking condonation for the late filing of its answering Affidavit.

[3] The Applicant seeks condonation for launching the review application six months beyond the six week period provided for by section 145 of the Labour Relations Act. The Third Respondent's Counsel submits that the Applicant in prayer 3 of the notice of motion seeks condonation for the late filing of the application. Ms. Gaffoor submits that the Applicant has failed to set out the basis for a condonation application in its founding affidavit and it stands to be struck out. The Applicant sought to bring the condonation affidavit in its replying affidavit. Of importance is that the Applicant was represented by Attorneys at the time of lodging the application on 19 December 2013.

[4] Of further significance is that the Third Respondent, in answer raises the Applicant's failure to set out grounds for condonation in its founding affidavit. The Applicant addresses this by stating that he admits the contents of the Third Respondent's paragraphs referred to above. The Applicant does not set out any explanation for the failure to deal with the grounds for condonation in its founding affidavit. It is trite that an applicant must set out its case in the founding affidavit as is necessary to make out a *prima facie* case. See in this regard *Juta & Co Ltd v De Koker*[1] where the court held as follows:

> 'In the light of the aforegoing I was of the view that sufficient allegations were contained in the founding affidavits to establish *prima facie* that

[1] 1994 (3) SA 499 T at 508 B-D

passages in the affected work constituted an infringement of copyright in respect of the copyright work. I emphasize that it was but necessary for the applicants to make out a *prima facie* case in this respect. Clearly, once regard was to be had to the evidence following upon the founding affidavits, that *prima facie* case might be destroyed or the applicants might at the end of the day have been in the position that they had failed to show on a balance of probabilities that there was any such infringement.'

[5] The Applicant must therefore stand or fall by his founding affidavit. (See also in this regard *Director of Hospitals v Ministry*[2]*).* An Applicant will generally therefore not be allowed to introduce a new matter in reply. The Applicant will especially not be allowed to introduce a new cause of action in the replying affidavit that supplants the cause of action contained in the founding affidavit. This rule is, however, not inflexible. The court may allow an applicant to set up an additional ground for relief arising from the Respondent's answering affidavit.

[6] In Shakot Investments (Pty) Ltd v Town Council of the Borough of Stanger 1976 (2) SA 701 D the principles are set out. The headnote to that case sets out accurately the principle enunciated by Miller J and is in the following terms:

> "In consideration of the question whether to permit or to strike out additional facts or grounds for relief raised in the replying affidavit, a distinction must, necessarily, be drawn between a case in which the new material is first brought to light by the Applicant who knew of it at the time when his founding affidavit was prepared and a case on which facts alleged in the Respondent's answering affidavit reveal the existence of possible existence of a further ground for relief sought by the Applicant. In the latter type of case the Court would obviously more readily allow an Applicant in his replying affidavit to utilise and enlarge upon what has been revealed by the Respondent

[2] 2005 (1) SA 475 (C)

and to set up such additional ground for relief as might rise there from."

[7] To the extent that the replying affidavits did contain new matter the Court has a discretion to allow such material to remain in the replying affidavit, giving the Respondent an opportunity to reply thereto should special or exceptional circumstances exist - Shephard v Tuckers Land and Development Corporation F (Pty) Ltd (1) SA 173 (T) at 177G-178A.'

[8] The Court in Fick v Walter[3] and Another set out the circumstances in which the court will allow an applicant to include new material in the replying affidavit:

[9] I refer to the case of Nedbank Ltd v Hoare 1988 (4) SA 541 (E) at 543 E, where Mullins J said:

> 'I do not read this Rule as implying that a deponent to an affidavit can in no way depart from the terms thereof. If this were so, a party could not, in a supplementary affidavit, vary or explain the terms of a founding affidavit. This is a matter of frequent occurrence, more particularly where it is not sought to withdraw or vary factual allegations, but only to amplify or amend legal conclusions or submissions, which are frequently incorporated in an affidavit, in order to clarify a cause of action.'

[10] In Pat Hinde & Sons Motors (Brakpan) (Pty) Ltd v Carrim and Others[4] the Court pointed out that, although the principle is that the Court will not allow an Applicant to supplement an application in the replying affidavit in order to cure a defect in the founding affidavit, it has a discretion to either strike out the new matter or allow the respondent to file a second set of answering affidavits to deal with the new matter.

[3] 2005 (1) SA 475 (c)
[4] 1976 (4) SA 88 (T) at 63 A-64 A

[11] That there is this principle supporting the argument emerges from *Schreuder v Viljoen, 1965 (2) SA 88 (O*). In this case it was held that:

> "A Court should not permit an Applicant in motion proceedings, where it is not certain on the application as a whole that the Respondent has no defence, to supplement his application in his replying affidavit in order to cure the defect where the application does not disclose a cause of action and the Respondent has taken an objection in limine against it."

[12] *In Kleynhans v Van der Westhuizen, N.O., 1970 (1) SA 565 (O).* On p. 568 De Villiers, J., goes on to state the following:

> "Normally the Court will not allow an applicant to insert facts in a replying affidavit which should have been in the petition or notice of motion (cf. *Mauerberger v Mauerberger,* 1948 (3) SA 731 (C); *De Villiers v De Villiers*, 1943 T.P.D. 60; *John Roderick's Motors Ltd. v Viljoen*, 1958 (3) SA 575 (O); *Berg v Gossyn* (1), 1965 (3) SA 702 (O); *Van Aswegen v Pienaar*, 1967 (1) SA 571 (O)), but may do so in the exercise of its discretion in special circumstances (cf. *Bayat and Others v Hansa and Another, 1955 (3) SA 547 (N); Schreuder v Viljoen*, 1965 (2) SA 88 (O). Once such a discretion has been exercised in favour of an applicant a Court of appeal will only interfere if it comes to the conclusion that the Court a quo has not exercised its discretion judicially,'

[13] In exercising my discretion, I shall firstly take into account the Third Respondent's response. When I inquired from the Third Respondent why it did not file an affidavit in response to the replying Affidavit it was left unanswered. I shall also consider the explanation for lateness and prospects of success in the review application. I also consider the fact that the facts (the need for a condonation application) were known to the Applicant at the time of deposing to the founding affidavit. The Applicant lays the blame for lateness at the doorstep of the Trade Union and the attorney it appointed. Apparently, a fee dispute arose between those parties which had the result of the

application not been launched timeously. The Applicant seeks to lay the blame with his representative who ought to have known that the dispute with their attorney may cause prejudice to the Applicant. There are limits to which a litigant is able rely on the negligence of his representative,[5] The Trade Union ought to have understood the time limits and acted sooner. The explanation is unconvincing.

[14] The Applicant's prospects of success in the review are fundamentally linked and shall be considered in exercising my discretion. The Applicants' case rests on the crisp point that the arbitrator held that the employment relationship had irretrievably broken down and it is averred that no such evidence had been led. The arbitrator deals with this in his award[6]. The arbitrator considers the argument raised by the employer that the employment relationship had irretrievably broken down. The employee was working with the supply of diesel and that diesel disappeared during the Applicants tenor. Although the theft of diesel could not be linked to the employee, the employer found it difficult to trust the employee and therefor renders the employment relationship intolerable. The arbitrator drew the conclusion that compensation should be the appropriate remedy.

[15] I do not necessarily agree with the conclusion of the Arbitrator but this is not the test I am required to consider. I am not convinced that the Arbitrator's decision was obviously wrong or such that no reasonable decision maker would reach such a conclusion after considering the evidence. It is trite that substantive unfairness does not as an absolute rule give rise to automatic reinstatement. It may be the primary remedy but practical considerations are to be applied by the Arbitrator. The Arbitrator had the opportunity to gage the parties conduct during the procedure and I have not been persuaded and therefore I cannot interfere with the conclusion reached by the Arbitrator.

[16] I have considered the merits of the review application and find that it cannot succeed and as a consequence the condonation application is dismissed.

---

[5] See Hardrodt (SA) (pty) ltd v Behardien and others (2002) 23 ILJ 1229 (LAC) at para 21
[6] see paragraph 33 of page 24 of the indexed pleadings.

Order

1. The condonation application is dismissed.

2. The review application is dismissed.

3. There is no order to costs

_____

THOMPSON AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant:	Advocate M.L. Khomola
Instructed by:	Lennon Moleele Attorneys
For the Respondent:	Advocate N. Gaffoor
Instructed by:	A.M. Carrim Attorneys

2

12

12