IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA 83/2016

In the matter between:

BLOEM WATER BOARD	**Appellant**
and	
ABRAHAM NTHAKO NO	**First respondent**
SHEIKS HASH	**Second respondent**
SOUTH AFRICAN MUNICIPAL WORKERS UNION	**Third respondent**
SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL	**Fourth respondent**

Heard: **18 May 2017**

Delivered: **28 June 2017**

Summary: The arbitrator arrived late for the hearing. The employer who had been in attendance had already left. The arbitrator concluded that the employer was obliged to attend for the whole day and that the employer had abandoned the arbitration and proceeded to hear evidence and issued an award. The employer did not seek to rescind the award in terms of section 144 of the LRA but instead

launched an application to review the alleged misconduct of the arbitrator. Held on appeal that the although internal remedies should be exhausted and piecemeal reviews are to be avoided, the Labour Court may intervene *in medias res* where the interests of justice require it although this power is to be used sparingly and only in exceptional circumstances. As the interest of justice required it and exceptional circumstances were present the appeal was upheld.

Coram: Tlaletsi AJP, Landman JA, and Phatshoane AJA

Neutral citation: **Bloem Water Board v Hash** (LAC JA 83/2016)

First Draft JUDGMENT

LANDMAN JA

[1] Bloem Water Board, the appellant, appeals against a judgment of the Labour Court (Phala AJ) dated 23 January 2012 that dismissed an application to condone the late delivery of an application to review and set aside an award and remit the dispute for fresh arbitration. The award was issued by Mr A Nthako NO, an arbitrator (the "arbitrator"), acting under the auspices of the South African Local Government Bargaining (the Council), the first and fourth respondents respectively, in a dispute concerning the alleged unfair dismissal of Mr Sheiks Hash, the second respondent, assisted by the union the South African Municipal Workers Union, the third respondent. The appeal is with leave of the court *a quo*.

The background

[2] The appellant dismissed the second respondent. After an unsuccessful internal appeal, the second respondent referred a dispute to the Council.

[3] On 14 December 2011, the appellant's CEO complained in writing to the Council that the arbitrator always arrived late for arbitrations or not at all, that he allowed the third respondent to represent the second respondent even though he was not an official of the union, he does not apply his mind, he does not act fairly and he should not arbitrate appellant's matters.

The arbitration

[4] The Council scheduled an arbitration for hearing at 10:00 on 16 January 2012. The appellant's representatives, the second respondent and a union representative were in attendance. The arbitrator was not there at the appointed time. He had caused a previous arbitration to be postponed because of his unpunctuality. After 45 minutes, the arbitrator had still not arrived nor had he communicated with the parties. The appellant's representatives then left the venue.

[5] On 16 January 2012, the appellant's CEO directed a complaint to the fourth respondent that its representatives had waited longer than 30 minutes for the arbitrator and there was no word from the Council whether a commissioner would be in attendance. The CEO also cautioned that the arbitration should not proceed it its absence.

[6] The second respondent and his representative did not leave. They waited until the arbitrator arrived at some unspecified time. The arbitrator's report reflected the time that the arbitration commenced as 10:00. This is incorrect.

[7] The arbitrator inquired, on record, whether the appellant's representative had been in attendance at the venue. On receiving a positive answer, he took the view that they had left prematurely as the arbitration had been set down for the whole day. He heard evidence and issued an award dated 23 January 2012. There is no evidence of when and how the award was communicated to the appellant. The appellant does not say when it was received but the employee relations officer, the deponent to the founding affidavit, says:

> 'The fourth respondent did not forward a copy of the award to the appellant. I only became aware of the award in and during February 2012, through our regional office via the internal electronic mail system. All the documents received by the office go through a process before they reach me as a result I only receive documents a few days after the office has acknowledged receipt thereof.'

[8] As far as the merits of the dismissal are concerned, the appellant sets this out with a minimum of detail. The findings of the appeal chairperson form part of the record and provide fuller details.

[9] In his award, the arbitrator:

(a) records that the appellant's representative had been present and left 30 minutes after the scheduled starting time;

(b) makes no mention of why he arrived late;

(c) finds that the appellant abandoned the arbitration process;

(d) sets out the third respondent's evidence;

(e) points out that there is no evidence for the appellant because it abandoned the arbitration process;

(f) finds that the dismissal of the second respondent was procedurally and substantively unfair; and

(g) ordered the appellant to reinstate the second respondent.

Evaluation

[10] The first order of business is the second respondent's point that the appellant is precluded from utilising the review process because the appellant could have sought the rescission of the award from the Council in terms of section 144 of the Labour Relations Act 66 of 1995 (the LRA). Section 144 reads:

> 'Any commissioner who has issued an arbitration award or ruling or any other commissioner appointed by the director for that purpose, may on that commissioner's own accord or, on the application of any affected party, vary or rescind an arbitration award or ruling –
>
> (a) erroneously sought or erroneously made in the absence of any party affected by that award;
>
> (b)…
>
> (c) granted as a result of a mistake common to the parties to the proceedings.'

[11] At the outset, it must be stated that the law does not encourage litigation. Parties who have another appropriate remedy should use those remedies. Mr Boda SC, with him Ms Majiet who appeared for the appellant, properly drew our attention to *Qibe v Joy Global Africa (Pty) Ltd: In re Joy Global Africa (Pty) Ltd v Commission for Conciliation and Arbitration and Others (Qibe)*[1] where this Court held:

> 'The contention thus advanced is that once an arbitration award is made (whether by default or opposed) the provisions of s 147(2)(a) or 3(a) are no longer applicable. This contention, in my view, is misconceived for two basic reasons: Firstly a default arbitration award made by an arbitrator in the absence of one of the parties is not final in effect, as it may be rescinded or revisited by the arbitrator who made the award. Therefore, although a default arbitration award will have full effect until set aside, it is not final for purposes of a review, as contemplated in the LRA, because the proceedings are not complete and the award may be revisited or rescinded by the arbitrator who made the default award. It follows that only the decision of the arbitrator dismissing the rescission application may be reviewed − and not the default arbitration award itself – as it is not a final decision.'[2] [Footnote omitted]

[12] The facts raised in this appeal are entirely different from those raised in the *Qibe* case. There are obvious disadvantages in attempting to review a default award

[1] (2015) 36 ILJ 128 (LAC).
[2] At para 10.

where the one party's version has not been adduced as outlined in *Magic Company v Commission for Conciliation Mediation and Arbitration and Others.*[3] But in so far as the *Qibe* judgment may be taken to state that the Labour Court is not entitled to review an award issued by the Commission for Conciliation Mediation and Arbitration (CCMA) or the bargaining council that is made in the absence of a party at all, I would respectfully disagree. The conventional approach of a court of review to decisions of a court or administrative body, whether under the Promotion of Administrative Justice Act 3 of 2000 or otherwise, is that internal remedies should be exhausted and piecemeal reviews are to be avoided. But a court may intervene *in medias res* where the interests of justice require it (ie where injustices would otherwise occur), although it is to be used sparingly and only in exceptional circumstances. In *Wahlhaus v Additional Magistrate, Johannesburg (Wahlhaus)*[4] the Court expressed the principle this way:

> 'While a superior court having jurisdiction in review or appeal will be slow to exercise any power, whether by mandamus or otherwise upon unterminated course of proceedings in a court below, it certainly has the power to do so, and will do so in rare cases where grave injustice might otherwise result or where justice might not by other means be attained….. In general, however, it will hesitate to intervene, especially having regard to the effect of such procedure upon the continuity of the proceedings in the court below, and to the fact that redress by means of review or appeal will ordinarily be available.'[5]

[13] Mr Grobler submitted with reference to *Sidumo and Another v Rustenburg Platinum Mine Ltd and Others*[6] that the award is an administrative act that the appellant wishes to impugn and that section 144 must be interpreted as an internal mechanism which an aggrieved party can employ to overturn the award. Mr Grobler submits, correctly, that a court of review will not readily intervene in

[3] (C682/03) [2005] ZALC 37 (19 January 2005).
[4] 1959 (3) SA 113 (A).
[5] At 120A.
[6] 2008 (2) SA 24 (CC) at para 112.

incomplete proceedings. He contends therefore that the review was brought prematurely.

[14] Section 144 of the LRA provides, *prima facie*, a remedy, and in the ordinary course the Labour Court would encourage an aggrieved party to exhaust other remedies even though it has the obligation, jurisdiction and power to oversee the dispute resolution bodies created in terms of the LRA. But section 144 does not, in my view, exclude the Labour Court review powers. Subject to the consideration in the *Wahlhaus* judgment, the Labour Court may review a decision *in medias res*.

[15] Even where the jurisdiction of a court is excluded or deferred, a court would be slow to find this to be case.[7] Moreover, section 144 is limited in its scope and does not allow for the correction of every mistake or irregularity.[8] It may be especially difficult to show "absence" and meet the requirements of section 144 where the appellant's representative attended but left the venue before the arbitration commenced.[9] What is more the arbitrator found that the appellant had abandoned the arbitration.

[16] Mr Grobler also submitted that whatever the arbitrator did or said before the arbitration commenced was not misconduct in the course of arbitration. But this does not take adequate account that the purpose of review is to consider material irregularities whether they appear on the record or not and at any time before, or during arbitration proceedings and also, if they surface only after arbitration proceedings are terminated.

[17] For the reasons expressed above and those relating to the conduct of the arbitrator dealt with below, I am satisfied that it is in the interests of justice and

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[7] See *Welkom Village Management Board v Leteno* 1958 (1) SA 490(A) and *Ntenzani v Magistrate, Sterkspruit* [1996] 2 All SA 148 (Tk) at 158e-i.
[8] CF the remarks of Jones AJA in *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills Cape* [2003] 2 All SA 113 (SCA) at para 6 with regard to Rule 42 of the Uniform Rules of the High Court.
[9] Cf *De Wet and Others v Western Bank Ltd* 1979 (2) SA 1031 (A).

that there are exceptional circumstances present which made it permissible for the Labour Court to entertain the appellant's review.

Condonation in the court *a quo*

[18] The second issue is whether the court *a quo* ought to have condoned the late filing of the application to review the award. In making its decision, the court *a quo* was exercising a true discretion. This Court's powers to interfere with the exercise of such a discretion are limited. This Court may only interfere with the discretion, as it was said in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*,[10] if the court *a quo*:

> '… had not exercised its discretion judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles.'[11]

[19] The test whether to grant or refuse an application for condonation is well known. It was expressed by this Court in *Grootboom v National Prosecuting Authority and Another*,[12] this way:

> 'In this Court the test for determining whether condonation should be granted or refused is the interests of justice. If it is in the interests of justice that condonation be granted, it will be granted. If it is not in the interests of justice to do so, it will not be granted. . .
>
> The interests of justice must be determined with reference to all relevant factors. However, some of the factors may justifiably be left out of consideration in certain circumstances. For example, where the delay is unacceptably excessive and there is no explanation for the delay, there may be no need to consider the prospects of success. If the period of delay is short and there is an unsatisfactory explanation but there are reasonable prospects of success, condonation should be granted. However, despite the presence of reasonable prospects of success,

[10] 2000 (2) SA 1 (CC).
[11] At para
[12] (2013) 34 ILJ 282 (LAC).

> condonation may be refused where the delay is excessive, the explanation is non-existent and granting condonation would prejudice the other party. As a general proposition the various factors are not individually decisive but should all be taken into account to arrive at a conclusion as to what is in the interests of justice.'[13]

[20] The attitude of the second respondent to the delay is not decisive but the fact that it did not object is relevant.

[21] The court *a quo* examined the appellant's explanation for the delay and observed:

> '[20] Although the Applicant chose to bring an application for condonation, the submissions are vague. It is clear in our law that condonation application must be made as soon as the Applicant becomes aware of the need for it. It follows that in a condonation application, the Applicant is required to indicate the time when he or she became aware of the need to make an application for condonation. In case of the late filing of the condonation application, the Applicant is required to explain such delay.
>
> [21] The Applicant made a convoluted submission instead of stating with certainty the date on which it became aware of the arbitration award.'

[22] I agree that the explanation is not as thorough as it should have been. However, there is no reason to doubt that the responsible employee became aware of the award in February 2012. Even if we assume that he became aware of the award on 1 February the application is slightly late and the condonation application was filed within a day of the responsible employee consulting the appellant's legal representatives. Because the delay was slight the court *a quo* was obliged to consider the prospects of success. Mr Grobler, who appeared for the second and third respondents, conceded this. The court *a quo* did not do so and therefore this court is at large to decide this aspect. And it is to this I turn.

[13] At paras 50-51.

Prospects of success

[23] In this case, the appellant must show that the arbitrator exercised his discretion irregularly and should not have proceeded with the matter in its absence and that it has a *prima facie* defence to the employee's case. As to the former, the record of the appellant's internal disciplinary proceedings that was followed by an internal appeal demonstrate that the appellant has a defence to the employee's claim that he was unfairly dismissed.

[24] The arbitrator was confronted with the fact that the appellant's representative had arrived for the arbitration and had waited for the arbitrator without any information as to whether the arbitrator would be arriving late or not at all. This situation required the arbitrator to exercise a discretion to stand the matter down and attempt to secure the return of those absent or to postpone the arbitration or to proceed with the arbitration. In considering the issue, the arbitrator should have been mindful that his failure to attend at the appointed hour (regardless of the reason for this) was the proximate cause of the appellant's representative leaving when they did.

[25] Instead, the arbitrator put the blame on the appellant. He investigated whether the appellant had abandoned the arbitration ie waived its rights and found that it had done so. The fact that the appellant attended the arbitration and waited for the arbitrator even though he had not arrived timeously and also had previously arrived late for an arbitration, does not signify that the appellant abandoned the arbitration. In *Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews and Another,*[14] the Court remarked that:

> 'Waiver is first and foremost a matter of intention; the test to determine intention to waive is objective, the alleged intention being judged by its outward manifestations adjudicated from the perspective of the other party, as a reasonable person. Our Courts take cognisance of the fact that persons do not as a rule lightly abandon their rights. Waiver is not presumed; it must be alleged

[14] 2009 (4) SA 529 (CC).

> and proved; not only must the acts allegedly constituting the waiver be shown to have occurred, but it must also appear clearly and unequivocally from those facts or otherwise that there was an intention to waive. The onus is strictly on the party asserting waiver; it must be shown that the other party with full knowledge of the right decided to abandon it, whether expressly or by conduct plainly inconsistent with the intention to enforce it. Waiver is a question of fact and it is difficult to establish.'[15]

[26] I am satisfied that there was no ground for the finding by the arbitrator that the appellant had abandoned its right to participate in the arbitration.

[27] There is nothing to show that the arbitrator even considered contacting the appellant that day. There is no merit in the submission that the parties were required to wait the whole day for the arbitrator to arrive. It does seem that the arbitrator took into account that the second and third respondents were anxious to proceed with the arbitration in the absence of the appellant and to avoid a postponement. They must have known that any award that they secured would be challenged. This puts paid to their submission that they are innocent bystanders.

[28] I am of the view that the arbitrator did not exercise his discretion judicially and that he committed misconduct in the exercise of his powers. This would have justified the intervention of the Labour Court in the proceedings. There is no cause to investigate any other aspect. The result is that the appellant had good prospects of success so that the appellant's application for condonation should have been granted. It follows that the appeal should be upheld. The matter must be remitted to the Council for hearing before another arbitrator.

Costs

[29] The usual approach to costs in labour matters, where the parties are engaged in an ongoing relationship, should be applied. I would not make an order for costs in this Court or in the court *a quo*.

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[15] At para 81.

[30] I make the following order:

1. The appeal is upheld.

2. The order of the Labour Court is set aside and replaced with the following order:

'(1) The late delivery of the application to review the award is condoned.

(2) The award is reviewed and set aside and remitted to the fourth respondent for arbitration de novo before an arbitrator other than the first respondent.

(3) There is no order as to costs.'

3. There is no order as to costs of the appeal.

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A A Landman

Judge of the Labour Appeal Court

Tlaletsi AJP and Phatshoane AJA concur in the judgment of Landman JA

APPEARANCES:

FOR THE APPELLANT: Adv FA Boda SC with him Adv S Majiet,

Instructed by Sunil Narian Attorneys Inc.

FOR SECOND AND THIRD

RESPONDENTS: Adv S Grobler

Instructed by Kramer, Weihmann Joubert Inc.