

SOUTH AFRICA / JUDGMENT

Henred Fraunhauf (Pty) Ltd and Another v Marcus N.O and Others (JA41/14) [2015] ZALAC 53; [2016] 4 BLLR 401 (LAC) (8 December 2015) [2015] ZALAC 53

COURT

Labour Appeal Court

BEFORE

Tlaletsi, Sutherland, Mngqibisa-Thusi

CASE / FILE NUMBER

JA41/14

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IN

THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: JA 41/14

In the matter between:

HENRED
FRAUNHAUF (PTY)
LTD
First
Appellant
HOUSE OF TRUCKS (PTY)
LTD
Second
Appellant
and
MARCUS M H N.O (cited in his
capacity as
Commissioner of the Commission for
Conciliation, Mediation and
Arbitration)
First
Respondent
THE COMMISSION FOR CONCLATION
MEDIATION AND
ARBITRATION
Second Respondent
NATIONAL UNION OF METALWORKERS
OF SOUTH
AFRICA

Third
Respondent
THE METAL AND ENGINEERING
INDUSTRIES
BARGAINING
COUNCIL
Fourth
Respondent
THE MOTOR INDUSTRY BARGAINING
COUNCIL
Fifth
Respondent

Heard: 13 May 2015
Delivered: 08
December 2015
Summary: Filing of record in review
proceedings - incomplete record filed by applicant despite being
warned that matter could not
be determined on an incomplete record -
record showing that applicant relying on evidence not forming part of
the transcribed record
- Impossible to determine merits of dispute in
the circumstances – Appeal dismissed with costs.
Coram: Tlaletsi DJP; Sutherland JA
and Mngqibisa-Thusi AJA

JUDGMENT

TLALETSI DJP

- [1] This is an appeal against the judgment of the Labour Court (Steenkamp J) dismissing an application to review and set aside certain parts of the demarcation award issued by the first respondent, a commissioner acting under the auspices of the second respondent the CCMA.
- [2] The third respondent is a trade union registered in terms of the Labour Relations Act (LRA), [1] acting in its own capacity and on behalf of its members employed by the first and second appellants (the appellants). Appellants are companies incorporated with limited liability in terms of the company legislation of the Republic.
- [3] The fourth respondent is the Metal and Engineering Industries (MEIBC), a bargaining council duly registered and incorporated in terms of the provisions of the LRA. The fifth respondent is the Motor Industry Bargaining Council (MIBCO) also a bargaining council registered in terms of the LRA.
- [4] The first appellant manufactures a variety of road freight trailers that are attached to trucks to transport goods by road. It also

manufactures what is commonly known as tanker trailers. In addition, the first appellant conducts the business of manufacturing of axles for the aforesaid trailers. The second appellant conducts the business as the manufacturer of tanker trailers.

[5] The appeal is brought jointly by the appellants, and is opposed by the third and fourth respondents hereinafter collectively, the respondents.

[6] In terms of the dispute referred to the CCMA by the parties, the Commissioner was required to determine whether and to what extent the business enterprise activities engaged by the first and second appellant in the manufacturing of the tankers and trailers and the business enterprise and activities engaged by the first appellant in the manufacturing of axles fall within the scope of registration or either MEIBC and/or MIBCO.

[7] Having considered the documentary as well as oral evidence presented by the parties and having considered the relevant certificates of the two Bargaining Councils, the Commissioner made an award on the following terms:

‘Demarcation Award

1. The axle factory

The axle factory conducted by the first respondent at its Wadeville premises is declared to fall within the scope and jurisdiction of the Metal and Engineering Industries regulated by the second respondent. First respondent is hereby ordered to register the axle factory at Wadeville and its employees therein employed with the second respondent.

2. Second applicant’s and first respondent’s trailer and tanker building and maintenance activities at Bellville and Wadeville

2.1. Any of the parties to this dispute shall be entitled to amplify their evidence or submit further evidence to this arbitration with a view to establishing whether either or both of second applicant and/or first respondent’s trailer building and maintenance

undertakings at Bellville and Wadeville are predominantly engaged in the building of “trailers (which include tankers) designed to transport loads of 27273 kg over” or whether either or both of these undertakings are primarily or predominantly engaged in the building of “trailers (which include tankers) designed to transport loads of less than 27273 kg”. Should the former position be established in respect of either of these undertakings, that undertaking will be deemed to resort under the jurisdiction of the second respondent. Should the latter be established to be the position in respect of either undertaking, that undertaking will be deemed to resort under the third respondent’s jurisdiction.

2.2. Notwithstanding my ruling in paragraph 2.1 above, first respondent shall not be entitled to submit further evidence as contemplated in 2.1 to establish that its trailer building and maintenance undertaking at Wadeville falls within the weight limitation prescribed in the

definition of the Motor Industry in the absence of an application by or on behalf of first respondent on good cause shown for the withdrawal of its admission in paragraph 10.2 of the pre-arbitration minutes at page 48 of Bundle B having been made and granted by the arbitrator, failing which first respondent will be precluded from submitting further evidence to its arbitration contrary to the terms of the admission.

2.3. Subject to paragraph 2.2 above, any of the parties hereto shall be entitled to request case management at CCMA National Office to enrol this matter for the submission of further evidence as contemplated in paragraphs 2.1 and 2.2. above, provided such request be lodged with CCMA National Office within 30 calendar days of receipt of this Determination or such extended period may be permitted upon written application to the arbitrator.'

- [8] Aggrieved by the aforesaid award, the appellants instituted review proceedings in the Labour Court in which they sought to review and set aside the award. The grounds of review relied upon by the appellants were to challenge the commissioner's interpretation of the certificates of registration of the bargaining councils on the basis that the Commissioner misconstrued the evidence presented to him, committed a gross and reviewable irregularity in not considering all the issues presented to him as evidence, that the determination made is clearly unreasonable, unjustifiable, irrational and irregular, did not determine the factual issues before him and exceeded his powers in terms of the LRA.
- [9] The Labour Court found that the conclusion reached by the Commissioner in his demarcation award is not so unreasonable that no other arbitrator could have come to the same conclusion and is therefore not open to review. The review application was consequently dismissed with no order as to costs.
- [10] Mr Van der Riet SC, appearing on behalf of the respondents, raised an objection to the effect that the record of the proceedings in the Labour Court and in this Court is incomplete as it does not include a transcript of the proceedings in the arbitration. He argued that the appeal cannot be determined on the incomplete record and that the appeal should on this ground alone be dismissed.
- [11] It is indeed correct that the record does not include a transcript of the arbitration proceedings. This problem is not something new. On 20 August 2008, the respondents' attorneys wrote to the appellants' attorneys acknowledging receipt of the appellants' notice in terms of Rule 7A(8) of the Rules of the Labour Court. They also advised that they were not aware of the service of the transcript of the proceedings and requested information about where and when such transcript was served as a matter of urgency. The letter was followed by a letter dated 8 September 2008 requesting among others, the transcript. According to the respondents, the second letter was sent because a reply from the appellants' attorneys to their first letter was not forthcoming.
- [12] However, the appellants have produced a letter dated 26 August 2008 addressed to the respondents' attorneys in which reference is made to the letter of 20 August 2008 and advised that Rule 7A (6) notice together with the transcriptions were sent per registered mail

and that the respondents' attorneys should expect to receive a notification from the Post Office to collect the items. On 26 August 2008, the respondents' attorneys acknowledged receipt of the parcel but that it did not contain a transcript of the proceedings and requested to be provided with the transcript as a matter of urgency.

- [13] On 8 September 2008, the respondents' attorneys wrote another letter to the appellants' attorneys requesting that the transcript be served on them urgently. This letter was followed by another one dated 26 September 2008 both which were not responded to. On 14 April 2008, the respondents' attorneys wrote a further letter to the appellants' attorneys in which they expressed among others, their surprise that the record for the review application has been indexed and paginated with the appellants' responding to the letters requesting the transcription of the proceedings in the arbitration. Until this date, no mention was made by the appellants that they would not rely on the transcript for their review application and that it was therefore not necessary to file the transcript of the arbitration proceedings. On the contrary, the previous correspondence created an impression that the transcript was part of the documents posted to the respondents.
- [14] On 30 April 2009, the appellants' attorneys wrote a letter to the respondents' attorneys and advised inter alia, that the tape recordings are inaudible and that the respondents' attorneys were in possession of all the documents in the matter.
- [15] It is common cause that at no stage was any attempt made by the appellants or their legal representatives to reconstruct the record of the arbitration proceedings. The respondents warned the appellants in their answering affidavit for the review application that they intend arguing, at the hearing of the matter, that the review application cannot be determined without the record of the arbitration

proceedings and that the review application should be dismissed.

- [16] In the replying affidavit, the appellants' response to the above notice was inter alia, that "the matter can fully and properly be determined on the record of the documents as it stands bearing in mind that only part of the

arbitration award of the first respondent is sought to be challenged in terms of this review application. The principal issue in respect by the review is in fact nothing more than an interpretation and application of the certificate(s) of the MEIBC/MIBCO, in respect of which any viva voce evidence at the arbitration is irrelevant. The contention of the [Appellants] is that the first respondent did not interpret and apply the provisions of these certificates as a reasonable decision maker could have done, on the grounds set out in the founding affidavit." They further contended that the viva voce evidence led at the arbitration cannot in any way contribute towards the proper and fair determination of the review application.

- [17] There is no reference in the judgment of the Labour Court to the fact that the record is incomplete and what that court's attitude thereto was. We have however been assured by counsel for the respondents without any counter, that the issue was argued before the Labour Court. This Court is nevertheless not precluded from considering the issue since it has been raised by the respondents in this Court.
- [18] In the affidavit filed in support of the application for review deposed to by Willen Meyers Coetzer, the first appellant's managing director, reference is made to the evidence of a certain Mr Winston Lubbe who testified on behalf of the council as well as a certain Matthews who testified for the appellants. It is not clear from the record whether they were the only witnesses who testified at the arbitration hearing. There is extensive reference in the supporting affidavit to the evidence that was before the Commissioner which is said to have been ignored or misconstrued by the Commissioner when he made his findings on the two issues which are the subject matter of this appeal.
- [19] To complicate matters further, the respondents have made it clear in their papers that they did not accept the appellants' record or recollection of what evidence was presented to the Commissioner. Without the transcript of the proceedings, it is impossible for this Court to resolve this and many other factual disputes between the parties on what evidence were actually presented before the Commissioner. Furthermore, without knowing what evidence was presented before the Commissioner, it is difficult for this Court to evaluate the grounds of review that are dependent on the assessment of the evidence presented and determine whether the award of the Commissioner is reasonable. Such an assessment cannot be made on the averments made in the affidavits which are not even common cause.
- [20] It has been shown above that the respondents were at all times concerned about the failure to file the transcript of the arbitration proceedings and advised the appellants' attorneys on numerous occasions about their concern. Instead of taking the required steps to reconstruct the record and to report on the outcome of the process, the appellants elected to present their review application on the incomplete record and contest that the transcript is not necessary. However, what is clear from the record is that the challenges to the findings made by the Commissioner are based on the evidence that was presented. Mr Snyman, who appeared on behalf of the appellants conceded that some of these contentions are based on the evidence presented at the arbitration and that the transcript is necessary.
- [21] For the above reasons, this Court is not placed in a position to be able to consider the merits of the appeal and, as such, the appeal falls to be dismissed.
- [22] There is another matter that raises a concern. It would appear that the manner in which the award is worded is not final. The Commissioner

has only made a ruling on the interpretation of the Bargaining Councils' registration certificate without making a demarcation

award. The parties are still entitled to "amplify their evidence or submit further evidence" to the Commissioner with a view to establishing whether either or both of the parties' undertakings are predominantly engaged in the building of trailers

designed for loads of 27273 kg or over and it is only then that a demarcation award would be made. Given the nature of the dispute, a demarcation made in these circumstances has in my view, a potential of influencing a demarcation on the axle factory referred to in paragraph 1 of the award.

[23] Given the provisional nature of the award, I am of the view that the dispute before us is moot and this Court should not concern itself with disputes that are moot. Compliance with the award as couched makes compliance impossible. The issue of mootness was recently considered by this Court in *Potgietersrust Platinum Ltd v Ditsela and Others* [2] where Ndlovu JA held that:

'[9] It is trite that, save in exceptional circumstances, a court will only entertain a dispute as long as such dispute remains live between the parties. It is so because a court does not need to make an order that will be incapable of execution by virtue of the matter having become academic. In *Geldenhuys & Neethling v Beuthin*, the Appellate Division (per Innes CJ) stated the following:

"After all, Courts of Law exist for the settlement of concrete controversies and actual infringements of rights, not to pronounce upon abstract questions, or to advise upon differing contentions, however important."

[10] Recently, the Legislature promulgated the Superior Courts Act, section 16(2) (a) of which provides as follows:

"(2)

(a) (i) When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.

(ii) Save under exceptional circumstances, the question whether the decision would have no practical effect or result is to be determined

without reference to any consideration of costs." [3] [Footnotes omitted]

[24] In light of the mootness of the dispute as well as the state of the record, it shall not be necessary to traverse the merits of the appeal.

[25] The appellants were warned that the record is incomplete and ought to have taken steps to reconstruct the record.[4] It would in my view be in accordance with the requirements of law and fairness that the appellants carry the costs of appeal.

[26] In the result, the following order is made:

The appeal is dismissed with costs.

Tlaletsi DJP

Sutherland JA and Mngqibisa-Thusi AJA concur in the judgment of Tlaletsi DJP.

APPEARANCES:

FOR THE APPELLANT:

S Snyman of Snyman Attorneys

FOR THE THIRD AND FOURTH

RESPONDENTS:

H Van der Riet SC

Instructed by: Ruth Edmonds Attorneys.

[1] Act 66 of 1995.

[2] Case No JA66/12 delivered on 2 July 2014 Unreported.

[3] At paras 9 and 10.

[4] See Papane v Van Aarde N.O. and Others

[2007] 11 BLLR 1043 (LAC) at paras 27 and 30.

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