

SOUTH AFRICA / JUDGMENT

Phaala and Others v Selby Construction CC and Others (JR2320/22) [2024] ZALCJHB 380 (8 September 2024) [2024] ZALCJHB 380

COURT

Labour Court Johannesburg

BEFORE

SB Nhlapo

CASE / FILE NUMBER

JR2320/22

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

case

no: JR

2320/2022

In

the matter between:

MATHUME
P PHAALA AND 17 OTHERS
Applicant
and
SELBY
CONSTRUCTION (CC)
First
Respondent
WILLEM
KOEKEMOER N.O.
Second
Respondent
COMMISSION
FOR CONCILIATION,
MEDIATION AND
ARBITRATION
Third Respondent

Heard:

30 July 2024

Delivered: 8 October 2024
This judgment was handed down electronically by circulation to the parties and legal representatives by email. The date of hand-down is deemed to be 8 October 2024.

JUDGMENT

NHLAPO, AJ

Introduction

- [1] This is a rather peculiar interlocutory application brought to strike out the “purported application and notice of motion” in the main review application that seeks to have the arbitration award reviewed and set aside.
- [2] As a result of what the applicant (the first respondent in the review proceedings) contends to be irregularities in deposing to the founding affidavit in the main review application, the applicant in these interlocutory proceedings has not filed the answering affidavit despite being served with the Rule 7A(8) notice. Instead, the applicant has opted for these interlocutory proceedings.
- [3] I must state at the outset that the point could have been raised as a preliminary point in answer to the review application once the Rule 7A(8) notice was served and filed. In my view, the applicants’ conduct does no more than delay the expeditious resolution of the dispute.
- [4] I thus take a dim view on such “interlocutory applications”, which, in my view, should be discouraged given the congested Court roll, more particularly of review applications. This unnecessary application exacerbates the situation.

Material

facts

- [5] On 18 October 2022, the first respondent launched an application to review and set aside an arbitration award dated 4 September 2022.
- [6] On 25 October 2022, the applicant, not happy with the certificate of the commissioner of oaths, served a notice to the first respondent to remove the cause of complaint in terms of Rule 11 of the Labour Court Rules[1] read with Rule 30 alternatively Rule 30A(1) of the Uniform Rules.
- [7] The complaint raised by the applicants as set out in the founding affidavit is:

‘It became clear that the statement attached to the Main Application (purporting to be an affidavit) was not commissioned in terms of the Regulations Governing the Administration of an Oath or Affirmation (particularly regulation 3(1) thereof) in that the statement was signed on 18 October 2022, allegedly by a female human resources manager, Ms. Naomi Chauke in front of the commissioner of oaths and allegedly commissioned on 18 October 2022 by a presumed Sergeant of the South African Police Service Centre, Tzaneen, confirming that the deponent having acknowledged that “he” knows and understands the content of the affidavit, thereby rendering it impossible for the statement to have been signed in the presence of the commissioner if the deponent is clearly a female.

A further concern came to my attention in that, the date upon which the Notice of Motion was signed by the Applicant’s attorney of record, is dated as 14 October 2022.’

- [8] The applicants further state that it is irregular that the notice of motion was signed on 14 October 2022 and the purported affidavit in support thereof was only signed on 18 October 2022.
- [9] Responding to the above complaint, the deponent to the founding affidavit in the review proceedings states that she indeed deposed to the founding affidavit in the presence of a commissioner as contemplated in Regulation 3(1) of the Regulations Governing the Administering of an Oath or Affirmation[2].
- [10] The deponent further states that the issue about the notice of motion being signed on 14 October 2022, and the founding affidavit being deposed to on 18 October 2022, is of no moment.
- [11] The applicants did not file a reply to the first respondent’s answer.
- [12] Obviously, I am not entitled to consider the issues that are raised by the applicants for the first time in the heads of argument, those are issues not canvased in the founding affidavit, especially given the nature of these proceedings. In the event that the applicants feel strongly about those points, the opportunity is not lost as the applicants are yet to file an answering affidavit in the review proceedings.

Legal framework

- [13] Authorities worth mentioning in this regard have been cited by both legal representatives. As such, the legal principle that is applicable is not controversial.
- [14] In *S v Msibi* (a full bench decision) the principle was summarised and expressed as follows in the headnote to the judgment:[3]

‘In a suitable case, where the requirements have not been complied with, the court may refuse to accept the affidavit concerned as such or to give any effect to it. The question should in each case be whether there has been a substantial compliance with the requirements.’

- [15] In *Lohrman v Vaal Ontwikkelingsmaatskappy (Edms) Bpk*, the full bench held as follows:[4]

‘Even, however, if this approach be insufficiently formalistic, it nevertheless seems to me that the document in question is an affidavit. It is now settled (at least in the Transvaal) that the requirements as contained in regs 1, 2, 3 and 4 are not peremptory but merely directory; the court has a discretion to refuse to receive an affidavit attested otherwise than in accordance with the regulations depending upon whether substantial compliance with them has been proved or not (*S v Msibi* 1974 (4) SA 821 (T)). In *Ladybrand Hotels v Stellenbosch Farmers' Winery* (supra) a similar conclusion was arrived at. In that case the admissibility of an affidavit was attached on the basis that the certification did not state that the deponents had signed it in the presence of the commissioner of oaths. It was held that the maxim *omnia preasumuntur rite esse acta* applied, that there was an onus on the person who disputes the validity of the affidavit to prove by evidence the failure to comply with the prescribed formalities and that in the absence of such evidence the objection taken failed. In any event, it was held that if the affidavit was defective it should be condoned.

It is of course a question of fact in each case whether there has been substantial compliance or not. In the present matter there is no evidence or indeed allegation that the affidavit was not sworn to. The objection is simply that the certification by the commissioner does not state that it was sworn to. In my opinion this is a proper case to hold, as I do, that there has been substantial compliance with the regulations. This was in essence the approach of the magistrate in the court *a quo* and I think that it was the correct approach. It follows that the objection taken to the affidavit and accordingly to the application must fail.’ [Own emphasis]

[16] The above constitutes the position in law, which is that non-compliance may be condoned by this Court provided there is substantial compliance with the regulations. I am inclined to do exactly that, which is to condone non-compliance.

Analysis

[17] In this instance, the nature of the complaint is that the deponent to the founding affidavit was not before the commissioner of oaths. The applicants in arriving at such a conclusion rely on the fact that the certificate refers to the deponent as “he”, whereas the deponent is a female and thus a “she”.

[18] In response to the above assertion, the deponent asserts that she personally attended at the Tzaneen Police Station to have the affidavit in the review application attested to. In essence, she does confirm that she was indeed before the commissioner of oaths at the time she deposed to the affidavit. In fact, she used the same commissioner of oaths for the purposes of the answering affidavit to this application.

[19] The evidence of the deponent has not been disputed in that no replying affidavit was filed to challenge it.

[20] In my opinion, this is a proper case to hold, as I do, that there has been substantial compliance with the regulations. It follows that the objection taken to the affidavit and accordingly to the review application must fail.

[21] There is also nothing sinister with the notice of motion being dated and signed on 14 October 2022, and the founding affidavit being deposed to on 18 October 2022.

[22] I reiterate that when a litigant intends to raise similar points in section 145 of the Labour Relations Act[5] (LRA) review applications, it is best practice that they be raised within the body of the answering affidavit as a point/s in limine to ensure that the point/s taken is determined together with the main review application. Such a practice will ensure expeditious

resolution of labour disputes, which serves the purpose of the LRA. Furthermore, it will save the parties litigation costs.

[23] In the premises, the following order is made:

Order

1. The interlocutory application is dismissed.
2. There is no order as to costs.

SB Nhlapo

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicants: Instructed by: Adv. B.C Bester Modiba Du Plessis Attorneys For the Respondent: Menzi Vilakazi Attorneys

[1] GN 1665 of 1996: Rules Regulating the Conduct of Proceedings in the Labour Court (repealed, effective 17 July 2024).

[2] GNR 1258 of 21 July 1972.

[3] 1974

(4) 821 (T).

[4] 1979

(3) SA 391 (T) at 398G – 399B

[5] Act 66 of 1995, as amended.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZALCJHB/2024/380.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/phaala-and-others-v-selby-unknown-topic-alcjhb-2024>

Prepared on 12 October 2026 · Esheria