

SOUTH AFRICA / JUDGMENT

Videx Mining Production (Pty) Ltd v NUMSA obo Paulsen and Others (J1185/21) [2021] ZALCJHB 375 (19 October 2021) [2021] ZALCJHB 375

COURT

Labour Court Johannesburg

BEFORE

Tlhotlholemaje

CASE / FILE NUMBER

J1185/21

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IN

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: J 1185/21

In the matter between:

VIDEX MINING
PRODUCTION (PTY)
LTD Applicant
and
NUMSA obo DENZEL
PAULSEN First
Respondent
RAYMOND DIBDEN
N.O. Second
Respondent
IMTIAZ SIRKHOT
N.O. Third
Respondent
THE METAL AND
ENGINEERING INDUSTRIES
BARGAINING
COUNCIL Fourth
Respondent

Heard: 5 October 2021

Delivered: This

judgment was handed down electronically by circulation to the parties' legal representatives by email, and publication on the Labour Court's website. The date and time for the hand-down is deemed to be on 19 October 2021 at 14:00

JUDGMENT**TLHOTLHALEMAJE, J**

- [1] The Applicant approached this Court on urgent basis seeking a variety of orders. These included the review and setting aside of a ruling issued by the Second Respondent (Commissioner Dibden), and substituting that ruling with an order directing that the Third Respondent (Commissioner Sirkhot), to conduct the arbitration proceedings before the Fourth Respondent, Metal and Engineering Industry Bargaining Council (MEIBC), in a manner that would allow two of the Applicant's witnesses to have their evidence heard in camera.
- [2] In the alternative, the Applicant seeks an order that the proceedings be conducted virtually without the identities of these witnesses being disclosed, and in the absence of the employee (Paulsen); or further in the alternative, to interdict and restrain the Respondents from proceeding with the arbitration pending the review application.
- [3] The urgent application is before the Court against the following background;
- 3.1 Paulsen was employed by the applicant on a permanent basis since October 2017. His services were terminated on 31 July 2019 following a disciplinary enquiry into allegations of gross misconduct related to threatening and intimidation of non-striking employees during a strike action embarked upon by the members of NUMSA.
- 3.2 Following a referral of an alleged unfair dismissal dispute to the MEIBC, the dispute could not be resolved on 16 September 2019, resulting in it being referred for arbitration. It was subsequently set down for 19 March 2020.
- 3.3 On the hearing date, the applicant sought to bring an application for the proceedings to be heard in camera, resulting in a postponement to 27 November 2020 when the matter came before Commissioner Dibden.
- 3.4 The application by the applicant was essentially for its witnesses to testify in camera based on the grounds that Paulsen was dismissed for allegedly threatening to burn down fellow employees' houses for not participating in the strike action. It was contended that Paulsen still lived in the same residential area as the witnesses he had threatened.
- 3.5 The applicant had further pointed out that the strike in question was violent, resulting in the murder of temporary staff members on 7 June 2020; the kidnapping of security officers, the torching of security officers' vehicles, and assault and intimidation of staff by striking employees. In this regard, it was submitted that Paulsen had clear motives to intimidate witnesses who could testify against him in regards to the threats made to them, and further that criminal charges had already been laid against him.

3.6 Commissioner Dibden dismissed the application for in camera hearing in a ruling issued on 22 April 2021. In his ruling, Commissioner Dibden pointed out that the application was not opposed by NUMSA and Paulsen, and further that;

3.6.1 The averments made by the applicant were bald; that there was ‘no argument’ to show that Paulsen had threatened the witnesses by any other means; that there was no evidence showing that following the criminal trial charges, Paulsen had threatened the witnesses in any other way; that there was insufficient basis to show a real threat and/or fear as opposed to the averments made by the applicant; and that there were no supporting affidavits from the witnesses to demonstrate that the feared for their safety.

3.7 Notwithstanding the above findings, Commissioner Dibden further afforded the applicant an opportunity to apply to have the matter virtually held if any and/or all of the witnesses feared to be in the same room as Paulsen. The Commissioner further recused himself from the matter without furnishing reasons, and directed that it be heard before another Commissioner.

3.8 When the matter came before Commissioner Sirkhot on 23 September 2021, the applicant requested that the arbitration proceedings be conducted virtually in respect of the two witnesses, and with their identities not being disclosed. Commissioner Sirkhot however held the view that Commissioner Dibden had already decided on the matter, and it was for the applicant to approach this Court for relief.

[4] In determining whether the applicant is entitled to the relief that it seeks, the starting point is section 158(1B) of the Labour Relations Act[1] (LRA), which provide that;

‘The Labour Court may not review any decision or ruling made during conciliation or arbitration proceedings conducted under the auspices of the Commission or any bargaining council in terms of the provisions of this Act before the issue in dispute has been finally determined by the Commission or the bargaining council, as the case may be, except if the Labour Court is of the opinion that it is just and equitable to review the decision or ruling made before the issue in dispute has been finally determined.’

[5] Ordinarily, and more specifically on an urgent basis, this Court in the light of the above provisions will rarely intervene in on-going arbitration proceedings, and will only do so where it would be just and equitable.

[6] It needs to be said outrightly that the circumstances of this case, and also given the rulings of both Commissioners, necessitates this Court’s intervention. An examination of Commissioner Dibden’s ruling makes it difficult to appreciate its real essence in regard to the application for in camera hearing, and whether in fact that ruling was finally dispositive of the issues he was required to determine. Inasmuch as in the ruling it was stated that the application was dismissed, in the same breath, the applicant in this case was afforded an election to apply ‘to have a virtual hearing if any and or all witnesses fear being in the same room as the applicant (Paulsen)’.

- [7] Clearly the above ruling and the election afforded to the applicant creates ambiguity if not confusion. From such an election, it cannot be said that Commissioner Dibden has definitively established that the witnesses in question were fearful for their lives, as that issue still has to be decided by another Commissioner when an application was still to be made for a virtual hearing. It can only but be reiterated that the purpose of any order, ruling or award, is to resolve disputes and not create fresh ones. Commissioner Dibden's ruling however achieved the opposite.
- [8] When Commissioner Dibden issued that clearly ambiguous ruling and recused himself from the matter, it is therefore no wonder that Commissioner Sirkhot when also confronted with an application to have the matter heard virtually, had instead kicked the matter out for touch so to speak, as he held the view that Commissioner Dibden had dealt with it.
- [9] It is however not necessary to dwell into whether Commissioner Sirkhot ought to have dealt with the matter or not in the light of the empowering provisions of section 138(1) of the LRA. This is so in that rather than not considering himself bound by Commissioner

Dibden's ruling as was the approach enunciated in *Sondolo IT (Pty) Ltd v Howes and Others*[2], Commissioner Sirkhot instead chose not to deal with the matter.

- [10] It is therefore in the light of the above conundrum faced by the applicant, that it was compelled to approach this Court on an urgent basis. There is therefore no basis for NUMSA to contend that the matter lacks urgency. The contention made on behalf of NUMSA that the urgency claimed was self-created because the ruling in question was issued on 22 April 2021 whilst this application was launched on 1 October 2021 cannot be sustainable. This is so in that the only time that the applicant could apply to have the matter virtually as stated in Commissioner Dibden's ruling, was on 23 September 2021. It was on that date that Commissioner Sirkhot declined to deal with the application, and thus afforded the applicant an opportunity to approach this Court. Thus, it was not necessary for the applicant to seek condonation as contended for on behalf of NUMSA, as that is an issue already implicit in the provisions of Rule 8 of the Rules of this Court, once the requirements thereof were satisfied.
- [11] Furthermore, it cannot be said that the applicant will have substantial redress in due course, as there was no choice available to it in the light of Commissioner Dibden's clearly ambiguous award, and Commissioner Sirkhot's reluctance to deal with the matter. Clearly in the light of these circumstances, it could not have been expected of the applicant to continue with the arbitration proceedings, where it was still unclear how it should proceed, and at the same time, ensure the

safety of its witnesses.

- [12] What is however more concerning with Commissioner Dibden's ruling is that it is clear that he omitted to take into account that the applications for in camera proceedings are extraordinary, and that they are not akin to ordinary interlocutory applications which merely require a consideration of affidavits.

[13] In camera hearings ordinarily affects various rights, including those of Paulsen to confront his accusers and cross-examine them unhindered in open proceedings;; the employer's right to properly present its case with the knowledge that its witnesses would do so without fear; and the right of those witnesses to freely and voluntarily testify. Equally impacted are the Commissioner's

ability to properly make an assessment of the evidence presented under those circumstances, and to therefore ensure that each party is afforded a fair hearing within any constraints that may be imposed by such proceedings.

[14] It is therefore incumbent upon the Commissioner, to require more from the parties when making a determination as to whether in camera proceedings should be allowed. These type of applications require the applicant party to lay a basis by making submissions and adducing evidence to convince the arbitrator that such an order should be granted. The other party should be given an opportunity to oppose the application, which may include allowing evidence to rebut the allegations of the applicant party.

[15] In line with the principles set out in NUM and others v Deelkraal Gold Mining Co Ltd[3], a three-tier approach was required rather than a mechanical and dismissive one as adopted by Commissioner Dibden. It was therefore

not sufficient for Commissioner Dibden, to simply without more, conclude that bald averments were made by the applicant, or that

there was insufficient basis to show a real threat and of fear, or that there were no supporting affidavit.

[16] It follows that the application Commissioner Dibden was confronted with, was not one where a simple discretion could be exercise without much thought and of the consequences thereof. As things stand, it is unclear as a result of the omission to adopt a proper inquisitorial approach, whether there is a basis for the two witnesses to feel concerned about their safety once they have testified. It is correct as it was submitted on behalf of NUMSA, that there was no such evidence before Commissioner Dibden. The reason however is clear, which is that the Commissioner did not do what was required of him to establish such evidence. Thus to the extent that it was argued on behalf of NUMSA that this Court should not readily interfere with Commissioner Dibden's discretion, it is trite that this Court is entitled to do so where as in this case, the discretion was exercised capriciously and clearly without regard to established legal principles.

[17] Given the facts and circumstances of this case, it ought to be concluded that the applicant has not only satisfied the requirement for urgency but also persuaded the Court that it would be just and equitable to review the ruling of Commissioner Dibden, before the principal issues in dispute have been finally determined. The applicant has thus established a clear right to the relief it seeks to extent that Commissioner Dibden had not properly considered the application that was before him, but had also committed errors in law in arriving at his

decision, thus making his ruling reviewable.

[18] In the same manner that one cannot speak of substantial recourse in due course, one cannot speak of the applicant having an alternative remedy, as this would have required of it endure arbitration proceedings which would have been prejudicial and harmful to its case and at worst, the unconsidered aspects of safety of its witnesses. It is not suggested the applicant had made a case why it sought in camera proceedings. All that is being said is that it ought to have been afforded a fair opportunity in line with established principles and approach, to make out its case why such proceedings were necessary. In the worst case scenario, the alternative remedy would have been to stay the arbitration proceedings, which by all accounts would not have been ideal particularly for Paulsen, who is

equally entitled to the expeditious resolution of the dispute.

[19] The only issue that remains is that of remedy. Various orders were sought in respect of how the arbitrations should be conducted in the light of the concerns surrounding the safety of the witnesses in question. It is however not for this Court to micro-manage how the MEIBC and its Commissioners should conduct their own processes. To this end, the appropriate order to make would be to remit the matter to MEIBC before another commissioner, and for the in camera application to be determined de novo.

[20] Further having had regard to the requirements of law and fairness, the applicant cannot be blamed for approaching the Court in the manner it did, nor was NUMSA's opposition to the application mala fide. Accordingly, an award of costs is deemed not to be inappropriate.

[21] In the premises, the following order is made;

Order:

1. The non-compliance with the forms and service contemplated in the Rules of this Court is condoned and this matter is heard as one of urgency.
2. The Ruling issued by the Second Respondent dated 22 April 2021 is reviewed and set aside.
3. The application for in camera proceedings in respect of two of the Applicant's witnesses is remitted to the Fourth Respondent for a determination de novo before a Commissioner other than the Second and Third Respondents.
4. There is no order as to costs.

Edwin Tlhotlhemaje

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: Z.M.

Navsa, instructed by Yusuf Nagdee Attorneys

For the First Respondent: Ms N. Masondo, of S. Mabaso Inc. Attorneys

[1] Act 66 of 1995, as amended

[2] (JR3217/06) [2009] ZALC 4; [2009] 5 BLLR 499 (LC); (2009) 30 ILJ 1954 (LC)

[3]

[1994] 7 BLLR 97 (LC), which required that;

- i. The party bringing the application should be given an opportunity to lead evidence of an objective nature (including hearsay evidence) in an open hearing, to show that there is a real or bona fide belief in the minds of the persons giving evidence that the potential witness(es), who are seeking anonymity, have a real and genuine fear for their safety and to make submissions as to why the witness(es) should be allowed to give evidence in camera and as to why they have such fear for their safety. The other party should also be afforded an opportunity to lead evidence and make submissions about this issue. At the end of this phase the Arbitrator should rule whether or not the witness(es) seeking

anonymity should be allowed to give evidence in camera as to the fear that they have for their safety. ii. The party bringing the application should be given the opportunity of calling the witness(es) seeking anonymity themselves, in camera, to give evidence including evidence of a subjective nature concerning their fears for their safety and the grounds thereof. The other party should be given an opportunity to lead rebutting evidence. At the end of this phase and after hearing the submissions

of the parties, the Commissioner should make a ruling whether or not the witnesses seeking anonymity would be allowed to give their evidence on the merits in camera. In considering whether to make such a ruling the Commissioner must inter alia consider the prejudice that the parties would suffer should such a ruling be made or not be made. iii. If a ruling is made that the evidence of the witness(es) may be heard in camera the party seeking to call the witness(es) is allowed to call them to give evidence in the presence of only the persons specified in the ruling. See also Paragraph 12.8 of the CCMA Practice and Procedure Manual.

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See also Paragraph 12.8 of the CCMA Practice and Procedure Manual.

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