



CONSTITUTIONAL COURT OF SOUTH AFRICA

Rand Refinery Limited v Sehunane N.O. and Others

CCT 204/2022

Date of Judgment: 21 August 2023

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On Monday, 21 August 2023 at 10h00, the Constitutional Court handed down judgment in an application for leave to appeal against the judgment and order of the Labour Court of South Africa, Johannesburg, dated 19 November 2021, in which the Labour Court set aside an arbitration award on the basis that the award had been improperly obtained in terms of section 145(2)(b) of the Labour Relations Act (the Act).

The applicant is Rand Refinery Limited (Rand Refinery), which conducts business as a refinery of precious metals. The first respondent is Mr Matome Victor Sehunane N.O. (Mr Sehunane) an arbitrator for the Commission for Conciliation, Mediation and Arbitration (CCMA). The second respondent is the CCMA, a statutory body established in terms of section 112 of the Act. The third respondent is the National Union of Metalworkers of South Africa (NUMSA), a trade union registered in terms of section 96 of the Act. The fourth respondent is Mr Wanda Maseko (Mr Maseko), a former employee of Rand Refinery in its bar casting department, and a member of NUMSA.

During February 2017, Mr Maseko and a number of other employees faced disciplinary charges arising from the theft of gold bars. Following the disciplinary hearing, Mr Maseko was dismissed on 22 May 2017. Mr Maseko referred an unfair dismissal dispute to the CCMA and Mr Sehunane was appointed as the arbitrator. During the arbitration proceedings, Mr Phumudzo Sydney Mulafhi (Mr Mulafhi), employed at the time by Rand Refinery as Manager of Security Investigations, participated as one of the witnesses for Rand Refinery. On 11 February 2018, Mr Sehunane delivered an arbitration award in favour of Rand Refinery, finding that Mr Maseko's dismissal was fair.

On 20 March 2018, NUMSA, on behalf of Mr Maseko, launched an application in the Labour Court to review and set aside the arbitration award in terms of section 145(2)(a) of the Act. In its application, NUMSA alleged that Mr Sehunane had committed a gross irregularity by accepting hearsay evidence and making a decision which no reasonable decision-maker could have made. Rand Refinery opposed the application and filed an answering affidavit. The review application was set down for hearing on 14 October 2021.

On 21 September 2021, three weeks before the hearing, NUMSA filed an application in terms of rule 11 of the Rules of the Labour Court for leave to supplement Mr Maseko's case by adding, as a ground of review, that the award had been improperly obtained in terms of section 145(2)(b) of the Act. In the application, NUMSA sought to amend the relief claimed in the notice of motion by including a prayer that the dispute be remitted to the CCMA for hearing *de novo* and for leave to file a supplementary affidavit to adduce new evidence. This new evidence took the form of various affidavits that were filed in respect of litigation between Rand Refinery and Mr Mulafhi in the High Court, Limpopo Division, Polokwane.

The High Court litigation between Rand Refinery and Mr Mulafhi is set against the background of Mr Mulafhi's dismissal in March 2019, on grounds of incapacity, after he failed several routine polygraph tests. After referring an unfair dismissal dispute to the CCMA, Mr Mulafhi and Rand Refinery entered into a settlement agreement in May 2019. In terms of the settlement agreement, Mr Mulafhi was to cooperate with Rand Refinery in all pending security matters and to return all documents on investigations and disciplinary cases. According to Rand Refinery, Mr Mulafhi began a smear campaign against the company, its attorneys and its labour law consultants, prompting it to launch an interdict application against him in the High Court. In the application, Rand Refinery sought to prohibit Mr Mulafhi from disclosing confidential information to third parties. On 16 September 2020, the interim order was granted and extended from time to time.

During October 2020, Mr Mulafhi (unrepresented at the time) filed a supplementary affidavit in the High Court wherein he alleged certain improprieties by Rand Refinery and its advisors in connection with disciplinary hearings. In August 2021, Mr Mulafhi consulted attorneys for the first time on the High Court litigation. These attorneys were also Mr Maseko's attorneys in the review case before the Labour Court. They came on record for Mr Mulafhi and towards the end of August 2021 Mr Mulafhi delivered an application in the High Court for leave to file a supplementary affidavit. The supplementary affidavit expanded on the alleged improprieties in Rand Refinery's disciplinary processes. Mr Mulafhi alleged, among other things, that he was cajoled into giving false evidence against employees, including Mr Maseko.

The rule 11 application, filed by NUMSA, sought to adduce Mr Mulafhi's affidavits together with all the papers filed in the High Court litigation. NUMSA alleged that Mr Mulafhi had committed perjury when he testified for Rand Refinery in the arbitration proceedings before Mr Sehunane. Rand Refinery filed a notice to oppose the rule 11 application and on 12 October 2021 served its opposing affidavit on NUMSA and Mr

Maseko. In this affidavit, Rand Refinery indicated that they opposed the rule 11 application and also responded to the allegations set out in Mr Mulafhi's affidavits.

On 14 October 2021, the review application was argued virtually and the Labour Court delivered judgment on 19 November 2021. The Court granted Mr Maseko's rule 11 application and found that even though Rand Refinery had filed a notice to oppose the application, it had failed to file an opposing affidavit. The arbitration award was set aside on the basis that it had been improperly obtained due to prima facie proof that the arbitration proceedings were tainted by the perjured evidence of Mr Mulafhi. The court ordered Rand Refinery to pay costs and that the case be remitted to the CCMA for a fresh hearing before a different arbitrator.

On 30 November 2021, Rand Refinery's attorneys filed an application for leave to appeal in the Labour Court. In their application, Rand Refinery explained that they had submitted an opposing affidavit to the rule 11 application which had formed part of the paginated pleadings that were sent to the Judge's law clerk, via email, on the morning of the hearing. They submitted that the Judge failed to consider the opposing affidavit and therefore the company had not been afforded a fair hearing. In refusing Rand Refinery's application, the Labour Court held that the company was oblivious to the fact that it had not file opposing papers and Mr Maseko's evidence as contained in the rule 11 application was uncontroverted. On the merits, the Court held that whether or not Mr Mulafhi had perjured himself in the arbitration proceedings had yet to be tested and that the only way to allow the issue to be properly ventilated was to remit the matter to the CCMA for a fresh hearing. Rand Refinery filed a petition for leave to appeal but this was refused by the Labour Appeal Court.

In this Court, Rand Refinery submitted that its opposing affidavit was served and filed before the hearing, on 12 and 13 October 2021 respectively. In support thereof, the company referred to an electronic acknowledgment of receipt by the Judge's law clerk of the paginated pleadings. Moreover, Rand Refinery submitted that the rule 11 application was argued as if it was opposed but that, since the matter was argued virtually, its attorneys could not be certain about what was in the Judge's file.

NUMSA admitted that the opposing papers were served on Mr Maseko but that it was unclear whether those papers were also filed with the Labour Court. They questioned the adequacy of Rand Refinery's submissions about the filing of the opposing affidavit, pointing to the fact that the company's deponent in this Court did not have personal knowledge about the filing of the papers or the sending of the email. In this regard, they submitted that the Rules of the Labour Court do not make provision for electronic service. Moreover, they submitted that during the virtual hearing Rand Refinery did not draw the opposing papers to the judge's attention.

In a unanimous judgment written by Rogers J (Zondo CJ, Maya DCJ, Kollapen J, Madlanga J, Majiedt J, Mathopo J, Theron J and Van Zyl AJ concurring), the Court found that as a matter of probability Rand Refinery had indeed filed its opposing affidavit with the Labour Court, even if only electronically. In this regard, the Court held that since Rand

Refinery had filed a notice to oppose and served its opposing papers on Mr Maseko and NUMSA before the hearing, it was unlikely that the company would not have also filed its opposing papers with the Court and that there would have been no point in preparing and serving the papers unless it was also filed with the Court. Moreover, NUMSA had not stated that the opposing papers did not form part of the paginated record. The Court held that, when granting the rule 11 application and setting aside the arbitrator's award, the Judge was either unaware of or overlooked the existence of the opposing affidavit. In her judgment refusing leave to appeal, the Judge had failed to address Rand Refinery's submission that it had presented an answer to the rule 11 application.

Regarding Mr Mulafhi's allegations, the Court held that Mr Maseko incorrectly attached copies of Mr Mulafhi's affidavits and all the High Court papers to the rule 11 application. Such copies constituted hearsay evidence in the Labour Court and were inadmissible. In any event, the Labour Court erred in finding that Mr Mulafhi's allegations remained uncontested. Since the Judge was minded to consider the High Court material, it could not only have regard to Mr Mulafhi's affidavits but it had to consider all the papers before the High Court, including the replying affidavit deposed to by Rand Refinery wherein the company directly refuted Mr Mulafhi's allegations. Furthermore, since Rand Refinery had responded to these allegations in the High Court, it was unlikely that it would have left these allegations unanswered in the rule 11 application.

On jurisdiction, the Court found that the Labour Court's overlooking of Rand Refinery's opposing affidavit violated the company's rights in terms of section 34(1) of the Bill of Rights. However, even if Rand Refinery had not filed an opposing affidavit, the Judge was not entitled to set aside the arbitration award. The Judge could have properly granted the rule 11 application if she thought that it was unopposed. Rand Refinery was not required to respond to Mr Maseko's amended relief and supplemented papers until the rule 11 application was granted. The Judge should at least have asked Rand Refinery, once the rule 11 application was granted, whether it needed time to consider the supplemented material.

On the merits, the Labour Court cannot set aside an arbitration award unless it is satisfied, on a balance of probabilities, that the award was improperly obtained in terms of section 142(2)(b). The Court held that this would entail finding on a balance of probabilities that Mr Mulafhi gave perjured evidence in the arbitration proceedings and truthful evidence in the High Court. Since this was not a finding that the Labour Court made, it could not set aside the arbitration award merely because of the possibility that a key witness gave perjured evidence. Consequently, the Court granted leave to appeal and upheld the appeal. It set aside the Labour Court's order and remitted the review and rule 11 applications for hearing by the Labour Court. On costs, the Court ordered each party to bear their own costs of the virtual hearing in the Labour Court and of the applications for leave to appeal in the Labour Court, Labour Appeal Court and this Court.