CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 227/14

In the matter between:

GEZANI JULIUS BALOYI	Applicant
and	
MEMBER OF THE EXECUTIVE COMMITTEE FOR HEALTH AND SOCIAL DEVELOPMENT, LIMPOPO	First Respondent
HEAD OF THE DEPARTMENT FOR HEALTH AND SOCIAL DEVELOPMENT, LIMPOPO	Second Respondent
PUBLIC HEALTH AND WELFARE SECTORAL BARGAINING COUNCIL	Third Respondent
DENGA MULIMA N.O.	Fourth Respondent

Neutral citation: *Baloyi v Member of the Executive Committee for Health and Social Development, Limpopo and Others* [2015] ZACC 39

Coram: Mogoeng CJ, Moseneke DCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Molemela AJ, Nkabinde J, Theron AJ and Tshiqi AJ

Judgments: Moseneke DCJ (majority): [1] to [45]
Froneman J (dissenting): [46] to [51]
Cameron J (dissenting): [52] to [75]

Decided on: 10 December 2015

Summary: unfair dismissal claim — arbitration — incomplete record — remittal inappropriate — reinstatement from date of dismissal

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ORDER

On appeal from the Labour Court:

1. Condonation and leave to appeal are granted.
2. The appeal succeeds with costs.
3. The order in the Labour Court is replaced with the following:
   (a) The arbitrator's award is reviewed and set aside.
   (b) The applicant is reinstated in his former position of employment with effect from the date of his dismissal.
   (c) The respondents must pay the costs of the application.

JUDGMENT

MOSENEKE DCJ (Mogoeng CJ, Jafta J, Khampepe J, Nkabinde J, Theron AJ and Tshiqi AJ concurring):

Introduction

[1] What should the Labour Court do when faced with a review application where the record of the arbitration proceedings sought to be reviewed has gone missing, and there has been no proper attempt to reconstruct it? That is the primary question in this application for leave to appeal. The applicant also complains that he has been unjustly dismissed and that the arbitrator's decision confirming his dismissal should in any event be reviewed and set aside on the merits. But, logically, that assertion can only be determined if an accurate record of the arbitration proceedings is available.

[2] This judgment follows after the following directions were issued by this Court on 17 March 2015:

> "1. The respondents are invited to file opposing affidavits, if they so choose, by Tuesday 7 April 2015.
> 2. Written argument, including argument on the merits of the appeal, must be lodged by—
>   (a) the applicant, on or before 17 April 2015; and
>   (b) the respondents, on or before 22 April 2015.
> 3. Further directions may be issued."

None of the respondents filed affidavits or written submissions – only the applicant did so.

Background and the disciplinary hearing

[3] In 1987, the applicant was employed as a learner artisan by the Department of Health and Social Development, Limpopo (Department) at the Malamulele Hospital (Hospital). Later, he was promoted to the position of artisan foreman in the same Hospital. In 2003 he was promoted to the position of senior artisan superintendent at Mankweng Hospital, Limpopo, which also fell under the Department.

[4] In March 2004, he was charged with misconduct and a disciplinary hearing was held. This was about three years after the alleged misconduct; the charges arose from his alleged role in connection with arrangements for servicing incinerators in various clinics in Limpopo in about May 2001 while he was employed at the Hospital.

[5] Three charges were brought. The first was that the applicant initiated a requisition for labour – the repair and service of eight waste incinerators at the clinics – that the Department did not need. His defence was that a certain Dr Wasilota, the superintendent of the Hospital at the time, had instructed him to generate a requisition for service providers to repair incinerators, which had not been used since delivery in

1997. Accordingly, the applicant's defence in the disciplinary hearing and up to now is that he did not commit misconduct as he carried out Dr Wasilota's instruction. He also says he requested at the hearing that Dr Wasilota be called as a witness so that he could confirm or deny this instruction. However, the Head of the Department gave an instruction that Dr Wasilota should not testify because his evidence would undermine or prejudice the Department's case. The applicant says he testified to this effect in the disciplinary hearing and his evidence was not controverted.

[6] The applicant says that, in any event, the witnesses who testified about the condition of the incinerators in the various clinics stated that the incinerators were either in great need of service or repairs, or had never been serviced despite the fact that they had not been used for a period of more than four years. Again, the applicant indicates that this evidence was not contested.

[7] There was an alternative charge to the first charge, namely that the applicant authorised payment to Prominent Medical Supplies CC (the supplier) for repairs to the incinerators that were not effected. However, the applicant says he testified that he did not authorise this payment, but that Matron Chauke did after a certain Mr Mathebula had prepared and signed the purchasing order. The applicant pointed out that he was off sick when this payment was authorised. On his return from sick leave the applicant signed the store register, which confirmed that the supplier had completed the work. The applicant says he testified that he routinely signed the store register if Mr Mathebula had already signed and captured the invoice and Matron Chauke had already authorised payment.

[8] The applicant says that this evidence was also not contradicted. On the contrary, it appears it was supported by the evidence of Matron Chauke, as she confirmed that she was the one who had authorised the payment. The applicant did, however, acknowledge that signing the store register was a "mistake". The applicant submits that, as with Dr Wasilota, Mr Mathebula was instructed by the Head of the Department not to give evidence.

[9] The second charge was that the applicant confirmed delivery of the repair services by the supplier knowing that the services were never rendered. The applicant denies that he did so. Again, although he admits to signing the store register, which confirmed that the supplier had completed the work, he says he relied on the authority of Mr Mathebula and Matron Chauke who had already signed and captured the invoice for payment. He further argues that no evidence was placed before the disciplinary hearing proving this allegation.

[10] The third charge was that the applicant authorised payment of R40 675 to the supplier for services not rendered, and non-performance was confirmed by the supplier. The allegation on which this charge rested was that the applicant authorised the payment knowing that the company had not rendered the services. The applicant's defence here was the same as in relation to the alternative to the first charge: Matron Chauke, and not he, authorised the payment after Mr Mathebula had prepared and signed the purchase order.

[11] The applicant avers that he called an employee of the supplier as a witness in support of his case, but the chairperson of the disciplinary hearing refused to allow this witness to testify. The applicant does not say what reason the chairperson gave.

[12] He adds that after he learnt that payment had been made to the supplier but the services had not been rendered, he contacted the supplier. After further investigation, the supplier acknowledged to him that the services had not been rendered. The supplier offered to repay the money in monthly instalments of R3 000. The applicant says the Department never took advantage of this offer.

[13] The applicant says that despite the paucity of senior hospital employees as witnesses, and the failure of the witnesses to incriminate him, the chairperson found him guilty and dismissed him. It is not clear whether the chairperson found the applicant guilty of all the charges or only of some, but on 19 February 2005 the

applicant was dismissed. The applicant does not say what reasons the chairperson gave for his finding and sanction. The applicant lodged an internal appeal, but this was dismissed on 3 June 2005.

[14] On what is before us, there being no affidavits on behalf of the Department, it appears uncontroverted that the chairperson may have committed a gross irregularity. This is evident both in his refusal to allow the applicant's witness from the supplier to testify, and in allowing the Head of the Department to prevent Dr Wasilota and Mr Mathebula from testifying as their evidence was relevant and important.

Arbitration

[15] After his dismissal, the applicant requested the Public Health and Welfare Sectoral Bargaining Council (Bargaining Council) to arbitrate an unfair dismissal dispute with the Department.

[16] The arbitration was conducted by Mr Denga Mulima (the arbitrator) under the auspices of the Bargaining Council. The Bargaining Council and the arbitrator are, respectively, the third and fourth respondents before this Court. The hearing started on 23 November 2005 and was completed on 5 January 2006. The award was issued on 10 January 2006. The applicant attached a copy of the award to his founding affidavit in this Court.

[17] The applicant says that the Department called eight witnesses who gave evidence. The evidence was along the same lines as that proffered at the disciplinary hearing. According to him, it did not implicate him in any wrongdoing. The evidence he gave was to the same effect as at the disciplinary hearing.

[18] In his award, the arbitrator found the applicant "to have acted outside the parameters set by the employer, the standard that there [was] no doubt he [was] aware and [had] been practising . . . for years". He then said of the applicant:

> "Thus he was aware that he should have identified the need of servicing the incinerators, the responsibility of which solely falls . . . directly under his responsibility. I have noted the untested instruction by Dr Wasilota, however such instruction could not take away his responsibility. Instead, he should have advised the medical superintendent (Dr Wasilota) that the incinerators do not need any service except one that needed repairs."

[19] The applicant complains that the arbitrator found him guilty of misconduct of which he had wrongly been charged. He was charged with initiating the process for the repair of the incinerators and his defence was that he did so to comply with a lawful instruction from Dr Wasilota. It is indeed not clear from the arbitrator's award which charges he found to have been proved and which not. One would have expected the arbitrator to make this clear, as this would have facilitated an understanding of his reasons for the award.

[20] The arbitrator concluded:

> "In totality of the facts in this case, there is nothing that I find to show or suggest on the balance of probabilities that the applicant did not act wrongly."

This is not the question the arbitrator should have asked himself. The onus to prove that the dismissal was fair was on the employer. The question he should have asked was whether the Department had proved that the dismissal was fair, or whether it had proved that the applicant had committed misconduct and that in all the circumstances dismissal was a fair sanction.

[21] The arbitrator recorded that the applicant complained that the dismissal was procedurally unfair because he was deprived of the opportunity to put questions to or cross-examine certain witnesses in the employ of the Department. The arbitrator pointed out that employers should take account of item 4(1) of the Code of Good

Practice: Dismissal contained in Schedule 8 of the Labour Relations Act[1] (Act). He then mentioned the basic rules in misconduct dismissals:

> "The accused employee must be afforded the opportunity to ask questions in cross-examination to the witnesses of the employer. *In casu* there is no evidence that . . . the applicant was denied or refused an opportunity to cross-examine the witnesses of the employer. Thus to all the witnesses the employer called to build up their cases, there were questions asked by the applicant's representatives, cross-examining them. The applicant preferred that the employer should have called certain witnesses beyond those he cross-examined. There is no duty on the employer party to call those witnesses preferred by the applicant party. It is on this basis that I do not find any unfairness to support [the] allegations by the applicant."

[22] It is true that in the disciplinary hearing, the applicant was allowed to cross-examine every witness the Department called. However, properly understood, this was not the applicant's complaint on procedural fairness. His complaint was that he was denied the opportunity to cross-examine the Department's witnesses whom he requested should be brought to the hearing, and who were not brought. Those witnesses were Dr Wasilota and Mr Mathebula.

[23] It is unclear from the papers before this Court whether the applicant attempted to call these witnesses himself and, if so, whether the Department's alleged instruction to them not to testify still stood. If one looks at the arbitrator's summary of the evidence by the Department's witnesses, none testified about procedural fairness. The arbitrator did not deal with the applicant's procedural complaints. If he had, on the applicant's version, he may have concluded that the dismissal was procedurally unfair.

[24] With regard to the substantive fairness of the dismissal, it seems open to question whether the alleged misconduct of which the arbitrator found the applicant guilty had been proven. Even if we assume that the arbitrator was justified in finding

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[1] 66 of 1995.

as he did, it would not follow that dismissal was necessarily a fair sanction. This is especially so when one considers that the applicant was an employee of the Department for 19 years with no evidence of previous misconduct.

[25] All this suggests that the dismissal should have been held to be unfair. But this did not happen.

Labour Court

[26] The applicant brought an application in the Labour Court to review and set aside the arbitrator's award. His troubles were only starting. Over a long period, the arbitrator and the Bargaining Council failed to deliver the record of the proceedings to the Registrar of the Labour Court. The hearing of the review was postponed a few times because of this failure. The applicant brought an application for an order compelling the arbitrator and the Bargaining Council to deliver the record. This was granted.

[27] There seems to have been a long delay thereafter before the Bargaining Council filed an affidavit in response to the order. In the affidavit, it said that the arbitrator had misplaced the mechanical recording and, therefore, it could not deliver the transcript. It also said that it would have no objection if the arbitration award were set aside and the dispute were remitted to another arbitrator to arbitrate it afresh. The respondents did not oppose the review application.

[28] At some stage, the Labour Court ordered the parties to reconstruct the record of the arbitration proceedings. According to the applicant, the reconstruction proved impossible. The applicant says that the arbitrator then delivered to the Registrar his handwritten notes without consulting him. Those were later typed out and filed in the Labour Court. The result was that the Court had both the handwritten and typed versions of the notes. The applicant says that he disputed those of the arbitrator's notes in which the arbitrator recorded that he had made certain concessions. Of this, the Labour Court noted that the applicant "had the opportunity when filing his initial

supplementary affidavit with the transcript of the proceedings, to deal with the correctness of the arbitrator's notes containing the concessions. Instead, he elected to stand by his founding affidavit and filed the notes with the concessions."[2]

[29] Despite acknowledging the applicant's objections, the Labour Court felt it apt to adjudicate the review application on the merits even though there was no complete record of the arbitration proceedings before it. It seems to have accepted that the handwritten notes and typed version constituted a transcript of the arbitration proceedings. It dealt with the matter as if it had the complete record of the proceedings. This was in the face of an affidavit filed by the Bargaining Council and the arbitrator that the record was not available and that, hence, they had no objection to the award being set aside. The Court made no reference to this. The Court instead held the applicant to the alleged concessions recorded in the arbitrator's notes, despite the fact that the applicant disputed them. It dismissed the review application.

Labour Appeal Court and Supreme Court of Appeal

[30] The applicant petitioned the Labour Appeal Court for leave to appeal, but that petition was dismissed. A petition for leave to appeal to the Supreme Court of Appeal was also dismissed on 15 October 2013.

In this Court

[31] The application was about 13 months late. The delay appears excessive. But there are mitigating circumstances. These are that the applicant and his Pretoria attorneys were not aware that the Supreme Court of Appeal had already issued its order and became aware of it only in about November 2014.

[32] This was not the first time that the applicant was let down by an attorney. There was a delay of about 19 months in the lodging of his application for leave to

[2] *Baloyi v MEC for Health and Social Development, Limpopo and Others* [2010] ZALC 282 at para 16.

appeal against the Labour Court judgment. That Court accepted the applicant's explanation that he had been misled by his then attorney of record about whether the review judgment had been handed down, and later about the procedure to be followed in an application for leave to appeal.

[33] Although the full truth of the matter is difficult to piece together without the complete record, and without evidence or submissions from the respondents, the applicant deserves better than the treatment he has received thus far. On his version, uncontradicted and unopposed before us, almost everybody has failed him in some way or another.

[34] For present purposes, it is sufficient to restrict ourselves to the Labour Court's decision to decide the review application without obtaining a proper record of the arbitration proceedings. The Labour Court paid no apparent heed to the Bargaining Council's affidavit that no record of the arbitration proceedings was available and that it and the arbitrator had no objection to a remittal for rehearing.

[35] Nor did it appear to merit any mention that the first and second respondents, the Member of the Executive Committee for Health and Social Development, Limpopo (MEC) and the Head of the Department, had withdrawn their opposition to the review application. In addition to this, the Labour Court was aware of and in fact noted the applicant's protestations regarding the recorded concessions. On balance, it seems that the Labour Court ought at least to have remitted the matter for rehearing.

[36] There may be cases where it will be contentious to determine a review of arbitration proceedings in the absence of a record,[3] or what remedy should follow

[3] *Papane v Van Aarde NO and Others* [2007] ZALAC 27; (2007) 28 ILJ 2561 (LAC); [2007] 11 BLLR 1043 (LAC) at paras 2-4 (judgment of Zondo JP, as he then was) and 27-30 (judgment of Kruger AJA); *Lifecare Special Health Services (Pty) Ltd t/a Ekuhlengeni Care Centre v Commission for Conciliation, Mediation and Arbitration and Others* [2003] ZALAC 3; (2003) 24 ILJ 931 (LAC); [2003] 5 BLLR 416 (LAC) (*Lifecare*) at paras 15 and 17; *Nkabinde v Commission for Conciliation, Mediation and Arbitration and Others* [2013] ZALCJHB 161 at paras 25-30; *Doornpoort Kwik Spar CC v Odendaal and Others* [2007] ZALC 70; (2008) 29 ILJ 1019 (LC) (*Doornpoort*) at paras 5 and 7-8; *Nathaniel v Northern Cleaners Kya Sands (Pty) Ltd*

when no proper record is available.[4] In this case, it was improper of the Labour Court to dismiss the review without a proper record of the arbitration proceedings in the face of evidence that no record existed. This presents this Court with a choice: we can send the matter back for rehearing before another arbitrator, which will be cumbersome and unduly hard on the applicant, or intervene on the merits now.

[37] The applicant had worked with the Department for 19 years, was promoted over that period and had no previous record of misconduct. He has admitted that he made a mistake in signing the store register. This should have been considered in mitigation of the sanction imposed on him. But more importantly, remittal would be grievously unjust in the face of the Department's inertia and unresponsiveness, especially given the applicant's earnest protestations of innocence, which are uncontroverted. It is on these bases, in addition to the amount of time that has passed, that we feel justified in affording the applicant an effective remedy, even though this entails us deciding the merits ourselves, without the benefit of a full record.

[38] In a dissenting judgment, Cameron J takes the view that the order of the Labour Court confirming the arbitrator's award should be confirmed. This is mainly because, despite the limping record, he finds that the applicant in his papers before the Labour Court made admissions about the arbitrator's notes which justified his dismissal as not being substantively or procedurally unfair. I have rehashed the uncontested events before the arbitrator. In my view, they do not support the conclusion Cameron J reaches.

[39] In another judgment, Froneman J parts ways with this judgment on whether the applicant is entitled to an order of reinstatement. He prefers to set aside the order of the Labour Court and the underlying arbitration award but, because of the defective

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[2003] ZALC 77; (2004) 25 ILJ 1286 (LC); [2004] 2 BLLR 157 (LC) (*Nathaniel*) at para 16; and *Uee-Dantex Explosives (Pty) Ltd v Maseko & Others* [2001] ZALC 63; (2001) 22 ILJ 1905 (LC); [2001] 7 BLLR 842 (LC) at paras 18-9.

[4] *Moyo v CCMA and Others* [2015] ZALCJHB 111 at paras 23-5; *Doornpoort* id at para 8; *Nathaniel* id at paras 18 and 20-1; and *Lifecare* id at paras 18-9 and 21.

record, he would remit the matter to a fresh arbitration. The outcome Froneman J opts for, in my view, has several difficulties.

[40] First, the Labour Court should have remitted the matter to the Bargaining Council as proposed by the arbitrator and the Bargaining Council itself. The mechanical recordings of the arbitration had been misplaced and could not be traced. This meant that the arbitration proceedings would commence afresh before a different arbitrator. None of the parties, including the applicant, were opposed to this proposal. The Court chose to decide the matter on the defective record before it and made an order adverse to the applicant, when it should not have done so.

[41] Second, the remittal would be grievously unjust given the amount of time that has passed since the dismissal. Also, Dr Wasilota, the hospital superintendent at the time, is deceased. His unavailability as a witness would compromise the value of remittal. Mr Baloyi's case has always been that he acted on the instructions of the Superintendent and of Matron Chauke. Both declined to take the stand and rebut Mr Baloyi's averment.

[42] Third, the MEC and the Head of the Department have displayed remarkable indifference towards this dispute and its resolution. They did not join issue with Mr Baloyi in the Labour Court proceedings. In this Court, they chose not to oppose the relief Mr Baloyi sought. They did not even respond to the directions of this Court inviting them to make submissions on the outcome of this application.

[43] Lastly, Mr Baloyi had been in the employ of the Department for 19 years with a clean record. The arbitrator should have tested the fairness of the employer's sanction against this. But he decided not to interfere with the dismissal. These factors are all relevant in considering whether remittal rather than reinstatement is a just and equitable remedy. It is not.

[44] Condonation and leave to appeal must be granted. The appeal itself must succeed and the arbitrator's award must be set aside. More importantly for the applicant, though, he must be reinstated in his former position in the Department.

Order

[45] The following order is made:

1. Condonation and leave to appeal are granted.
2. The appeal succeeds with costs.
3. The order in the Labour Court is replaced with the following:
   (a) The arbitrator's award is reviewed and set aside.
   (b) The applicant is reinstated in his former position of employment with effect from the date of his dismissal.
   (c) The respondents must pay the costs of the application.

FRONEMAN J:

[46] I agree with Moseneke DCJ that there will be cases where it will be contentious to determine a review of arbitration proceedings in the absence of a record,[5] or what remedy should follow when no proper record is available.[6] This is one of those cases. It is common cause that the record of the arbitration proceedings was not available and that, despite an order of the Labour Court to reconstruct the record of the arbitration proceedings, the reconstruction proved impossible.

[47] In the Labour Court the applicant sought an order for the remittal and rehearing of the arbitration proceedings. The Bargaining Council filed an affidavit indicating that no record of the arbitration proceedings was available and that it and the arbitrator

[5] See above n 3.

[6] See above n 4.

had no objection to a remittal and rehearing. The first and second respondents, the MEC and the Head of the Department, withdrew their opposition to the review. The Labour Court nevertheless dismissed the review application on the merits and refused an arbitration rehearing.

[48] In this Court the applicant once again sought a remittal and rehearing. There was, again, no opposition to the application. Directions were then issued calling on the respondents to file opposing affidavits and on all the parties to file written argument, also on the merits of the appeal. None of the respondents filed affidavits or written submissions – only the applicant did so. In the papers before this Court the applicant disputed the correctness of the so-called concessions.

[49] In his judgment Cameron J concludes that the arbitrator's notes and the supplementary affidavit in the Labour Court are sufficient to dismiss the application. The main judgment comes to a different conclusion on the same incomplete record. Moseneke DCJ finds that the applicant was unfairly dismissed and is entitled to reinstatement. I disagree that the matter can or should be decided on the incomplete record and would order a rehearing of the arbitration proceedings. This is the relief the applicant originally sought in the Labour Court and to which none of the parties objected.

[50] There has been no response by any of the respondents to the applicant's assertions in this Court that there was an incorrect recording by the arbitrator of the concessions he allegedly made in the arbitration. In these circumstances the applicant might be done a disservice if the matter is decided on an incomplete record of the arbitration proceedings. Remittal for arbitration might appear unjust in the face of the applicant's long unblemished record and the apparent injustice of the sanction of dismissal in those circumstances. But nevertheless the difficulty of deciding the merits of the case on an incomplete record remains. The applicant did not seek an order on the merits in the initial review, and it would be inappropriate to do so here. None of the parties objected to the remittal the applicant sought.

[51] I would thus concur in granting condonation and leave to appeal, but would substitute the Labour Court order with one remitting the matter back for an arbitration rehearing.

CAMERON J (Madlanga J and Molemela AJ concurring):

[52] The applicant, Mr Baloyi, has sought long and hard to reclaim a job at the Hospital from which he says an internal disciplinary inquiry unfairly dismissed him more than ten years ago, in February 2005. After his internal appeal failed, he asked the Bargaining Council to arbitrate an unfair dismissal dispute with the Department in terms of section 191(1)(a)(i) of the Act.[7]

[53] The arbitrator afforded Mr Baloyi a full rehearing. He heard first-hand evidence from eight witnesses on behalf of the Department, as well as from Mr Baloyi, for whom a trade union representative from the Health and Other Services Personnel Trade Union of South Africa appeared. The arbitrator considered all the evidence, and weighed it up with the arguments without reference to the disciplinary

[7] Section 191(1) of the Act provides as follows for disputes about unfair dismissals and unfair labour practices:

> "(a) If there is a dispute about the fairness of a dismissal, or a dispute about an unfair labour practice, the dismissed employee or the employee alleging the unfair labour practice may refer the dispute in writing to—
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> (i) a council, if the parties to the dispute fall within the registered scope of that council; or
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> (ii) the Commission, if no council has jurisdiction.
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> (b) A referral in terms of paragraph (a) must be made within—
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> (i) 30 days of the date of a dismissal or, if it is a later date, within 30 days of the employer making a final decision to dismiss or uphold the dismissal;
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> (ii) 90 days of the date of the act or omission which allegedly constitutes the unfair labour practice or, if it is a later date, within 90 days of the date on which the employee became aware of the act or occurrence."

inquiry.[8] He issued his award on 10 January 2006. He found against Mr Baloyi. He found his dismissal both procedurally and substantively fair. He concluded:

> "In totality of the facts in this case, there is nothing that I find to show or suggest on the balance of probabilities that the applicant did not act wrongly. On the contrary I find that he transgressed the employer's disciplinary code. I also find that the employer had a good cause to find him guilty as charged."

[54] In arriving at his conclusion, the arbitrator took note of the onus on the employer to show that the dismissal was fair. He noted the statutory factors determining whether a dismissal for misconduct is unfair.[9] He considered the employer's procedure for entering into a "transaction involving, amongst others, servicing of their equipments, in this case the incinerator machines". He took into account that Mr Baloyi "signed in acknowledgment that indeed [the supplier had] rendered their duties to his satisfaction". In fact, payment had been authorised even though no services had been delivered.

[55] Crucially, the arbitrator recorded a number of admissions Mr Baloyi made. These were pivotal to his finding that Mr Baloyi "acted outside the parameters set by the employer, the standard that there [was] no doubt he [was] aware and [had]

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[8] In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] ZACC 22; 2008 (2) SA 24 (CC); 2008 (2) BCLR 158 (CC) at para 18 Navsa AJ held that an arbitration under the auspices of the CCMA is a hearing *de novo*.

[9] Item 7 of Schedule 8 of the Act, Code of Good Practice: Dismissal, provides:

> "Any person who is determining whether a dismissal for misconduct is unfair should consider—
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> (a) whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and
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> (b) if a rule or standard was contravened, whether or not—
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> (i) the rule was a valid or reasonable rule or standard;
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> (ii) the employee was aware, or could reasonably be expected to have been aware, of the rule or standard;
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> (iii) the rule or standard has been consistently applied by the employer; and
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> (iv) dismissal with an appropriate sanction for the contravention of the rule or standard."

been . . . practicing for years". In particular, the arbitrator found that Mr Baloyi had failed to check whether the incinerators needed to be serviced in the first place or at least before the processing of the transaction commenced, and, thereafter, that he had failed to check that the supplier had rendered the work it had been contracted to undertake.

[56] The arbitrator dealt with Mr Baloyi's complaint that his dismissal was procedurally unfair because he was deprived of the opportunity to put questions to or cross-examine certain witnesses from the Department. He then found that there was "no evidence that the applicant was denied or refused an opportunity to cross-examine the witnesses of the employer". The arbitrator said:

> "Thus to all the witnesses the employer called to build up their cases, there were questions asked by the applicant's representatives, cross-examining them. The applicant preferred that the employer should have called certain witnesses beyond those he cross-examined. There is no duty on the employer party to call those witnesses preferred by the applicant party. It is on this basis that I do not find any unfairness to support [the] allegations by the applicant."

[57] Mr Baloyi then sought to review the adverse award in the Labour Court in a special statutory review of the arbitrator's decision.[10] But that Court found against him. It dismissed his application for condonation for his late review and later refused him leave to appeal, as did the Labour Appeal Court and the Supreme Court of Appeal. He now seeks leave to appeal to this Court. Though it is not wholly clear from his application, it seems that, because the tape recordings of the arbitration proceedings are lost, he seeks a remittal for a fresh hearing of his dismissal dispute.

[58] What should the Labour Court do when faced with a review application where the record of the arbitration proceedings sought to be reviewed is incomplete? The adverse consequences to the applicant's right of access to courts and to fair practices

[10] In terms of section 145 of the Act.

are plain. Regrettably, incomplete, patched-up records caused by faulty mechanical equipment or lost tape recordings are not uncommon.[11] But it is rarely appropriate for a court to proceed on patch work where the parties have not tried to reconstruct as full and as accurate a record of the proceedings as the circumstances allow.[12] There may be circumstances where a court is able to scrutinise the arbitrator's award plus all the documentary evidence, including the arbitrator's transcribed handwritten notes and the applicant's supplementary affidavits, to determine whether the decision should be set aside. These are the circumstances in which we must determine this case.

[59] On 6 August 2015, the Registrar of the Labour Court provided the complete record of the proceedings before that Court. This consists of 351 pages comprising Mr Baloyi's application to review and set aside the decision of the arbitrator; the arbitrator's transcribed handwritten notes; the arbitration award; as well as the affidavits and written submissions filed in argument.

[60] When he brought his Labour Court application, Mr Baloyi made no objection to the correctness of the arbitrator's notes. On the contrary, during the course of the proceedings he filed a supplementary affidavit that attached the arbitrator's transcript of the proceedings. These contained notes where the arbitrator recorded concessions he had made during the arbitration.

[61] Mr Baloyi provided the arbitrator's notes as the record of the proceedings without any suggestion that they were incomplete or inadequate. He was legally represented so he cannot say that he acted in ignorance. But nearly six months later, he filed a supplementary affidavit. This for the first time challenged the correctness of

[11] The predicament incomplete records create has arisen in several instances in the Labour Court and the Labour Appeal Court. See *Liwambano v Department of Land Affairs & Others* 2012 ZALCJHB 14; [2012] 6 BLLR 571 (LC); *Nathaniel* above n 3; *Lifecare* above n 3; *JDG Trading (Pty) Ltd t/a Russell's v Whitcher NO & Others* [2001] 3 BLLR 300 (LAC); and *Department of Justice v Hartzenberg* [2001] ZALAC 7; [2001] 9 BLLR 986 (LAC).

[12] Id.

the arbitrator's notes. Mr Baloyi now said the arbitrator had inaccurately recorded his concessions.

[62] The Labour Court was not impressed. Rightly so. It noted that Mr Baloyi "had the opportunity when filing his initial supplementary affidavit with the transcript of the proceedings, to deal with the correctness of the arbitrator's notes containing the concessions. Instead, he elected to stand by his founding affidavit and filed the notes with the concessions."

[63] Mr Baloyi failed to file a copy of that affidavit in this Court. Nor did he attempt to reiterate or explain the nature of his objections to the concessions the arbitrator recorded.

[64] Mr Baloyi's objections to the arbitrator's record of his concessions are unconvincing. He takes issue with the arbitrator's recordal that he "was responsible for the maintenance duties over the whole Malamulele Hospital and all its satellite institutions". But to what does he object? He merely clarifies that he "testified that [he] was the administrative Head of the Directorate: Maintenance". What the arbitrator recorded is evidently correct. His "clarification" operates to his detriment. It merely amplifies the extent of his authority and responsibility. This is because in it, he admits to having "many subordinates . . . reporting to" him.

[65] Substantively, Mr Baloyi denies that he was responsible for every transaction and decision involving maintenance. He objects to the arbitrator's record on the basis that the particular decision to service the eight incinerators was subject to a tender committee in which he had no part. But his objection obscures the arbitrator's findings. By his own admission, he was the person responsible for maintenance. So any instruction to procure maintenance services ought reasonably and responsibly to have emanated from him. And how was the tender committee constituted? Could it have been constituted unless he, as "the administrative Head of the Directorate: Maintenance", recommended it? Mr Baloyi does not tell us.

[66] His defence was to say he acted on the instruction of Dr Wasilota. This the arbitrator accepted in his favour. But the defence, as the arbitrator found, was incompatible with the nature and ambit of Mr Baloyi's own responsibility to which he attested.

[67] But this is not the only attempt to abdicate responsibility for his "mistake". Mr Baloyi's affidavit recording his objections to the concessions attempts to blame his "subordinates". Either way, he attempts to exonerate himself. It is hard to discern a basis on which to fault the arbitrator for finding his dismissal justified.

[68] Both Moseneke DCJ and Froneman J rightly note that there may be cases where it will be contentious to determine a review of arbitration proceedings in the absence of a record, or what remedy should follow when no proper record is available.[13] In this case, the Labour Court was correct to dismiss Mr Baloyi's review even though it lacked a transcript of the mechanically recorded arbitration proceedings. The arbitrator's notes, together with Mr Baloyi's further supplementary affidavits, were sufficient.

[69] I can find no reason to disturb the decision of the Labour Court. Mr Baloyi's objections to the concessions are unpersuasive. The concessions cohere with the arbitrator's award, they fit in with the evidence, and they conform with what Mr Baloyi says in his application in this Court, which is that he—

> "acted wrongly in signing without ensuring himself whether the service providers rendered work or not, he thought they [had] performed. He only learned that they did not do work when the investigation ensued."

[13] See above n 3.

[70] There is no plausible basis on which the concessions the arbitrator records can be swatted away. All we have is Mr Baloyi's denial that he made any of those concessions. But why would the arbitrator record them? Did the arbitrator lie? Did he malignly record prejudicial concessions Mr Baloyi never made?

[71] These are important issues. When should a higher court hold that what a lower tribunal has recorded from the proceedings before it is incorrect? What level of proof is necessary for that conclusion?

[72] The arbitrator determined that Mr Baloyi's dismissal was fair. The Labour Court found that the review test was not satisfied. We are being asked to intervene. Mr Baloyi had a clean record but on his own showing his conduct was incompatible with the responsible position he occupied.

[73] Stripped to essentials, he was the senior artisan and the person responsible for repairs and service. He failed to advise his superior of the true situation with the incinerators and requisitioned an unnecessary service. He then was absent when the contractor turned up but when asked to certify that the work had been done did so without any check at all. This caused the Department substantial loss because the contractor took the money and notwithstanding its undertaking has not repaid it.

[74] To summarise, Mr Baloyi was represented all along, the arbitrator applied the correct guidelines to determine the fairness of the dismissal for misconduct.[14] He considered the procedural unfairness point pertaining to the witnesses Mr Baloyi wanted the Department to call but failed to call himself. The arbitrator rightly found that there was no onus on the Department to call witnesses at Mr Baloyi's preference. Mr Baloyi has not explained why he or his representative failed to call the witnesses he considered crucial to his defence. His failure to make any mention of his

[14] Item 7 of Schedule 8 of the Code of Good Practice: Dismissal above n 9.

objections to the concessions recorded by the arbitrator in his application to this Court makes our order for reinstatement (for which he never asked) perplexing.

[75] For these reasons, I would grant condonation but refuse the application for leave to appeal for absence of prospects of success.

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