IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Court Case No: JR1000/2011

Appeal Case no: JA29/2015

In the matter between:

FRANCIS BAARD DISTRICT MUNICIPALITY **Appellant**

and

REX, C N.O. (cited in his capacity as

Arbitrator of the South African Local

Government Bargaining Council **First Respondent**

THE SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL **Second Respondent**

SAMWU obo L H SHUSHU **Third Respondent**

Heard: **10 May 2016**

Delivered: **28 June 2016**

Summary: Review of arbitration award – incomplete record filed in the review application – court should enquire whether the missing part of the record is material to the determination of the review. Materiality would be decided after considering, *inter alia*, the grounds of review, the nature of the missing evidence and the attitude of the arbitrator and the parties. Court should also assess whether all reasonable steps were taken to get the missing part or to

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reconstruct the record. Missing part of the record linked to the grounds of review – court could not consider the grounds of review in the absence of the facts which it is alleged the commissioner failed to apply his mind to – Evidence showing that applicant also failed to take all reasonableness steps to attempt the reconstruction exercise; neither did the applicant approach the commissioner for reconstruction – right of the applicant to review overweighed by the employee's right to speedy resolution of the dispute – Labour Court's judicially exercised its discretion to dismiss the review – Appeal dismissed with costs.

Coram: Davis, C J Musi JJA, and Murphy AJA

JUDGMENT

C J MUSI JA

[1] This is an appeal against the judgment of the Labour Court, (Morgan AJ), wherein it dismissed the appellant's review application for want of a proper record to entertain the merits of the application.

[2] Ms Shushu (the employee) was employed by the appellant since August 2006. During 2010, she was charged with misconduct; found guilty and dismissed on 6 August 2010. An internal appeal and conciliation under the auspices of the second respondent (South African Local Government Bargaining Council (SALGBC)) failed. She referred the dispute to arbitration.

[3] The first respondent (the Commissioner) found that her dismissal was substantively unfair. He ordered her reinstatement.

[4] Dissatisfied with the award, the appellant launched a review application in the Labour Court. It was common cause that the record of the proceedings before the Commissioner was incomplete. The appellant called four witnesses, during the arbitration, but only one witness' testimony was transcribed in full.

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Two witnesses' testimonies were not transcribed at all and one witness' testimony was incomplete (re-examination was not transcribed). The employee's testimony was also incomplete because her re-examination was not transcribed.

[5] The appellant filed its review application on 11 May 2011. The SALGBC filed the record, including five compact disks, on 24 May 2011. The SALGBC did not serve the record on the Commissioner. The appellant furnished the third respondent with the record of proceedings on 11 April 2012; almost a year after it received the compact disks.

[6] The third respondent filed its answering affidavit on 20 June 2012 in which it raised the preliminary point about the defective record. It is not clear why the appellant did not see that the record is incomplete.

[7] Having been made aware of the defective record, the appellant wrote to the third respondent on 27 June 2012, stating the following:

> 'Now it is true that the transcript is missing one audio file, being the testimony of two witnesses, being Lebo Modise and Anita Grebe. We were going to call on you to participate in a possible reconstruction exercise in respect of the evidence of these two witnesses, once you had filed the answering affidavit.'

[8] This is not entirely correct, because, as pointed out above, more than the testimony of the two witnesses was missing.

[9] The third respondent replied on 11 July 2012 stating that:

> 'Any reconstruction exercise ought to have been conducted prior to you delivering the record and your client's Rule 7A(8) notice. Be that as it may and without prejudice to our client's rights, we are prepared to participate in the reconstruction of the evidence of Lebo Modise and Anita Grebe led at the arbitration proceedings."

[10] The appellant's attorney replied on 17 July 2012, indicating that "we shall revert to you shortly about the issue of reconstruction".

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[11] Approximately six months later, on 29 January 2013, the appellant's attorneys reverted by stating:

> 'The difficulty we have is that there is simply no basis from which the record can be reconstructed. Our client kept no notes of the evidence. There are also no notes of the arbitrator, other than the evidence of Grebe and Modise as recorded in the award. To compound difficulties, this is not a situation where parts or sections or lines/words are missing from the evidence, the entire evidence of these two witnesses is missing. Our view is that further reconstruction is not possible.'

[12] The appellant's attorney then indicated that they shall stand or fall by the incomplete record. He stated the following in a letter of 29 January 2013:

> 'We intend to proceed with the review application on the basis of the record as it stands. In terms of our earlier undertaking to you, please advise whether you wish to file a further answering affidavit on the basis of the record as it stands.'

[13] The court *a quo*, after hearing argument, found that the missing parts of the record were material and that the matter could not continue without these missing parts. It considered whether to remit the matter to the SALGBC or to dismiss the application. It found that the applicant was not diligent enough with regard to the reconstruction of the record and decided to dismiss the application.

[14] Mr Orten, on behalf of the appellant, argued before us that the decision of the court *a quo* was incorrect and that it should have remitted the matter back to the SALGBC. He contended that the court *a quo* used the wrong test to decide the matter. He submitted that there was enough material before the court *a quo* to decide the matter. He further submitted that the court *a quo* did not give sufficient weight to the consideration that the appellant had a right to review.

[15] I agree with Mr Orten that the appellant's right to review is a very important consideration. The dismissal of the review application because the record is incomplete shuts the door for the appellant. The appellant has a constitutional

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right to have the dispute resolved in a fair public hearing before a court.[1] However if it is impossible to decide the dispute in a fair manner and the applicant does not do enough to enable a court to decide the matter in a fair manner; what is a court to do? The court has a duty to see to it that justice is done and that all the parties to the dispute are treated fairly.

[16] Although it was not the appellant's duty to record and preserve the testimonies of the witnesses, it had a duty to ensure that it places the best record before the court *a quo*.[2] It should take all reasonable steps to achieve this. In *Peter Fountas v Brolaz Projects (Pty) Ltd and Others,*[3] this Court said the following:

> 'In my view there can be no doubt that the court *a quo* should not have proceeded to consider the merits of the review application in this matter when there was material evidence missing in the record. What the Court *a quo* was required to have done was to consider whether the first respondent as the applicant in the review application had taken all reasonable steps to search for such evidence and or to reconstruct the record. If the first respondent had taken all reasonable steps to either find the missing evidence or to reconstruct the record and these had been to no avail, it could then have had to deal with the question of what should be done. If, however, it was of the view that the first respondent had not taken all reasonable steps that it could and should have taken, it would have had to choose one of two options…'[4]

[16] Nkabinde JA, (as she then was), went on to state the options, namely dismiss the application, or postpone it or strike it of the roll. Nkabinde JA stressed that the dismissal option is not one that a court should take lightly.

[17] The third respondent offered to participate in the reconstruction process and to that extent, she suggested a few dates on which such reconstruction could be done. The appellant did not take up the offer. Instead, it was obsessed with its own lack of notes and to some extent the Commissioner's notes. In the process it forgot that the third respondent was also a party to the proceedings

[1] See Section 34 of the Constitution of SA 1996.
[2] *Toyota SA Motors (Pty) Ltd v CCMA and Others* (2016) 37 ILJ 313 (CC) at para 43
[3] Unreported judgment of the LAC, case number JA36/2003.
[4] At para 31.

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and that it or the employee might have notes. No enquiry in this regard was made.

[18] In *Lifecare Special Health Services (Pty) Ltd t/a Ekuhlengeni Care Centre v CCMA and Others,*[5] the manner in which a reconstruction ought to be done was properly explained by the court as follows:

> 'A reconstruction of a record (or part thereof) is usually undertaken in the following way. The tribunal (in this case the commissioner) and the representatives (in this case Ms Reddy for the employee and Mr Mbelengwa for the employer) come together, bringing their extant notes and such other documentation as may be relevant. They then endeavour to the best of their ability and recollection to reconstruct as full and accurate a record of the proceedings as the circumstances allow. This is then placed before the relevant court with such reservations as the participants may wish to note. Whether the product of their endeavours is adequate for the purpose of the appeal or review is for the court hearing same to decide, after listening to argument in the event of dispute as to accuracy or completeness.'[6]

[19] Although the SALGBC is responsible for the overall preservation of the proceedings, it is the arbitrator who is in charge of the proceedings and the recording. He/she is very important in the reconstruction process. It is therefore of utmost importance that the arbitrator should be made aware of the problem and for him to make suggestions as to how the situation can be remedied, if it can.

[20] In *Papane v Van Aarde N.O. and Others,*[7] the majority decided to deal with the merits of the matter although the record was incomplete. The majority considered the fact that no objection was raised in the court *a quo* in respect of the record. The record was served on all the parties without objection. The respondent did not raise any objection, in its answering affidavit, or before the court *a quo* about the incomplete record. In *casu,* however objection was raised in the answering affidavit, before the court *a quo* and before us. The record was not served on the Commissioner. Zondo JP (as he then was), in

[5] (2003) 24 ILJ 931 (LAC).
[6] At para 17.
[7] (2007) 28 ILJ 2561 (LAC).

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the minority, was of the view that the Commissioner whose award was sought to be reviewed and set aside ought to be given an opportunity to indicate whether he objected to the application to set aside his award because of an incomplete record. I agree. The Commissioner is indeed an interested party and his/her view should be solicited and considered. The record in this matter was not served on the Commissioner, at any stage.

[21] It seems to me that the first enquiry is whether the missing part of the record is material. Materiality would be decided after considering, *inter alia*, the grounds of review, the nature of the missing evidence and the attitude of the arbitrator and the parties. The second question is whether the applicant took all reasonable steps to get the missing part or to reconstruct the record. When considering this question, the court would *inter alia* consider the chances of retrieval or reconstruction and the steps taken by the applicant. When the question whether to dismiss, postpone or remove the review application is considered the court would have regard to the right to review and any prejudice to the parties.

[22] There is a direct link between the record, the standard of review and the grounds of review. Each case will therefore depend on its own facts and circumstances. There can be no one size fits all approach. A court may not set aside a finding of fact by a Commissioner unless there is no evidence to support it or, if in light of all the evidence, the finding is otherwise unreasonable. The unreasonableness of the factual finding can only be determined by examining the record in relation to the factual findings made by the Commissioner. If the grounds of review are patent from the imperfect record there would not be a need for a full record.[23] The court *a quo* found that the missing evidence is material. This conclusion was correctly reached after considering all the evidence that was before the court *a quo* as opposed to the evidence that was supposed to be before it. The arbitration award is of scant assistance.

[24] The grounds of review are *inter alia* that the factual findings of the Commissioner did not correspond with the evidence and documents placed

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before the Commissioner, and that he did not apply his mind properly and rationally to the fact and the law.

[25] The court should ideally see all the material that was before the decision-maker so that it can fully and fairly deal with the grounds of review especially when the grounds of review are dependant on the factual findings of the Commissioner. It goes without saying that there can, in some cases, be no full and fair review if all the evidence is not before the court. In this matter, two witnesses' testimonies were not available. One witness' re-examination and the employee's re-examination were also not transcribed. Although a lot of documents were placed before the Commissioner, these documents are of no assistance because their status is uncertain. The appellant alleges that they were admitted whilst the third respondent points out - correctly based on the pre-arbitration minute – that the agreement was just that they are what they purport to be. Most of the documents were not proven. The documents are also not helpful without the testimony of the witnesses who testified with regard thereto. It would have been very difficult, if not impossible, for the court *a quo* to determine whether a reasonable decision-maker could have reached the conclusion that the Commissioner reached. The missing parts were material.

[26] The appellant served and filed an incomplete record. It was oblivious of the missing parts when it served same. It is the third respondent that focussed its attention on the incomplete record. It is clear that, even when the record was filed, it was not properly checked by the appellant's attorneys in order to see whether it was complete. This displays a lack of diligence in the manner in which this case was handled.

[27] When the shortcoming was pointed out in the answering affidavit, the appellant's attorney did not grasp the magnitude of the problem because they clearly thought that it was only the testimonies of Modise and Grebe that ought to be reconstructed.

[28] When the third respondent's attorneys offered to participate in the reconstruction exercise and suggested a few dates on which it could be done;

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they were kept in abeyance for approximately six months. They were then told that it would be impossible to reconstruct the record. The appellant did not endeavour to contact the Commissioner in order to ascertain whether he indeed had no notes or recollection of the evidence. The appellant should have served the incomplete record on the Commissioner and scheduled a meeting with him and the opposition in order to see whether the record could be reconstructed. They did not even obtain an affidavit from the SALGBC as to the efforts it made to get the missing part of the record. In fact, no affidavit, except, the replying affidavit, has been filed in connection with the missing parts of the record.

[29] I agree with the court *a quo* that the appellant did not take all reasonable steps to locate the missing parts of the record or to reconstruct it. The appellant challenged the factual findings of the Commissioner; as such, it ought to have been aware that the devil would be in the detail in this review. Those details could only be in the complete record containing the testimonies of all witnesses. The significant parts of this review are definitely in the missing part.

[30] The court *a quo* exercised its discretion when it decided to dismiss the review application. This discretion was exercised judiciously and upon correct principle after considering all the facts. It considered the fact that the appellant did not take all reasonable steps to locate and/or reconstruct the record whilst it had ample time to do so. The employee's dismissal occurred four years prior to the hearing of the review application.

[31] I am mindful of the financial implication of the order of the court *a quo*; however, the appellant only has itself to blame. Its conduct displayed a lack of urgency and went against the objects of the Act, namely the fair and speedy resolution of labour disputes. Its right to review is outweighed by all the factors mentioned above.

[32] There is no reason in law or fairness why the costs should not follow the result.

[33] For all of these reasons the appeal is dismissed with costs.

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C. J. MUSI JA

Davis JA and Murphy AJA agreed with C J Musi JA.

APPEARANCES

FOR THE APPELLANT: Adv. Van der Riet SC

Instructed by Cheadle Thompson & Hatsom

FOR THE RESPONDENT: Mr Orton

Instructed by Snyman Attorneys

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