IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA19/2015

In the matter between:

IDWU OBO CYRIL LINDA AND 4 OTHERS	**Appellants**
and	
SUPER GROUP	**First Respondent**
W M RAFELETA N.O.	**Second Respondent**
NATIONAL BARGAINING COUNCIL FOR THE FREIGHT INDUSTRY	**Third Respondent**

Heard: **22 March 2016**

Delivered: **28 February 2017**

Coram: Tlaletsi DJP, Davis and Sutherland JJA

JUDGMENT

SUTHERLAND JA

Introduction

[1] The appeal is brought on behalf of employees who had initially been found by an arbitrator to have been unfairly dismissed by the first respondent (the employer),[1] but which award to that effect had been set aside on review.

[2] Two questions arise for decision. First, the state of a reconstructed record provokes a need to consider whether it is appropriate to hear the appeal at all. Second, on the premise that it is appropriate to do so, whether the award holding the dismissals unfair, fails to pass muster as one to which no reasonable arbitrator could have come.

[3] The judgment of the Labour Court is defended by neither party, and was plainly incorrect as regards the test adopted for review. It may safely be ignored.

[4] The award of the arbitrator also leaves much to be desired. He had to conduct two enquiries. First, he had to decide a dispute of fact about the reason for the dismissal. He favoured the employee's version, but neglected to offer an explanation why he did so. Second, he had to decide if any misconduct of which the employees were truly guilty, warranted dismissal. This enquiry he did not embark on because he exonerated the employees of any misconduct.

[5] Save for raking out clues as to what evidence was adduced, the award may also safely be ignored.

The Record

[6] Not for the first time, a transcribed record of an arbitration has not been made available to litigants. The parties in this matter have made reasonable efforts to recompose one. What is before this Court has been agreed to be the best that can be done. It is a narrative summary, in the third person, of what was

[1] The parties have put up no quarrel with 'Super Group' being cited as the employer. The evidence indicates that the employer was 'Sizeka' a labour broker. The relationship is not explained on these papers. However, as this was not a controversy, no attempt is made in this judgment to unravel the exact facts.

supposedly said by three witnesses. There is no rendition of questions and answers. The origin of the information is not expressly identified. Supposedly, it was drawn from notes of the employees' representatives at the arbitration. An affidavit records that the respondent's attorneys gave 'input'. Is it good enough to enable a court to decide a material dispute of fact?

[7] The problem of the adequacy of a record of an arbitration taken on review has recently enjoyed the attention of the Constitutional Court. In *Toyota Motors (Pty) Ltd v CCMA* [2016] 3 BLLR 217 (CC)[2] and *in Baloyi v MEC, Health & Social Development, Limpopo* (2016) 37 ILJ 549 (CC*),*[3] the dilemma which faces a review court when presented with an inadequate record was addressed. What emerges from the various dicta of that Court is that where the interests of justice demand it, a pragmatic approach is appropriate, despite the inadequacies of the record.

[8] In my view, once a proper effort to reconstruct a record has been made, the review court should tackle the task, provided the record is adequate to enable the relevant controversy to be decided. At the two extremes there could, on

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[2] In *Toyota* at [43] the Constitutional Court held:
'Toyota, as the party seeking review, had an obligation, when it became apparent that there were difficulties with the record, to have initiated steps towards reconstruction. In *Lifecare [Special Health Services t/a Ekurhuleni Care Centre* [2003] 4 BLLR (LAC]) the Labour Appeal Court had occasion to determine how the reconstruction of the record should be undertaken by a party whose obligation it is to do so. The Court said the following:

> "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 . . . 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 endeavour 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 a dispute as to the accuracy or completeness…..When it appeared that there were difficulties with regard to the record, it was the obligation of Lifecare, as the reviewing party, to initiate the enquiries and steps which have been set forth in this judgment. It should not have been left to the Labour Court at first instance, and to this Court on appeal, to resolve problems which were other than residual or intractable." [at 17019].

3. In *Baloyi,* the Constitutional Court was divided three ways about the approach to an incomplete record. At the review stage, the Labour Court had ordered a reconstruction. This was done but was attended by inordinate delay. The Labour Court was criticised for lack of circumspection in assessing the adequacy of the record for the purposes of the review application. It was held that the Labour Court ought to have remitted the matter, given the inadequacies of the proffered record. Nevertheless, The Constitutional Court faced with the choice of remittal or hearing it, opted for the latter course of action. The rationale was that a remittal would be 'cumbersome and unduly hard on the applicant' [see at [36] and [41]]. As a result, the Constitutional Court intervened on the merits. See esp [26]-[36] per Moseneke DCJ.

the one hand, be an issue that either does not or hardly turns on the facts, and on the other hand, the issue may be one in respect of which, close examination of the content of the *ipisima verba* of witnesses is critical. The former may safely be heard, despite a rudimentary record, the latter, perhaps, not at all. Many cases will fall in between these poles. A measure of judgment is called for to assess the feasibility of a proper adjudication in a given case.

[9] In certain cases, the record may be rather poor for the relevant purpose, although not completely useless. The preferable option may be to set aside the whole proceedings and allow the dispute to be adjudicated afresh. However, that option, although from a purely forensic standpoint may be attractive, the implications of a remittal may work undue hardship on one or both parties. Typically, that unhappy predicament results from the long elapse of time since the dispute arose. When a remittal would, after a long elapse of time, trigger prejudice, the appropriate choice may be to hear the matter, warts and all. Generally, in such a case, it is appropriate for a court to weigh heavily the wishes of the parties, who after all, carry the risks of the imperfections of the record; if both prefer to press on to a final resolution of the dispute on an inadequate record, such a choice may tip the judicial judgment call on whether to carry on or to remit.

[10] In the present case, the precipitating event occurred on 8 February 2008, fully eight years and one month prior to the appeal being heard. The award was given on 11 August 2008. The review was heard on 13 December 2011, and lamentably, judgment delivered on 1 October 2014. The employees, we have been told from the bar, do not seek reinstatement. The parties do wish to press on. The long delay ought not to be exacerbated by a remittal.

[11] In our view, the sensible option is to hear the matter and put the dispute to bed.

The (un)reasonableness of the award

[12] It is common cause that the first respondent is a labour broker; that it assigned the employees to Goodyear at a site in Germiston, on 8 February 2008, and that they left the site before the end of the work-day. The employer

relies on the desertion of the employees from their jobs on that day to justify the dismissal The employees' defence is that they did not desert; rather, one Lucas Nkosi, a supervisor, told them to leave as they were not up to the job, and they acquiesced in that instruction. The versions are, thus, diametrically opposite.

[13] The arbitrator preferred the employees' version. On review, shorn of the wordiness of the abundant case-law,[4] the straightforward question to be asked is whether the body of evidence that was put before the arbitrator could not have justified a reasonable arbitrator in preferring the employees' version.

[14] The employer called Hermien Willemse and Lucas Nkosi to support its case.

[15] Willemse, the operations manager, is based at the head office. She testified that each of the employees had been in the employ of the employer for some time prior to 8 February. Their assignments had ended and they were available for re-deployment. They were offered assignments at Goodyear. They accepted. Their wage rates remained static. They were delivered to Goodyear at 8h00 on 8 February.

[16] The next she knew of the employees, was when she got an e-mail from Tom Reid of Goodyear telling her they had deserted. That e-mail was sent at 14h15. She got a second e-mail from Nkosi at 15h02 to the same effect. What decisions that were taken by the employer was prompted by the content of the e-mails, regardless of whether the contents were true. The material contents of the e-mails conveyed that the employees left without announcing their intention to do so, or saying why. Both Reid and Nkosi claimed that upon their enquiring of other staff, what was relayed to them was that "money" was discussed and that the employees allegedly said to other staff that they were not prepared to work for R400 per week, as they were used to getting R1500 per fortnight.

[4] The authorities have been traversed in the law reports *ad nauseam,* and bear no repetition: *Sidumo & Another v Rustenburg Platinum Mines Ltd* [2007] 12 BLLR 1097 (CC); *Heroldt v Nedbank Ltd* (2013) 34 ILJ 2795 (SCA) at [25]; *Gold Fields Mining (SA) (Pty) Ltd (Kloof Gold mine) v CCMA and Others* [2014] 1 BLLR 20 (LAC); *Head of Dept of Education v Mofokeng* [2015] 1 BLLR 50 (LAC) at [33]. Most recently, the decision in *Anglo-Platinum (Bafokeng Rasemone Mine) v De Beer* [2015] 4 BLLR 394 (LAC) at [11] adds to the pronouncements of the review test.

[17] It is common cause that the employees arrived at the head office later that day, at an unspecified time, whereupon they got suspension notices which stated:

> '….you have breached the disciplinary code by:
>
> a. Dereliction of duties on 8th February 2007 (sic) by abandoning your place of work from approximately 10h00.
>
> b. Absent without permission on 8th February 2007(Sic) from approximately 10h00….'

[18] According to Willemse, she attended a disciplinary enquiry held on 13 February. A minute [175-179] of the enquiry was presented to the arbitrator and confirmed by Willemse as accurate.

[19] What happened at the disciplinary enquiry, as reflected in the minute, was that the employees pleaded guilty to the charges, as set out in the suspension notices. Ostensibly, it was upon this basis that no other evidence was adduced. Nkosi was available and ready to testify but it was apparently deemed unnecessary for him to do so. The most significant portion of the minute is the remarks made by the arbitrator when giving the outcome. In paragraph 5.3, it is recorded:

> 'The accused stated that they were not aware of the extensive travel costs implicated in accepting their new positions in Germiston and as a result decided to desert their new workplace, placing the company's name into serious disrepute with the client'.

[20] The e-mails and the minute were challenged as fabrications by the representative of the employees, and it was claimed no disciplinary enquiry took place. Further, the employer's case of desertion or that they discussed pay with other workers was denied. Save for those notations, no further detail of the exchange is recorded. The employee's case concerning the events that occurred at Goodyear were not put to Willemse; correctly so, as she could, of course, offer no comment.

[21] Willemse gave other evidence, addressed elsewhere about matters that do not touch directly to the events of 8 February *per se.*

[22] As to the events at Goodyear, Nkosi, who had loitered at the disciplinary enquiry in case of need, was now called at the arbitration. His account of the relevant events was that he met the employees and put them to work, off-loading and stacking tyres. He cautioned them "to be careful with the tyres as he did not want any accidents at the site" [298]. It is common cause that they had arrived at about 8h00. At about 10h00, just after the tea break, the employees had gone. As to why, he repeated what he had stated in his e-mail. The critical aspect of his evidence relates, of course, to whether he had any exchange with the employees when they left, which according to him, there was none. In cross-examination, it was put that Nkosi had failed to train the employees and he had then dismissed them for poor performance. His answer was that the job entailed offloading tyres and packing them straight, hence no training was necessary. The employees, he said, deserted before performance could be assessed. That was the sum of the cross-examination, as recorded.

[23] What is the evidence to support the employee version? Only Cyril Linda testified. He described being taken with co-workers to the Goodyear site in Germiston to begin a new assignment. Nkosi was introduced to them. He instructed them to offload tyres and pack them. Nkosi told them to take care and avoid any accidents. The job entailed packing tyres according to size and codes. Later Nkosi called each man and said they did not perform to standard and were thus dismissed. Why Nkosi thought so was not made known to them. They mutely acquiesced. Thereafter, they phoned "Handsome" at the head office of the Employer. When this happened and who "Handsome" is and what role he occupies at the employer were not recorded. (The name Handsome Qobose appears on the attendance list as an interpreter in a minute of their disciplinary hearing on 13 February [Record 175]). Handsome told them to return to the head office. No corroboration of this communication was ever offered. It is common cause that they returned, but when is not recorded. At the head office, it is common cause that they were suspended.

They were thereafter called to a disciplinary hearing but were dismissed without any hearing. Linda specifically denied complaining about transport costs, and claimed Willemse lied. The note of the cross-examination reflects that he was challenged with reference to the events at the disciplinary hearing, and his contention that Nkosi had dismissed him. In argument, it was suggested that Linda was not challenged with the employer version; on this record, that inference cannot be made, rather a fair reading indicates that it must have been put to him.

[24] Such was the material before the arbitrator upon which to make findings on credibility and on the probabilities. Could a reasonable arbitrator conceivably prefer the employees' version? The *onus* rests on the employer, so if there is doubt as to which version to prefer, the employees' version must be preferred.

[25] In my view, the employees' version is so vitiated by improbability that it is unreasonable to prefer it. Much was made of the absence of direct evidence of the employees supposed expressions of dismay about their pay and travel costs. This is misdirected. The proper perspective is to take the remarks made by themselves at the disciplinary enquiry as important. Their plea of guilty to desertion had to be explained; it was not. The travel costs grievance, which was not a part of what Reid or Nkosi conveyed (for what little that was worth) was ventilated there for the first time in the disciplinary enquiry. The employer charged the employees with misconduct based on hearsay allegations of desertion. There was nothing improper with that. They pleaded guilty and offered reasons to mitigate their misconduct. They did not, at the disciplinary hearing, say a word about Nkosi firing them for poor performance. This body of fact, married to the e-mails, whose significance is not the truth of their contents, but the timing of the allegations, forms a formidable case.

[26] Unless a finding could be made that the e-mails and Hearing were indeed fabrications, that evidence was an insuperable obstacle to believing the employees.

[27] Similarly, a reason had to exist to reject Nkosi's evidence. But again, the probabilities favour his version, even absent the reports he received,

supposedly, from other staff. The employees came and went within two hours. How much work could five men do in that time that warranted the supervisor's outright rejection of them? Moreover, the very substance of their case is preposterous: what training is required to offload and stack tyres alongside other workers doing the same task? Why would Goodyear want to cover up that the workers sent to them were inadequate if that was indeed the case? No motive exists.

[28] The assessment is vexed by the arbitrator giving no clue as to why he believed the employees. This requires a review court and this Court to speculate in order to plumb the possibilities that a reasonable fact–finder could be persuaded that the employees were chased off by Nkosi, as alleged. To do so, one would have to find that there was a conspiracy hatched by no later than 14h15 that same day, and that the eight persons at a non-existent disciplinary enquiry conspired soon after to concoct the employer's version.

[29] In my view, the body of evidence cannot sustain the result rendered by the arbitrator. The appropriate set of facts to be found proven was that advanced in support of the employer's case. This is not simply because this court takes that view and, ergo, the arbitrator was unreasonable. Rather, the finding in the award is perverse in relation to the evidence. Accordingly, the employees were guilty of desertion.

The Sanction

[30] Self-evidently, an enquiry into an appropriate sanction on the proper facts was not undertaken. That task must be performed now.

[31] The contestation over sanction involves, on the one hand the plight of the employees who had miscalculated the impact of additional travel costs and who rashly abandoned their posts, against, on the other hand, the impact of that abandonment on the business credibility of the employer.

[32] A reading of the disciplinary enquiry minute does not reveal that a sensible appreciation existed of the employees' predicament. It was indeed appropriate to weigh the business embarrassment factor as the chairman did,

but in the absence of addressing the circumstances holistically, the question of the *degree* of culpability was fudged.

[33] Anterior to the events which hitherto have been the focus of the judgment are the circumstances of the business of the employer at the time of the deployment of the employees to Goodyear. Willemse testified to those circumstances. Two elements of her evidence are pertinent.

[34] First, she explained that the labour broking market was competitive, hence maintaining credibility with customers was imperative to retain custom. The desertion dented the employer's goodwill with Goodyear. No further placements have been called for since this incident. No challenge was put up to these contentions. In my view, it is fair to accept that the probabilities indeed support such a perspective.

[35] Second, she explained the contractual relationships with the employees. By its very nature as employees of a labour broker, the employees formally agreed to be moved from site to site as operational demands required and opportunities changed. Transport to and from workplaces were the responsibility of the employees. The group of five employees concerned had been employed in April 2007, save for one who was employed from May. Thus, they had all been employees for about 10 months. Their written contracts of employment were adduced, the terms of which, supported this evidence. Accordingly, they were all familiar with the usual operational arrangements. Moreover, they were invited to take up posts at Goodyear when their previous assignment terminated; the assignments were not forced on them. This position, however, must be qualified by the fact that had they not agreed to take up the Goodyear posts, there was no other work available, and their retrenchment would have, unavoidably, followed.

[36] In my view, admittedly derived from a paucity of facts on this record, it is not apparent why the personal circumstances of the employees did not enjoy greater consideration. The perfunctory handling of the issue of guilt owing to a plea of guilty may be overlooked in the hands of laymen, but the matter of sanction warranted conscious consideration. It seems to me that the sole

premise for deciding the sanction was the embarrassment the employer suffered. That was not good enough. On the meagre wages being earned, it must be obvious that the net earnings after transport costs is a major factor in the ability of these employees to support themselves, and no less, support or contribute to the support of their families. The fact that they would walk out in mid-shift seems to me to lend weight to the sincerity of their grievance, which regardless of contractual obligations ought to have been investigated. The common labourer is not to be treated as a mere unit of labour. He is also a human being. No more than a modicum of empathy ought to have propelled the chairman of the disciplinary enquiry to probe the implications of their predicament and weigh that factor in determining the degree of blameworthiness to attach to their actions.

[37] Accordingly, despite the employees having been guilty of desertion, and despite the serious consequences for the business credibility of the employer, the sanction of dismissal was inappropriate. Allowing due weight to the effect of their misconduct on the business credibility of the employer, a final written warning would be proportionate to their delinquency. If there had been no other opportunity to be placed, as appears to be the case, the employees would have faced retrenchment.

[38] Compensation is sought by the employees. This Court shall determine an appropriate sum.

[39] Paradoxically, if they had been retrenched in February 2008, they would probably have been given retrenchment packages based on, a most, a year's service, perhaps at two weeks' pay. At R400 per week that would have yielded R800. In inflated money terms, by my rough calculation, R400 in February 2008 is about R600 now, in March 2016. Their hypothetical retrenchment packages would have been about R800 each.

[40] In giving weight to that consideration, and allowing an appropriate measure to denote the unfairness of the dismissal, I would award as compensation to each employee-appellant the sum of R2400, a sum equivalent to one months' wages, at an estimation of current 2015 values.

Order

[41] I make this order:

41.1. The appeal is upheld, in part, and dismissed in part.

41.2. The Judgment of the court *a quo* is set aside.

41.3. The award of the arbitrator is reviewed and set aside.

41.4. The employees are declared to have been guilty of desertion.

41.5. The sanction of dismissal is declared to have been inappropriate and unfair.

41.6. Compensation is awarded to each employee-appellant in the sum of R 2400.

41.7. There is no order as to costs.

The court expresses its appreciation to Advocates Myburgh SC and Itzkin, and their attorney, Mervyn Taback, who acted pro amico in the matter

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Sutherland JA

(with whom Tlaletsi DJP and Davis JA concur)

APPEARANCES:

FOR THE APPELLANTS: Adv A Myburgh SC, with him Adv R Itzkin,

Instructed by Meryyn Taback Inc,

Ref: St Elmo Wilkin

FOR THE FIRST RESPONDENT: Adv W Hutchinson,

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