REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case No JR 1973/10

Case No JR 293/07

Case No JR 919/00

In the matter between:

MASHALE PAULUS MALAPANE Applicant

and

NATIONAL BARGAINING COUNCIL FOR First Respondent

THE ROAD FREIGHT INDUSTRY

COMMISSIONER LORAINE JOHNSTON Second Respondent

TWIN TRUCKING (PTY) LTD Third Respondent

Heard: **8 July 2014**

Delivered: **24 July 2014**

Summary: Employee dismissed for failing to disclose that he had a previous conviction. Arbitrator had found the dismissal to be unfair and awarded 12 months' compensation. Applicant seeks to review award. Matter remitted to first respondent for rehearing on sanction only. Also wants to re-enrol matter previously struck off and consolidate another matter where this court had made an order. Both applications refused.

JUDGMENT

SEEDAT AJ

Introduction

[1] This is an application (the primary application) in terms of s 145(1) of the Labour Relations Act, 66 of 1995 (the LRA) to review and set aside the arbitration award of the second respondent (the commissioner) issued under the first respondent's case number GPRFBC7992.

[2] The commissioner had found the dismissal of the applicant to have been unfair and awarded him compensation for 12 months.

Preliminary matters

[3] To the primary application to review, the applicant,[1] who appeared in person, wants to re-enrol a matter that was struck off the roll by this court on 15 October 2003 under case number JR 3919/00 and should this application be successful, consolidate it with the primary application together with the matter in which Nel AJ made an order in favour of the applicant on 8 May 2008 under case number JS 293/07.

Re-enrolment of case J3919/00

[4] This matter was struck off the roll on 15 October 2003 because the applicant was not present. In his affidavit supporting the application for re-enrolment, the applicant says that he did not attend court because he had not received the notification of the hearing. He also bemoans his financial state.

[5] The applicant wants to re-enrol the matter more than 10 years after it been struck off the roll.

[1] The applicant filed voluminous documents much of which were prolix, repetitive, irrelevant and riddled with emotional diatribe.

[6] The Constitutional Court in *Mohlomi v Minister of Defence*[2] in dealing with the consequences of excessive delay said:

> 'Nor in the end is it always possible to adjudicate satisfactorily on cases that have gone stale. By then witnesses may no longer be able to testify. The memories of ones whose testimony can still be obtained may have faded and become unreliable. Documentary evidence may have disappeared.'

[7] In *Radebe v Government of the Republic of SA & others*[3] the court gave two reasons as to why a court should refuse a claim at the behest of a party who has been dilatory:

> 'The first is that unreasonable delay may cause prejudice to other parties…The second reason is that it is both desirable and important that finality should be reached within a reasonable time in respect of judicial and administrative decisions.'

[8] Molahlehi AJ *National Union of Metalworkers of SA obo Nkuna v Wilson Drills-Bore (Pty) Ltd t/a A & G Electrical*[4] remarked that justice and fairness to both parties should determine whether to re-enrol a matter or not.

[9] The statement of claim in this matter was filed in September 2000 and set down twice before on 25 October 2000 and 15 February 2001. The applicant was aware of both these dates even though on the last date he was in a Namibian jail and wrote to the registrar of this court seeking a postponement. The matter was postponed sine die. It is not clear from the papers how the matter came back before this court on 15 October 2003 when it was struck off the roll. The applicant has not given a satisfactory explanation as to why he could not be present in court on 15 October 2003. It is not enough for a defaulting party to say simply that he did not receive the notice of set down.[5].

[10] The applicant then remains idle and only on 19 July 2012, almost nine years after his claim was struck off, does he launch his application to re-enrol the dispute. Again, his reasons that he had to work to pay off his debts are fatuous. Indeed, on the 5 November 2010 – some 18 months before the

[2] 1997 (1) SA 124 (CC) para 11
[3] 1995 (3) SA 787 (N)
[4] (2007) 28 ILJ 2030 (LC) at para 26
[5] *Caravan & Pleasure Resort v SA Health Care Trade Union obo Bronkhorst & another* (2008) 29 ILJ 1008 (LC)

application to re-enrol case J 3919/00 – he filed the primary application thus giving lie to his claim that he could not attend to the re-enrolment because of work commitments.

[11] It is incomprehensible that a man such as the applicant who is so diligent and quick in litigating, did not follow up on this matter. The time lapse is excessive. In the circumstances, re-enrolment will be prejudicial to the other parties and it would be neither fair nor just for this matter to be re-enrolled.

[12] The application to have case number J 3919/00 re-enrolled is dismissed. The need for its consolidation with the primary application therefore falls away.

Consolidation of case JS 293/07

[13] In terms of rule 23 of the Rules of the Labour Court, consolidation may be granted where it is 'just and expedient' to do so.

[14] In this case, Nel AJ made an order on 8 May 2008 reinstating the applicant and ordering the third respondent to pay outstanding bonuses and remuneration for 14 months. The applicant seeks consolidation so that the order of the learned judge can be varied for remuneration to be calculated over 26 months.

[15] Provision for the variation of a court order is not to be found in the Labour Relations Act 66 of 1995, the Rules of the Labour Court or the Labour Court Practice Manual. Guidance may be sought in rule 42 of the Uniform Rules of Court.

[16] It is generally accepted that once a court has made a final judgment or order, it has no authority to correct or alter it.[6] One of the few exceptions to this rule is where there was an obvious error.

[17] Waglay J (as he then was) in *Piner v SA Breweries*[7] stated:

'For the court to grant consolidation of separate actions, it need not simply consider whether the balance of convenience may favour such consolidation, but go further and be satisfied that consolidation will in no way prejudice the party or parties sought

[6] *West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1934 AD 173
[7] (2002) 23 ILJ 1446 (LC) at para 4

to be joined . See in this respect *New Zealand Insurance Co Ltd v Stone* 1963 (3) SA 63 (C) at 63H. The prejudice must, however, be substantial; one of the issues that the court is required to consider is whether the relief sought in each of the separate actions which are sought to be consolidated, depends on the determination of substantially the same questions of law or fact or not.'

[18] The order of Nel AJ was final and different to the issues before me. If the applicant was dissatisfied with the learned judge's computation of compensation, his only recourse was to have applied for leave to appeal.

[19] For these reasons, the application to consolidate case JS 293/07 is refused.

Review of case 1973/2010

[20] The commissioner had found the dismissal of the applicant by the third respondent to be unfair and ordered the third respondent to pay compensation to the equivalent of 12 months' remuneration.

[21] The applicant challenged the award of the commissioner on numerous grounds:

- The commissioner had failed to consider the payment of overtime
- Disciplinary proceedings were not instituted timeously
- The finding of the chairperson of the disciplinary hearing was not communicated to the applicant timeously and hence he was denied the right to mitigate
- The applicant was not afforded an appeal
- The commissioner did not reinstate him
- The commissioner failed to pay the average remuneration
- This court increase his remuneration by 12% which was the increment given to all employees whilst he was on suspension.
- This court declares his dismissal to be automatically unfair.

[22] The applicant seems to home in on procedural transgressions by the third respondent. But this does not help his cause because his dismissal was, in any event, found to be unfair by the commissioner.

[23] Neither can compensatory awards be adjusted to take into account increments in salaries[8] nor can this court on review declare a dismissal to be automatically unfair when it was arbitrated as an unfair dismissal only.[9]

[24] Given that the commissioner had found his dismissal to be unfair, the only issue that this court has to consider is the sanction imposed by the commissioner.

The arbitration record

[25] After the applicant had launched his review application, the first respondent, on 17 September 2010, filed the bench notes of the commissioner as the only record of the arbitration proceedings.

[26] There seems to be no dispute that the arbitration hearing was electronically recorded. The handwritten notes were simply notes kept by the commissioner and appear to be scanty, incomplete and illegible. They cannot be regarded as a comprehensive reflection of the arbitration proceedings. In any event, the applicant disputes the correctness of these notes.[10]

[27] The applicant states that he did receive two compact discs from the first respondent on 21 August 2010 but that these were blank and he returned them to the first respondent.

[28] On 22 November 2010, the attorneys for the third respondent wrote the applicant confirming that the transcription of the arbitration proceedings was not filed and that the applicant was required to obtain the record or attempt to reconstruct the record. The applicant was referred to the case of *Lifecare Special Health Services (Pty) Ltd t/a Ekuhlengeni Care Centre v Commission for Conciliation, Mediation & Arbitration.*[11]

[8] Section 194(1) of the Labour Relations Act 66 of 1995 stipulates that compensation must be 'calculated at the employee's rate of remuneration on the date of the dismissal'.
[9] There is nothing on the available record to show that the dispute was referred as an automatically unfair dismissal. Even if it was, then the first respondent would have lacked jurisdiction to arbitrate the dispute under its auspices (s 191(5)(b)) unless the parties had agreed in writing to do so (s 141(1)).
[10] Page 275 of the bundle
[11] (2003) 24 ILJ 937 (LAC).

[29] The applicant was dismissive of the attorneys' proposal and maintained that the application can be determined without a record.[12] He relied on *Shoprite Checkers (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration*[13] and *Ram Hand-to-Hand Couriers v National Bargaining Council for the Road Freight Industry*[14]

[30] It is correct that sometimes, in the absence of a complete record, the courts have been robust in determining the matter on the available information.[15] But this would be where the 'irregularity may be so patent from the award that a record might not be necessary'[16] or because there was no 'material dispute of fact going to the very heart of the review application'.[17]

[31] However, there have been instances, where this court has been reluctant to review an award on its merits without a proper record of what happened in the arbitration hearing.[18]

[32] In *ASA Metals (Pty) Ltd (Dilokong Chrome) v Commission for Conciliation, Mediation & Arbitration*[19] Zondo AJ said:

> 'When all is said and done, a decision as to whether an award is reasonable must be taken after a careful and thorough consideration of all the material that was before the commissioner and not just the reasons he or she gave for it.'

[33] All I have before me, are the scribbled notes of the commissioner and this is of no assistance in reviewing and varying the award.[20]

---

[12] Though in an exchange with me, the applicant conceded that the record may be necessary.
[13] (2002) 23 ILJ 943 (LC)
[14] Case No C174/2007 at para 4
[15] *Papane v Van Aarde NO & others* (2007) 28 ILJ 2561 (LAC); *Public Servants Association of SA on behalf of Khan v Tsabadi NO & others* (2012) 33 ILJ 2117 (LC)
[16] *Shoprite Checkers (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration* (2002) 23 ILJ 943 (LC) at para 11. Though in the matter before him, Francis J was of the view that the record was 'crucial' and the failure to produce the record was a reviewable irregularity.
[17] *Ram Hand-to-Hand Couriers v National Bargaining Council for the Road Freight Industry* (Case No C174/2007 at para 4
[18] Zondo JP (as he then was) in *Papane v Van Aarde NO & others* (2007) 28 ILJ 2561 (LAC);*Coates SA (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration* [2004] 4 BLLR 353 (LC); *Metalogik Engineering & Manufacturing CC v Fernandes & others* (2002) 23 ILJ 1592 (LC); *Boale v National Prosecuting Authority of SA & others* (2003) 24 ILJ 1666 (LC)
[19] (2013) 34 ILJ 350 (LC) at para 17
[20] *Doornpoort Kwik Spar CC v Odendaal & others* (2008) 29 ILJ 1019 (LC) para 8

[34] I am not amenable to dismissing the application for review for want of a record because it would seem that the electronic recording was missing and the applicant alone cannot take the blame.[21] The first respondent filed the handwritten notes of the commissioner but did not say what had happened to the transcripts.

[35] Astonishingly, the third respondent's attorneys did not bring an application in terms of rule 11 of the Rules of the Labour Court for an order to dismiss the review application, alternatively for an order to direct the applicant to comply with rule 7A(5), rule 7A(6) and rule 7A(7) of the Rules.

[36] Essentially, the applicant's complaint was that though his dismissal was declared by the commissioner to be unfair, he was not reinstated and that his compensation was based on an incorrect amount.

[37] The award shows that the commissioner was aware of s 193 of the LRA but, except for a bald statement that the 'respondent's unchallenged evidence indicated that there was a breakdown in the employment relationship'[22] did not elaborate on the factors or the evidence that influenced her decision not to order reinstatement.

[38] From the applicant's version it would seem that there was a dispute apropos the applicant's remuneration. The parties were called upon by the commissioner to submit proof of the remuneration to her. The commissioner then simply relies on the remuneration used by Nel AJ in case 293/07 as a basis of computing the compensation.

[39] These are issues I cannot determine without a full record.

[40] The practical approach in my view, based on fairness and justice, is to remit[23] the matter to the first respondent to be heard before a commissioner other

[21] *Boale v National Prosecuting Authority of SA & others* (2003) 24 ILJ 1666 (LC) para 5. The applicant said that when he went to the offices of the first respondent, he was told that the record was missing.
[22] This is disputed by the applicant
[23] *Bolasana v Motor Bargaining Council & others* (2011) 32 ILJ 297 (LC); *Doornpoort Kwik Spar CC v Odendaal & others* (2008) 29 ILJ 1019 (LC)

than the second respondent but on the aspect of sanction alone, the dismissal already having been found to be unfair.

[41] I am tempted to award costs against the applicant for the obfuscatory, often irrelevant and sometimes scurrilous nature of his papers. But then, the applicant is a lay litigant on a crusade against conspiratorial forces averse to him.[24] I do not make any order as to costs.

_____

SEEDAT AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

APPLICANT:	In person
THIRD RESPONDENT:	Advocate C Roodt
Instructed by:	AM Spies Attorneys

[24] On page 379 of the bundle, the applicant alleges: 'It is only under a very intensive examination of the whole evidence in this matter that one can arrive to a conclusion that there was in fact a corrupt relationship between the Commissioner and the 3rd Respondent through the First Respondent. There is something FISHY here in this matter.' See also page 445 para 10 and pages 381ff.