

IN THE LABOUR COURT OF SOUTH AFRICA

CASE NO: J4051/00

In the matter between:

Applicant

and

COMMISSION FOR CONCILIATION,

First Respondent

Second Respondent

Third Respondent

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JUDGMENT

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FRANCIS J

Introduction

1. This is an application brought in terms of section 145 of the Labour Relations Act 66 of 1995 (“the Act”), for the review of an award made by the second respondent (“the commissioner”) under the auspices of the first respondent (“the CCMA”) wherein the commissioner found that the applicant’s dismissal of the third respondent for misconduct (alcohol abuse, sleeping on duty and neglect of duty) was both substantively and procedurally unfair and ordered his reinstatement with full retrospective effect.
2. The third respondent opposed the application. The papers filed with this Court

comprises *inter alia*, founding, supplementary and answering affidavits, and the bundle of documents and written submissions submitted to the commissioner.

There is no transcription of the tape recording of the arbitration proceedings and no handwritten record thereof as either the CCMA or the commissioner has lost them.

Background facts

3. Prior to his dismissal, the third respondent was employed by the applicant as a sales manager at its Midrand store.
4. The events that led to the third respondent's dismissal occurred during the evening of 7 and the morning of 8 November 1998, over which period the third respondent worked night shift and was in overall charge of the store.
5. The third respondent was called to attend a disciplinary enquiry on the following charges:
 - “1. *Gross misconduct in that it is alleged by management that you slept in the store while on duty, and also that you were under the influence of alcohol for the period of your shift.*
 11. Poor performance in that on Sunday 8/11/98 you allowed the nightshift to clock out and leave the store prior to the end of the shift while knowing that the sales floor and stock room was not up to the standard as required by store management

and the company standards respectively.”

6. On 17 November 1998, and at the conclusion of the enquiry, the third respondent was dismissed after having been found guilty as charged, which decision was subsequently upheld on appeal.
7. Further to the third respondent having invoked the statutory dispute-resolution procedures, the matter proceeded to arbitration before the commissioner on 19 June 2000.
8. Both the substantive and procedural fairness of the third respondent’s dismissal was in dispute before the commissioner. The applicant called two witnesses (Ronald Sadiki, a shelf packer, and Bernard Jean Pierre, the receiving manager) while the third respondent testified on his own behalf.
9. The commissioner found in the arbitration award that the third respondent’s dismissal was substantively and procedurally unfair and ordered that he be reinstated with full retrospective effect. It is this award that the applicant is seeking to review.

Absence of a record

10. It is common cause that the record of the arbitration proceedings is lost. Marian

Harrison who represented the applicant at the arbitration proceedings did not keep notes in the knowledge that the proceedings were being recorded by the commissioner. I was informed from the bar that the third respondent might be in possession of some notes. Those notes will not be adequate to assist the applicant in reconstructing the record. They are scant. The applicant is unable to reconstruct the record. I also fear that a reconstruction of the record in the present proceedings will prove to be counter productive. There is every prospect that it will produce a host of new disputes. No purpose will be served to let the applicant reconstruct the record.

11. The issue about the absence of a record has arisen in this Court before. I am of the view that in some review applications, a record of the arbitration proceedings may not strictly speaking be necessary. An irregularity may be so patent from the award that a record might not be necessary. A further example is where it is common cause between the parties that the commissioner refused cross examination or to swear in witnesses.
12. When this Court exercises its powers of review under section 145 of the Act, the point of departure for any debate concerning challenges made to the conduct of a commissioner is what was before the commissioner during the proceedings. What was before the commissioner, is constituted by the record of the proceedings. I am of the view that in this review, it is crucial that a record of the proceedings

should have been made available. I am not able to apply my mind properly in this application without having regard to a record of the proceedings.

13. Mr Graham, who appeared for the third respondent, urged me to dismiss the application on the grounds that the applicant has failed to make the record available. In support of this contention he relied on the decision in *JDG Trading (Pty) Ltd t/a Russels v Witcher NO & Others* (2001) 22 ILJ (LAC) at 650 G to H. The LAC held that in the absence of the transcribed proceedings before the commissioner, the court *a quo* was in no position to adjudicate properly on the application before it and ought to accordingly to have dismissed it. The LAC found that the court *a quo* was not entitled to have interfered at all with the order made by the commissioner. The appeal succeeded.
14. The facts in *JDG Trading (Pty.) t/a Russell v Watcher NO and Others* are clearly distinguishable from the present matter. In the aforesaid matter, the notes of the proceedings and six recorded cassette tapes of the arbitration proceedings as well as a bundle of documents submitted at the arbitration hearing was filed with the Registrar. filed. The applicant had failed to have either the handwritten record or the tapes transcribed. In the present matter, the recorded cassettes and handwritten notes of the commissioner were lost. It was not placed in dispute that the applicant was unable to reconstruct the record of the proceedings. It is not the applicant's fault that the record and transcript of the proceedings are lost. It will

be unfair to dismiss the application as since it was not the applicant's fault that no record could be provided.

15. The question that remains is whether I should refer the matter back to the CCMA for a hearing *de novo*. In the matter of *Uee-Dantes Explosives (Pty) Ltd v Maseko & Others* [2000] 7 BLLR 842 (LC), I referred a matter back to the CCMA after the record and handwritten notes were not found. See also *Department of Justice v Hartzenberg* [2001] 9 BLLR (LAC).
16. When deciding to refer the matter back to the CCMA one must consider not only the interest of the third respondent but those of the applicant as well. The choice is either to let the award in the third respondent's favour stand, or to set it aside and to refer the matter for a hearing *de novo*. If the award is allowed to stand, then the applicant's right of review will be completely frustrated, thereby prejudicing it. A remittal, on the other hand, will deprive the third respondent of his award and will lead to the parties incurring more costs. This may be especially hard on the third respondent, who is an individual and who may not be possessed of adequate funds. Mr Graham submitted that his client would be unduly prejudiced by a remittal.
17. As stated above, it was not the applicant's fault that the cassette tapes and handwritten notes were lost. The responsibility for their safekeeping rests on the

CCMA. On balance, however, it appears to me that the applicant's right of review is the overriding consideration. If the matter is remitted for a *de novo* hearing the third respondent may prove his case once again, in which event his position will be safeguarded. But if the review application is dismissed, the applicant will lose the opportunity of persuading this Court that the commissioner committed irregularities. It will be faced with a liability in compensation and with a finding that it dismissed the third respondent substantively and procedurally unfairly, a result which might not have been sustained on review. It is always unfortunate when a matter has to be remitted, but it seems to me to represent the lesser inequity.

18. This is not a matter where I should award costs against one of the parties.
19. In the circumstances the following order is made:
 1. The arbitration award of the second respondent made on 1 July 2000 under CCMA case number GA 56114, is hereby reviewed and set aside.
 2. The dispute is referred back to the first respondent to be heard by another commissioner other than the second respondent.
 3. There is no order as to costs.

FRANCIS J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

NT : A T MYBURGH INSTRUCTED BY DENEYS REITZ
ATTORNEYS

SPONDENT : D G GRAHAM INSTRUCTED BY JOSE NASCIMENTO
ATTORNEYS

: 18 APRIL 2002

NT : 24 APRIL 2002