IN THE LABOUR COURT OF SOUTH AFRICA

(Held in Johannesburg)

Case No JR648/02

In the matter between:

FIDELITY CASH MANAGEMENT SERVICES (PTY) LTD	Applicant
and	
MUVHANGO, SA NO	1st Respondent
THE COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION	2nd Respondent
SATAWU obo RACHOSI, C	3rd Respondent

JUDGMENT

STELZNER AJ

This is an application in terms of section 145 of the Labour Relations Act of 1995 ("the Act") in terms of which the Applicant seeks to review and set aside the arbitration award of the 1st Respondent. The award was dated 13 March 2002 but only reached the parties on or around 11 April 2002. The review was filed on 23 May 2002 in response to an application launched by the 3rd Respondent to have the award made an order of court. The application is made within the time provided for in section 145 of the Act.

The matter involves the dismissal of the 3rd Respondent who had been employed by the Applicant as a driver of its security vehicles. The 3rd Respondent was dismissed for dishonesty (submitting an application for emergency leave on the false pretext that his father had passed away; failing to follow procedures (leaving crewmen at banks with

clients' cash and driving away leaving the crewmen alone for extended periods of time) and verbally threatening colleagues at work. The 1st Respondent found that Applicant had failed to prove the allegations / charges against the 3rd Respondent and that the dismissal was therefore substantively unfair. Having found as he did on substantive fairness the 1st Respondent found it unnecessary to consider the issue of procedural fairness. The Applicant was ordered to reinstate the 3rd Respondent and to pay him his salary and benefits from date of dismissal to the date on which he would resume duties, save for a period of approximately three months where the progress of the matter had been delayed.

What is problematic in regard to this matter and my task in considering the review is that the record before me is not complete. The record was delivered by the CCMA to this Court on 28 June 2002. It was pointed out on behalf of the 3rd Respondent that the record was not transcribed and filed by the Applicant until 12 November 2003 and that Applicant had failed to prosecute the review expeditiously, despite various attempts by or on behalf of the 3rd Respondent to elicit further action on the matter, in February and by way of letters dated 27 June, 4 August and 15 August 2003. The 3rd Respondent then filed its opposing / answering affidavit on 26 November 2003. Once again there was delay on the part of Applicant which only filed its replying affidavit on 8 March 2004.

It was further argued before me that the 3rd Respondent had been compelled to take a lead role in prosecuting the review in that it was 3rd Respondent who inspected the court file and found that the record was incomplete, pressed the Applicant to file a complete record, indexed and paginated the court file and filed the corresponding Rule 22B notice. The record that was eventually filed was incomplete. All the tapes supplied by the 2nd Respondent were transcribed but tape two was found to contain recording only on about a quarter of side A with nothing on side B. Applicant contends that the missing portion includes evidence vital to its case on review, in particular the evidence of one of its witnesses, Mr Nortje. In fact the missing portion of the record contains the evidence of Mr Nortje, Mr Clarke and Ms H Swanepoel, all of whom testified on Applicant's behalf at the arbitration. Applicant argues that it is not at fault in regard to the fact that the record is incomplete and that to the extent that its right of review is prejudiced (which it says is the case) this is a reason on its own to refer the matter back to the CCMA for a hearing *de novo.*

The 3rd Respondent argues that Applicant made no effort to reconstruct the record. It did not convene a meeting between the parties and the commissioner (1st Respondent) with the purpose of trying to agree on a reconstruction of the record using the notes made by all the parties, including the commissioner, at the arbitration. This fact should not be seen in isolation but in the light of the fact that Applicant bears the onus in review proceedings and in the light of Applicant's dilatory conduct in prosecuting the review.

The 3rd Respondent further made the point that Applicant elected not to file a supplementary affidavit and then sought to deal with a great deal of the evidence in its replying affidavit. In circumstances where an applicant gets the opportunity to file a supplementary affidavit it was argued that the rule that an applicant must make out its

case in its founding papers should be strictly applied.

Applicant argued that what I have before me consists of two mutually opposing versions which can only be resolved by way of oral evidence and that the right place for that to happen is back at the CCMA in an arbitration *de novo.* Applicant argues that its right to review must carry more weight than the 3rd Respondent's right to finality in the matter because if I deny the review then Applicant has no further opportunity of ventilating its concerns and dealing with the case on its merits whereas the 3rd Respondent will have the chance to put his case again at the fresh arbitration hearing if I refer the matter back to the CCMA for a fresh arbitration. The least prejudicial course of action, it is submitted, would be for this Court to send the matter back to the CCMA for a fresh hearing.

Having read the papers, including the arbitration award, and the available portion of the record it is apparent that the evidence of Nortje, Clarke and Ms H Swanepoel formed a key part of Applicant's case and had to be weighed by the 1st Respondent against the version of the 3rd Respondent. In the absence of that evidence I am not in a position to fully evaluate all the arguments advanced by Applicant in support of its case for review. However, I do not think that Applicant made a proper effort to reconstruct a record which might have placed me in such a position. Whether or not it would have been possible to do so is a matter of speculation now – it may well not have but is also could have.

The parties attempt in the opposing and replying affidavits to set out what evidence was given by the various witnesses on the basis of their respective recollections thereof. Clearly, their respective renditions conflict with each other in a number of material respects. I agree with Mr Snyman who appeared for the Applicant that this Court is not the appropriate place for oral evidence to be heard in order to sort out these differences. This Court should have been placed in a position to assess the different versions as they were placed before the 1st Respondent via a full transcription of the record or a satisfactory reconstruction thereof. However, Applicant ought to have made an effort to reconstruct the record. There is no evidence or suggestion by Applicant that it did so. Instead Applicant has taken the clear stance that because it was the 2nd Respondent's duty to keep a proper record, in the absence of it doing so Applicant was entitled simply to sit back, throw up its hands and say that there was nothing it could do about that.

This is not a case where the 2nd Respondent has simply not made the tapes available or has lost the tapes. The tapes were made available but the greater portion of one of the tapes was blank and thus the evidence of certain witnesses could not be transcribed.

Both parties referred me to the decision of the Labour Appeal Court in *Lifecare Special Health Services (Pty) Ltd t/a Ekuhlengeni Care Centre v CCMA & others* (2003) 24 ILJ 931 (LAC). In that matter the company placed before the court a typed transcript of seven out of the 11 tapes on which the evidence had been recorded, four tapes having gone missing, together with the handwritten notes of the commissioner which were not transcribed in respect of the evidence which was missing. When the matter came before it on appeal the LAC had the following to say about what the applicant in that matter should have done when it appeared that there were difficulties with the record - "*…it was the obligation of [the applicant], as the reviewing party, to initiate the enquiries and*

steps which have been set forth in this judgment." The steps referred to and set out earlier in the judgment were that a reconstruction of the record should have been attempted in the following way. The commissioner and the representatives should have come together, bringing their extant notes and such other documentation as may be relevant and should have endeavoured to the best of their ability and recollection to reconstruct as full and accurate a record of the proceedings as the circumstances allowed. This should have been placed before the relevant court with such reservations as the participants may wish to note. Whether the product of their endeavours would be regarded as adequate for the purposes of the review would be for the court hearing the matter to decide. (See para 17 at page 939 of the *Lifecare* judgment (supra)). The LAC commented further (at para 18) that while it appreciated that reconstructing parts of the record some time after the event would be time consuming and maybe frustrating, the parties concerned were expected to co-operate so as to attempt to do so.

The 3rd Respondent referred me to the decision of this Court in *Nathaniel v Northern Cleaners Kya Sands (Pty) Ltd & others* [2004] BLLR 157 (LC), in support of the argument that I should not remit the matter back to the CCMA simply because of the absence of a complete record. In that matter the parties had, as the Court put it, "*gone to great lengths to reconstruct the record, including perusal of their legal representatives' notes, the commissioner's notes and the employment of a specialist transcriber to re-assess the tapes."* (At para 7 page 158 of the *Kya Sands* judgment.) Notwithstanding these efforts the record was incomplete in respect of certain material evidence. The learned Judge Gamble AJ held that despite the record being incomplete this was not a ground on its own to refer the matter back to the CCMA. Instead he proceeded to consider whether or not the applicant in that matter had made out a case on the material that was before the court. The learned Judge concluded that the applicant had not and dismissed the application.

In this matter the Applicant has contended in the first instance that the award should be set aside and referred back to the CCMA on the ground of the incomplete record alone.

Applicant referred me to the decisions in *Uee-Dantex Explosives (Pty) Ltd v Maseko & others* (2001) 22 ILJ 1905 (LC) and *Shoprite Checkers Ltd v CCMA & others* (2002) 23 ILJ 943 (LC) in support of the argument that because it was not Applicant's fault that the record was incomplete, the responsibility for ensuring a complete record resting with the CCMA, and because Applicant's right of review should be the overriding consideration, I should refer the matter back to the CCMA for a fresh hearing.

As did Judge Gamble in the *Kya Sands* matter (supra), I find that these two decisions are distinguishable from the matter before me on the facts. In both those cases there was no record made available by the commissioner and the court found that the commissioner's failure to make available the record constituted a reviewable irregularity under the Act.

Applicant also referred me to the decision of the Labour Appeal Court in *Department of Justice v Hartzenberg* (2001) 22 ILJ 1806 (LAC). This matter is not applicable to review proceedings under section 145 of the Act as it dealt with an appeal under the old (1956)

LRA.

I am of the view that the reasoning in the *Kya Sands* matter is most on point in relation to the matter before me. I am also disinclined to refer the matter back simply because of the record being incomplete in circumstances where the Applicant has failed to take steps to reconstruct the record of the kind as set out in the *Lifecare* decision (supra). If I, and this Court generally, were to take such a view then it would be easy for applicants to bring reviews in the many instances that (unfortunately) the record supplied by the CCMA is incomplete, without there being real substantive grounds for such review and without such applicants making any effort to remedy the problem of the incomplete record. Had the Applicant taken proper steps to attempt remedy the defects in the record and had the record nevertheless remained materially incomplete then I might have taken a different view.

In the alternative to its first argument (that the review should succeed simply on the basis of the record being incomplete) the Applicant has put up specific averments as to why the award of the 1st Respondent is not justifiable. I cannot properly test those averments in the absence of a record in regard to the evidence of most of the Applicant's key witnesses. However, I have already found that it was incumbent on the Applicant (following the *Lifecare* decision (supra)) to attempt to place me in a position where I had a sufficiently complete record to enable me to deal with all of its arguments.

I could have deferred making a decision on the merits of the review by postponing the matter and ordering the Applicant to make an attempt to reconstruct the record, however, neither party has sought such an order or suggested that that is what I ought to do. I am also mindful of how much time has elapsed since the dismissal of the 3rd Respondent, much of that time resulting from Applicant's failure to pursue this review expeditiously.

In the circumstances I am of the view that Applicant must stand or fall on the basis of the case made out and the record which is before me, bearing in mind that it has the onus of making out its case for review.

In summary, the 1st Respondent found that the 3rd Respondent had shown that there was no dishonesty in the way in which he conducted himself regarding the issue of leave. He found the evidence to be that the 3rd Respondent had previously applied for study leave which was refused because his studies were not work-related. Shortly thereafter he applied for emergency leave because of the death of his father, to travel home and to attend the funeral. This was granted. The 3rd Respondent testified that he was approached by a person from his home town who was not known to him and advised of the death of his father, in the presence of another employee, Mr Shai. He applied for leave on that basis and started making arrangements to travel home. While making those arrangements he visited the union offices and his church (to advise the church of the death of his father). He later discovered that he had not received the correct message and that it was not his father who had passed away but his aunt. He phoned the company to advise them of this fact. When he reported for duty on the Monday he was told that arrangements had already been made for a replacement and he must finish

his leave since it had already been granted. Applicant's witnesses said that the 3rd Respondent was found at the church hall writing exams during the period of emergency leave. The 3rd Respondent produced a time-table showing that by the time he was granted emergency leave the series of exams he was required to write were already half completed and said that there would have been little point in his starting to write the exams half way through. Applicant's case was that the 3rd respondent had lied to the company about his father's death in order to get leave for the purposes of writing exams when that leave was refused. It was argued that it was too coincidental that he needed emergency leave shortly after his application for study leave was refused. The 3rd Respondent denied any such dishonesty and explained the confusion in regard to who exactly had died as set out above. At the arbitration hearing he produced proof of his aunt's death which he explained he did not have at the time of the disciplinary hearing. (It is therefore not correct as stated in Applicant's heads of argument that no proof was ever produced.)

In regard to the second and third charges 1st Respondent found that Applicant had not made out its case because he was not satisfied with the evidence of Mr Mnisi and Mr Shai, in particular the 1st Respondent made a credibility finding against Mr Mnisi. The about turn that Mr Mnisi made in his evidence in chief after being shown the document which was his previous statement is apparent from the record of that portion of the evidence which appears from line 7 page 55 of the record and following. The inference that Mr Mnisi had been coached and encouraged to make a statement against the 3rd Respondent appears clearly from the award and is supported by the record. Applicant provides no evidence from the record (which is complete in relation to Mr Mnisi's evidence) to indicate that the 1st Respondent's findings are incorrect let alone reviewable.

As to Applicant's contentions regarding the order of reinstatement to which is objected on the basis that the employment relationship had been completely destroyed, this cannot be accepted if the 1st Respondent correctly found that the allegations, and especially the allegation of dishonesty, had not been proved.

On the basis of what is before me I am of the view that the 1st Respondent thoroughly reviewed the evidence which he heard and which was placed before him, broadly along the lines on which an adjudicator is obliged to go about resolving factual disputes as recently restated by the Supreme Court of Appeal in *Stellenbosch Farmers' Winery Group Ltd and another v Martell at Cie and others* 2003 (1) SA 11 (SCA) at 14I-15E. Where there are gaps in the record what I can see at least from the 1st Respondent's award is that he summarises the evidence and evaluates it. He also had the opportunity of hearing the evidence first-hand and assessing the demeanour of the witnesses. He, for instance, finds the evidence of Mr Mnisi not to be credible and explains why. Mr Mnisi did an about turn in relation to his evidence on being shown the contents of a document after testifying contrary to what was contained in that document.

The 1st Respondent explains in his analysis of the evidence why he believed the 3rd Respondent and why he concluded that no case had been made out of dishonesty in

relation to his application for special leave. That explanation appears from the evidence of the 3rd Respondent in the record and is corroborated by the evidence of Mr Shai who was called to testify by way of a subpoena. Mr Shai was also an employee of the Applicant who appeared to have no reason to come to the 3rd Respondent's aid by falsely confirming his version of what happened when he was advised of the death of his father (which later turned out to be the death of his aunt).

The 1st Respondent found the evidence of Mr Nortje to be less than reliable and refers to the fact that he changed his version under cross-examination. Indeed he points to a number of contradictions in the evidence of the three key witnesses of the Applicant. I am unable to check that against the record but cannot say that the 1st Respondent acted irrationally or failed to apply his mind properly to the evidence before him.

In the circumstances Applicant has failed to make out a case for review and I make the following order.

1. The application to review the arbitration award of the 1st respondent is dismissed.

2. Applicant is ordered to pay the 3rd Respondent's cost in relation to this application.

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Stelzner AJ

Date of hearing	14 April 2005
Appearance for Applicant	Mr S Snyman of Snyman van den Heever Heyns
Appearance for 3rd Respondent	Mr A Burrow of Cheadle Thompson and Haysom
Date of judgment	22 April 2005