IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

CASE NO: C450/03 & 185/04

In the matter between:

UNITRANS FREIGHT (PTY) LIMITED	Applicant
and	
URSULA BULLBRING N.O.	First Respondent
NATIONAL BARGAINING COUNCIL FOR THE ROAD FREIGHT INDUSTRY	Second Respondent
SOCIETY DEVELOPMENT TRADE UNION OBO KIRI SMITH	Third Respondent

---

JUDGMENT

NEL, AJ

[1] This is an application to review and set aside or correct the award dated 29 July 2003, made by the first respondent ("the Commissioner"), acting under the auspices of the second respondent, under case number D110/WC/03. In his award the Commissioner found the applicant's dismissal of the employee, Kiri Smith ("Smith"), to have been substantively unfair and ordered the applicant to reinstate Smith without any back pay.

[2] Smith is represented herein by the Society Development Trade Union ("the Union"). He was dismissed by the applicant on 3 April 2003 for alleged gross negligence. An unfair dismissal dispute was declared which led to the Commissioner, on 29 July 2003, making the arbitration award which are being sought to be reviewed and set aside.

{3] On 4 September 2003, the applicant filed his review application. It should be noted that the Notice of Motion filed on behalf of the applicant is clearly defective in that it does not contain a prayer seeking the review and setting aside of an identified award. On 6 February 2007, some three years and five months later, the applicant filed a notice to amend its Notice of Motion, indicating that it would apply to amend it by deleting the relief sought in the original Notice of Motion and replacing it with an order properly seeking the review and setting aside of the relevant award of the Commissioner, now properly identified.

[4] On 23 November 2004, Smith brought an application under case number C185/04 seeking an order of Court making the arbitration award handed down by the Commissioner on 29 July 2003 an order of Court in terms of Section 158(1)(c) of the Labour Relations Act ("the LRA"). It is apparent that the applicant herein received this application as, in later papers

filed on behalf of the applicant, it confirms as a fact that Smith brought an application to make the arbitration award an order of Court and that he did so under case number C185/04. The applicant however contended that this application had not been properly served on it. This it said was so because the entire document had not been served on it and because the papers ought to have been served on the Road Freight Employers Association, it being the designated address for service on the applicant, and not its premises in Worcester. It would appear that the applicant accordingly did not file any opposing papers within the time limit to Smith's application. Smith alleges that a request was made to the Registrar of this Court to enrol the application to have the award made an order of Court. The Registrar of this Court allegedly declined to enrol the application as the review application was still pending and needed to be disposed of first.

[5] A fresh application was then launched on behalf of Smith by the Union as the third respondent in the applicant's review application, seeking an order of Court declaring that the applicant's review application instituted out of this Court on or about 3 September 2003 be declared to be deemed to have lapsed, alternatively an order declaring that the applicant had abandoned its said review application. An order was further

sought by the Union, directing the Registrar of this Court to enrol both the review application in case number C450/2003 as well as the application (to have the award made an order of Court) filed under case number 185/2004 by Smith. A further component of the relief sought by the third respondent in its application was that, in the event of the Court dismissing the review application, it sought an order that the applicant should make retrospective payment of Smith's salary and benefits from August 2003 until final determination of this application.

[6] In its application the third respondent, *inter alia*, alleged that since the applicant had served its review application it had patently failed to take any further steps in the proceedings to dispose with the review application or to bring finality to the matter. Smith further alleged in his supporting affidavit that, as there had been an excessive passage of time in the review application launched by the applicant and as there was no indication whatsoever that the applicant was serious to dispose expeditiously with the review application and to bring finality to the matter, he had obtained legal opinion. It was this legal opinion which motivated Smith in bringing the application (under case number C185/04) in terms of the provisions of Section 158(1)(c) of the LRA to have the award made an order of Court.

[7] Further relevant allegations made by Smith are that he contended that the review application herein was nothing less than an abuse of the Court process and merely intended to deny Smith the relief he had by law obtained and were entitled to. He also submitted that the review application and the conduct displayed by the applicant and its representatives flew in the face of the requirements of the LRA, namely the effective and expeditious resolution of disputes.

[8] The applicant entered opposition to the third respondent's application and filed its opposing affidavit thereto on 6 October 2005.

[9] Squarely faced with the allegations, which I have referred to a moment ago, the applicant responded by submitting that approximately a month after it had brought the application to review, a Mr Myburgh had attended the offices of the Bargaining Council ("the BC"). He had asked a Mr Ben van Rooyen, an official of the BC, whether the BC had forwarded the documents and tapes to the Registrar of this Court. Van Rooyen apparently advised Myburgh that the BC had not done so at that stage. It was contended on behalf of the applicant that it had been advised by Mr Myburgh that it was his, Mr Myburgh's, understanding that the BC would attend to the filing of the record with this Court. Mr Myburgh

had apparently further advised the applicant that he was not aware that Unitrans was entitled to bring an application to compel the BC to file the record with this Court. It was for this reason, namely the ignorance on the part of the applicant as well as Mr Myburgh, who was acting for the applicant at the time, that the applicant did not bring an application to compel the BC to file the record of the Arbitration proceedings.

[10] The deponent of the affidavit on behalf of the applicant further found it interesting that Smith was prepared to incur the costs of bringing the application (to dismiss the applicant's review application), yet he was not prepared to bring an application to compel the BC to comply with rules of this Court. I believe I will correctly summarise the rest of the affidavit filed on behalf of the applicant in opposition to the third respondent's application to dismiss the review by stating that it contains a number of bald denials of the most relevant allegations made on behalf of the third respondent, but does not really provide any further insight into the conduct of the applicant, which the Union complained about, in failing to move forward with its review application with due haste.

[11] Some nearly six months later, on 10 April 2006, the applicant filed its supplementary affidavit in terms of Rule 7A(8)(a) of

the rules of this Court. In its supplementary affidavit the Court is advised that the BC was required to despatch the record of the proceedings to this Court within ten days of receipt of the application to review but that it had only despatched the record of the proceedings, excluding the tapes, to the applicant in October 2005. A candidate attorney of the applicant's attorneys of record had spoken to an employee of the BC in Cape Town on 29 September 2005. This employee advised the candidate attorney that the BC's Johannesburg Branch had only requested the tapes from the Cape Town Branch the previous week. The BC employee further advised the candidate attorney that she was unaware that the applicant had brought any review application. The BC employee stated that she had looked for the tapes but had been unable to find them. She further stated that the practice in the BC was that tapes were re-used after one year and that in all likelihood the tapes had probably been re-used. For the rest, one is advised of the further efforts made over the period October to November 2005 on behalf of the applicant to obtain the record until in early December 2005 it could only recover every alternate page of the Commissioner's handwritten notes from the BC. Thereupon efforts were made to obtain the handwritten notes taken by the third respondent, which also yielded no results. On 15 February 2006, the applicant's attorneys of record

reminded Smith's representatives that the tapes of the arbitration proceedings had been lost and that the arbitrator's notes were incomplete. They further advised that they had established that the applicant's representative at the arbitration did not have adequate record of the arbitration proceedings and that since they had not been provided with any notes taken by the third respondent at the arbitration, it was not possible for them to reconstruct the record. As there was no record of the arbitration proceedings, the applicant's attorneys proposed that the arbitration award be set aside or abandoned by agreement between the parties and that the matter be referred back to the BC for arbitration. This proposal was rejected on behalf of Smith.

[12] When the applicant's attorneys of record were advised on 28 March 2006 by the third respondent that it did not have any notes of the arbitration, the applicant says that it became evident that without any handwritten notes, the parties would not be able to construct a proper and accurate record of the arbitration proceedings. It contended that on this basis alone the award ought to be reviewed and set aside and sent back to the BC for rehearing by another arbitrator. Applicant contended that in the absence of any record of the arbitration proceedings it was left with no alternative but to refer

exclusively to the first respondent's arbitration award which it then continued to do in its supplementary affidavit.

[13] On 21 July 2006, the applicant filed an application seeking that its non-compliance with the provisions of Rules 7A(5) and (6) in relation to the preparation of the record and Rule 7A(8) in relation to the delivery of its supplementary affidavit, be condoned.

[14] The situation with which I am accordingly confronted is that the applicant in the review has not filed the record of the arbitration proceedings and seeks to rely on the absence of a proper accurate record of the arbitration proceedings as a ground why the award ought to be reviewed and set aside and sent back to the BC for rehearing by another arbitrator. This is a rather astonishing submission, bearing in mind what I believe to have been the actual cause of the BC not having filed the record. What I have before me here is an applicant who brings a review application in which it expressly requires the BC to file the record of proceedings and to do so within ten days of receipt of the applicant's review application. A month later, it would appear very much in passing, the applicant's representative merely enquires from the BC whether it had filed the record of the arbitration proceedings. Not even an iota of further action is taken by the applicant to

procure the production by the BC of the record. It is apparent that not even the filing by Smith, about a year later, of an application to have the award made an order of Court, caused the applicant to take any steps whatsoever to pursue its review application. It certainly did not plead ignorance before this Court in respect of the fact that it knew that obtaining the record from the BC was the next step necessary in moving its review application forward. It would appear that only when, yet another year later, Smith brought another application, this time to have the review application in effect dismissed, did the applicant start to take active steps to pursue its review application.

[15] What is most relevant in this regard is that I have little doubt that the applicant's failure to take any steps whatsoever to compel the BC to produce the record, or even simply to remind it of the fact that it is under a duty to do so, is the reason why the BC in the end was unable to produce the required record. This view of mine must in no way be understood to condone the failure by the BC to properly respond to the notice contained in the original review application, calling on it to produce the record.

[16] The failure by the applicant herein to act with far more diligence in the pursuit of its review application, particularly

in respect of ensuring the timeous delivery of the record of the proceedings, is yet another reminder of how crucially important it is that particularly applicant parties in review proceedings should vigilantly and diligently pursue compliance by Bargaining Councils and the Commission for Conciliation, Mediation and Arbitration ("the relevant party") with time periods, particularly as far as the production of the record of arbitration proceedings is concerned.

[17] The applicant itself is required to expressly advise the relevant party in its Notice of Motion that it must dispatch within 10 days of receipt of its Notice of Motion the record of proceedings to the Registrar of this Court. On what conceivable basis can an applicant then contend that it did not know that the relevant party had a specified period within which to perform a clearly stated duty? What conceivable basis can there then be for an applicant party not to at least expect performance from the relevant party of its duty to deliver the record in the allowed time period? What excuse can there be for a party, under these circumstances, not to start at least soon after the expiry of the 10 day period to enquire why there had not been compliance, if that is the case? Ignorance of the law (or the rules of this Court for that matter) can not be allowed to be an excuse for a party not to

compel compliance by the relevant part with its obligations to dispatch the record timeously.

[18] There can hardly be any acceptable excuse for an applicant party for not taking active and proper steps to enforce compliance by the relevant party of the time periods within which these statutory bodies are required to perform their statutory duties. Where its failure to do so is then most likely directly responsible therefor that the relevant party can later not produce the record (because it had re-used the tapes) and for that reason, due mostly to the applicant party's conduct, the record of arbitration proceedings can then not be reproduced, that applicant party should hardly be allowed to hide behind its own conduct, and to benefit therefrom, when the record of the arbitration proceedings can, in the event, not be produced.

[19] A Court is in most cases in no position to properly decide a review application in the absence of a properly transcribed record. Before a Court may be able, and willing, to decide a review in the absence of a proper record, a clear case justifying such course of action will have to be made out by a party seeking that it be done. It is the onus of the applicant in a review application to ensure that such proper record be placed before the Court.

[20] Only in the event that an applicant party has satisfied the Court that no blame can be placed before its door for the absence of a properly transcribed record, may the Court be inclined to be sympathetic towards such applicant and may the absence of the record result in such applicant succeeding in a review purely by reason of the fact that no transcribed record is capable of being placed before the Court.

[21] In the present matter the applicant herein has most certainly not persuaded me that no blame can be placed before its door for the absence of a properly transcribed record. No case has been made out by the applicant that I should, or could, decide the matter without a proper record. On the contrary, the applicant wants to persuade me that the absence of the record herein should in and by itself be held as a reason why the applicant should succeed in its review application.

[22] As I am, however, of the view that the absence of a properly transcribed record herein is directly attributable to the failure on the part of the applicant to pursue its review application herein with due diligence, it follows that the applicant should hardly be able to benefit from its own failure to diligently pursue its review application herein. The applicant has also in my view dismally failed to diligently pursue the timeous obtaining from the BC of the record of the proceedings.

[23] I am accordingly in the first instance of the view that by reason purely of the fact that the applicant herein has failed to place a proper record of the arbitration proceedings before me, the application to review should be dismissed.

[24] It was argued before me that the applicant through its erstwhile representative has dealt with this review application in a manner, which could only be described as grossly negligent, incompetent and dilatory. I tend to agree with this proposition.

[25] A further proposition with which I find myself in agreement with is that it was contended on behalf of Smith that if the Court were to entertain the review application herein, having regard to how it has been dealt with, it would create an untenable position for employees who had been successful in arbitration proceedings if the Court were to allow this kind of laxity on the part of an applicant in review proceedings.

[26] We live in a country where unemployment is unacceptably high. This unfortunate state of affairs has existed for a very long period of time leading to it becoming common place to refer to dismissal as being the ultimate penalty in employment matters. The reason for referring to dismissals as such is simply that once an employee has lost employment it very

often may be that such employee does not find alternative employment and if he does, it is after a very long period of unemployment. Clearly such a situation will in most every case lead to hardship, often involving an extended family as well and not only the person who has lost his or her job. The relevance of this is that I do not believe that any employer could under these circumstances not be acutely aware of the fact that, when an employee has been successful through the dispute resolution mechanisms provided for by the LRA to be reinstated, that will most always come as a great relief for that most likely still unemployed person. When that employee is then met with a review application, which is the employer's statutory right to institute, this most always puts the employee's reinstatement on hold. As such employee would most likely not find alternative employment for the duration of the review proceedings, it is of the utmost importance that finality be reached as soon as is possible. I have little doubt that this is one of the reasons why the legislature has deemed speedy resolution of disputes so paramount in the whole dispute resolution scheme of arrangement. For an applicant party to bring an application for review and then in effect for a period of two years to do absolutely nothing, save for one enquiry posed, it would appear in passing a month after the review application was filed, enquiring whether the record of the arbitration proceedings had been filed, is in my view

dilatory in the extreme. In fact it borders in my view on recklessness and certainly smacks of a total disregard for the plight and rights of the dismissed employee.

[27] I accordingly am of the view that this is a case where, in the exercise of the Court's discretion, it is entitled to refuse the applicant any relief purely by reason of the fact that the applicant has failed to pursue the relief it sought diligently and that it has unjustifiably delayed seeking its relief herein. This is so by reason of the mere length of the delay herein coupled with the fact that in my view the applicant had over an extended period of some two years failed to take any reasonable steps to procure that its review application be progressed with. It would, in my view, be inequitable to grant the applicant any relief in the face of the delays that have occurred herein.

[28] I am of the view that the applicant's conduct herein discloses a total disregard for the rights of Smith who had won an award in his favour more than four years ago. This is borne out even more by the fact that when the employee, about a year after the award had been made in his favour, attempted to have the award made an order of Court, not only did the applicant simply ignore such application but it also failed, at

that point in time, to make any efforts to expedite its review application.

[29] It follows that by reason of the absence of a record of the arbitration proceedings as well as by reason of the delays on the part of the applicant to proceed with this application, I am of the view that the application should be dismissed. As it would appear as if the third respondent was at times legally represented, I believe that it is appropriate that I award costs to the third respondent and leave it to the Taxing Master to determine what, if any, costs so awarded to be tax in favour of the third respondent.

[30] Smith brought an application under case number C185/04 seeking an order of Court making the arbitration award handed down by the Commissioner on 29 July 2003 an order of Court in terms of Section 158(1)(c) of the LRA. I am satisfied that the relief sought by him in that application should now be granted and that he should also be awarded such costs as he incurred in bringing that application. For purposes of clarity, such order as to costs that I accordingly make I will make against the applicant herein and to the extent that the applicant herein was cited as a respondent party in case number C185/04, the cost order which I make herein against the applicant is in respect of it as the respondent party in case C185/04.

[31] Accordingly in case number C450/03 and in case number C185/04, I make the following order:

1) The application to review is dismissed.
2) The award of 29 July 2003 made under case number D110/WC/03 TOKISO REF NO: Tokiso/03/477 under the auspices of the second respondent is made an order of court.
3) The applicant is ordered to pay the third respondent's costs of suit.

_____

DEON NEL

ACTING JUDGE OF THE LABOUR COURT

Date of hearing : 26 April 2007

Date of Judgment: _____

Appearances:

For the applicant : Advocate Robert Stelzner instructed by Deneys Reitz Incorporated.

For the third respondent : Mr A Kok of the Society Development Trade Union.