

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

In the matter between:
979/03

CASE NUMBER: JR

RAND WATER BOARD
APPLICANT

AND

THE COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION
RESPONDENT

1st

MANSINGH, ROSHNEE
RESPONDENT

2nd

LANGENI SINDISO

3rd
RESPONDEN
T

JUDGEMENT

MOLAHLEHI J

Introduction

- [1] This is an application to review and set aside the arbitration award issued by the second respondent (“the commissioner”) under case number GA 2063/02 dated 22 May 2003.

Points in limine

- [2] At the first seating of this matter the third respondent raised two points in limine. The first point concerned the late filing of the review application by the applicant and the second failure to file the transcript of the electronic recording of the arbitration proceedings as required by rule 7A of the rules of the Labour Court.
- [3] The applicant brought its application for condonation for the late filing of its review from the bar. Mr Tiedemann, counsel for the applicant argued that the reason for not lodging the application earlier was because initially the applicant was of the view that the application was brought within the prescribed time limit.

[4] The third respondent opposed the application and contended that the applicant should have brought a formal application and that the application should have been brought much earlier. The respondent did not dispute that the application was one day late.

[5] On 11 May 2007, this Court issued an order in terms of which the late review application was condoned. In exercising my discretion to allow the condonation application without requiring a substantive application, I was of the opinion that the objection that the third respondent raised was of a highly technical nature and not in line with the spirit of the Labour Relations Act 66 of 1995. I was also of the view that the approach adopted did not prejudice the third respondent.

[6] It is now accepted that the Court has a discretion to exercise in considering whether or not to grant condonation. The factors that the court takes into account in considering whether or not to grant condonation are; (a) the degree of lateness or non compliance

with the prescribed time frame, (b) the explanation for the lateness or the failure to comply with time frames, (c) prospects of success or *bona fide* defence in the main case; (d) the importance of the case, (e) the respondent's interest in the finality of the judgement, (f) the convenience of the court; and (g) avoidance of unnecessary delay in the administration of justice. See *Foster v Stewart Scott Inc* (1997) 18 ILJ 367 (LAC).

[7] The late filing of the review application was condoned having regard to the duration of the delay, being one day, the reasonableness of the explanation and the prospects of success.

[8] The order further issued a *rule nisi* calling upon the first and the second respondents should they desire to show cause if any, on the date of the next hearing why an order of costs should be not made against them. The Registrar was in this regard, directed to ensure that the order was served on the Director of the CCMA.

[9] It is apparent that the order was served on both office of the

Director and the CCMA Gauteng office. There was however no appearance on behalf of the CCMA or the commissioner at the subsequent hearing. Another order was issued in terms of which it was directed that the order should be served on the Director of the CCMA personally.

Background facts

[10] The third respondent was initially employed as a temporary mechanic by the applicant during July 2000, and was appointed to a permanent position during November 2000. The permanent appointment was made subsequent, to an advertisement for the motor mechanic position. In terms of the advert one of its requirements was possession of a driver's license.

[11] It is only after his appointment that the applicant claimed to have discovered that the third respondent was not in possession of a driver's license. The third respondent was then informed that it was a requirement for him to obtain a driver's license in a

memorandum dated 22 July 2001 and to produce it by no later than 31 August 2001. The third respondent was advised in the same memo that failure to produce the license within the stipulated time period could lead to his dismissal.

[12] A further memorandum was sent to the third respondent on the 25 September 2001, informing him that he was required to produce the driver's license before November 2001.

[13] On the 24 January 2002, the third respondent was issued with a final written warning for failing to produce a driver's license. He was then given until the 28 February 2002, to produce the driver's license.

[14] The third respondent having failed to produce the driver's license was charged and dismissed during May 2002.

The grounds for review

[15] The applicant contended that the commissioner committed a gross irregularity in concluding that on a balance of probabilities the applicant's version was more probable. The applicant contended that there was no basis for the conclusion because the third respondent did not testify during the hearing.

[16] In its further grounds of review set out in the supplementary affidavit the applicant avers that during the hearing, the commissioner enquired from the third respondent's attorney whether the evidence of the third respondent would be the same as what she stated in the opening statement. The affirmative response from the attorney was then followed by an advice from the commissioner that in that case it would not be necessary to lead the evidence of the third respondent.

[17] It is apparent that at the end of the arbitration hearing it was agreed that the parties would submit written heads of arguments to the commissioner. The applicant contended that even though

the case was closed on evidence the third respondent submitted further evidence in form of an affidavit which was attached to his heads of argument. It is this case that the applicant contended the commissioner relied on in arriving at the conclusion in her award that the version of the third respondent was more probable. The applicant further contended that the third respondent never served the heads of argument or the affidavit attached thereto on it.

The record of the arbitration proceedings

[18] The applicant's attorneys of record addressed a letter to the CCMA on the 27 August 2003 requiring it to deliver the record of the arbitration proceedings and further requiring the same to be delivered as urgently as possible. This was in the light of the CCMA having failed to deliver the same within 10 days as required by rule 7A of the rules of the Court.

[19] On 18 September 2003, a candidate attorney from the applicant's

attorneys attended at the Court to check in the file whether or not the record of the proceedings had been filed. The inspection revealed that the record was in fact filed on the 5 July 2003, but this record as will appear later was not a complete record. The CCMA never responded to the applicant's telefax of the 27 August 2003 reminding the CCMA about its duties in as far as the record was concerned.

[20] Thereafter, Mr Bardenhorst of the applicant's attorneys of record telephonically contended the CCMA and was informed that the audio tapes had been forwarded to the Registrar of the Court.

[21] Mr Safronek of the applicant's attorneys then attended at the Court for a further search of the tapes. His search confirmed that the CCMA had filed the record of the arbitration with no tape recordings.

[22] On 29 September 2003, Safronek attended at the CCMA and discussed the absence of the tapes with Ms Khunyeza, one of the

employees of the CCMA who advised that she would look into the issue of the tapes.

[23] Thereafter, Ms Khunyeza contacted Mr Safronek during the afternoon of the same day and informed him that she had found the tapes and further confirmed that they were not filed with the Court. The applicant's attorneys addressed an e-mail to Commissioner Dawson of the CCMA informing him that there were no tapes filed with the court.

[24] It would appear that the CCMA did not respond to the above e-mail but served the notice of compliance in terms of rule 7A (3) of the Labour Court Rules on 12 October 2004, stating that 1 (one) tape had been filed.

[25] On the 15 October 2004, the recording company, Sneller advised the applicant that they had found the tape to be blank and therefore no transcription could be made.

[26] The applicant's attorneys approached the CCMA for further assistance in facilitating the reconstruction of the record, it being impossible to transcribe the inaudible tape.

[27] The CCMA was approached again on 12 April 2005, and was requested to assist with facilitation of the record. The applicant further enquired as to the availability of the hand written notes of the commissioner and also requested the telephone number of the commissioner. The applicant's attorneys were advised to put their request in writing.

[28] On 15 June 2005, (still no response from the CCMA) the applicant addressed a letter to the CCMA, enclosing the reconstructed record and requested comments by the commissioner. No comments were ever received from the commissioner neither was a response from the CCMA regarding whether or not the reconstructed record was delivered to the commissioner.

[29] On the 15 July 2005, the applicant's attorneys were unsuccessful in communicating progress of the review record both by faxination and telephone to the third respondent attorney. It then transpired later toward the end of August 2005 that the third respondent's attorney had been struck off the roll.

[30] I now turn to deal with the point in limine raised by the third respondent. As indicated earlier the third respondent raised an objection *in limine* in that the applicant had failed to provide a complete record of the proceedings.

[31] It is undisputed that the arbitration proceedings were electronically recorded. It therefore follows that the applicant was in terms of rule 7A of the rules obliged to place before this Court the electronically recording of the arbitration proceedings which would form part of the record for the purposes of this review.

[32] In *SACCAWU and others v President, Industrial Court Tribunal*

& *another* 2001 (1) SA 277 (SCA), the court held that an applicant in review proceedings who does not furnish adequate record to the court runs the risk of not discharging the onus that the matter is reviewable.

[33] In the case of *Department of Justice v Herzenberg* 2002 (1) SA 103 (LAC), the court after finding that it was not the fault of the applicant that the tapes were lost remitted the matter back to the CCMA to be heard *de novo*.

[34] The responsibility of ensuring that there is a proper recording of the proceedings rested with the CCMA. The applicant can therefore not be blamed for failing to produce an adequate recording when the electronic recording was defective or for that matter not in existence. The applicant can also not be criticized for not taking steps to have the record reconstructed.

[35] The third respondent contended that the applicant should have compelled the CCMA to file the record. I do not see what purpose

this would have served. The CCMA was not refusing or failing to file the record. A blank cassette was filed. There is no evidence that this was not the cassette which was used during the proceedings.

[36] In the circumstances, the point in limine raised by the respondent stand to be dismissed.

The Merits of the Review

[37] Whilst the record is incomplete and the key issues raised by the applicant centers around what transpired during the proceedings, the matter can be adjudicated on the other papers before the court.

[38] The applicant in its reconstructed record at paragraph 5, 6, and 7 states:

“5 At the end of Mr Luther’s evidence, Rand Water closed its casa.

6 Thereafter, the Commissioner asked Ms Silwana to confirm whether Mr Langeni's evidence would be in accordance with the allegations made in her opening statement and that Mr Langeni would only be called to confirm such statements. The Commissioner asked Ms Silwana whether there was anything that Mr Lungeni wished to add to the statements made by her in her opening address and Ms Silwana stated that there was not. The Commissioner then said to Ms Silwana that it was not necessary to testify during the arbitration proceedings.

7. Mr Langeni did not testify during the arbitration proceedings and did not call any witness on his behalf."

[39] In his comment on the record compiled by the applicant, the third respondent does not deny the contents of the above paragraphs. However, Mr Ngqwangele, the third respondent's counsel suggested during argument that the comments should not be considered because they were prepared and submitted by the previous attorney of the third respondent when she no longer had a mandate to do so. This was submission from the bar. There is no evidence in the answering affidavit of the third respondent to this

extent.

[40] In fact in the answering affidavit the applicant, when dealing with this issue as set out at paragraph 21 of applicant's founding affidavit simply states: “ *Contents of this paragraph are noted*”

[41] It is not clear what is meant by noting the contents of paragraph 21 of the applicant's founding affidavit. Whatever meaning can be attached, it cannot mean that the contents of the paragraph are denied.

[42] The third respondent throughout the proceedings was legally represented. If the intention was to deny the contents of the paragraph it could have been stated as such as is the case in the other paragraphs of the document. The other approach for the third respondent, was confession and avoidance to avoid the legal consequence of it being interpreted that he did not deny the contents of the paragraph. (see *Herbstein and van Winsen*, The Civil Practice of the Supreme Court of South Africa (fourth

edition) Juta, page 466).

- [43] In the light of the above I am of the view the probabilities support the version that the third respondent did not testify during the arbitration hearing. The only inference that can be drawn is that reference to the third respondent's version by the commissioner, comes from the evidence contained in the affidavit of the third respondent which was attached to his heads of argument. In this regard it has to be noted that the third respondent does not deny that the affidavit was attached to his heads of argument and that both were never served on the applicant.

COSTS

- [44] The CCMA was called upon to show why it should not be ordered to pay the costs arising from the manner in which it dealt with the issue of the record.

- [45] Mr Ntombela, argued on behalf of the CCMA, that costs could

not be granted against the CCMA because of the provisions of s126 of the Labour Relations Act 66 of 1995 (“the Act”). Mr Ntombela relied specifically on subsection 2 which reads as follows:

“The commission is not liable for any loss suffered by any person as a result of any act preferred or omitted in good faith in the counter of exercising function of a commission”

With due respect s126 is irrelevant and not applicable to the issue of costs.

[46] The responsibility to record and to keep a record of the proceedings rests with the CCMA and includes the dispatch of the record to the Court in terms of rule 7A (2) (b) of the rules of the Labour Court. Thus it was the duty of the CCMA, as soon as it was informed that the tape was blank, to ask the commissioner to avail her hand written notes and to facilitate reconstruction of the record of the proceedings.

[47] The CCMA has not provided any explanation for the manner in

which it dealt with the issue of the record in this matter. In this regard the CCMA failed to perform its legal duty as required by rule 7A of the rules of the Court. The argument of Mr Ntombela that the applicant did not compel the CCMA to produce the record is rejected. This argument suggests that CCMA will only carry out its duties only when compelled by the Court to do so. In fact this approach is reflective of the approach and the manner in which the CCMA treated the attorneys of the applicant.

[48] Mr Ngqwande, the third respondent's counsel argued that the CCMA should pay the third respondent's costs if the award is reviewed. He argued that the third respondent may have reconsidered his position to oppose the review had the CCMA carried out its duties properly. I do not agree with this contention. The third respondent persisted with its opposition despite the overwhelming prospects of success.

[49] In the results I make the following order:

1. The points *in limine* raised by the third respondent are dismissed.
2. The arbitration award issued by the second respondent under the auspices of the first respondent on 22 May 2003, under case number GA 216063/03 is reviewed and set aside.
3. The dispute is referred back to the first respondent to be heard by another commissioner other than the second respondent.
4. The first respondent and second respondent are to pay the applicants costs, the one paying the other to be absolved.

MOLAHLEHI J

DATE OF HEARING: 25 JULY 2007

DATE OF THE ORDER: 09 NOVEMBER 2007

DATE OF THE JUDGMENT: 12 NOVEMBER 2007

APPEARANCES

For the Applicant: Adv T C Tiedemann

Instructed by: Petersen Hertzog & Associates

For the First & Second Respondent: Mr Ntombela

For the Third Respondent: Adv Ngqwangele

Instructed by: Khumalo Attorneys