

IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

Case no: C848/17

In the matter between:

TRANSNET FREIGHT RAIL**Applicant**

And

NEIL FRANSENBURG**First Respondent****URSULA BULBRING N.O.****Second Respondent****TRANSNET BARGAINING COUNCIL****Third Respondent****Date heard: 13 June 2019****Delivered: 2 August 2019**

JUDGMENT

RABKIN-NAICKER, J

- [1] The First Respondent (Transnet) filed a notice in terms of Rule 30(2) and Rule 30A of the Uniform Rules of Court. Its Notice dated the 23 March 2018 stated that it considers the delivery of the Applicant's supplementary affidavit in the review application of a jurisdictional ruling under this case number, to be an irregular step.
- [2] The grounds contained in the Notice are that the applicant failed to file the record of the arbitration proceedings as contemplated in Rule 7A(6) of the Labour Court Rules and the supplementary affidavit is premature and constitutes an irregular step. Furthermore, that he has not followed the procedure in terms of Clause 11.2.4 of the Practice Manual i.e.:
- "If the record of the proceedings under review has been lost, or if the recording of the proceedings is of such poor quality that the tapes are inaudible, the applicant may approach the Judge President for a direction on the further conduct of the review application. The Judge President will allocate the file to a judge for a direction, which may include the remission of the matter to the person or body whose award or ruling is under review, or where practicable, a direction that the relevant parts of the record be reconstructed."*
- [3] Transnet gave the applicant 10 days to remedy the complaint failing which it would approach this Court to have the supplementary affidavit withdrawn. It lodged such an application on the 3 May 2018. The applicant did not comply with the Notice and erroneously filed what he titled a 'replying affidavit' to the Notice on 28 March 2018. It should be said that he is a lay person and has not sought legal assistance
- [4] In argument before me, the applicant pointed out that the Second Respondent had stated in her affidavit in response to the review, that she has no record of the proceedings and averred that:
- "I have been requested to provide a recording of the proceedings in this dispute. I no longer have the recordings of the proceedings in my possession. This is because almost two years have passed since the hearing of this matter. Also no evidence was led at the hearing. The common cause facts were presented and argued as appears from the ruling."*

[5] The applicant handed up a written note at the hearing that had been written by the registrar¹, unfortunately undated, to the late Judge Steenkamp, in which she wrote the following: “Judge this matter in the arguments, they are saying there is no record, so I am not sure what to do, does it get remitted to the bargaining council.” The only arguments in the file which relate to this application are dated the 21 May 2019 and the 11 June 2019. The directives that were sent out by Judge Steenkamp to both parties are dated the 27 June and 19 October 2018. The directive states that the applicant must comply with Rule 7(A) 6 and Rule 7A (8) i.e.

“(6) The applicant must furnish the registrar and each of the other parties with a copy of the record or portion of the record, as the case may be, and a copy of the reasons filed by the person or body.....

(8) The applicant must within 10 days after the registrar has made the record available either-

(a) by delivery of a notice and accompanying affidavit, amend, add to or vary the terms of the notice of motion and supplement the supporting affidavit; or

(b) deliver a notice that the applicant stands by its notice of motion.”

[6] It is not possible to know whether the Registrar’s undated note was brought to Judge Steenkamp’s attention, or if so, when. As I have recorded in footnote 1 to this judgment, the applicant also removed this note from the Court file at some stage which he should not have done. Had the note been properly brought to the attention of a Judge for direction, the parties would have been instructed to meet and attempt to reconstruct the record of the arbitration.

[7] In all the circumstances, it is clear that as a matter of fact and law, the filing of the supplementary affidavit was an irregular step². What guides me in making an order in this matter is the principle of the speedy resolution of labour disputes. The parties need to meet and attempt to reconstruct the record by putting together the documents (if any) used at the arbitration and seeking to

¹The applicant had removed this from the Court file. The Registrar confirms this is her handwriting.

² Helen Suzman Foundation v Judicial Service Commission 2018 (4) SA 1 (CC) at paras 79-80

find agreement as to whether paragraphs 3 to 5 of the Award do constitute the common cause facts before the second respondent. They should report back to this Court whereupon a Directive will be given on the future conduct of the review.

[8] The first respondent argued that costs should follow the result in this application. However, taking into consideration that the applicant is a lay person and that the Registrar's note regarding the lack of a record does not appear to have been considered by a Judge, I decline to order costs in this matter.

[9] In all the circumstances, I make the following order:

Order

1. The supplementary affidavit dated the 21 February 2018 is deemed withdrawn;
2. The parties are to meet to attempt to reconstruct the record to the best of their abilities including in the way directed in Paragraph 6 of this judgment;
3. The parties are to report to this Court within 15 Court days of this order as to their progress, whereupon a Directive will be issued by a Judge on the further conduct of the review.

H. Rabkin-Naicker

Judge of the Labour Court

Appearances:

Applicant: In person

First Respondent: Mandlakazi Ngumbela instructed by Dentons