

REPUBLIC OF SOUTH AFRICA
IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN
JUDGMENT

Not Reportable
C819/2017 & C315/2020

In the matter between:

DEPARTMENT OF WATER AND SANITATION
and

Applicant

**GENERAL PUBLIC SERVICE SECTORAL
BARGAINING COUNCIL**

First Respondent

COMMISSIONER MM MARAWU N.O.

Second Respondent

SHOWUSA OBO 11 MEMBERS

Third Respondent

Date heard: 19 August 2021 on the papers

Delivered: 18 January 2022

JUDGMENT

RABKIN-NAICKER J

- [1] The two applications before me concern an award under case number GPBC514-2017 dated 5 October 2017. The second respondent (the Arbitrator), awarded an amount in excess of R2million in respect of an unfair labour practice dispute relating to overtime payments claimed by the eleven employees. The first application before me concerns a review of the Award under case number C819/2017, which appears to have been dated stamped by the Court on January 9 2018. The second, under case number C315/2020 is an application to make the Award an order of Court under section 158(1) (c) of the LRA. It was filed on the 10 October 2020.

- [2] An interlocutory application to compel the first and second respondents to produce the record of the arbitration was brought to this Court by the Applicant (the Department) on the 30 May 2019. This it seems was as a result of the third respondent (the union) applying for the Award to be certified. On that day, the parties agreed a draft order, which this Court made an Order of Court. The Order provided that:
- “1. That the first and second respondent file the record of the bargaining council proceedings within 10 days of this order.
2. That the Applicant may file its supplementary affidavit within 14 days of receipt of the record.”
- [3] On the day prior to the application to compel, the 29 May 2019, the first respondent had filed an explanatory affidavit indicating that it was not in possession of the record of the proceedings and that the Arbitrator had failed to provide it to the Council. In addition, it was recorded that the second respondent (the Arbitrator) had mentioned he had deleted the records.
- [4] The Arbitrator then issued a date for an attempt to reconstruct the record. The attempted reconstruction took place on the 26 June 2019. Both the Department and a union official representing the employees were present. However, this official was not the same person who represented the employees at the arbitration. Not all witnesses at the arbitration were present at the reconstruction.
- [5] The applicant department submits that the reconstruction is inadequate for the purpose of the review. I have read the reconstruction and am of the view that it certainly cannot provide a basis for the review application to be duly heard in this Court.
- [6] The union on behalf of its members have argued in their 158(1)(c) application that the Award stands to be made an order of Court on the basis that it was deemed withdrawn and had lapsed in terms of the Practice Manual of this Court. It is certainly correct that the Department did not prosecute the review with the necessary haste. However, when the parties appeared in Court on the 30 of May 2019, some months before the section 158(1) (c) application was launched, they came to an agreement relating to the filing of the record and the

filing of a supplementary affidavit. They further both took part in an attempt to reconstruct the record after the said Order was handed down. In these circumstances, the submissions regarding the purported lapsing and deemed withdrawal of the review which were contained in the section 158(1)(c) application cannot be entertained. By entering into the agreement and attending the attempted reconstruction, the parties were aware and acted with this awareness, that there simply was no record available.

- [7] In these circumstances, any post facto submissions that the record was not filed on time or the review had lapsed cannot be of any merit. The Court recognizes that the Department did not hasten to prosecute the review. However, given the quantum awarded by the Commissioner, it would not be in the interests of justice to dismiss the review on the basis that no record exists. The proper remedy will be to remit the dispute to arbitration. This is despite the time period that has lapsed since the unfair labour practice was alleged to have taken place.
- [8] The union has asked for costs on an attorney/ own client scale given the dilatory prosecution of the review and based on the fact that the review was launched on January 9 2018 out of time (albeit it was served on the respondents on 4 December 2017 within the 6 week period). This is no basis for the costs order sought or for the dismissal of the review. In any event, I grant condonation of this slight delay in filing the review application in Court, given that there was no prejudice suffered by the respondents.
- [9] The union and its members were also dilatory in dealing with the review themselves. They did not seek to apply to dismiss it timeously based on the relevant clauses of the Practice Manual and entered into the agreement that was made an order of Court referred to above, before bringing the 158(1) (c) application. I see no reason in these circumstances to depart from the *Zungu* principles and make no costs order herein.
- [10] In these circumstances, I make the following order:

Order:

In re C819/2017

1. The Award under case number GPBC514-2017 is reviewed and set aside.

2. The dispute is referred back to the first respondent for re-hearing before an arbitrator other than third respondent.

In re C315/2020

1. The application is dismissed.

H. Rabkin-Naicker

Judge of the Labour Court of South Africa

Appearances:

Applicant: M Tijana instructed by the State Attorney

Third respondent: Gustav de Vries Attorneys Inc