

Not reportable

**THE LABOUR COURT OF SOUTH AFRICA,
HELD AT CAPE TOWN**

Case no:C43/2021

In the matter between:

JOHANNA CHRISTINA SMITH

First Applicant

And

COMMISSIONER INGRID BOTHA N.O

First Respondent

**THE COMMISSION FOR
CONCILIATION, MEDIATION AND ARBITRATION**

Second Respondent

SUNEL EYBERS T/A SIGN & GRAPHIX WORLD

Third Respondent

Date of Hearing: 6 July 2022

Date of Judgment: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing down judgment is deemed to be 10h00 on 22 July 2022

Summary: Review - failure to file transcript of CCMA proceedings – application dismissed.

JUDGMENT

KAHANOVITZ AJ

[1] This is an unopposed review where the applicant is 1. seeking to review and set aside a jurisdictional ruling made by the first respondent; 2. seeking remittance of the matter to be arbitrated by a different Commissioner and 3. seeking condonation for filing the application 47 days outside of the six-week period.

[2] The applicant was employed by the third respondent as a graphic designer. During the Covid national lockdown the third respondent suspended trading. In this period the applicant was not paid a salary but derived some income from the TERS fund.

[3] On 1 June 2020 the applicant returned to work after a change in lockdown level restrictions led to the reopening of her place of employment. She was presented with a new employment contract which purported to reduce her gross monthly salary from R13000 to R9000.

[4] Applicant refused to sign the contract and consulted her legal representative.

[5] On 9 June 2020 she was handed a letter terminating the employment contract for operational reasons.

[6] On 22 June 2020 she referred two disputes to the CCMA. One was an unfair dismissal dispute challenging the fairness of her retrenchment and the other an unfair labour practice dispute concerning an alleged unfair unilateral change to her terms and conditions of employment in the form of the the reduction of her salary of R13000 to R9000 per month.

[7] Both disputes were set down for conciliation 16 July 2020. The unfair retrenchment case was settled on that day and a settlement agreement prepared by the CCMA. It was signed by both parties. The settlement agreement records that it is in full and final settlement of the dispute referred to the CCMA and provides for payment by the employer of the sum of R13 951,06 by no later than 31 September 2020.

[8] The applicant continued to pursue the alleged unilateral change terms and conditions case. She then referred it to arbitration. The referral to arbitration characterises the nature of the dispute as a unilateral change to terms and conditions. While S64 of the LRA is incorrectly relied on as the applicable statutory provision governing the dispute it is fairly clear that her claim properly construed was that the unilateral change gave rise to an unfair labour practice. The result sought in the event of a successful claim is compensation in an unspecified amount.

[9] At the arbitration the applicant was represented by an attorney. The third respondent was represented by the proprietor, Ms Eybers.

[10] The arbitrator ruled on 30 September 2020 that she did not have jurisdiction.

[11] The arbitration award reports that the arbitrator was addressed on the question of whether the CCMA had jurisdiction and that it was established that as the applicant earned above the threshold provided by in the National Minimum Wage Act 9 of 2018 that act was not applicable. ¹ The CCMA held that the case was accordingly a contractual issue which could not be heard by the CCMA but only by the Labour Court.

[12] Applicant contended on review this was not the dispute referred for determination. She submitted that the jurisdictional ruling was accordingly erroneous, and the dispute should have been arbitrated in terms of section 186(2)(a) of the LRA Act 66 of 1995.

[13] The review was referred 47 days late and condonation is sought. Condonation was sought essentially on the grounds that applicant was unable to file papers earlier as she was seeking approval for this case to be funded under the terms of a legal insurance policy. Approval to proceed was only obtained on 17 December 2020 at a

¹ Section 4(8) of the Act provides as follows: "(8) It is an unfair labour practice for an employer to unilaterally alter wages, hours of work or other conditions of employment in connection with the implementation of the national minimum wage and sections 191, 193, 194(4) and 195 of the Labour Relations Act apply, unless the context indicates otherwise."

time when her attorneys' offices were closed. In addition, her chosen counsel did not become available to assist her until 18 January 2021.

[14] It was pointed out to the applicant in court that a transcript of the CCMA proceedings had not been filed. This was a case concerning what was or was not said at the CCMA hearing. The review papers filed at court also failed to disclose or draw attention to the absence of the transcript or seek to explain or condone its absence.

[15] Boale v National Prosecuting Authority of SA & others (2003) 24 ILJ 1666 (LC) held that it is trite that there is a duty on an applicant to provide a review court with a full transcript of the proceedings that she wishes to have reviewed. The applicant in this case has failed to provide this court with a full or any transcript of the proceedings she wishes to have reviewed. Where an applicant fails to provide a full transcript of the proceedings, the review application must be dismissed. The only exceptions would be where the audio recording is missing or where the parties are unable to reconstruct the record.²

[16] I should mention that a further basis on which the application would likely have failed is that applicant would have experienced considerable difficulty in obtaining condonation for the late filing of the review. The absence of the full record would also have been a reason to refuse condonation as the papers are still not in order. So too would have been the failure to even mention that no transcript had been filed in circumstances where the practice note certifies that the papers are in order.

[17] The applicant was also asked to explain the purpose of the review in circumstances where her unfair dismissal dispute had been fully and finally settled and she was no longer in the employ of third respondent. Counsel submitted that if it had been found that her salary had been unfairly unilaterally reduced then the amount payable under the settlement agreement could have been higher.

² See also Toyota SA Motors (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others (2016) 37 ILJ 313 (CC) at para 167 on the circumstances in which a failure to file a full transcript can be excused.

Accordingly, she might be entitled to compensation in her unfair labour practice claim.

[18] That agreement was however in full and final settlement of the dispute revolving around the termination of employment and the issue of whether or not her salary was unfairly reduced on the eve of her termination - in consequence of which she possibly received a lower settlement pay out in her unfair retrenchment case - appears now to be moot. In the absence of the transcript, it is however not necessary for me to make any decision on this point.

Order

[1] The review application is dismissed.

[2] No order is made as to costs.

Kahanovitz AJ

Acting Judge of the Labour Court of South Africa

Representatives -

**For the Applicant: Adv G Viljoen instructed by M
Scott from Preshnee Govender Inc.
Attorneys**