IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case No: JR 1281/06

In the matter between:

SOLIDARITY obo JF BOTHA	**applicant**
and	
COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION	**First Respondent**
COMMISSIONER MPHO PHETLA *N.O*	**Second Respondent**
DDT MECHANISED MINING SERVICES (PTY) LTD	**Third Respondent**

JUDGMENT

Molahlehi J

Introduction

[1] This is an application in terms of which the applicant, Solidarity on behalf of its member, Mr Botha (the employee) seeks to review and set aside the award issued by the second respondent (the commissioner) under case number NW5963-05 on the 12 April 2006. In terms of the arbitration award the commissioner accepted the version of the respondent, namely that the employee had not been dismissed and accordingly dismissed his unfair dismissal claim.

Background facts

[2] It is common cause that the employee was prior to his dismissal employed as shift "boss". The parties at the arbitration hearing presented two conflicting versions. The employee's version was that he was dismissed whilst the respondent on the other hand contended that he was not. As indicated earlier the commissioner accepted the version of the respondent and rejected that of the employee.

[3] Mr Viljoen, the technical manager, in testifying on behalf of the respondent during the arbitration hearing stated that he assigned the employee to work with him because of the tension that seemingly existed between him (the employee) and his manager. This was a temporary posting pending an alternative placement being available for the employee.

[4] During the period of working with Mr Viljoen, the employee injured his back and as a result of this incident it was decided to transfer him to the Marula area. The policy of the respondent was that in the circumstances of employee's case he had to undergo an exit medical examination before the transfer. It would further seem that the Marula area falls under the Impala mine. As part of the transfer and medical testing a letter was addressed to Impala mine hospital which read as follows:

> "*Please let J.F Botha ID No: 5010255723086 undergo an exit medical examination on your shaft. His contract has been ended with DDT.*

[5] The respondent's case was that the above letter was not addressed to the employee but to the hospital and that the employee intercepted the letter and used its contents to suit himself. The intention of the letter was to ensure that the employee receive medical examination at the Impala mine hospital. This was also according to the respondent a common practice in the mining industry and in particular at Impala that the mine at which an employee is stationed does the medical examination before the employee leaves that mine. The employee was handed the letter to hand to the hospital personnel before attending the medical examination.

[6] It was also the case of the respondent that the employee still attended the store where was posted, even after receipt of the letter which he sort to rely on as a basis for his claim that he was dismissed. Between the periods – 9 September 2005 when the employee received the letter and the 3rd October 2005 when he received the notice of the disciplinary hearing the employee had not told anybody that they should not expect him at the store because he had been dismissed. The employee referred the dismissal dispute only after receiving the notice of the disciplinary hearing according to the respondent.

[7] The case of the employee during the arbitration hearing was that he had been required to travel between Lydenburg and Rustenburg to attend work seemingly after

redeployment. This placed a strain on his health. He was hospitalised on 7th August 2005 and was diagnosed with a lung infection. He was deployed at the Impala mine where he did not go underground because of his health condition. He could not hand his medical certificate to the third respondent's management because their offices were always closed whenever he went there. He testified that despite handing the medical certificate on the 15 August 2005, he was disciplined for being absent without authorisation.

[8] In as far as his dismissal was concerned the employee testified that after his transfer to Impala his supervisor confronted him and wanted to know about the transfer. The supervisor then advised him to accept an amount of R35 000 .00 in lieu of his dismissal and when he declined this offer the following day, the supervisor told him that he should consider himself dismissed.

The grounds for review and the arbitration award.

[9] The commissioner found that it was improbable that the employee was dismissed through the letter which had been addressed to the hospital. The commissioner also rejected the version of the employee that he was told by the supervisor that if he declined to accept the offer of payment in lieu of dismissal there would be no work for him i.e. he was dismissed after rejecting the financial offer of separation. The commissioner accepted the version of the respondent that the letter which the

respondent sought to rely on as evidence of his dismissal was intended to facilitate his exit from where he was working to the Marula area. The commissioner reasoned that the employee remained at his workstation even after receipt this letter.

[10]The applicant contended that the commissioner acted grossly irregular in that he failed to apply his mind to the evidence and the material placed before him and as a result reached a conclusion that is not rational or justifiable. This test for review was formulated prior to the decision in *Sidumo v Rustenburg Platinum Mines Limited (2007) 28 ILJ 2405 (CC)*. In the supplementary heads of argument the applicant relies on that judgment to have the award reviewed and set aside.

[11]The applicant also complained that the commissioner made no attempt at properly understanding the sentence; *"His contract has been ended with DDT*," in the letter written to the Impala hospital which concerned the medical examination of the applicant. The applicant also in this regard contended that the commissioner placed too much weight on the evidence of Mr Viljoeon.

Evaluation

[12]The commissioner in his award formulated the issue as follows:

> ***"****3.1 Whether the employee was dismissed and if so, was such dismissal procedurally and substantively fair."*

It is evidently clear even from the papers of both parties that the key issue which the commissioner had to deal with before considering the procedural and

substantive fairness of the dismissal was the issue of whether or not there was a dismissal.

[13]The applicant has raised two points *in limine*, the one relating to challenging the authority of the deponent to attest to the founding affidavit and the other concerns the incomplete record of the transcript of the arbitration proceedings.

[14]The general rule applicable to review cases is that there is duty on an applicant to provide a review court with a full transcript of the proceedings he or she wishes to have reviewed and failing which the review must either be struck of the roll or be dismissed. *See Boale v National Prosecuting & Others 2003 10 BLLR 988 (LC).*

[15]The exception to this rule is that the court may consider the review even in the absence of the transcript where it has been shown that the tape cassettes are missing or where the parties are unable to reconstruct the record. In this instance the court will determine the application on the evidential material which was before the commissioner or for that matter on the basis of the arbitration award itself. See *Nathaniel v Northern Cleaners Kya Sands (Pty) Ltd & others 2003 JOL 11640 (LC)*.

[16]I pause to briefly deal with the deference between dismissing or striking a matter from the roll. The distinction between striking the matter off the roll and dismissal is that in the case of dismissal the matter is disposed off and can no longer be set down, on the roll again. This means if the applicant wishes to proceed with the matter in that instance he or she would have to start the matter *de novo*. On the other hand when the matter is struck off the roll, the applicant can after remedying the defect arising from

the incomplete or inadequate record have the matter re-enrolled and set down for a hearing. The different consequences that arise from dismissal, striking the matter off the roll, absolution from the instances were considered in *Goldman v Stern 1931 AD 261*.

[17]In *Peter Fountas v Brolaz Projects (Pty) Ltd & others case number JA 35/03.* Nkabimde AJA, considered the options which the court could adopt when considering whether to dismiss or struck the matter of the roll because of a defective or inadequate record. The dismissal option should be adopted where the applicant fails to explain why despite the ample opportunity he or she had, failed to take the appropriate steps to address the issue of the defective or inadequate record. The *Peter Founters',* decision cautioned that the court should be slow in resorting to the dismissal option for this has serious implication to a litigant who is seeking to challenge what he or she believes to be an unfair and unreasonable award. In my view, in appropriate circumstances where the dictates of speedy resolution of the dispute, justice and fairness so dictates, the court should not hesitate to dismiss the matter due to inadequacy of the record.

[18]This approach of not readily dismissing an review application even though there seem to have been no satisfactory explanation was adopted by Mashazi AJ, in the unreported case of *Solidarity obo Canavan v Commission for Conciliation, Mediation and Arbitartion and Others (case number JR2999/06*

[19].In as far as the dismissal option is concerned the court in *Peter Founters's case* in the last part of paragraph [33], said:

> *"This occur where, for example, the matter had dragged on for a long time and the relevant party had had ample opportunity to reconstruct the record but had, for no acceptable reason, failed to so."*

[20]The other option indicated in *Peter Founters,* is that of postponing or striking the matter of the roll to afford the applicant the opportunity to reconstruct the record or to find the missing parts of the record. This should in general be done where the applicant has given a satisfactory explanation as to what attempts he or she had taken to reconstruct or find whatever part of the record may be missing.

[21]The ultimate determination as to whether or not to dismiss or struck a matter from the roll should be based on fairness and justice after the assessment of the conduct of the applicant and the circumstances of the case. The order of dismissal would in my view be inappropriate where there is evidence of the attempts on the part of the applicant, enquiring from the CCMA regarding the missing portion of the record and seeking to have that part reconstructed. It would also be unfair to dismiss where the record cannot be found and it is also impossible to reconstruct.

[22]It seems to me from the reading of the authorities that where there is no record or the record is inadequate, the applicant has in addition to explaining in the papers why the

record is not complete or is in adequate, has to indicate in full the steps he or she took to ensure that the record was before the Court including attempts at reconstructing it.

[23]In dealing with the issue of the missing part of the record the Labour Appeal Court, in the case of *Papane v Van Aarde N.O &Others 2007 JOL 20412(LAC),* confirmed its decision in *Lifecare Special Services (Pty) Ltd t/a Ekuhlengeni Care Centre v Commissioner for Conciliation Mediation & Arbitration & others (2003) 24 ILJ 931 (LAC)*, and per Kruger AJA said:

> *"In the ordinary course the appellant should first have endeavoured to establish, by way of further investigation and affidavits, whether or not the missing part was irretrievably lost. If not, then the parties and the commissioner should have endeavoured to reconstruct the missing part".*

[24]In the *Papane's* case (supra), on the facts the Court found that the appellant failed to initiate any steps toward the reconstruction of the missing part of the record and to this extend the Court held that, the court a quo should have declined to hear the matter on its merit and should have either dismissed the application or struck it of the roll.

[25]In the present case the applicant has failed to file the transcribed portion of the evidence f its own witness, the employee. The transcribed part of the record indicate that the *"rest of tape 1 side 1 and 2 is blank"*. There is no evidence from the applicant as to what steps he took to have this portion of the record reconstructed.

[26]It is common cause that the employee did testify during the arbitration proceedings which then means that his evidence was not transcribed and filed as part of the record. This portion of the record is materially important and without it this court is not placed in a position where it would be able to fairly determine whether the decision of the commissioner was reasonable or otherwise. This portion of the record is important because as indicated earlier the first issue which the commissioner was enjoined to consider was whether or not the employee was dismissed. Therefore, it then follows that the evidentiary duty to show that the dismissal took place rested with the applicant. This evidentiary material is essential in the determination of whether the decision of the commissioner that there was no dismissal is reasonable regard being had to the evidentiary material which was before him. There is no explanation from the applicant as to why the missing portion of the record which is so materially important to the determination of whether or not the court should interfere with the arbitration award is not transcribed and filed as part of the record.

[27]It is therefore my view that the applicant has failed to place before this court a complete record to enable the court to assess and evaluate the reasonableness of the conclusion reached by the commissioner. And for this reason I do not deem it necessary to determine the merit of the review application. It therefore means that the applicant's application stand to be dismissed on this ground alone.

[28]I see no reason in the circumstances of this case why costs should not follow the results.

[29]In the premises the applicant's application to review and set aside the arbitration award issued by the commissioner under case NW5963-05 dated the 12 April 2006, is dismissed with costs.

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Molahlehi J

Date of Hearing: 30 May 2008

Date of Judgement: 23 October 2008

APPEARANCES:

For the Applicant: T J Scott

Instructed by: (Union Official)

For the Respondent: Adv Strauss

Instructed by: TG Bosch-Badenhorst Attorneys