

IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

REPORTABLE

CASE NO: JR 1905/08

In the matter between:

STEVE TSHWETE LOCAL MUNICIPALITY

Applicant

AND

**SOUTH AFRICAN LOCAL GOVERNMENT
BARGAINING COUNCIL**

First Respondent

RAYMOND HLONGWANE N.O.

Second Respondent

SAMWU o.b.o. PITJADI AND OTHERS

Third Respondent

JUDGMENT

MOLAHLEHI J

Introduction

- 1] This is an application for leave to appeal against the decision of this court which was handed down on 16 July 2010. In terms of judgment the court dismissed the applicant's application to review and set aside the arbitration award of the second responded.
- 2] The decision of the court is based on the finding that in arriving at the conclusion as he did, the commissioner did so correctly both on the jurisdictional point and the merits of the case.
- 3] The contention of the applicant in its application for leave to appeal is based on

the contention that the court erred in making a finding that the second respondent did not act grossly irregular in that he ignored the evidence which was before him. The applicant further contends that it was denied the basic principle of a fair hearing.

- 4] Mr Kruger, appearing for the applicant argued during the hearing of this leave to appeal that whilst he conceded to the difficulty posed by the absence of the record the court should not allow that to overshadow the interpretation of the arbitration award. He further argued that even with the limitation of the absence of the record, it is clear on the proper reading of the arbitration award that the commissioner decided the merits of the matter without affording the applicant a proper hearing. The point made in this regard is that the commissioner made the decision on the merits of the matter on the basis of the submissions that had been made as concerning the jurisdictional issue. In other words the argument on behalf of the applicant is that the commissioner determined the merits of the matter by taking into account what had been submitted concerning the jurisdictional point.
- 5] The court a quo in upholding the commissioner's arbitration award found firstly that the arbitration proceedings were recorded electronically according to what is stated in the arbitration award. The applicant does not seem to take issue with this finding. There is however no explanation as to why the court was not furnished with the record.
- 6] The second basis for refusing to interfere with the arbitration award is that the court rejected the complaint of the applicant that it was not given an opportunity

to present its case in as far as the merits of the disputes were concerned. In this respect the court based its finding on what the commissioner said in the arbitration award when he said:

“Both parties made submissions in respect of the merit of the case and the point in limine.”

- 7] In terms of section 166 the Labour Relations Act number 66 of 1995, leave to appeal to the Labour Appeal Court has to be obtained from the judge against whose decision leave to appeal is sought. In order to succeed in an application for leave to appeal a litigant has to show that there is a reasonable prospects that another court may come to a different conclusion to the one that reached by that court.
- 8] In applying the above test I took into account both the written and oral submissions made by both parties including the judgment of this court.

- 9] It is common cause that the applicant has not furnished the court with the transcript of the arbitration hearing. At the hearing of the review application the court offered the applicant postponement of the matter to afford it the opportunity to produce the record or if it did not exist to reconstruct the same. The applicant turned down the offer and submitted that the matter can be resolved on the basis of the arbitration award.
- 10] The approach to be adopted when confronted with a missing or defective record has been laid down by the Labour Appeal in the case of *Lifecare Special Health Services (Pty) Ltd t/a Ekuhlengeni Care Centre v CCMA [2003] 5 BLLR 416 (LAC)*, when it was held that in the absence of the full record of the arbitration proceedings, the parties should take all the necessary steps in an attempt to reconstruct the record.
- 11] That approach was followed in the case of *Solidarity obo Botha v CCMA (2008) JOL 22668 (LC)*, where the court held that the general rule applicable to review cases is that there is a duty on an applicant to provide a review court with a full transcript of the proceedings he wishes to have reviewed, failing which the review must either be struck off the roll or be dismissed. The exception 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.
- 12] In *Mondi Kraft (Pty) Ltd v PPWAWV & Other (1999) 10 BLLR 1057 (LC)*, it was held that the court is not precluded from reviewing an award in absence

of the record of arbitration proceedings where sufficient facts are placed before it. The court found that a failure to provide a verbatim record of the proceedings does not prevent the court from determining the matter in appropriate circumstances. There may well be circumstances where the court is unable to make a finding without the full record, but where a reviewable defect is obvious from the arbitration award and the admitted facts before the Court, and if the Court is satisfied that it has before it all relevant evidence on the issues, it may find that the award is not justifiable despite the absence of the entire record.

13] In *Shoprite Checkers Limited v CCMA & Others (2002) 7 BLLR 677 (LC)*, it was common cause that the record had been misplaced. The representatives of the parties could not provide notes made at the proceedings to the court. The court specifically stated that in some review applications, a record of the proceedings may not be strictly necessary. This may occur in circumstances where the grounds for review or irregularity are apparent from the award itself, or where the facts upon which the grounds for review are based are common cause.

14] In *Metalogik Engineering & Manufacturing CC v Fernandez & Others (2002) 10 BLLR 985 (LC)* the court found that, given the absence of a record and the failure of the applicant to reconstruct the record, it was not in a position to properly assess the merits of the review application and thus that there were no good grounds to set aside the award. The court upheld the

commissioner's finding of the, unfairness of the dismissal. The court found further that there were grounds for the review of the computation of the compensation. This issue was remitted to the CCMA from a fresh determination, as the court was not in a position to substitute its own determination on compensation with confidence.

- 15] In ***Fidelity Cash Management Services (Pty) Ltd v Muvhango NO & Others*** the Court held that :

"The fact that the commission has mislaid the record or part thereof is not automatically entitling applicant to an order remitting the matter for re - hearing. The applicant bears the onus in review proceedings and must make a proper effort to reconstruct the record."

- 16] In the present instance the applicant did not in the court a quo place before the court the transcript of the arbitration hearing. As stated earlier an offer made by the court for the opportunity to rectify this defect was declined by the applicant.

- 17] The counsel for the applicant conceded that there were two conflicting versions on the papers which were put before the court a quo. The version of the respondent is that the commissioner after considering the issue of jurisdiction proceeded to consider the merits of the dispute. The version of the applicant on the other hand is that a proper reading of the arbitration award indicates the commissioner never considered the merits of the dispute

but simply relied on the submissions which had been made in relation to jurisdiction to arrive at a conclusion regarding the merits of the dispute.

18] In my view there is a material dispute of fact as to what happened at the arbitration hearing and that dispute can only be reconciled with reference to the transcript of the arbitration proceedings. The applicant has failed in his duty to put before the court *a quo* a transcript of the arbitration hearing when the issue to be resolved so dictated. In the absence of the record or the portion thereof dealing with the issue of whether or not the commissioner considered the merits, the court was not placed in a position where it could properly assess the issue before it. The duty to show that an arbitration award is reviewable rests on the applicant. The applicant discharged its duty of showing that an award is reviewable by placing before the court evidence, through papers and other material that served during the arbitration hearing.

19] In my view, the applicant has failed to persuade me that there are reasonable prospects that another court may reasonably arrive at a conclusion different to the one reached.

20] In the premises leave to appeal to the Labour Appeal Court is dismissed with no order as to costs.

Molahlehi J:

Date Hearing : 20 October 2010

Date of Judgement: 5th November 2010

Appearances

For the Applicant : Adv M. A. Kruger

Instructed by : Ntuli Noble Inc

For the Respondent: Adv Malindi

Instructed by : Mkhabela Huntley Adekeye Inc