

SOUTH AFRICA / JUDGMENT

Mphela v Metal Engineering Industries Bargaining Council and Others (JR1661/12) [2022] ZALCJHB 252 (6 September 2022)

[2022] ZALCJHB 252

COURT

Labour Court Johannesburg

BEFORE

Schensema

CASE / FILE NUMBER

JR1661/12

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Source record

THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

case

no: JR1661/12

In

the matter between:

PETER
DITLHOKOE
MPHELA
Applicant
and
METAL ENGINEERING
INDUSTRIES
BARGAINING
COUNCIL
first Respondent
PAUL
KIRSTEN
N.O.
Second Respondent
PRETORIA
METAL PRESSING (DENEL SOC LTD)
Third Respondent

Heard:

21 July 2022

Delivered:

06 September 2022 (This judgment was
handed down electronically by emailing a copy to the parties.

JUDGMENT

SCHENSEMA, AJ

Introduction

- [1] This is an application in terms of section 145 of the Labour Relations Act^[1] (the LRA) in which the Applicant seeks the review and setting aside of an arbitration award dated 28 May 2012, issued by the Second Respondent (the Commissioner) acting under the auspices of the First Respondent, Metal Engineering Industries Bargaining Council (the Council).
- [2] The Third Respondent, Pretoria Metal Pressing (Denel SOC LTD) (Pretoria Metal Pressing) opposed the review application.

Papers Filed

- [3] The Applicant delivered a notice of motion and founding affidavit on 17 August 2012.
- [4] The record of proceedings which runs to some 196 pages was delivered on or about 25 July 2013 and a notice in terms of rule 7A (8) of the Rules for the Conduct of Proceedings in the Labour Court (the Rules) was delivered on or about the same day. No supplementary affidavit was served and filed.
- [5] There are two answering affidavits. The first affidavit was delivered on 12 June 2014 and deposed to by Petrus JJ Potgieter, an employee of Pretoria Metal Pressing. The second affidavit which was also deposed to by Petrus JJ Potgieter was delivered on 14 December 2015.
- [6] The purpose for which the two answering affidavits were delivered is not dealt with by Pretoria Metal Pressing and no replying affidavit was delivered.

Background

- [7] The factual background is set out in the founding affidavit^[2] to which Pretoria Metal Pressing responded in an answering affidavit^[3].
- [8] The Applicant was employed by Pretoria Metal Pressing since April 1981. During 2011, he was charged with misconduct, found guilty and dismissed on 27 October 2011.
- [9] Pursuant to his dismissal, the Applicant referred an unfair dismissal dispute to the Council in November 2011, conciliation failed and the matter was subsequently referred to arbitration. The Commissioner found that his dismissal was procedurally and substantively fair.
- [10] Dissatisfied with the award, the Applicant launched this review application, seeking the review and setting aside of the award.

Review Grounds

[11] The Applicant in his founding papers has raised the following review grounds:

11.1 The Commissioner had committed gross irregularities in that during the arbitration proceedings, Pretoria Metal Pressing's main witness Mr Tjaart Barwise was inconsistent during his testimony;

11.2 The Commissioner had considered the video evidence produced by Pretoria Metal Pressing's witness without authenticating same;

11.3 The Commissioner disregarded the fact that the co-accused Ms Mariam Mogabi had also denied having been involved in the alleged misconduct, while considering discreditable evidence of Mr Barwise;

11.4 Much of the evidence submitted by the Applicant during the arbitration was not considered by the Commissioner; and

11.5 In light of the above gross irregularities, the arbitration award is not an award that a reasonable decision maker, having considered all of the facts and the evidence before him, could have made.

Incomplete record

[12] It is common cause that the record of the proceedings before the Commissioner is incomplete. As already stated above, the record of proceedings as filed by the Applicant runs to some 196 pages of this, the transcribed record of the arbitration proceedings is a mere 56 pages.

[13] At the arbitration hearing, the Applicant, led the evidence of Mr I Paliane, and testified on his own behalf. Pretoria Metal Pressing, led the evidence of three witnesses namely: Mr P.J Potgieter; Ms M Mogabi; and Mr J.J Barwise

[14] If regard is had to the transcript, it is apparent that the recording does not outline the evidence of the Applicant and his witness, nor does it account for the evidence of Mr P.J Potgieter and a portion of Mr Barwise's evidence. The record starts with evidence led on the second day of the arbitration proceedings[4].

[15] The missing portions of the transcript have not been reconstructed and accordingly the only record of the viva voce evidence led at the arbitration is a portion of Ms Mogabi and Mr Barwise's evidence, the latter of which is incomplete. Pretoria Metal Pressing have taken issue with this in its answering affidavit.[5] No response has been provided by the Applicant, as no replying affidavit was filed.

[16] This matter was previously set down for hearing on 10 June 2015, before the Honorable Justice Lallie, who postponed the matter sine die to afford the Applicant the opportunity to reconstruct the missing parts of the transcribed record.

[17] The matter was then referred to the Council for the reconstruction of the record. The reconstruction hearing was set down for 19 May 2017, but never took place because the Commissioner ruled that the compact disc of the initial hearing is partially damaged and therefore cannot be fully transcribed.

[18] On or about 18 November 2019, some two years later after the Commissioner's ruling, the Applicant's previous attorneys of record addressed a letter to the Judge President of this Court, stating the following:

"...We now intend to apply for Motion Hearing on this matter. We therefore request a further directive because the compact disc of the recorded initial hearing is partially damaged and cannot be fully transcribed.

We also attached herewith a copy of the Ruling from the MEIBC for your attention and easy reference".

[19] No further steps were taken and on 31 March 2021, some two years after the Applicant's previous attorneys of record wrote to the Judge President of this Court, the Applicant's attorneys of record addressed a letter to the Registrar of this Court, stating the following:

"... This matter was previously set down for hearing on 10th of June 2015, before the Honorable Justice Lallie, who postponed the matter sine die to afford the Applicant the opportunity to reconstruct the missing parts of the transcribed record. The Court Order is attached hereto marked Annexure "B".

As per the Court Order [B], the matter was referred to the Metal and Engineering Industries Bargaining Council (hereinafter "MEIBC")

for the reconstruction of the record. Commissioner Paul Kirstein ruled that the compact disc on the initial hearing is partially damaged and therefore cannot be fully transcribed. The Ruling is attached hereto marked Annexure "C".

A letter outlining the aforementioned was already addressed to the Judge President of the Labour Court by the Applicant's previous attorneys on 18 November

2019. No response has been forthcoming. The letter is attached hereto marked Annexure "D".

We intend on applying for a new date for hearing of this matter. A Notice of Enrolment was already filed at the Honourable Court on 27 May 2019; however, no date has been allocated.

We hereby request the intervention of the Judge President to provide us with further directives herein..."

[20] The question that requires consideration, is what the effect of the woefully incomplete record on the present proceedings is.

- [21] At the commencement of the proceedings, I had raised these issues and the Applicant's representative submitted that there are sufficient irregularities in the incomplete record which requires a review. In response and notwithstanding its answering affidavit, Pretoria Metal Pressing's representative placed on record, that Pretoria Metal Pressing has no issue with proceeding with the review application on the basis of the incomplete record.
- [22] The issue of missing or incomplete record has been dealt with by the Courts on numerous occasions including but not limited to JDG Trading (Pty) Ltd t/a Russells v Witcher N.O. and Others[6]; Department of Justice v Hartzenberg[7]; Lifecare Special Health Services (Pty) Ltd t/a Ekuhlengeni Care Centre v Commission for Conciliation, Mediation and Arbitration and Others[8]; Solidarity obo Botha v CCMA and Others[9]; Balasana v Motor Bargaining Council and Others[10]; Liwambano v Department of Land Affairs and Others[11]; Mabogoane v CCMA and Others[12]; Peter Fountas v Brolaz Projects (Pty) Ltd and Others[13].
- [23] The position that is adopted by our courts, is summarised by Nkabinde AJA (as she was then) in Peter Fountas as follows:

“In my view there can be no doubt that the Court a quo should not have proceeded to consider the merits of the review application in this matter when there was material evidence missing in the record. What the Court a quo was required to have done was to consider whether the first respondent as the applicant in the review application had taken all reasonable steps to search for such evidence and or to reconstruct the record. If the first respondent had taken all reasonable steps to either find the missing evidence or to reconstruct the record and these had been to no avail, it could then have had to deal with the question of what should be done. If, however, it was of the view that the first respondent had not taken all reasonable steps that it could and should have taken, it would have had to choose one of two options.

The one would be to dismiss the application on the basis that the first respondent had had ample opportunity to take those steps and had no acceptable explanation for not having done so. This is not an option that the Court a quo could have taken lightly because it would have shut the door in the face of the first respondent who would not have been able to have set aside an arbitration award that may well not have deserved to stand. However, it is a decision that a Court may take in an appropriate case”. [14]

- [24] Considering the remarks made by Nkabinde AJA, an enquiry must be conducted to determine whether the missing portion of the record is material, in other words is it possible to deal with this review application based on the record filed? If so, then the review must proceed on the basis of the available record.
- [25] If it is found that the missing portion of the record is such that the matter cannot be determined without it, then it must be determined

whether or not the Applicant has taken all reasonable steps to reconstruct the missing portion of the record. If it is established

that he has, then it may be that the review should succeed on this basis and be remitted – certainly there is authority for this in *Uee-Dantex Explosives (Pty) Ltd v Maseko and Others*[15].

[26] As further stated in *Francis Baard District Municipality v Rex N.O and Others*[16] there is an obligation on an administrative decision maker to keep an objective record and that an applicant should not be prejudiced for the unavailability of such a record where they have taken all reasonable and necessary steps to obtain it. However, if it is found that an applicant has not taken all the necessary and reasonable steps to locate the missing portion of the evidence or to reconstruct the missing portion of a record, then the Court has two further options as identified in *Peter Fountas*, which is to either postpone or dismiss the matter.

[27] In exercising this discretion, this Court must have regard to the factors identified in that matter including whether or not the matter had become protracted and whether or not the relevant party had an opportunity to reconstruct but had failed to do so.[17]

[28] Although it is not the Applicant's duty to record and preserve the testimonies of witnesses, he had a duty to ensure that he places the best record before this Court. The Applicant should, therefore, take all reasonable steps to achieve this.

[29] The Applicant has only attempted to reconstruct the record once, on 19 May 2017. The reconstruction, however, never took place, due to the Commissioner's ruling that the compact disc of the initial hearing is partially damaged and therefore cannot be fully transcribed.

[30] No explanation is provided by the Applicant as to what steps he had taken to pursue the reconstruction process pursuant to the ruling made by the Commissioner and prior to his previous attorneys of record addressing a letter to the Pudge President of this Court on 18 November 2019, approximately two years after the order was issued and a follow up letter issued by his current attorneys of record on 31 March 2021, approximately three years after the ruling by the Commissioner.

[31] In *Lifecare Special Health* the manner in which a reconstruction ought to be done was properly explained by the court as follows:

‘A reconstruction of a record (or part thereof) is usually undertaken in the following way. The tribunal (in this case the Commissioner) and the representatives (in this the Applicant's representative and the employer's representative) come together, bringing their extant notes and such other documentation as may be relevant. They then endeavour to the best of their ability and recollection to reconstruct as full and accurate a record of the proceedings as the circumstances allow. This is then placed before the relevant court with such reservations as the participants may wish to note. Whether the product of their endeavours is adequate for the purpose of the appeal or review is for the court hearing same to decide, after listening to argument in the event of dispute as to accuracy or completeness.’[18]

- [32] It is also not clear whether or not Pretoria Metal Pressing was invited to the reconstruction process and whether an enquiry was made in respect of what evidence it had that could possibly assist with the process.
- [33] It is imperative, as set out in the aforementioned cases, for one to, as a starting point, establish whether the missing parts of the record are material. The materiality would be decided upon considering, inter alia, the grounds of the review, the nature of the missing evidence and the attitude of the arbitrator and the parties.[19]
- [34] In considering the aforementioned case law, I have also considered the steps that were taken by the Applicant and whether all reasonable steps had been taken to reconstruct the record.
- [35] It is trite that there is a direct link between the record, the standard of review and the grounds of review. Each case will therefore depend on its own facts and circumstances.[20] There can be no one size fits all approach. A court may not set aside a finding of fact by a commissioner, unless there is no evidence to support it or, if in light of all the evidence, the finding is otherwise unreasonable.
- [36] The unreasonableness of the factual finding can therefore only be determined by examining the record in relation to the factual findings made by the Commissioner in his arbitration award.
- [37] If one, then turns to the grounds for review set out in the Applicant's founding affidavit the Applicant makes the submission that: [21]

'Most of the evidence produced by the Applicant during the arbitration hearing was never considered by the Commissioner, ...'

- [38] The Applicant then sets out, in some detail, the various instances in which the Commissioner is alleged to have failed to consider the evidence[22] culminating in the allegation[23] that the award is not one which a reasonable decision maker could make considering the evidence that was before him.
- [39] The grounds for review of an arbitration award are set out in section 145 of the LRA. However, these grounds are suffused with the requirement of reasonableness – this much was settled by the Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[24], in which Navsa, AJ held that the “test” is:
- 'Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?'
- [40] The question that flows from this standard is then how does this court determine the reasonableness or otherwise of a decision-maker's

decision? In this respect, some guidance is provided by the Supreme Court of Appeal in *Herholdt v Nedbank Ltd* [25] in which the test was summarised, as follows:

'A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator.'

- [41] It is thus obvious that in the absence of a complete (or reasonably complete) record, unless there is a glaring defect, it is impossible for this Court to properly assess the reasonableness or otherwise of the decision without having the benefit of all of the material that was before the decision maker.
- [42] In other words, reasonableness can only be assessed with regards to the evidence before the decision maker. If a large portion of this evidence is not before this Court, then it is extremely difficult, if not impossible for this Court to properly apply the Sidumo test.
- [43] Whilst the bulk of the record is made up of documentary exhibits, without the benefit of a complete transcript which does not have the evidence of the Applicant and his witness amongst other things, this Court cannot assess what the significance of these documents are. The documents cannot speak for themselves and in order to properly assess the totality of evidence, in this matter, a full transcript is crucial.
- [44] If regard is had to the grounds raised by the Applicant in this matter it is my view that these simply cannot be properly assessed without the full record. In fact, it is my view that the missing portion of the record is not only material but that it would be impossible to determine this matter without it.

Steps taken by the Applicant to reconstruct the record

- [45] There is no explanation in the pleadings regarding the record, save for two letters that were in the Court file which I had sight of whilst preparing for this matter.
- [46] While distinguishable from JDG Trading[26] on the basis that this is not a matter where an applicant had simply not bothered to transcribe a record which was available, it is my view that the Applicant simply did not do enough to attempt to reconstruct the substantial portion of the missing evidence in the transcript.
- [47] It appears from the papers that the Applicant elected to deliver the incomplete record and notice in terms of rule 7A(8)[27] before making any attempt to reconstruct – or even to enquire with Pretoria Metal Pressing's Attorneys as to the possibility

of a reconstruction.

- [48] In light of these failures, I am of the view that the Applicant did not take all reasonable steps to locate the missing evidence or to reconstruct the record.

Postponement or Dismissal of the Review Application

- [49] As already outlined above, a decision to dismiss a review application should not be taken lightly. However, in *Boale v National Prosecuting Authority of SA and Others*[28] the Court held that dismissal of the application was the correct course unless the cassettes were missing or where the parties were unable to reconstruct the record.
- [50] In the case of *Solidarity obo Botha v CCMA and Others*[29] the Court, held that in dismissing an application for review on the basis of an incomplete record, it seems 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 inadequate, has to indicate in full, the steps he or she has taken to ensure that the record was before the Court including attempts at reconstructing it.
- [51] I am of the view that in the present matter, the Applicant has had ample opportunities to reconstruct the record but has made no real attempt to do so. I also take note of the fact that this litigation is already more than nine years old.
- [52] Having considered the authority on the point[30], and being aware of the factors set out in *Peter Fountas*, it is my view that this is not a matter in which postponement or striking from the roll will serve any purpose.
- [53] Accordingly, the only course of action is to dismiss the application based on the incomplete record. It is, therefore, not necessary to consider the merits of the application.
- [54] In the results, the following order is made:

Order

1. The application for review is dismissed.
2. There is no order as to costs.

H. Schensema

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate Denton

Instructed by: Pieter Prinsloo Attorneys

For Respondent: Advocate Pienaar

Instructed by: Kenneth MacPhail Attorneys

- [1] No. 66 of 1995, as amended.
- [2] Page 7, paragraphs 5.1 – 5.5
- [3] Page 3 – 4 of paragraphs 16 – 21 of the Answering Affidavit dated 12 June 2014

- [4] Page 164 lines 2 -15
- [5] Page 2 paragraph 4 of the Answering Affidavit dated 12 June 2014
- [6] (2001) 22 ILJ 648 (LAC).
- [7] (2001) 22 ILJ 1806 (LAC).
- [8] (2003) 24 ILJ 931 (LAC).
- [9] [2009] 3 BLLR 257 (LC).
- [10] (2011) 32 ILJ 297 (LC).
- [11] (2012) 33 ILJ 1862 (LC).
- [12] (2012) 33 ILJ 1874 (LC).
- [13] (JA36/03)
- [2006] ZALAC 12 (17 May 2006).
- [14] Ibid at para 31 and 32.
- [15] [2001] 7 BLLR 842 (LC); See also: New Clicks SA (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others (2008) 29 ILJ 1972 (LC).
- [16] (2016) 37 ILJ 2560 (LAC).
- [17] Ibid.
- [18] Id fn 8 at para 17.
- [19] Id fn 16.
- [20] Id fn 16.
- [21] Founding Affidavit at paragraph 6.1.4.
- [22] Founding affidavit paragraphs 6.1.4.1 – 6.1.4.3 .
- [23] Founding Affidavit at paragraph 7.3.
- [24] [2007] 12 BLLR 1097 (CC).
- [25] (2013) 34 ILJ 2795 (SCA).
- [26] Id fn 6.
- [27] Pages 157 – 158 of the paginated bundle.
- [28] (2003) 24 ILJ 1666 (LC); See also Mabogoane (Id fn 12).
- [29] [2009] 3 BLLR 257 at 22.

[30] See: Papane v van Aarde N.O. and Others

(2007) 28 ILJ 2561 (LAC); Department of Community Safety: Western Cape Provincial Government v General Public Service Sectoral Bargaining Council and Others

(2011) 32 ILJ 890 (LC); Nathaniel v Northern Cleaners Kya Sands (Pty) Ltd and Others

(2004) 25 ILJ 1286 (LC); Doornpoort Kwikspar CC v Oodendaal and Others

(2008) 29 ILJ 1019 (LC); Fidelity Cash Management Services (Pty) Ltd v Muvhango N.O. and Others

(2005) 26 ILJ 876 (LC); Shoprite Checkers Ltd v Commission for Conciliation, Mediation and Arbitration and Others

(2002) 23 ILJ 943 (LC).

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