

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, GQEBERHA

Not Reportable
Case no: PA15/2021

In the matter between:

THE MINISTER OF POLICE

Appellant

and

**POLICE AND PRISONS CIVIL RIGHTS UNION
(POPCRU) OBO X SENTI AND S FOLOKWE**

First Respondent

**SAFETY AND SECURITY SECTORAL
BARGAINING COUNCIL (SSSBC)**

Second Respondent

E N M KHUMALO N.O

Third Respondent

Heard: 23 August 2022

Delivered: 17 August 2023

Coram: Waglay JP, Kathree-Setiloane AJA and Tokota AJA

JUDGMENT

WAGLAY JP

[1] Warrant Officer Senti (Senti) and Constable Folokwe (Folokwe) (collectively the “Respondents”) were dismissed from their employment following a disciplinary hearing whereat they were found to have contravened various regulations involving “*extorting money from a detainee; extorting money from a detainee in*

exchange for him to be granted bail; failing to comply with the responsibility to uphold and enforce the law; and committing the offence of corruption”.

- [2] The Respondents believed they were unfairly dismissed and referred their dispute to the Safety and Security Sectoral Bargaining Council (Bargaining Council) first for mediation and thereafter for arbitration.
- [3] The Third Respondent (Commissioner) found their dismissal to be unfair both procedurally and substantively and ordered their reinstatement. The award was handed down on 26 July 2017.
- [4] The South African Police Service (Appellant) launched a review application seeking to set aside the award and replace it with a finding that the dismissal was fair, alternatively for the Labour Court to refer the matter back to the Bargaining Council for it to be heard *de novo* before a commissioner other than the Commissioner who conducted the arbitration.
- [5] The grounds upon which the Respondents sought to have the award set aside were that, in coming to his award, the Commissioner relied on extraneous evidence; disregarded the rules of evidence; disregarded material evidence placed before him; found that the video evidence presented to him was tampered with; failed to make a finding in respect of mutually destructive versions. Two additional grounds raised by the Respondents were that the award was not rational, and that the decision reached by the Commissioner was not one which a reasonable decision-maker could arrive at based on the evidence which was properly before him.
- [6] The review application was launched out of time and the Appellant thus also sought condonation for the delay in launching its application. The application was launched on 13 September 2017. The Bargaining Council duly delivered tapes

and documents and on 25 January 2018, the Appellant served and filed its record for the review application.

[7] The State Attorney, representing the Appellant, clearly failed to peruse the record prior to filing it and a few days after doing so, it was brought to their attention that a substantial portion of the record was missing. The State Attorney in earnest tried to obtain the missing portions of the record without success. There was almost daily correspondence and discussions between the parties to try and trace the recordings of the hearing. The attorneys for the Respondents also drew the Appellant's attention to the fact that because of its failure to file the record timeously, the review was deemed to be withdrawn or archived. The Appellant then applied in terms of Rule 11: (i) to reinstate the application in the event of it having been deemed to be withdrawn; (ii) to compel the Bargaining Council and its arbitrator to deliver all and any digital recordings of the evidence led at the arbitration and/or handwritten notes of the evidence of 15; 16 and 17 February 2018; and (iii) be granted an extension of time to file the record in the review application while simultaneously filing its Rule 7A(8) notice.

[8] The application was heard on 30 October 2018 and the following order was made:

1. The review application filed under case number PR203/17 is reinstated;
2. The second and third respondents [*the Bargaining Council and the Commissioner*] are compelled to deliver the full record of the arbitration proceedings under case number PSSS204 – 16/17 and to dispatch such record to the Registrar at the Labour Court within 15 days of the date of this order;

3. In the event that the second and third respondents are unable to dispatch the record as per paragraph 2 of this order, they shall file an affidavit within 15 days to explain why they are unable to do so;
4. In the event that the second and third respondents are unable to dispatch the record as aforesaid, the second respondent is ordered to set the matter down for reconstruction within 30 days of the date of this order;
5. The applicant is granted an extension to file the record in the review application pending under case number PR203/17;
6. The applicant has to file the transcribed record of the missing portion of the evidence presented under case number PSSS 204 – 16/17 within 30 days of receipt of the record from the second the third respondents, alternatively within 30 days after the reconstruction of the evidence;
7. if the applicant is unable to file the record as aforesaid, it must approach the Registrar for further direction.
8. There is no order as to costs. ‘

[9] The Bargaining Council was unable to trace any further documents or recordings and therefore called the Appellant and the Respondents to a meeting with them in an attempt to reconstruct the record. Not much progress was made despite what appears to be serious attempts to reconstruct the record. The Bargaining Council did trace a further disc relating to the arbitration but it could not be transcribed as it was “*inaudible*” and the Commissioner informed the parties that the recording on his computer was damaged because his computer was infected by a virus and corrupted.

[10] There were further discussions between the parties with little progress being made. In May 2019, the State Attorney enquired of the Respondents if they would agree to the matter being referred to arbitration afresh (if the Court was agreeable) because they were of the view that the missing evidence was crucial to their case. The Respondents were not agreeable to the matter being referred back to the Bargaining Council. They were of the view that the Court should determine the matter based on the evidence then available. The Appellant did not agree.

[11] By 21 January 2020, the parties had reached the end of the line of trying to add to the record so that a full and proper record could be filed at Court for a proper determination of the review application. The missing portion of the record included the cross-examination of Senti, the sole witness on behalf of the Respondents, and the video footage of the misconduct which for the Appellant constituted the most crucial evidence at the arbitration. The Appellant is of the view that the video footage was conclusive of the misconduct committed by the Respondents. The Respondents, on the other hand, believe that the video recording is unhelpful to the Appellant and that it was inadmissible because the Commissioner had rejected it on the grounds that it was tampered with.

[12] Perhaps it is instructive to note that there is a debate about what can be seen on the video recording. This is not only crucial but the cross-examination of Senti is directly linked to it and as stated earlier, there is simply no transcript of Senti's cross-examination.

[13] In the absence of a proper record, the Appellant decided, as provided in clause 7 of the Court Order, to launch a further application in terms of Rule 11 seeking the Court to provide further direction for the conduct of the review application. It did so on 21 February 2020. Once again, the Appellant also sought to reinstate its appeal because an Acting Judge had erroneously ordered the file to be archived.

[14] On 3 August 2020, the Court hearing the matter made the following order:

- '1. The review application under case number PR203/17 is reinstated.
2. The applicant shall deliver the record as supplemented by the arbitrator's notes in terms of Rule 7A(6) of the Labour Court Rules by no later than 12 August 2020.
3. The applicant shall deliver its supplementary affidavit in terms of Rule 7A(8)(a) of the Labour Court Rules, indicating its reservations with the adequacy of the record, by no later than 24 August 2020 [sic].
4. The first respondent shall deliver its answering affidavit by no later than 14 September 2020.
5. There is no order as to costs.'

[15] The order notwithstanding, the Appellant launched a further application a few weeks later on 28 August 2020 seeking further direction from the Court to the effect that the matter be referred back to the Bargaining Council for an arbitration *de novo* before a different commissioner or for the Court to give a "*directive for the further conduct of the matter*". The Respondent opposed this application.

[16] I fail to see the logic of bringing this application, particularly since the affidavit in support of the application, besides stating the Appellant's unhappiness with the Respondents' conduct, appears to comply with paragraph 3 of the court order of 3 August which said:

‘3. The applicant shall deliver its supplementary affidavit in terms of Rule 7A(8)(a) of the Labour Court Rules, indicating its reservation with the adequacy of the record, by no later than 24 August 2020.’

[17] While, for reasons only known to it, the Appellant claimed that the affidavit should not be considered as being in compliance with paragraph 3 of the order above, while the Respondents accepted it as compliance therewith.

[18] In its affidavit, the Appellant set out why it believed the incomplete record was inadequate and the Respondents continued to hold the view that the record incomplete as it was, was sufficient to determine the review application.

[19] Both matters were set down for hearing: the application seeking directive from the Court; and the review application. The Appellant persisted with its application for directive/s but also dealt with the review in the alternative.

[20] The Labour Court correctly dismissed the application for further directives in the matter. I fail to understand what directives the Appellant could have hoped for other than for the matter to be referred to the Labour Court for a final determination one way or another: either accepting the sufficiency of the record or, if it finds the record inadequate, to exercise its discretion and arrive at an order which the interest of justice demands.

[21] Having dismissed the interlocutory, the Labour Court then dealt with the review proper. It found against the Appellant, upholding the arbitration award. It is this judgment which is before this Court on appeal with leave of the Labour Court. The appeal is both against the Labour Court’s dismissal of the interlocutory application and the review application.

[22] For reasons already stated, I am of the view that the Labour Court cannot be faulted for dismissing the interlocutory application. With regard to the review

itself, while I do not think it is appropriate to deal with the evidence such as it is on the record because of the order I propose, I do need to say that there are some glaring issues which, in my view, have rendered the record, before the Labour Court and now before this Court, inadequate to arrive at a fair and reasonable determination of the review application.

[23] The first issue relates to the video presentation at the arbitration. In this regard, the video recording presented at the arbitration was one of the items that was misplaced. It was, however, not the only copy of the video as the Appellant has more copies. Thus, for the Labour Court to say that the video recording is lost and will not be available if the matter is referred to arbitration *de novo* is clearly erroneous. The Labour Court took the view that no purpose will be served in referring the matter for arbitration *de novo* because the video recording was no longer available. It went on to conclude based on the error that the Appellant could not produce the video recording that: “[t]he unavailability of the video will instead prejudice the applicant in its effort to discharge the onus of proving substantive fairness of the individual first respondents’ dismissal”.

[24] Furthermore, it appears that the Commissioner took the view that the video should be rejected in totality because, the witnesses for the Appellant who presented the video, stated that the video recording presented at the arbitration might have a frame or two missing. I fail to see why a “missing frame or two” should lead to a rejection of the video footage, or more specifically why that should constitute “tampering” with the recording when no evidence was led, nor any submissions were made to that effect. Importantly, and as contended by the Appellant, the video is crucial to the determination of the falsity of the testimony of Senti. According to the Appellant, the video footage is proof that the Respondents were not doing what they claimed they were when the alleged misconduct occurred.

[25] The handwritten notes of the Commissioner relating to the issue of the video are also woefully problematic. The Commissioner's notes record at least three critical questions that were asked of Senti in relation to the video recording. Curiously, however, not one of Senti's responses is recorded in the Commissioner's handwritten notes. This is crucial as it diminishes any reliability that may be placed on the Commissioner's notes. It is on this basis that the Appellant submits that this was evidence which would demonstrate that Senti's evidence could not be relied on and that certain conclusions drawn from the viewing of the video recording would also demonstrate the failure of the Commissioner to arrive at a rational and reasonable award.

[26] I am unable to comment on whether any conclusions can be drawn from what is said in the absence of the video recording and the transcript of Senti's cross-examination. What I do not accept, from the record as is before this Court and what was before the Labour Court, is that there is no evidence upon which the Commissioner could have concluded that the video recording was "*tampered with*". The Commissioner's failure to note Senti's response to the questions asked which, on the face of it, appear relevant, adds to my belief that this record is simply insufficient to arrive at a fair decision on the appeal before this Court.

[27] The missing evidence is necessary to determine the reasonableness of the Commissioner's decision. To argue that the onus is upon the Appellant to ensure a full and proper record is before the Court is in my view not always correct. It is the responsibility of all the parties particularly the Commission, who has the responsibility to ensure not only that it keeps a full and proper record, but to ensure in the event of a review, that a full and complete record of the proceedings is before the reviewing Court.

[28] Furthermore, while the delay of a few years may well be reason enough to dismiss a review, this can only apply where the applicant has failed to act diligently. In this matter, the Appellant has made every attempt to trace, seek,

consult and engage with everyone possible in an attempt to fix the record. The number of affidavits filed in this matter, setting all the attempts made to try and prepare a proper record for the review, demonstrate very diligent conduct on the part of the State Attorney. In the circumstances, it would, in my view, be unconscionable to dismiss the appeal against the interlocutory application and the review application simply because of the lapse of time. While I accept that it is the Respondents, if successful, who bear the brunt for the delay, any adequate relief that they may be granted at a later date, may never be sufficient to address the prejudice they currently suffer. However, I consider it to be in the interests of justice that this matter be referred back to the Bargaining Council to be arbitrated anew before a commissioner other than the Third Respondent.

[29] I also apologise for the delay in the handing down this judgment and ask the Bargaining Council to attempt to arbitrate this dispute with due haste so that this long outstanding matter can be finalised.

[30] I see no reason in the law of equity to make an order in respect of costs.

[31] In the result, I make the following order:

Order

(i) The appeal is upheld with no order as to costs.

(ii) The order of the Labour Court is set aside and substituted with:

- “1. The arbitration award handed down by the Safety and Security Sectoral Bargaining Council (SSSBC) in the matter between *POPCRU obo Senti and 1 Other v South African Police Service* under case no PSSS 204-16/17 is hereby reviewed and set-aside and the matter is referred back to the SSSBC for arbitration anew

as a matter of urgency before a commissioner other than the Third Respondent,

2. There is no order as to costs.”

B Waglay JP

Kathree-Setiloane AJA and Tokota AJA concur.

APPEARANCES

For the Appellant:

Adv Rawjee

Instructed by Ms Glanvill, State Attorney

For the First Respondent:

Adv Le Roux

Instructed by Mike van der Veen, Wheeldon
Rushmere & Cole