

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case No: JA16/00

In the matter between :

The Department of Justice

Appellant

and

Heidi Hartzenberg

Respondent

JUDGMENT

COMRIE A.J.A:

1.The respondent was formerly employed as a prosecutor in the Department of Justice. She was stationed in the specialist commercial branch at the Pretoria

Magistrates Court. In the latter part of September 1995 she fell pregnant. With effect from January 1996 she was assigned to the training post in the same branch, which meant that she was relieved of her duties as prosecutor. In early March 1996 she resigned from the public service on 24 hours notice. Thereafter she instituted proceedings in the Industrial Court. In essence her case was that although she had resigned, she had in reality been constructively dismissed in circumstances amounting to an unfair labour practice. It is not necessary for the purposes of this judgment to set out all the details. I should mention, however, that they included, but were not confined to an allegation that on account of her pregnancy, she was forced by her superiors to accept the training post, which was much against her will and made her most unhappy.

2. The case eventually came to trial before an additional member of the Industrial Court, Mrs. Grobbelaar. Both sides were represented by counsel. It was heard in two stages: first the "merits," and then the quantum. The court a quo found in favour of the respondent on the merits, and at the second stage awarded the respondent compensation in the sum of R 70449,00. Costs of two counsel and of an actuary were allowed.
3. The Department appealed.
4. The appeal initially came before this Court on 16 November 2000. It appeared that several of the cassettes, on which much of the oral evidence had been recorded, were missing. In consequence the Department, as appellant, had failed to place a proper and complete record of appeal before this Court. Furthermore, the Department had not by then taken steps *mero motu* to put together a reconstructed record of the missing parts. The Court made an order to the effect that the Department was given one month within which to compile a reconstructed record, failing which the appeal would be deemed to be dismissed with costs.

5. Despite strenuous effort by Mr. Duvenage of the State Attorney's Office, the Department was unable to comply timeously, and an attempted reconstruction was only presented in the new year. The sources for the attempt were counsel's incomplete and cryptic notes. Mrs. Grobbelaar cannot find her own bench notes; she has either not kept them or she has mislaid them. The missing evidence all relates to the first stage of the hearing, ie on the merits. The respondent testified first. Her evidence in chief (running to nearly 40 pages) is fully recorded and transcribed. That is where it stops. Her cross-examination and re-examination is lost, save for the reconstruction (35 less than closely typed pages). The Department called four witnesses, namely Adv .Dicker, Mr. Bezuidenhout, Ms. Kannemeyer and Ms. Humphries. Their testimony, in all its stages, is also lost, save for the reconstruction(which runs to some 45 pages, again less than closely typed). It is stated in the affidavits that the Department's witnesses gave their evidence over a period of the best part of two days. Even if this period included the respondent's cross-examination and re-examination, the whole reconstruction covers a mere 83 widely spaced pages.

6. It is not open to question that the attempted reconstruction is hopelessly inadequate for the proper determination of this appeal, which turns in significant part on credibility. Mrs. Grobbelaar, who has viewed the reconstruction, is not prepared to certify it as true and correct. I attach no blame to her, or to the parties or to the legal representatives. It is evident that they have done their best and that a satisfactory version will not be forthcoming. Despite a diligent search, the missing cassettes cannot be found, and there is no suggestion that they will come to light in the foreseeable future.

7. What are we to do now ? I do not think we are bound by the order that was granted by this Court on 16 November 2000. That order was interlocutory in nature. It was made before reconstruction was attempted, and while a proper reconstruction was believed to be feasible. It is true that the

Department was out of time in filing the attempted reconstruction, but the delay was not undue and in my view has been adequately explained. We know now what the Court on 16 November did not know, that a proper reconstruction cannot be achieved. That is the central feature, and it would be wrong in the circumstances to penalise

the Department (by dismissing the appeal or confirming its dismissal) on account of a relatively minor and understandable delay.

8. Rules of Court commonly provide for the lodging by an appellant of a full or complete and correct appeal record within a specified time. Rule 5 (7) of this Court requires a copy of the record of the proceedings in the Court a quo . Rules 5(10)(f), (g) and (h) provide:

“ Every copy of the record must -

f)include the judgment given by the Labour Court;

(g) contain a correct and complete index of the evidence and of all the documents and exhibits in the case, the date and nature of the exhibits being briefly stated in the index;

(h) contain only those documents that were referred to in any proceedings in the Labour Court”.

Rule 5(15) provides:

15)“Any reference in the record of evidence of any witness to any document or exhibit contained in the appeal record must reflect, in brackets in the margin opposite the reference, the page number in the appeal record of such documents or exhibit”

Rules 5 (12) and (16) deal with specified omissions from a record.

9. Although not expressly stipulated, it is implicit in Rule 5 that the appeal record to be lodged by an appellant, must be a complete and correct record subject to permissible omissions. Rule 5 (17) provides that if an appellant fails to lodge the record timeously, then “the appellant will be deemed to have withdrawn the appeal” unless an extension of time is granted. Rule 5 does not deal with the particular position which presents itself here, namely that a complete and correct record cannot be lodged. In **Waverley Blankets Ltd and Others; Waverley Blankets Ltd v Sithukuza and Others (1999) 20 ILJ 2564 (LAC)** an application to condone the late filing of the appeal record was refused by this Court. There was, however, no suggestion that a proper record could not be lodged. The decision is thus distinguishable.

10. The position with regard to criminal appeals from the magistrates courts was settled in **S v Joubert 1991 (1) SA 119 (A)**, where the appeal record could not be reconstructed. It should be borne in mind that in criminal appeals the State has duty to safekeep the record at first instance, and the duty to transmit it. It was held that the State’s failure to discharge these duties prejudiced an accused in that it frustrated this right of appeal, and that he was consequently entitled to an acquittal. The “replica” principle was enunciated at 126 A. See **S v K 1991 (2) SACR 190 (B)** where the frustration principle is well illustrated.

11. In civil appeals, however, the position is less than clear. With the exception of **Beaumont v Anderson 1949 (3) SA 562 (N)**, I have not found a case directly in point. The case law establishes that it is the duty of an appellant’s attorney to lodge a complete and correct record timeously; and to ensure that the evidence is fully transcribed, and the exhibits and judgment included. Upon actual or contemplated failure to comply in time, the appellant is expected to bring a substantive application for condonation as soon as possible. It is normally a requirement that the appellant’s prospects of success on appeal be canvassed. Failing such application, or if it is refused, the usual order is that the appeal be

struck from the roll, although some rules (including Rule 5(17) of this Court) provide that the appeal is deemed to be withdrawn. A punitive costs order is sometimes granted. See Kahn v Radyn 1949 (4) SA 552 (C); Nicol's Motor Works v Breytenbach 1953 (4) SA 1 (T); Anastassiades v Argus Printing and Publishing Co. Ltd 1955 (2) SA 349 (T); Bekker v Dawkins Steenmakery 1959 (1) SA 32 (T); Mashaba v Engelbrecht 1959 (1) SA 34 (T); Van Der Riet v Rheeder 1965 (3) SA 712 (O); Senator Versekerings Maatskappy Bpk v Lawrence 1982 (3) SA 132 (A); Rennie NO v Gordon and Another NNO 1988 (1) SA 1 (A); Rennie v Kamby Farms (Pty) Ltd 1989 (2) SA 124 (A); SA Broadcasting Corporation v Corrective Action Holdings (Pty) Ltd t/a Mass Media Marketing 1999 (3) SA 601 (W) and the case cited at 602; Dos Santos v Unibank Ltd 2000 (1) SA 801 (W); Mamabolo v Rustenburg Regional Local Council 2001 (1) SA 135 (S C A). In the numerous cases which I have cited, there is not a single instance where it was suggested that material portions of the record had been lost and could not be reconstructed.

12. Beaumont v Anderson, supra, was an appeal from the magistrates court. The pages of the handwritten record of the plaintiffs evidence in chief were lost, it would seem irretrievably, with the consequence that the magistrate was unable to furnish his reasons for judgment. Broome J pointed out that the appellant had a statutory right of appeal which had been frustrated through no fault of his own. On the other hand the respondent had a judgment in his favour. The Court declined to remit the case for hearing de novo, which it thought would be unfair to the respondent, who had a judgment in his favour. It continued:

“His alternative prayer is that the case be remitted to
the

magistrate to re-hear the evidence of the plaintiff, and that

is, in my opinion, the best way out of the difficulty. A similar course was followed in the case of EX PARTE FIRTH (46 LT 120)".

13. While that course may have commended itself to the Court on the facts of that case, it would in my opinion be entirely inappropriate in the present matter. It would mean re - hearing most of the evidence including, it seems to me, the cross-examination of the respondent.

Credibility was important in this case, and her credibility was as much at stake as that of the Department's witnesses. It may also be asking too much of Mrs . Grobbelaar to disabuse her mind of the perceptions which she has already formed of the witnesses. And it may perhaps be asking too much

of the Department to expect it to have confidence in her ability to do so.

It is, of course, not feasible to remit only part of the case on the merits for re - hearing before a differently constituted court.

14. An alternative course advanced by Mr. Pretorius, who led for the appellant, would be to remit the matter to Mrs. Grobbelaar for a "reconstruction" hearing. The object of this exercise, he explained, would be to ascertain a complete and correct reconstruction. There was little,

if any dispute about what each of the Department's four witnesses said in chief. So the respondent, and each of the Department's witnesses, would be taken through their previous cross-examinations and re-examinations within the parameters disclosed by the various handwritten

notes. No "new" cross-examination would be permitted, but only questions relating to their previous testimony. Mr. Pretorius pointed out that all five witnesses were still available, and that the Department's witnesses have deposed to affidavits in which they comment on the attempted reconstruction. There would thus be little or no scope for them

to tailor their evidence. The course proposed by counsel is thus a variation on and extension of what was done in Beaumont v Anderson, supra.

15. I fear that such an endeavour is likely to prove counter productive. There is every prospect that it will produce a host of new disputes. Moreover, there is a real prospect that at the end of the enquiry Mrs . Grobbelaar may still find herself unable to certify. Even if she does certify, it may not be possible to eliminate all disputes, in which event this Court may be asked to resolve them. I am persuaded that the proposal is too risky, and that it would be inadvisable for us to adopt it in the circumstances of this case.
16. What remains is a choice: either to let the judgment in the respondent's favour stand, or to set it aside and to refer the matter for

hearing de novo . If the judgment is allowed to stand, then the Department's right of appeal will be completely frustrated, thereby prejudicing it. A remittal, on the other hand, will deprive the respondent of her judgment and will lead to the parties incurring more costs. This may be especially hard on the respondent, who is an individual and who may not be possessed of adequate funds. **Mr Bam**, who led for the respondent, submitted that his client would be unduly prejudiced by a remittal. He mentioned the matters

to which I have referred, as also the need for finality and, in labour cases, expedition. He pointed to some delay on the part of the Department's attorney in attempting to rectify the position prior to the hearing of the appeal on 16 November 2000, though an appropriate costs

order was made on that occasion. Counsel pointed to the possibility that a

trial de novo may lead to another appeal. He suggested that in having to testify again, the respondent would undergo further "trauma". Finally, he borrowed from the criminal appeals and submitted that it was the State's fault that the tapes were missing. In evaluating prejudice, he said, such fault was a weighty consideration.

17. I deal with the last point first. It was not the appellant Department's fault that the tapes were lost. The responsibility for their safekeeping rested on

the Department of Labour. It would be too far reaching, in my opinion, to carry any such fault from one department of State to another. Moreover, we do not know the circumstances of the loss, so that it is difficult to assess fault or its extent. Certainly, the State should not be blamed for the fact that Mrs. Grobbelaar's notes are no longer extant. There is no merit in the "trauma" argument, but the other points raised by Mr. Bam are not without force. On balance, however, it appears to me that the Department's right of appeal is the overriding consideration.

As has been pointed out, all the witnesses are available. If the matter is remitted for re - trial the respondent may prove her case once again, in which event her position in regard to costs will be safeguarded. But if the appeal is dismissed, the Department will lose the opportunity of persuading

this Court that the trial Court erred. It will be fixed with liability in the sum

of R 70449,00 (plus costs) and with a finding that it constructively dismissed the respondent, results which might have not been sustained on appeal. It is always unfortunate when a re - trial has to be ordered, but it seems to me to represent the lesser inequity. A re -trial in this respect means a re-hearing on all aspects of the case.

18. The Industrial Court no longer operates save to finalise part-heard matters. In other pending matters that court's functions are now performed by the Commission for Conciliation, Mediation and Arbitration. See item 22 A of schedule 7 to the Labour Relations Act 66 of 1995 read with

Government Notice no.R214 promulgated in Government Gazette dated 19 February 1999. I do not regard the present matter as part-heard. It follows that the case must be remitted to the Commission. In a letter before the Court, the National Senior Commissioner expresses regret for what has happened and offers to make available a commissioner who is experienced in Industrial Court matters to try the case de novo.

19. With regard to costs, **Mr Pretorius** properly conceded that the Department should be liable for the costs of the hearing on 16 November 2000, which were in a sense wasted. For the rest, I am of the view that it would be fair to order that the costs at first instance and on appeal be in the cause of the re-trial.

20. The following order is made:

1. The judgments and orders of the Court a quo are set aside and the matter is referred to the Commission for Conciliation, Mediation and Arbitration for re-hearing de novo before a commissioner (other than Mrs Grobbelaar);

2. The appellant is to pay the costs of the hearing before this Court on the 16 November 2000 on the basis then ordered. All other costs at first instance and on appeal are to be costs in the re-hearing contemplated in para 1 above.

R.G. Comrie
Acting Judge of Appeal

I agree

RMM Zondo
Judge President

I agree

K. van Dijkhorst
Acting Judge of Appeal

For the Appellant: Adv. G.C. Pretorius SC and Adv. L. Bolt

Instructed by: The State Attorney, Pretoria

For the Respondent: Adv. A.J. Bam SC and Adv. C. Pretorius

Instructed by:

Messrs
Maartens
&
Huysamen,
Pretoria.

Date of Argument: 5 June 2001

Date of Judgment:

