

**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG**

Case no: DA15/02

In the matter between:-

**LIFECARE SPECIAL HEALTH
SERVICES (PTY) LTD t/a EKHLENGENI
CARE CENTRE**

APPELLANT

and

**THE COMMISSION FOR CONCILIATION,
MEDIATION & ARBITRATION**

1ST RESPONDENT

NGCOBO HM (COMMISSIONER)

2ND RESPONDENT

MZULWINI TV

3RD RESPONDENT

JUDGMENT

COMRIE AJA:

[1] The third respondent was formerly employed by the appellant (Lifecare) as a residential health care worker. On 25 February 2000, in the course of an

unprotected strike, he allegedly misconducted himself vis a vis other non-striking workers. This led to a disciplinary enquiry and to his dismissal on 2 August 2000.

[2] The fairness of the dismissal was challenged in arbitration proceedings held in Durban before the second respondent, who is a commissioner of the first respondent. The arbitration was heard during January and March 2001. No less than twelve witnesses testified, six per side. The commissioner's award, dated 26 March 2001, was adverse to the appellant.

[3] On 4 May 2000 the appellant launched a review application in the Labour Court. The notice of motion called in the usual way for the production of the record of the arbitration proceedings. In an "additional" founding affidavit the deponent stated that:-

"1. The taped recordings obtained from the CCMA via the Labour Court are incomplete. The six tapes received were numbered 5-11. Enquiries made with the CCMA Administrator, Ms Melly Benjamin, revealed that the above mentioned six tapes were the only ones available as received from the commissioner. This therefore means that there are at least four tapes missing. This is so despite the fact that the hearing continued from where tape number 11 ends.

2. Evidence of three witnesses (Graham Foley, Shamla Samuels and Joyce Mazibuko) for the Applicant was not captured in the available tapes. Evidence of Mzulwini's four witnesses (Bheki Mbatha, Mandla Msomi, Emanuel Makhanya and Evelyn Cele) was also not captured in the tapes. This could be on account of the apparently missing tapes.

3. One of the tapes, number 9, has in the middle of Mzulwini hearing a different hearing recorded.....”

[4] The commissioner’s handwritten notes were also received. The deponent stated that they:-

“.....cannot be regarded as a comprehensive reflection of the arbitration hearing. This is based on the fact that they amount to a summary, that includes an interpretation of what was said at the time which was reduced to a concise meaning as understood by the receiver (commissioner).....”

[5] The material placed before the Labour Court by the appellant, qua applicant, was :

4. a typed transcript of the tape-recorded evidence, to the extent that the cassettes were available; and
5. the handwritten notes kept by the commissioner in respect, it would seem, of the evidence which was missing. These notes, running to 48 pages, were not transcribed.

[6] In his answering affidavit the third respondent accepted that the typed transcript was an incomplete record of the evidence led at the arbitration. The third respondent stated further:-

“33.2 Commissioners do not keep copious and detailed notes of hearings.

33.3 The proceedings are recorded and Commissioners listen to evidence that is led. Awards are usually handed down without transcribed recordings being made available to Commissioners beforehand.....”

I interpose that it is certainly true that commissioners are encouraged to make use of electronic recording equipment whenever possible.

[7] The review came before **Ngcamu AJ** in the Labour Court. It appears that the third respondent raised an objection in limine in that the appellant had failed to provide a complete record of the arbitration proceedings. The learned judge pointed out that only a portion of the record had been transcribed but not the commissioner’s handwritten notes. He regarded himself as bound by the decision of this Court in **JDG Trading (Pty) Ltd t/a Russell’s v Whitcher N.O. and Others** (2001) 22 ILJ 648 (LAC); [2001] 3 BLLR 300 (LAC) in which Labour Court rule 7A was considered and applied. **Ngcamu AJ** said:-

“ The applicant is obliged to have transcribed the handwritten notes if the record is incomplete. This has not been done”.

There being no application for a postponement in order to have the handwritten notes transcribed, the objection was upheld and the review was dismissed with costs.

[8] The appellant appeals with leave granted by the Court a quo. The third respondent has filed a notice abiding the decision of the Court, in the interests of saving costs.

[9] I turn immediately to the judgment of **Goldstein AJA** in the **JDG Trading** case on which the Court a quo relied. That case, like the present, arose out of a CCMA arbitration which was taken on review to the Labour Court in terms of section 145 of the Labour Relations Act 66 of 1995. Procedurally, such reviews are governed by Labour Court rule 7A, the terms of which are set out in the judgment of **Goldstein AJA**. It will be seen that an applicant for review must in the notice of motion call upon the person or body, whose decision or proceedings are under review, to deliver to the registrar “the record of the proceedings sought to be corrected or set aside together with such reasons.....” See sub - rules (1) and (2). [Compare uniform rule 53 (1).]. Sub - rule (5) then obliges the applicant to “make copies of such portions of the record as may be necessary for the purposes of the review and certify each copy as true and correct”. Copies are distributed to the parties and to the registrar. Sub - rule (6). Sub - rule (7) deals with the costs of transcription of the record, copying and delivery. By sub - rule (8), as is well known, an applicant then has an opportunity to amend, add to or vary the notice of motion and to supplement the supporting affidavit.

[10] Furnished to the registrar in that case were the commissioner’s handwritten notes, “6 recorded cassette tapes of the arbitration proceedings” as well as a “[b]undle of documents submitted at arbitration hearing (exhibits)”. The applicant failed to transcribe either the handwritten notes or the cassettes. **Goldstein AJA** said:-

“[12] In terms of rule 7A(5), (6) and (7) the appellant was obliged to have transcribed the handwritten record and also the contents of the cassette tapes. Arguably, if the latter proved to be complete, it may have proved

unnecessary to transcribe the handwritten notes. The appellant failed to have either the handwritten record or the tapes transcribed.

[13] In the absence of the transcribed record of the proceedings before the first respondent, the court a quo was in no position to adjudicate properly on the application before it and ought accordingly to have dismissed it”.

[11] It is manifest that **JDG Trading** is distinguishable from the present case. In **JDG Trading** there was a record (whether it consisted of the handwritten notes or the cassette tapes or both) which the applicant, in breach of the rule, had simply failed to transcribe. There was no suggestion that a material portion of the record was lost. Nor was it a case where the issue was so narrow that the Labour Court could have done without the record. It was further unnecessary for **Goldstein AJA** to decide what precisely constituted the “record of the proceedings”; hence he said at para 12:-

“Arguably, if the latter proved to be complete, it may have proved unnecessary to transcribe the handwritten notes”.

[12] This brings me to the question: what comprised the record of the arbitration proceedings before the commissioner in the present appeal? It was that record which in terms of rule 7A the applicant for review (Lifecare) was obliged to transcribe and distribute. I have mentioned earlier that the arbitration was heard during January and March 2001, the award itself being dated 26 March 2001. According to the rules then applicable, the first respondent was obliged to keep a record of any evidence given in an arbitration hearing, and of any award or ruling made by a commissioner. The rules provided:-

“The record may be kept as handwritten notes or an electronic

recording.”

Since the commissioner made use of an electronic recording, the desirable form, the probable inference is that he chose that form as the “official” record, and that his handwritten notes were no more than bench notes kept for the tribunal’s convenience, as is the invariable practice among magistrates and Judges. Though we have no definite statement to that effect from the commissioner himself, the parties appear to be in substantial agreement that the electronic recording constituted the record. I shall proceed upon that basis.

[13] It follows that what Lifecare was obliged to place before the Labour Court in terms of rule 7A was a transcript of the electronic recording of the arbitration proceedings, which was the “record” for the purposes of the review. Lifecare complied with that obligation as far as the circumstances permitted, given that it caused to be transcribed and distributed all the cassette tapes which were said by the CCMA to be available. Rule 7A itself imposes no obligation upon an applicant for review additionally to transcribe and distribute an informal note of the proceedings, such as a commissioner’s benchnotes. Nor can rule 7A be interpreted so as to require an applicant to do the impossible. The Court a quo accordingly erred in dismissing the application for want of compliance with rule 7A.

[14] This is not to say that much purpose was served by placing the untranscribed notes before the Court a quo. It is properly to be expected in that Court, as in this Court, that handwritten documents will be accompanied by typewritten transcriptions or copies. The commissioner’s handwriting affords

ample reason for the settled practice.

[15] How should the Court below have dealt with the matter? This is not a case such as **Department of Justice v Hartzenberg 2002 (1) SA 103 (LAC); [2001] 9 BLLR 986 (LAC)** where most of the record of the evidence before the Industrial Court was indisputably lost and where a reconstruction of the record was not considered to be feasible. That stage has not been reached yet in the instant matter, and may never be reached. I point out that we have no affidavit from Ms Benjamin regarding the CCMA's storage and record keeping system at Durban or that diligent search was made for the missing tapes. The commissioner has not indicated how many cassette tapes he handed over to the CCMA. No attempt has been made to reconstruct the missing part of the record using the commissioner's benchnotes as a starting point. Lifecare's rejection of those notes was premature inasmuch as they constituted a valuable source for the purpose of reconstruction.

[16] **Ngcamu AJ** recorded in his judgment that: "There is no application before me to have this matter postponed in order to have the handwritten notes transcribed". The learned Judge had earlier said that: "the applicant is obliged to have transcribed the handwritten notes if the record is not complete". Transcribing the commissioner's notes, as though they possibly constituted an alternative record, was not of itself the solution. In my view the Court should have suggested to the parties that the matter be postponed in order: (a) to make the enquiries referred to in the previous paragraph; and (b) insofar as might prove necessary, to attempt a reconstruction. The latter would at least have been required for the part of tape 9 which was over-recorded, and may be required in respect of other tapes. It is not possible to speculate how Lifecare's legal

representative in the Court *a quo* would have reacted to such a suggestion had it been proffered from the bench.

[17] 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 case Ms Reddy for the employee and Mr Mbelengwa for the employer) 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 a dispute as to accuracy or completeness.

[18] I appreciate that reconstructing parts of the record some two years after the event will be time consuming and may prove frustrating. However, the situation is not all bleakness. In addition to the commissioner's handwritten notes, Mr Mbelengwa filed a full closing argument of nine typewritten pages which should prompt his recollection. Those concerned are expected to cooperate. With the requisite cooperation, there is reason to hope that a fair reproduction will be feasible.

[19] When it appeared that there were difficulties with regard to the record, it was the obligation of Lifecare, as the reviewing party, to initiate the enquiries and steps which have been set forth in this judgment. It should not have been left to the Labour Court at first instance, and to this Court on appeal, to resolve problems which were other than residual or intractable.

[20] The appellant does not seek costs either on appeal or in the Court below.

[21] In the result the appeal succeeds with no order as to costs. The order granted by the Court *a quo* is set aside and replaced by the following order:-

“(i) The application is postponed sine die for investigation and, insofar as may be necessary, reconstruction of the record of the arbitration proceedings.

(ii) No order as to costs.”

R.G. COMRIE
ACTING JUDGE OF APPEAL

I agree.

RMM ZONDO
JUDGE PRESIDENT

I agree.

A.N. JAPPIE
ACTING JUDGE OF APPEAL

Appearance:

For the appellant: Adv A.T. Myburg

Instructed by: Messrs Deneys Reitz - Sandton

For the respondent: No appearance

Date of hearing: 5 March 2003

Date of judgment: 28 March 2003