

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

Case No JA36/03

In the matter between

Peter Fountas

Appellant

and

**Brolaz Projects (Pty) Limited
Commission for Conciliation,
Mediation and Arbitration
Tucker, RJ N.O.**

1st Respondent

2nd Respondent

3rd Respondent

JUDGMENT

NKABINDE AJA

Introduction

[1] The appellant, a former employee of the first respondent, appeals to this Court against a decision of the Labour Court in terms of which that Court reviewed and set aside a certain arbitration award. That arbitration award had been issued by the third respondent in a

dispute between the appellant and the first respondent about whether or not the first respondent had dismissed the appellant and, if so, whether or not such dismissal had been fair. The third respondent is a commissioner of the Commission for Conciliation, Mediation and Arbitration (“**the CCMA**”) which is the second respondent. The arbitration award was to the effect that the appellant had been dismissed and that his dismissal had been substantively fair but procedurally unfair. In terms of that award the first respondent had been ordered to pay the appellant certain compensation.

Proceedings in the Labour Court

- [2] The first respondent was aggrieved by the award and brought an application before the Labour Court to have that award reviewed and set aside. The first respondent’s review application in the Labour Court was successful. That part of the award which related to procedural fairness was set aside and it was remitted to the CCMA to enable the CCMA to reconsider it. With the leave of the Court a quo, the appellant now appeals to this Court against the order of the Labour Court.

The appeal

- [3] There are three procedural issues that need to be considered before the merits of the appeal can be considered if they have to be considered at all. The first is the application for the condonation of the appellant’s failure to deliver his heads of argument timeously. The second is the first respondent’s application for the condonation

of its failure to deliver its heads of argument timeously. The third is the incompleteness of the record of the arbitration proceedings pursuant to which the arbitration award which was the subject of the review proceedings in the Court a quo was issued. I shall deal with each in turn.

The appellant's failure to deliver his heads of argument timeously.

[4] Rule 9 of the Rules of this Court provides:

- “(1) The appellant must deliver a copy of the heads of argument not later than 15 days before the hearing or not later than any earlier date determined by the Judge President;
- (2) The respondent must deliver a copy of the heads of argument not later than 10 days before the hearing or not later than any earlier date that may be determined by the Judge President...” (Emphasis added).

[5] On 29 December 2003 the Registrar of this Court sent a direction issued by the Judge President to the parties’ attorneys of record regarding the delivery of heads of argument. The directive read as follows:

- “1. By direction of the Judge President of the Labour Appeal Court, the parties in the above appeal are required to deliver their Heads of Argument as directed below:
 - (a) the appellant is required to deliver to the Registrar and the respondent or its representatives its/his/her Heads of Argument on or before the 31st of January 2004.

(b) the respondent is required to deliver to the Registrar and the appellants or its representatives its Heads of Argument on or before the 20th of February 2004.

2. The parties' attention is specifically drawn to the provisions of Rule 9 of the Labour Appeal Court.....
3. The parties are hereby notified that failure to comply with the Judge President's direction in 1 and 2 above may result in this appeal not being set down for hearing next term.
...”.

[6] The appellant failed to deliver his heads of argument on or before 31 January 2004 as directed by the Judge President. He only delivered them on 28 June 2004. That was a delay of about five months. He ought to have simultaneously delivered an application for the condonation of such failure. He did not do so. Indeed, by the time of the hearing of this appeal the appellant had not as yet delivered the application for the condonation of the late delivery of his heads of argument.

[7] The explanation advanced by the appellant's Counsel from the bar when the Court raised this issue was that the appellant's attorney of record had understood the last paragraph of the Judge President's direction to mean that the only consequence of a failure to attend to the timeous delivery of the appellant's heads of argument would **‘be not setting the matter down in the next term’**. He explained that he was also under a mistaken belief that, since the relevant Rule of this Court afforded him time until 15 days prior to the hearing of the appeal to file the appellant's heads of argument, he was not obliged to apply for condonation in respect thereof. Of

course, this understanding was wrong and completely unjustified. On the day of the hearing of the appeal this Court ordered the appellant to deliver an application for condonation after the hearing of argument.

- [8] The appellant's condonation application was subsequently delivered on 2 March 2005. The respondent did not oppose the application. The appellant's attorney, Mr SH Van den Berg of Willem Van Rensburg Attorneys, deposed to the founding affidavit in support of the application for the condonation of the late delivery of the heads of argument. He explained that the delay in delivery the appellant's heads of argument had been due to the fact that his offices had been closed over the festive season when the Judge President's direction was delivered on 29 December 2003.
- [9] Mr Van den Berg explained further that the notice came to his attention during mid-January 2004 when his office re-opened in the New Year. According to Van den Berg the appellant was out of funds to prosecute the appeal at the time. Mr Van den Berg stated that he had decided to accommodate the appellant when he realized that good prospects of success existed on appeal. Mr Van den Berg explained that, as there was no financial cover to instruct Counsel to draw the heads of argument, he prepared the heads of argument himself. He explained that drawing the heads of argument himself was a novel experience. He said that he had to research the legal issues and make sure that the submissions on appeal were presented with utmost clarity. He said that that took time.

- [10] Mr Van den Berg stated that he mistakenly believed that there was no urgency in filing the appellant's heads of argument because the only consequence of failing to deliver them within the time specified in the Judge President's direction would be that the appeal would not be set down for hearing in the following term. As stated above he only delivered the heads of argument on 28 of June 2004. He explained further that it was not until the afternoon of Monday, 28 of February 2005, that counsel, who was briefed on 27 February 2005 to argue the appeal, informed him that the appellant's heads of argument had not been delivered timeously in terms of the Judge President's direction and that a condonation application for such late delivery of heads of argument should therefore have been filed.
- [11] Mr Van den Berg explained that it was impossible at that time to prepare an application for condonation to present to this Court at the hearing of the appeal on 1 March 2005 due to the fact the telephone lines and computers in his office had been damaged by a lightning. He proffered an apology for his ignorance of the law and the inconvenience which such ignorance might have caused to the Court. As to the prospects of success he simply stated that reasonable prospects of success existed.
- [12] The explanation advanced by the appellant's attorney for the late delivery of the heads of argument clearly shows that the attorney concerned had not read the provisions of Rule 9(1). Had he done so, he would have been aware of the alternative in that sub-rule and the fact that the directive in the Registrar's notice was in line with the empowering provisions in the Rule. The remissness on the part

of the attorney concerned is most disconcerting because it was his duty, as the appellant's legal representative, to establish the relevant rules and procedures applicable when he accepted instructions from the appellant. His explanation is so lacking as to influence this Court to consider a strict sanction. Had the employer been prejudiced by the delay and had it also not been equally dilatory in delivering its heads of argument, serious consideration would have had to be given to the possibility of this Court making an order of costs *de bonis propriis* against the appellant's attorney.

- [13] The appellant's attorney's conduct in the handling of the matter of the appellant's heads of argument and the condonation application leaves much to be desired. It is trite that a practitioner is required to take the necessary steps to familiarise himself with the rules of each court in which he has a matter to handle on behalf of a client. The appellant's attorney breached this duty in this matter. However, the application for condonation was not opposed and, it seems to me that, the appellant's prospects of success on the merits are reasonable. In the light of this the appellant's application for the late delivery of his heads of argument should be condoned. It is hereby condoned.

The first respondent's failure to deliver its heads of argument timeously.

- [14] In terms of the Judge President's direction, the first respondent had been required to deliver its heads of argument on 20 February 2004 which was a period of 20 days from the date when the appellant was to have delivered his. The first respondent failed to comply

with the Judge President's direction in this regard. The first respondent's heads of argument were filed on 20 October 2004, a period of approximately eight months outside the prescribed period and over three months after the appellant had delivered his heads of argument. This was after the appellant had delivered his own heads of argument on 28 June 2004.

[15] The first respondent's application for the condonation of the late delivery of its heads of argument was delivered on 1 November 2004. The appellant did not oppose it. The explanation for the delay, set out in the affidavit of the first respondent's attorney of record, Mr Erasmus, was that the first respondent had instructed him to close the file provisionally when the appellant's heads of argument were not forthcoming. The appellant had apparently advised the first respondent's attorneys on 14 January 2004 that his heads of argument were being prepared. Mr Erasmus explained that, after the appellant had delivered his heads of argument on 28 June 2004, he had briefed Counsel to draw the first respondent's heads of argument. He stated that Counsel furnished the heads of argument at the beginning of October 2004. Mr Erasmus stated further that no prejudice had been caused to the appellant by the delay in the delivery of the heads of argument.

[16] Mr Erasmus did not say when exactly Counsel was briefed to prepare the first respondent's heads of argument and why it had taken almost three months for the first respondent's heads of argument to be delivered, particularly when the appellant's heads of argument had been delivered on 28 June 2004. Mr Erasmus said

nothing about the prospects of success of the first respondent's defence.

[17] In the first respondent's favour, it must be said that it would have been difficult for it to prepare its heads of argument prior to the appellant delivering his because he would not know what case the appellant sought to argue on appeal. That accounts for the delay from 20 February 2004 to 28 June 2004 when the appellant delivered his heads of argument. With regard to the period from 28 June 2004 to 20 October 2004 all first respondent's attorney has said is simply that he briefed the first respondent's Counsel to prepare the heads of argument and these were received back by him at the beginning of October 2004. He did not state exactly when he briefed Counsel nor did he explain why, having received the heads of argument from Counsel at the beginning of October 2004, he waited for about three weeks thereafter before he delivered them to the Registrar.

[18] The first respondent's attorney chose not to take this Court into his confidence. The first respondent's attorney's conduct in this regard is completely inexcusable. The first respondent seems not to have been at fault in regard to the delay but its attorney clearly is. It does not appear to me that this is one of those cases where the attorney's unacceptable conduct should be visited upon the party he represents. Accordingly, for this reason, the fact that the application was not opposed and the fact that the appellant cannot himself claim any prejudice and despite the fact that such conduct did occasion the Court some inconvenience, I am prepared to

condone the late delivery of the first respondent's heads of argument. It is hereby condoned.

The incomplete record of the arbitration proceedings

- [19] The record of the arbitration proceedings sought to be reviewed which was delivered by the first respondent in the Court a quo was incomplete. Substantial relevant evidence was not included apparently because the first respondent's attorneys or their Johannesburg correspondent did not locate certain tapes containing such evidence. The first respondent's Johannesburg correspondent was Mr Charl Riaan du Plessis. He delivered his own affidavit as well as an affidavit by his messenger in regard to what was done to try and locate the tapes.
- [20] In his affidavit Mr du Plessis stated that the audio cassettes relating to the hearing of the merits of the dispute in the arbitration were missing. He said that on 23 October 2002 he "attended the Registrar of the Labour Court and found that the record was filed by the CCMA, together with the first mentioned audio cassettes, but was unable to find any additional audio cassettes." He said that "(t)he relevant personnel of the Registrar were also unable to trace the additional cassettes." He stated that he also "attended personnel of Sneller Verbatim Transcribers, who hold offices in the Labour Court Building and who apparently transcribed the first mentioned audio cassettes but was unable to locate the additional audio cassettes." It seems that this was still on 23 October 2002. He says that on the same day he also tried to obtain page 88 of the record filed by the CCMA but was unable to find it.

- [21] Mr du Plessis also states that on 5 November he **“again attended the offices of the Registrar”** of the Labour Court but was once again unable to locate the missing audio cassettes or page 88 of the record. He says he thereafter instructed his messenger to attempt to locate page 88 of the record and the missing audio cassettes at the CCMA. He says that his messenger told him, and the messenger confirms this, on or about 8 November 2002 that **“she had been by (sic) informed by the personnel at the CCMA that the entire record and all audio cassettes had been sent to the Labour Court and that no copy of the record or page 88 or any further audio cassettes are in possession (sic) of the CCMA”**. He concluded his affidavit with a submission that **“the missing audio cassettes and the missing page 88 of the record cannot reasonably be located or found.”**
- [22] The appellant did not deliver any answering affidavit in support of his opposition of the review application. He delivered only a notice of opposition. He had probably planned to deliver an answering affidavit after the delivery of the record by the first respondent. It was probably because the record that was delivered was not complete that he did not deliver an answering affidavit.
- [23] The deponent to the founding affidavit of the review application, Mr Bradley Michael Ferraris, deposed to an affidavit that was prepared in the light of Mr du Plessis’ affidavit about the record. He stated in paragraph 3 thereof that it had transpired that, although **“the First Respondent (i.e the Commission for Conciliation, Mediation and Arbitration in the Court a quo) lodged the tape recording of the proceedings under review with**

the Registrar of this Honourable Court, upon the transcription thereof, it [had] transpired that not all tapes had been so lodged, as only the point in limine heard on 6 February 2001 and 8 March 2001 was transcribed. The tapes for the arbitration hearing heard on 5 March 2002, 11 April 2002 and 25 April 2002 could not be found.” Mr Ferraris went on to state that, “(a)fter making enquiries in this regard, the First Respondent advised the applicant that it does not have any other tapes in its possession... In the result the transcription, ..., is incomplete in the respect stated above.”

[24] Mr Ferraris stated that he had been advised by his attorney that **“an attempt was made to reconstruct the record by including all documentation available in the matter which record is attached marked 286 – 509.”** He went on to make the point that the first respondent was prejudiced by the non-production of the tapes. He submitted in the last sentence of the affidavit that **“the matter be referred back to the CCMA for a de novo arbitration.”**

[25] Mr Ferraris also deposed to a supplementary affidavit that is said to have been delivered in terms of Rule 7A(8)(a) of the Rules of the Labour Court. In that affidavit Mr Ferraris stated that he did not intend to supplement the first respondent’s founding affidavit in order to add to the first respondent’s grounds of review. He also said that he did not intend to amend or vary the first respondent’s notice of motion save that, given the incomplete record of the arbitration proceedings under review, he was asking that the Labour Court should remit the matter to the CCMA for a fresh

hearing before a commissioner other than the commissioner who had dealt with it before.

[26] It would seem that, when the matter came before Pauw AJ in the Labour Court, Counsel for the first respondent first sought to have the review application dealt with as an unopposed matter on the basis that the appellant had failed to file an answering affidavit even though he had filed a notice of opposition. The Court a quo refused to deal with the matter on that basis. In my view the Court a quo was correct in this regard.

[27] Counsel for the first respondent seems to have thereafter asked the Court a quo to set the award aside on the basis of the absence of a complete record of the arbitration proceedings. The Court a quo refused to do so but proceeded to deal with the merits of the review application despite the fact that the record of the proceedings sought to be reviewed was incomplete. The Court a quo approached the merits of the review application on the basis that, in the absence of the record, it was bound by all factual findings made by the commissioner, **“even more so than a judge on appeal.”**

[28] The Court a quo then proceeded to deal with the merits of the review application and concluded that the commissioner’s finding that the appellant’s dismissal was procedurally unfair was unjustifiable in relation to the reasons given for it. It set the award aside and made an order remitting it to the commissioner to reconsider the procedural fairness of the dismissal and compensation. No order was made as to costs.

- [29] The first ground upon which the appellant relied on appeal to seek that the decision of the Court a quo should be set aside was that the Court a quo erred in entertaining the first respondent's review application in circumstances where the record of the arbitration proceedings was incomplete. It is clear from the affidavits relating to the record delivered on behalf of the first respondent as well as the first respondent's supplementary affidavit that the missing parts of the record were material. That is why even the first respondent stated in the supplementary affidavit that the matter should be remitted to the CCMA to be heard afresh.
- [30] The Court a quo concluded that the commissioner's finding on procedural fairness was unjustifiable. However, the appellant would have been entitled to argue that, although the commissioner had found that the dismissal was substantively fair, it was, in his submission, substantively unfair with the result that, if the Court upheld his contention, it could refuse to set the award of compensation aside on that basis. In the absence of the record of such evidence, the Court a quo would not have been able to properly consider such a contention.
- [31] 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.

[32] 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.

[33] The other option that the Court a quo could take would have been to postpone the review application or to strike it off the roll to enable the first respondent or all parties to take such steps as might not have been taken earlier to search for the missing evidence or to reconstruct the record. The latter option is one that a Court will usually adopt unless it is dealing with a case where considerations of fair play between the parties, finality of litigation and others demand that the application be dismissed without the consideration of the merits. This would occur where, for example, the matter had dragged on for a long time and the relevant party had had ample opportunity to reconstruct the record but had, for no acceptable reason, failed to do so.

[34] In this matter the first respondent does not appear to have approached the Director of the CCMA for his intervention in locating the missing tapes. It does not say who it is at the CCMA that it dealt with. It might have dealt with some junior staff members who might not have been able to deal with the matter properly. If approached, the Director would probably have been able to deal with this matter appropriately or to assign the task to a senior and responsible official of the CCMA. In this regard the first respondent did not file any affidavits deposed to by someone from the CCMA. Someone at the CCMA must be able to say that he or she is the one who dealt with the tapes in this matter, when he dealt with the tapes and whether he or she delivered those tapes to the Registrar of the Labour Court and when he did so. He might have also been able to say who in the office of the Registrar of the Labour Court received the tapes. In turn such staff member from the office of the Registrar or the Registrar could depose to an affidavit and explain how the tapes could have got missing once they were in the Registrar's custody.

[35] The first respondent did not file any affidavit deposed to by someone in the Registrar's office who could say whether that office did receive tapes from the CCMA in this case, what tapes it received, when they were received, what he or she did with them thereafter and how they could have got lost if they had been delivered to the Registrar's office. Furthermore, the first respondent did not approach the appellant or his attorneys to ask them to help reconstruct the evidence contained in the missing tapes. If its attorneys had done so, the reconstruction might well have been done successfully.

- [36] In the light of all of the above it seems clear that the first respondent did not take all reasonable steps to find the missing tapes or to have the record reconstructed.

What should the Court a quo have done?

- [37] In my view the Court a quo should have struck the matter off the roll and ordered the first respondent to pay the appellant's costs. This is also what the appellant seems to have expected the Court a quo to have done. I do not think that the dismissal of the review application would have accorded with considerations of fairness between the parties. If the matter is struck off the roll, the parties will still get a chance to do whatever is necessary in order to later argue the matter after all attempts have been made to find the missing evidence or reconstruct it. If the application was dismissed, that would have been the end of the first respondent's attempts to have the award set aside. In cases such as *Department of Justice v Hartzenberg* 2002 (1) SA 103 (LAC); (2001) 22 ILJ 1806 (LAC), *JDG Trading (Pty)Ltd t/a Russels v Witcher NO & others* (2001) 22 ILJ 648 (LAC) and *Lifecare Special Health Services (Pty)Ltd t/a Ekuhlengeni Care Centre v Commission for Conciliation, Mediation and Arbitration & others* (2003) 24 ILJ 931 (LAC) this Court has previously dealt with situations where in an appeal or review application the record was incomplete or had been lost. It seems to me that the approach adopted herein as to what should happen when the Labour Court is faced with a review application that has no record or has only part of the record, is similar to the approach adopted in *Lifecare*, supra, at 935J (par 15) to 937 (par 20).

[38] In conclusion I am of the view that the Court a quo erred in proceeding to deal with the merits of the review application when the record was incomplete. It should have struck the matter off the roll.

[39] In the premises I make the following order:

1. The appeal is upheld with costs.
2. The order of the Court a quo is hereby set aside and replaced with the following one:-

“The application is struck off the roll with costs.”

Nkabinde AJA

I agree.

Zondo JP

I agree.

Mlambo AJA

Appearances:

For the appellant : Adv MA Lennox
Instructed by : Willem Van Rensburg Attoreny

For the respondent : Adv. L Charoux
Instructed by : Erasmus Attorneys

Date of judgment : 17 May 2006