

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

Held in Johannesburg

Case no JA 25/05

In the matter between

ISRAEL SABATA PAPANE

Appellant

and

MARTINUS VAN AARDE N.O.

First Respondent

**COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION**

Second Respondent

**SOUTH AFRICAN BROADCASTING
CORPORATION**

Third Respondent

JUDGMENT

Zondo JP

[1] I have had the opportunity of reading the judgment prepared by Kruger AJA in this matter which comes after this judgment. I agree with the judgment same the decision that the matter should be decided on the merits.

[2] I am of the view that it would not accord with the dictates of justice and fairness to determine this matter on the merits. I say this because the record of the arbitration proceedings the award of which was sought to be reviewed in the court below is incomplete

and the evidence that is missing from the record may well prove very material if found and, may, therefore, influence the ultimate judgment. I also say this because the commissioner whose arbitration award was sought to be reviewed and set aside, was not given an opportunity to indicate whether he objected to the application to review his award being dealt with on the basis of an incomplete record. The commissioner was an interested party in the review proceedings in the Labour Court. In my view before his award could be reviewed and set aside on the basis of a record containing less evidence than he had before him when he made his award, the commissioner was entitled to be given an opportunity to say: I don't mind if the application to review my award is considered on the basis of an incomplete record of the evidence I had before me because whatever evidence is missing is irrelevant or insignificant or to say: I object to the review application being considered on the basis of less evidence than I had before me until all steps, including those that I may take, have been taken to ensure that there is before the Court a complete record of the evidence that I had before me when I decided on this award. Of course, in an appropriate case the court can overrule the arbitrator in this regard. But that is a different issue. He must be given a chance to give his views.

- [3] The appellant served the incomplete record on the CCMA (and not directly on the commissioner). He also served on the CCMA an affidavit in which he said that he was aware that the record was incomplete and that he was told by the company responsible for the transcription that there were no further cassettes available to complete the transcript in respect of the arbitration proceedings. I

must point out that the fact that the appellant filed an incomplete record meant that he had failed to comply with the rules of the Labour Court which require that a complete record of the arbitration proceedings be filed when an arbitration award is sought to be reviewed. This means that the appellant required to make an application for the condonation of his failure to comply with the relevant rule of the Labour Court. In the condonation application he would be required to justify why the review application should be heard without the missing parts of the record and to show what steps he had taken to try and secure or reconstruct the missing parts of the record. The Court would not ordinarily allow a review application to be considered on the merits without a complete record of the evidence that had been before the arbitrator whose award was sought to be reviewed.

- [4] In the light of the above I am of the view that the Labour Court should not have proceeded to hear the review application on the merits. No good cause had been shown why the relevant rule of Court had not been complied with and the missing parts of the record could well throw light one way or another on the question whether it was part of the appellants' service conditions to work night shift. In this regard there are three matters that are a cause for concern to me. I deal with them below.

- (a) It appears to be common cause that a letter of appointment was given to the appellant and that in such letter it was not stated that part of his conditions of employment was to work night shift. The question that arises is: if the working of night shift was such a material or important part of the appellant's conditions

of service, why was it not stated in the letter of appointment that it was part of his conditions of service? In this regard it is common cause that there was no written contract of employment that the appellant signed. Does the fact that the letter of appointment did not say anything about the appellant having to work night duty not mean that, indeed, as he contends, it was not part of his conditions of service to work night shift? The question arises were the SABC's witnesses asked about the fact that the letter of appointment said nothing about this issue? If they were asked, what answer or answers did they give? I do not have any way of knowing this because their evidence in its entirety is not included in the record. I do not think that it is an answer to say that the commissioner has summarised their evidence in his award unless the parties, including the commissioner who conducted the arbitration, were to advise that the missing parts of the evidence do not include anything on that. It is not enough because the commissioner might have left that out of his summary if he did not appreciate its significance. It is not enough if only the appellant and the SABC agree upon this and they exclude the commissioner.

- (b) Another matter that causes me concern with regard to this matter is the fact that the SABC included the obligation to work night shift in the collective agreement that it concluded with the union to which it thought the appellant belonged.

This Court found in previous proceedings between the parties that the appellant was not a member of that union. He was, therefore, not bound by the collective agreement, and, therefore also by the clause in the collective agreement, imposing the obligation to work night shift. The question that arises is: if the nature of the job that the appellant did was such that there was an inherent obligation to work night duty, as is contended by the SABC, why did the SABC seek to include the obligation to work night duty in the collective agreement if there was such an obligation anyway even without such agreement? Was this not because there was no such obligation and the SABC sought to create such an obligation?

- [5] It is true that the appellant, by responding to the advertisement for the position to which he was appointed agreed to work “**shifts and long hours**” because the advertisement did say that any person seeking appointment to such position should be prepared to work shifts and long hours. The SABC seems to think that an agreement to work shifts necessarily means an agreement to work night shift. I do not think that this is correct. An employee can work shifts without working night shift. An example of this would be where in one week such employee worked a shift from 06h00 to 14h00 and in another week he worked a shift from 14h00 to 20h00. Sec 17 of the Basic Conditions of Employment Act No 75 of 1997 (“**the BCEA**”) prohibits the working of night shift unless there is an agreement between the employer and the employee. There is no corresponding prohibition of the working of shifts which are not night shifts. Accordingly, the working of night shift requires a

specific agreement. Accordingly, an agreement to work shifts does not per se mean an obligation to work night shift. It may be that because the appellant was not new to the SABC, he knew that a person working in the position that was advertised would necessarily work night shift but I would prefer to consider this as part of all the evidence including the evidence not included in the record before making a decision on the issue.

- [6] The appellant worked night duty for a long period. In the incomplete record that has been filed we know that he explained why he did not complain over a long period about working night shift and his evidence appears to be uncontradicted. It might or might not become contradicted when all evidence that was led is in the record. I do not know. When asked why he had not complained, the appellant explained: **“The reason is simple Andre, because Fred has made a promise with me and he requested that I must give him a chance so that he should appoint a production manager. At the present moment he is the only regional manager who is operating across the board and he cannot do everything.”** This explanation is consistent with the statement the appellant made elsewhere where he said that he had worked night duty because he was helping out. It does not appear that it was put to him that the explanation he gave was false nor does it appear that the **“Fred”** he refers to was called to contradict his explanation. In those circumstances I do not think that a basis exists in law to decide the matter on the basis that his explanation is not genuine. Maybe the evidence of one or other witness which was not included in the record would deal with this. I simply do not know.

- [7] If the terms and conditions of employment which existed when the appellant commenced in the position did not include an obligation to work night duty, then, if the SABC seeks to say that by agreeing to work night duty on the occasions that he did, the appellant was in effect agreeing to work night duty forever while he was in that position, it would have to prove an amendment of his conditions of employment. Furthermore, if it seeks to say that he worked night duty for so long that he must be taken to have agreed to forever work night duty on the occasions when required to do so in the position in which he was employed, a number of questions would arise. One would be: what about the explanation that the appellant gave as to why he had agreed to work night duty when he did? For how long did his practice of working night duty have to go on before it could form part of his conditions of service? Has it been shown that such period was long enough?
- [8] With all of the above questions I am not sure that, on the incomplete record, I would be able to find against the appellant. However, what is clear to me is that there is no justification why the evidence that has not been included in the record was not secured or reconstructed before the merits of the review application could be considered by the Court a quo. There is no justification that has been advanced for this omission. The Court a quo also did not give any reasons as to why it proceeded to deal with the merits of the review application without a complete record.
- [9] I do realise that the matter has been dragging on for a long time and considerations of finality in litigation enter the picture.

However, I think that that factor can be adequately addressed by giving an order which is similar to an order that this Court gave on the 6th March 2007 in a matter where the Labour Court had also dealt with the merits of a review application when the record of the arbitration was incomplete. Such order imposes deadlines for the taking of certain steps and directs the Registrar of the Labour Court to give the matter some priority in setting it down once the record is complete.

[10] I would accordingly make an order in the following terms:-

- “1. The appeal is struck off the roll.**
- 2. The order granted by the Labour Court is set aside and replaced with the following order:**
 - “(a) The application for review brought by the applicant is struck off the roll in order to enable the parties in this matter together with the Commissioner who heard the arbitration to reconstruct those parts of the record of the arbitration proceedings that are missing in the record and supply whatever documents including exhibits before the Commissioner into the review record.**
 - (b) The applicant is directed to immediately take such steps as may be necessary to initiate the process aimed at achieving the purpose envisaged in (a) above, including bringing to the attention of the Commissioner the fact that the record filed in this review application was incomplete and that her co-**

operation is required to ensure that there is a complete record before the Court.

- (c) The complete record must have been filed or delivered to the Registrar within thirty (30) Court days from 6 March 2007, failing which the applicant must in writing through the Registrar apply for an extension of time if the complete record is not filed within that period.
- (d) Once the record has been filed with the Registrar or at the time of filing the complete record, the applicant must in writing request the Registrar to give the matter some priority in setting it down for hearing in the Labour Court and it is ordered that the Registrar should give the matter some priority.
- (e) The applicant is ordered to pay the third respondent's costs but such costs shall be limited to disbursements".

Zondo JP

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Third Respondent

JUDGMENT

Kruger AJA:

- [1] This is an appeal against an order of the Labour Court dismissing a review application which had been brought by the appellant against the respondents. In that review application the appellant had sought to have the Labour Court review and set aside an arbitration award issued by first respondent under the auspices of the second respondent to the effect that his dismissal by the South African Broadcasting Corporation (the "SABC") was fair. The appellant, who appeared in person before us, was dismissed from the employment of the SABC. The first respondent, the commissioner at the second respondent (the Commission for Conciliation,

Mediation and Arbitration) (the "CCMA") found the dismissal procedurally and substantively fair. The Labour Court dismissed the appellant's application to review that award. It is against that decision of the Labour Court that this appeal lies. Leave to appeal was granted by that Court.

The appellant's application to lead further evidence

- [2] Appellant filed a notice of motion under s 174 of the Labour Relations Act 66 of 1995 (the "Act") for this court to admit new evidence which was not before the Labour Court. That evidence was the record of the proceedings before the disciplinary hearing, which appellant said did not form part of the papers before the commissioner or the Labour Court. Appellant withdrew that application at the outset of the hearing in this court. Nothing more needs to be said about that application.

Authority of attorneys and Dr Naves to represent the SABC

- [3] The attorneys purporting to act on behalf of the SABC, namely, Maserumule Inc, did not file a power of attorney with their heads of argument as required by Rule 6 of the rules of this Court. Rule 6 reads as follows:

"6(1) A power of attorney authorising a representative to prosecute the appeal or the cross-appeal must be delivered within 10 days of the delivery of any notice of appeal or cross-appeal.

(2) If there is no cross-appeal, a power of attorney to oppose an appeal must be filed with the registrar by the respondent's representative when copies of the respondent's main heads of argument are filed under rule 9."

- [4] Maserumule Inc filed their heads of argument on 20 September 2005. A document purporting to be a power of attorney was filed subsequently on 29 September 2005, six days after the heads of argument had been filed. Maserumule Inc also filed a condonation application on the same day. The deponent to the affidavit filed in support of the condonation application, Ms Sono, says the filing of the power of attorney together with the heads of argument was inadvertently omitted. A power of attorney dated 27 September 2005 is attached to the condonation application. It is signed by Pat Naves, Director of Human Capital at the SABC. There is also a letter from Maserumule Inc addressed to the registrar, dated 28 September 2005 stating: "Kindly note that the power of attorney is subject to ratification by the board of directors at a board meeting due to be held in October 2005."

- [5] The appellant took the point that the opposition to his appeal was unauthorised and that Maserumule Inc were not authorised to represent the SABC. What Maserumule had to show was that the SABC was properly before the Court and that they had authority to represent it.
- [6] At the hearing of this appeal on 5 September 2006, it was pointed out to Mr Maserumule, who purported to appear for the SABC, that no document had been filed confirming ratification of the power of attorney by the board of directors of the SABC in accordance with the letter of 28 September from his firm to the registrar. Mr Maserumule was, after some argument, granted an opportunity to deliver the necessary documents later dealing with this issue of authority and to file whatever condonation application, if any was required. The appellant was to also have an opportunity to file papers in response to whatever papers Maserumule Inc filed. All of this was ordered with the consent of the appellant. In the meantime, Mr Maserumule was allowed to present oral argument **“on behalf of”** the SABC on the assumption that he would be able in due course to prove that opposition of the appellant's appeal had been duly authorised and that he was authorised to represent the

SABC in this appeal. Obviously, if this was not proved, the appeal would have to be dealt with on the basis that it was unopposed.

[7] On 6 September 2006 Maserumule Inc filed a further condonation application regarding the power of attorney. The affidavit filed in support of the condonation application was deposed to by Ms Sono who is an attorney employed by Maserumule Inc. There is no affidavit deposed to by any member of the Board of the SABC or any official or employee of the SABC either to confirm any of the statements made by Ms Sono in her affidavit or in support of the condonation application. Ms Sono does not say in her affidavit that she has been authorised by the relevant authority at the SABC to bring this condonation application on its behalf. Ms Sono has not put up any proof that she was authorised to bring this condonation application on behalf of the SABC and to depose to the affidavit.

[8] I find it very disturbing that Maserumule Inc omitted to put up proof that they were authorised to bring this condonation application and that Ms Sono was authorised to depose to the affidavit that she deposed to when their authority to represent the SABC has been questioned and they are supposed to prove it.

Indeed, this is more surprising when regard is had to the fact that during their preparation for the hearing of this matter, they should have realised that they had not provided the ratification that they had hoped to provide and should then have addressed the issue of authority before the hearing. One would have thought that, when one's authority has been challenged, one would make sure that whatever one did thereafter, one put up the required proof of authority.

[9] In the supporting affidavit deposed to by Ms Sono, she stated that during the board meeting on 24 October 2005 the issue of the authority or power of attorney was not deliberated upon and no resolution was passed to the effect foreshadowed in her letter to the registrar dated 28 September 2005. I do not know how Ms Sono knows what was or was not deliberated upon by the Board of the SABC at the particular meeting. I am sure that she is not a member of the Board of the SABC because, if she was one, she definitely would have said so in her affidavit.

[10] In paragraph 2 of her affidavit Ms Sono said that the **“facts contained”** in the affidavit **“are unless otherwise stated or the converse appears from the context, within my personal**

knowledge....” With regard to what was or was not deliberated upon at the relevant meeting of the Board of the SABC, it does appear from the context that Ms Sono does not, or, cannot, have personal knowledge thereof. She also does not say how she might have come to know what was or was not deliberated upon at the meeting of the Board of the SABC. Quite clearly, her evidence in this regard is hearsay and inadmissible.

- [11] Ms Sono annexed to her affidavit a new power of attorney signed by Dr Patience Naves as "Group executive: Human Capital Services" on 6 September 2006. In paragraph 8 of her affidavit, Ms Sono, among other things, says: **“I am advised that Dr Patience Naves, who had signed the power of attorney in any event, had the delegated authority in her capacity as a member of the Group Executive of the [SABC] to sign the power of attorney and authorise the [SABC’s] attorneys to defend the appeal. I attach an extract of the Delegation of Authority Framework, Version 2, marked annexure ‘BMS1’”.**

- [12] It will be noted that Ms Sono says that she is advised that this is the position. She does not disclose by whom she has been advised nor does she put up an affidavit deposed to by the person who advised

her and who has personal knowledge that this is the position. Accordingly, her evidence in this regard is hearsay and inadmissible. Why she did not get an affidavit from somebody at the SABC who has personal knowledge of this is difficult to understand.

- [13] Ms Sono annexed to her affidavit an extract from some document purporting to deal with the “**Delegation of Authority Framework of the SABC.**” This was in addition to the power of attorney signed by Dr Naves which she also attached to her affidavit. Ms Sono says that Dr Patience Naves is a member of the group executive. There is a letter from the group chief executive officer of the SABC dated 5 September 2006 stating that Dr Patience Naves is the Group Executive: Human Capital Services at the SABC. There is no affidavit deposed to by the Group Chief Executive Officer of the SABC. In fact even that letter is not signed by the Group Chief Executive himself but by someone else who purports to sign on behalf of the Group Chief Executive. Accordingly, we do not even know whether the Group Chief Executive knows about this letter.

[14] It is not clear what the status of the Delegation of Authority Framework is. There is no affidavit deposed to by anybody from the SABC saying what this Delegation of Authority Framework is. At page 5 thereof it is described as an agreement between the shareholders of the SABC and the SABC. Dr Naves has also attached some page to the power of attorney she has signed and claims that such page proves certain delegated powers. That page proves absolutely nothing. Something is written therein but it has no meaning. That part of this document from which Dr Naves purports to derive her authority is not clear, and is not explained. The institution and defence of legal proceedings is dealt with under the heading: "**Legal**". Paragraph (c) thereof provides: "**Institute or Defend Procedures in Court (High, Magistrate or Small Claims Court) and the settlement of disputes by arbitration or mediation**". There is no reference to the Labour Court or the Labour Appeal Court. The involvement of the "**Chief Legal Advisor as the only GEM**" seems to be required together with a group executive member. There is no sentence saying what this is all about. As I have said it has no meaning. It does not convey anything.

[15] With regard to the power of attorney signed by Dr Naves, it is to be noted that she purports to appoint attorneys for the SABC but there is nothing anywhere including in the document she attaches to her affidavit that purports to give her authority to appoint attorneys for the SABC – which is a separate issue from the power to institute or defend court proceedings.

[16] In his opposing affidavit the appellant contends that the SABC should be found to be not properly before the Court. As a preliminary point appellant argues that Ms Sono is neither the SABC nor an employee of the SABC. He submits that the law only permits legal representatives to represent parties before court, but not to become litigants. He also contends that the SABC should have acted more expeditiously to rectify the matter of the power of attorney. The appellant submits that Ms Sono's evidence is hearsay, and that she has no personal knowledge of what she deposed to.

[17] The appellant also contends that the powers of attorney filed by Maserumule Inc must be rejected because they are not stamped in accordance with rule 67(a)(iii) of the Uniform Rules of Court. It is convenient to immediately dispose of this point. That rule deals

with appeals from lower courts to provincial or local divisions of the High Courts. It does not apply to this Court or the Labour Court. The rule which is applicable in the present circumstances is rule 6 of the Rules of this Court. In terms of that rule no stamp duty is required for powers of attorney. Item 19 of the Stamp Duties Act 77 of 1968, which dealt with powers of attorney, was repealed by s 14(1) of Act 32 of 1999.

[18] Proof that the SABC has authorised the opposition of the appellant's appeal and that Maserumule Inc have been authorised to represent the SABC would normally be provided by way of an affidavit deposed to by a person who attended the meeting of the Board of Directors which issued a resolution to the effect that the SABC oppose the appeal and authorising Maserumule Inc to represent the SABC in that regard. The resolution would then be annexed to that affidavit. If the Board has delegated that authority to some official, proof of that fact would have to be provided.

[19] We have not been provided with any resolution of the Board of the SABC authorising that the appellant's appeal be opposed. First, there was a letter that said that there would be a meeting of the Board of the SABC which would provide ratification of the power

of attorney that had been filed. Then no ratification of the Board was filed. Then we were informed – by way of hearsay evidence – that the Board had not deliberated on the matter. Thereafter we were told that in any event it was unnecessary for the Board to ratify that power of attorney because Dr Naves had authority to make the relevant decision.

[20] As proof that Dr Naves occupies the position that we were told she occupies at SABC, a letter was provided purporting to be written by the Group Chief Executive. However, the letter was not signed by the Group Chief Executive but was signed by somebody else who purported to do so on behalf of the Group Chief Executive. The Group Chief Executive did not depose to any affidavit. The person who purported to sign on behalf of the Group Chief Executive did not depose to any affidavit either.

[21] The document annexed by Dr Naves to the power of attorney signed by her made no sense. Where the incomplete document put up by Ms Sono as showing that Dr Naves had the requisite authority referred to the institution or defending of legal proceedings, it referred to the institution or defending of court proceedings in the High Court, Magistrates' Court and Small

Claims Court and did not refer to the institution or defending of proceedings in the Labour Court or in this Court. Hearsay evidence was tendered without any attempt to justify it on the basis of any of the recognised exceptions to the rule against hearsay evidence. To crown it all a condonation application was brought by Ms Sono without any attempt whatsoever to show that the SABC had authorised the bringing of such condonation application and for her to depose to an affidavit in support thereof. This matter could have been handled much better than it was.

[22] We have no hesitation in finding that Maserumule Inc have failed to show that the SABC has authorised the opposition of the appellant's appeal and that they have the authority to represent the SABC in this matter. Accordingly, the SABC is consequently not properly before us. No question of condonation arises in the absence of proper authorisation. At any rate even the condonation application which Ms Sono purported to bring on behalf of the SABC was not shown to be authorised by the SABC.

[23] In the light of the conclusion reached above with regard to the issue of authority, the appellant's appeal must be dealt with as an unopposed appeal. However, the fact that the appeal is unopposed

does not mean that it must necessarily succeed. It remains for the appellant to show on the merits that the court below erred and that the appeal should be allowed. In considering the matter, we shall disabuse our minds of the contents of the heads of argument filed by Maserumule Inc and the oral argument advanced by Mr Maserumule. In those circumstances we uphold the point taken by the appellant that the opposition of his appeal has not been shown to be authorised and that Maserumule Inc have no authority to represent the SABC in this matter.

Incomplete Record

[24] The transcription of the proceedings before the commissioner is incomplete. Apart from a first page of introductions, it begins towards the end of the evidence in chief of the appellant and continues with his cross-examination and re-examination. Omitted is the evidence of the two witnesses for the SABC (Messrs Richter and Van Tonder) as also most of the appellant's evidence in chief. However, we do have a reasonably full and detailed summary of the missing evidence in the commissioner's award.

[25] The proceedings in the Labour Court were launched in early 2003 and copies of the founding papers were served on all three

respondents. The incomplete record of the arbitration proceedings was filed at the Labour Court, and served on all three respondents, on or soon after 11 July 2003. The SABC's attorneys, Messrs Maserumule Inc, initially objected to the incompleteness by way of a letter dated 18 September 2003. The attorneys also complained that "the record does not contain a bundle of documents relied upon by the parties during the arbitration". This latter defect must have been rectified at some later stage because we do indeed have the requisite bundle. Notwithstanding the letter of 18 September 2003, the SABC was able to complete its answering affidavit eleven days later, on 29 September 2003. Nowhere in that affidavit does the deponent, Mr. Weber, refer to, or complain about, the incompleteness of the transcription. In two places Mr. Weber complains about the missing bundle of documents. The first, at par. 12, is in the context of the appellant's remuneration level at the relevant time. That was later rectified by the appellant who annexed a copy of a payslip to his replying affidavit (at par. 7). The second, at par. 25, was in the context of the collective agreement. The SABC rectified this by annexing a copy of the agreement.

[26] On or soon after 14 November 2003 the appellant filed a supplementary affidavit stating:

- “3. I hereby confirm that the transcripts submitted to the Labour Court on this matter were incomplete.
4. I further confirm that this was observed upon my receipt of transcript from Bloemfontein CCMA and when enquiring with them, I was informed by Free State Transcribers CC that there was a fault with their mechanical recording done on the matter and they could therefore not transcribe the whole contents of what transpired at the CCMA hearing.”

This affidavit was served on the CCMA and on the SABC’s attorneys, but it would seem not on the commissioner. The appellant’s replying affidavit followed later.

[27] In terms of the decisions of this Court, the appellant’s explanation for the incomplete record (at par. 4 of his supplementary affidavit) was insufficient. See **DEPARTMENT OF JUSTICE v HARTZENBERG** 2002 (1) SA 103 (LAC); **JDG TRADING (PTY) LTD t/a RUSSELLS v WHITCHER NO AND OTHERS** (2001) 22 ILJ 648 (LAC); **LIFECARE SPECIAL HEALTH SERVICES (PTY) LTD t/a EKHLENGENI CARE CENTRE**

v CCMA & OTHERS (2003) 24 ILJ 931 (LAC); **FOUNTAS v BROLAZ PROJECTS (PTY) LTD AND OTHERS** (LAC, judgment dated 17 May 2006, as yet unreported). In the ordinary course the appellant should first have endeavoured to establish, by way of further investigation and affidavits, whether or not the missing part was irretrievably lost. If not, then it could have been transcribed. If irretrievably lost, then the parties and the commissioner should have endeavoured to reconstruct the missing part. The appellant has not initiated any of these steps. In the ordinary course, therefore, the Labour Court should have declined to hear the matter on its merits, and should either have dismissed the application or struck it from the roll (with a view to obtaining a full record).

- [28] There are, however, circumstances that take this case out of the ordinary course in my view. I have already mentioned that although the SABC complained by letter about the incomplete record, it did not pursue that complaint in its answering affidavit. The first and second respondents (the commissioner and the CCMA respectively) chose not to oppose the application, as is common practice. A manifestly incomplete record was served on them, as a cursory glance would have revealed, and the inadequacy

was drawn to the CCMA's attention. However, they chose not to oppose on even the narrow basis that the truncated record would hinder or prevent a just outcome. There is nothing in the judgment of Revelas J, at first instance, to suggest that anybody made a point of the incomplete record before her. In this Court, on appeal, neither the appellant's heads of argument, nor (for what it is now worth) the SABC's heads touch upon the question. During argument before us both the appellant and (again for what it is now worth) Mr. Maserumule indicated that they were content for the appeal to be decided on the incomplete record.

- [29] The appellant was dismissed around the end of September 1999. This appeal was heard virtually seven years later. The dispute came before this Court in about 2002 in another form, when it was held that the appellant was entitled to an arbitration. That arbitration was held in the last quarter of 2002 and the commissioner's award is dated 13 December 2002. Review proceedings followed in the Labour Court, whence the present appeal to this Court. Finality in the litigation beckons strongly and with it a corresponding finality in the respective positions of the appellant and the SABC.

[30] I do not understand the decided cases, cited earlier, to preclude this Court from determining an appeal on less than a complete record in an appropriate and exceptional case, provided the Court feels able to do so on the material before it. I consider that this is such a case. In addition to all the factors that I have mentioned, we have a full and detailed summary (in the award) of the evidence of all three witnesses at the arbitration. While less than ideal, I think that summary plus the appellant's cross-examination, which was transcribed in full, is adequate for our purposes. As will appear, the appellant's admissions under cross-examination were not without material significance. Furthermore, the central issues before us fall within a relatively narrow compass. Those issues, together with such subsidiary issues as arise, can in my view be justly resolved on the material before us. I am satisfied that it is the course we should follow in this matter.

The merits of the appeal

[31] The appellant started working for the third respondent on 1 June 1989 as junior production assistant. During 1995 a position for Radio Production Assistant in Bloemfontein was advertised. The requirements were stated as follows in the advertisement:

- Matric,
- Sesotho- and English-speaking,
- Driver's licence,
- Ability to work under pressure,
- Be prepared to work shifts and long hours,
- Will take full responsibility for the studios. The successful applicant will carry out the normal studio production functions.

[32] Appellant's application was successful and he was appointed to the position of radio producer assistant in Bloemfontein. Appellant apparently received a letter of appointment with annexures. There is no letter of appointment or contract in the papers before us. There was no other written contract of employment. At some stage after he commenced appellant worked night shifts. The following transpired at the arbitration hearing (vol 4 p 310):

"In 1995, on the strength of the advertisement, you phoned Mr, it is your own version now, and you said that you are interested in taking up the job as advertised, correct? – Correct.

You were then appointed, or transferred, correct? – Correct.

You were, you were happy having read the contents of the advertisement that you were required to work long hours under pressure and going to work shifts, correct? – Yes.

You were, you did work the shifts as required? – Yes, because I was alone. It was ... (inaudible).

You did work the shifts as required in terms of the advertisement? – Yes.

Right, for the first time in 19, for the first time in 19, in May 1999 you formalised your dispute and you indicated to management that you were no longer going to work this, let us call it night duty, because it is affecting your health? – Correct.

And it was disturbing you family? – Correct.

You were told that it was part of your conditions of employment to work these shifts? – Contract of service.

Servicing? – Yes.

You were scheduled to do the shifts? You were scheduled and I refer to page 42A and 42B, the February and the September ones? -- Yes

Where in February you worked a cycle of 5 weeks and in September you worked a cycle of 4 weeks and you worked these hours that you were complaining about once every 4th or 5th week then, correct? – Yes."

On 1 March 1998 a new Time Management System came into effect. It embodied an agreement between the SABC and the "Federation" (apparently between Bemawu and Mwasa) (vol 2 p 174) to work "Overtime and a Shift allowance/Time management election". Under the heading "Unsociable hours" the agreement defined unsociable hours as being:

"the hours from 17h00 to 07h00 on a week day and from 17h00 on a Friday to 07h00 on a Monday."

The agreement went on to provide as follows:

- "Every employee working these hours will receive a 10 minute credit for every hour or part of an hour worked.
- Management will have the right to either reduce the working hours to compensate for the credits earned or pay out the credits.
- The credits will be revisited at the end of May 1998 after the impact of the credits have been determined at which point it will be the subject of further negotiations.
- Any personnel member currently receiving a shift allowance may elect to continue with it or elect to come into the new system.
- Meal intervals will be scheduled as per the Act."

[33] Appellant did not sign a document electing either to continue with the shift allowance scheme or to participate in the new unsociable hours system, although in practice he seems to have accepted one of the choices, namely to receive an overtime allowance.

[34] A grievance meeting between the Broadcasting, Electronic Media and Allied Workers Union ("the union") and the SABC

was held on 6 July 1999. At that meeting the union *inter alia* complained that people who worked unsociable hours were not being paid. Management promised to investigate and make payouts.

[35] On 23 July 1999 appellant wrote a letter to the SABC:

"I will like to bring to your attention that I have decided to withdraw myself from working unsociable hours in Makumane/Matshohlo with effect from the 02 August 1999.

Secondly I wish to bring to your attention that on the [illegible]- 29 July '99 I will be taking my days off. Reasons for this being (1) reluctance of management to solve a problem of unsociable hours by the Act. (2) Refusal of Prod Asst Supervisor (Tswene) to give me my days off when I need them. Maybe I must bring to your attention that anyone working between 23:00-06:00 he/she is doing so risking his/her health and [illegible] is hazard according to the Employment Act. I hereby again hope you will find this in order. Thank you. (signed) Papane"

[36] A new three-person shift roster was introduced with effect from 1 August 1999 in an endeavour to make fair arrangements for the affected production staff. (At the time appellant and one other employee were working shifts.) With

effect from 1 September 1999 Van Tonder, the manager of operation facilities, Free State, once again revised the shift roster and implemented a four-person shift roster. This new roster meant that an employee would work one week morning shift, one week day shift, one week evening shift and one week programmed day shift. (This appears from the arbitration award, summarising the evidence of Van Tonder (which is not in the papers before the court)).

[37] On 3 September 1999 the appellant wrote a letter in which he repeated his request to be relieved from working night duty (vol 2 p 17). The copy in the papers is illegible at places:

"Israel Papane (Prod Ass)

03 Sept '99

Night Shift

I arrived late yesterday on the [illegible] Sept '99. I arrived at 04:00am instead of [illegible] am. I was trying to help to work night shift hence I have requested [illegible] my letter of the 27 July '99 to be [illegible]-ved from night duties. I believe I stand to loose nothing by not working night [illegible]. I would like to reiterate my statement in the letter of 27 July '99. It is not my intention to disturb the production but [illegible] I

can't take the risk anymore. Let me [illegible] relieved from night duties immediately.

Your co-operation in this regard is welcome.

Prod Asst

I S Papane (002242)"

In this letter he thus stated that he stood to loose nothing by not working night duties, and that he could not take the risk anymore, asking that he be relieved from night duties immediately.

[38] Management responded in a letter dated 7 September 1999:

The body of the letter reads:

"I am concerned about your arguments raised in the above-mentioned letter about you working night shifts. I would like to bring to your attention that working night shift, in this instance, is not your choice or right but it is part of your service contract. It is an inherent requirement of the job.

Refusal to work this shift is tantamount to breach of service contract and will, if you pursue it, lead to you being charged with:

- Non-compliance with duties of the service contract
- Dereliction of duties.

These charges are very serious and might lead to your dismissal. I would, therefore, advise you to seriously consider your decision or understanding of the NIGHT SHIFT; because as a production assistant you are not employed to work an 08h00 to 16h30 shift, but to work differing or rotating shifts, as is the case now. This is not subject to negotiations but it is part of your service contract.

Your co-operation and attendance will be highly valued.”

[39] Appellant responded in a letter dated 8 September 1999 stating that working night shifts was not included in his original contract with the SABC, and also not mentioned in his letter of appointment. He stated that he was trying to help. He referred to section 17(c) of the Basic Conditions of Employment Act 75 of 1997 (“BCEA”) and stated that coercion in this situation was constructive dismissal. In his evidence at the arbitration hearing he stated that when he worked night duty, from 1997, he was trying to help out.

[40] Appellant refused to work the scheduled shifts on 13, 14 and 15 September 1999 but instead reported for and worked day shifts only. A disciplinary hearing was held on 22 September 1999. The appellant was charged with non-compliance with duties of his service contract refusing to work shift or unsociable hours, while knowing that the job category of a production assistant is a shift working category. Appellant did not dispute that he had not worked the scheduled shifts on 13, 14 and 15 September 1999. He said that he was only willing to work the normal day shift (08h00-16h00).

[41] As a result of the finding at the disciplinary hearing, appellant was dismissed by way of a letter dated 30 September 1999. Appellant noted an internal appeal. The appeal panel upheld the findings and sanction of the disciplinary hearing.

The arbitration hearing

[42] The record of the arbitration proceedings put before us was incomplete, but the appellant agreed that the appeal be argued on the partial record as it stood. We have accordingly to rely on the Commissioner's summary of the evidence of messrs Richter, Van Tonder and the appellant

and on so much of the evidence of the appellant as was transcribed.

[43] Richter, at the time of the arbitration the regional manager of the SABC Free State, testified that an inherent requirement of the job which appellant had was to work long and irregular hours according to operational needs of a 24 hour radio service. Van Tonder, the operational manager, testified that it was trite practice or policy for anchor journalists to work on a shift rotation system.

[44] Appellant testified that he worked night duty from 1997, but was only trying to help out. He only started complaining about the shifts in May 1999. He agreed that he received credits for this shift work, although he was only paid in March 2000.

[45] The commissioner found that appellant acknowledged that he received the credits. Appellant was credited with excess hours worked to be paid out for the months of January, February, April, May, June, July, August, September 1999.

Each of those time reconciliation sheets contains an entry “Credits i.r.o. unsociable hours” and “Time to be paid out”.

[46] The commissioner found the dismissal of the appellant procedurally and substantively fair.

Appellant's contentions

[47] Appellant's contentions before us can be set out as follows:

- (i) Contrary to the finding of the commissioner and the court *a quo*, appellant falls under the provisions of the BCEA. Section 17 BCEA prohibits night shift work unless there is agreement.
- (ii) The BCEA, 75 of 1997, especially s 17, allowing night work, does not operate retrospectively. Appellant started working during about 1995 in the position he was dismissed from. The BCEA came into operation on 1 December 1998 when appellant was already working for the SABC.
- (iii) Appellant's health deteriorated because of night shift work.

- (iv) There was no written contract of employment and his letter of appointment, together with its annexures, does not suffice to compel him to work night shifts.
- (v) Appellant never signed a document electing either to continue with the current shift allowance scheme or to participate in the unsociable hours system.
- (vi) By working the unsociable hours, appellant was just helping out; not because he was legally or contractually bound to do so.

The BCEA

[48] I deal firstly with the contentions relating to the BCEA. In its answering affidavit the SABC alleged that the appellant was excluded from the operation of the BCEA by virtue of the fact that his earnings exceeded the amount referred to as the maximum under the BCEA. The appellant denied this, and said that he was covered by the BCEA, and referred to a salary advice dated 27 August 1999. The commissioner stated that the appellant was a senior employee earning more than R89 500 per annum. The commissioner says that the appellant was a member in good standing of BEMAWU

“as he was still paying his monthly levies”. It is not absolutely clear that the commissioner actually held that appellant's remuneration exceeded the statutory limit, although this may have been the finding. Possibly the commissioner had a salary slip of appellant before him indicating earnings in excess of R89 500. However, the only primary evidence of Appellant's income in the papers before the Court is a salary advice dated 27 August 1999, reflecting total monthly earnings of R6 521 (vol 1 p 78). Multiplied by 13 this gives an annual income of R84 773. Further, the exclusion from the BCEA is an exclusion which the third respondent would have to prove. On these papers the third respondent has failed to establish any exclusion. The contract falls under the BCEA.

- [49] As to the retrospectivity of s 17 BCEA, s 17 does not stipulate that an agreement to work night shifts cannot pre-date the statute. It is unlikely that the legislature intended that shift workers had to agree all over again after the BCEA came into operation; that would have thrown whole industries (e.g. the security industry) into chaos. Where employees had agreed, pre-statute, to work at night, employers had to

comply with the other requirements of s 17 (which the SABC tried to do). That is a prospective application of the statute.

[50] In his defence appellant did not rely on the absence of transportation (s 17(2)(b)).

Health

[51] As to the issue of health (s 17(3)), appellant did not rely on the medical certificate which forms part of the papers (dated 4 August 1999), but argued that his general health was negatively affected by the night work. There was no evidence to substantiate such claim. In so far as appellant suggested that once he had indicated that night work was having an adverse effect on him, the SABC should have had him examined medically, appellant had to do more than produce one medical certificate, covering a couple of days only. Even if appellant had been medically examined, and found medically unfit, he might have been boarded, or given another position, yet it does not follow that he would have retained his existing job but without shift work.

Did appellant agree to work unsociable hours?

[52] Regarding agreement, the first question is whether the trade union agreed to this on behalf of appellant. This court held in **SABC v CCMA, Mkhosana NO, Papane and BEMAWU**, Case JA 29/00, decided on 11 July 2002, that the appellant was not a member of the Broadcasting, Electronic Media and Allied Workers Union ("BEMAWU") from March 1999 until his dismissal from the SABC in September 1999. In argument before us appellant pointed out that the "Time Management Principles" referred to an agreement between the SABC and "the Federation". Before this court it has not been established that appellant was a member of BEMAWU. If the appellant was not a member of the trade union at the relevant time, he would not be bound by any collective agreement concluded by it.

[53] Section 17(2) BCEA provides:

"(2) An employer may only require or permit an employee to perform night work, if so agreed, and if –

- (a) the employee is compensated by the payment of an allowance, which may be a shift allowance, or by a reduction of working hours; and

(b) transportation is available between the employee's place of residence and the workplace at the commencement and conclusion of the employee's shift."

[54] The remaining question is whether appellant personally agreed to do the night work as required in the introductory part of s 17(2). An agreement in writing, as is for instance required in s 16(6)(b) of the BCEA, is not required. On the wording of s 17(2), even an implied agreement will suffice. In my view the existence of such agreement is apparent from the following:

(i) The advertisement for the position warned applicants: "be prepared to work shifts and long hours". Appellant was not a novice – he had been working for the SABC since 1989. He must have known what this meant. At the arbitration hearing the following transpired (vol 3 p 259):

"Now, since 1997, no, since 1995 when you were transferred here? – Yes?

You worked the shift in terms of a shift roster? – Yes.

So, from 95 to 97 you never, to 99, you never complained. You started complaining in May 1999? – From?

From 95, when was this, when, when were you transferred? – 95.

In 95.

So, from 95 to 97 I can not find any documentation where you were unhappy about working these shifts? – Because my shift was starting at ten o'clock when I was here in 1995. Then it will have to move until half past six in the afternoon.

Okay. – Yes.

But, we agree, sorry, I do not want to belabour the point. – I did not complain.

But, we agree that you started complaining in May 19, heavily complaining in 19, in May 1999? – Yes.

You agree to that? Before that no hassles. Now, how come Mr, Mr Papane, if you have a look at page 42 and 42B. 42A and 42B?

Commissioner: It is a shift roster?

Mr Weber: That is it sir. And if you can recall Mr Papane, if you can recall. Let me just get the document, that is where you testified? If you can recall, after you have closed your evidence in chief, the Commissioner asked you this question about pages 30, 42A and 42B and you explained it very nicely to us. 42A is your shift roster in 1999? – February 1999.

Correct? – Yes.

And you explained to the Commissioner that, that was a five week cycle that you worked those shifts. Week one, you worked from three o'clock in the morning to eleven o'clock in the morning? – That is right.

Week two, you worked from five o'clock in the afternoon to eight o'clock in the evening. Week three, that is what you told the Commissioner, I wrote it down. – No, week two is from three o'clock in the morning.

No, well Mr Commissioner, I do not know, that is what Mr, and then week three, eight o'clock to 16h30. – Yes.

Week four, twelve o'clock in the afternoon to eight o'clock in the evening and week five, twelve o'clock in the afternoon to eight o'clock in the evening? – Yes sir.

All right. But, you worked the morning shift, these ungodly hours, the three o'clock hours. Why did you not complain in February? – The reason is simple Andre, because Fred has made a promise with me and he requested that I must give him a chance so that he should appoint a production manager. At the present moment he is the only regional manager who is operating across the board and he can not afford everything."

- (ii) Appellant admitted at the arbitration hearing that he knew (from the advertisement) that the Bloemfontein job entailed working night shifts (vol 3 p 248 line 24 – 249 line 15). Appellant did actually work shifts for a period of years – as he admitted – before he started complaining.

- (iii) When appellant complained, in his letter dated 23 July 1999, his complaints arose from the way the system worked, especially as it affected him. His complaint was not that he was under no contractual obligation to work shifts at all.
- (iv) Appellant received benefits for working shifts. He was credited with excess hours worked paid out for the months of January, February, April, May, June, July August and September 1999 (see the Time Reconciliation sheets, vol 2 pp 156-163). For an extended period appellant thus received compensation. The eventual payment came later, in March-April the following year. It was not appellant's case that he was not entitled to benefits. His complaint was that in this and other respects he was not being treated properly.
- (v) From the Appellant's correspondence and evidence at the arbitration hearing it is apparent that he initially had no objection to doing night work, and in fact did such night work. Subsequently he changed his stance, when he was not receiving the money and when he felt that he was being unfairly treated. He was warned of the possible repercussions by the SABC's letter in clear terms. He

persisted. There is no suggestion that he recanted at the disciplinary enquiry, and he certainly has not recanted since then (from arbitration up to this court). As I have said he knew that night shift work was required in his position, and he did in fact perform such night shift work, and at least by conduct agreed to do so. The provisions of section 17 BCEA requiring an agreement were complied with.

- (vi) Appellant's contention that he was just "helping out" is not convincing in the light of the evidence: he did the night shift work over a prolonged period; he accepted the monetary credits for overtime; he only started complaining when he felt the system was not being fairly implemented.
- (vii) The evidence that appellant agreed to work shifts, including night work, at Bloemfontein is cogent and compelling. The commissioner cannot be faulted for concluding that appellant so agreed. It follows from all this, therefore, that the appellant was indeed guilty of a dereliction of his duties, in that he refused to work night shifts deliberately and without good reason and despite being warned of the consequences.

Procedural fairness

[55] As to procedural fairness, appellant's complaints related to the presence of Mr Paul Tati on the disciplinary panel. In his heads of argument in this court appellant says at the disciplinary hearing he did not want to disclose the true reason as one of the reasons for the recusal of Mr Paul Tati because he feared that as a result of such allegation he would later be forced to bargain so as to keep his sources anonymous or face civil action. He advanced a reason before us for his request for recusal. We chose not to record that. It is sufficient to say that one cannot fault the disciplinary hearing. As, according to the appellant, the true reason for the request for recusal was not raised at the application before the disciplinary hearing, no sufficient basis was made out before that panel for the request for recusal of Mr Tati. There is no merit in the allegation of procedural unfairness.

The sanction

[56] In his founding affidavit appellant says that the commissioner erred in finding that the gravity of the offence outweighed his personal circumstances to the extent that he should be

dismissed. Appellant says he was employed by the SABC for 10 years and rendered perfect service. He says the commissioner erred in not finding that the penalty meted out by the disciplinary hearing was severe having regard to his 10 year long good standing service as well as his family responsibility and the fact that he had a clean disciplinary record.

- [57] Appellant refuses to do the job for which he was employed. He is only prepared to do part of the job, but excluding a significant and material obligation, namely to work night shifts. The sanction of dismissal appears unavoidable. We are unable to find any basis to interfere with the finding of the Commissioner that the sanction of dismissal was fair, particularly in the light of **Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA and Others** [2006] 11 BLLR 1021 (SCA) at pars 37-40).

Costs

- [58] The court *a quo* ordered the appellant to pay the costs, save certain costs which had been reserved on 30 July 2004. There is no reason to interfere with the exercise of the

discretion of the court *a quo*. In this court the appeal has been treated as unopposed, and no order as to costs should be made.

Order

[59] In the result the appeal is dismissed.

Kruger AJA

I agree

Comrie AJA

Appearance for appellant:

In person

Appearance for third respondent:

No authorised
appearance

Date of hearing:

5 September 2006

Date of judgment:

20 March 2007