

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

CASE NO: JA 5/06



In the matter between:

TAKALANI HOME FOR THE MENTALLY DISABLED

Appellant

and

THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION

1ST Respondent

**HONNORAT, E N. O (cited in his capacity as Commissioner of the Commission for
Conciliation, Mediation and Arbitration)**

2nd Respondent

NEHAWU obo DAWN KGOLE

3rd Respondent

Before: Willis JA, Patel JA and Sangoni AJA

Heard: 09 NOVEMBER 2007

Delivered: 15 NOVEMBER 2007

J U D G M E N T

PATEL JA

PATEL JA:

[1] This is an appeal brought, with leave of the court *a quo*, by the appellant, Takalani Home for the Mentally Disabled (“Takalani”) against an order dismissing an unopposed review application brought by Takalani challenging an order made by the second respondent in his capacity as Commissioner of the first respondent, The Commission for Conciliation, Mediation and Arbitration (“CCMA”). In terms of this order the third respondent, Dawn Kgole (“Kgole”) was reinstated in the employment of Takalani, as a care worker. Her primary duty was to provide care to the Takalani’s mentally ill patients.

[2] The record of the proceedings before the CCMA is not before us. It appears that the court below also laboured under the same disadvantage when the review was considered. The brief background that I set out below is culled from the award of the second respondent. It is as follows:

- On the 22nd February 2003, Kgole was on duty in one of the wards. The ward was divided into 3 cubicles. Kgole and one Lehlokwana were responsible for one of these cubicles within the ward. A parent of one of the children from the ward visited the said ward 15 minutes before 1.00pm, and

discovered that the child was unattended to and was eating his own faeces.

- The matter was reported to the sister in charge, Sister Ndukwana, who came to the ward, found Kgole not to be there, and then gave the child a bath.
- According to Takalani it was understood that workers had to stagger their lunch breaks so that at least one worker per cubicle remained on duty. On the day in question, Kgole and Lehlokwana went on lunch break at the same time leaving the cubicle unattended.
- Kgole suggested that there was nothing wrong with her taking her lunch break at that time provided that there were other care workers in the ward to watch over the unattended cubicle. She also disputed that the child was eating his own faeces.
- When Kgole returned to work after being off for 2 days, she was summoned to attend a disciplinary hearing on 27 February 2003. The hearing was later postponed to 3 March 2003.

[3]On 3 March 2003, pursuant to a disciplinary hearing chaired by the appellant's deputy chair person Mr Mahopo, Kgole was dismissed for negligence perpetrated against physically and mentally disabled people entrusted to her. Kgole referred

an unfair dismissal dispute to the CCMA. The conciliation proceedings failed to be resolved and the matter was referred for arbitration proceedings before the 2nd Respondent. The 2nd Respondent found that the dismissal was both substantively and procedurally unfair and ordered the reinstatement of Kgole.

[4]Takalani applied to review and set aside the award in terms of section 145 of the Labour Relations Act 66 of 1995 (“LRA”). The Notice of Motion called for the production of the record of the arbitration proceedings but no record of the *viva voce* evidence was furnished by the second respondent. The court below, per Kruger AJ, dismissed the review application. The learned judge found that there was nothing wrong with the arbitration hearing, and there was no reason to interfere with it on review. Owing to the absence of the record the learned judge was not in a position to evaluate the evidence. His judgment is premised essentially on the evaluation of the reasoning of the second respondent. I might mention that no record of the disciplinary hearing is included in the record before us.

[5]Application was thereafter made by Takalani in terms of section 166(1) of the LRA and Rule 30 of the Labour Court for leave to appeal against the whole of the judgment of

Kruger AJ. Leave to appeal was duly granted and that is how the matter serves before us.

[6]I shall briefly deal with the rules dealing with review applications. Rule 7A of the Rules of the Labour Court deals comprehensively with review applications in the following terms:

'7A Reviews

- (1) A party desiring to review a decision or proceedings of a body or person performing a reviewable function justiciable by the court must deliver a notice of motion to the person or body and to all other affected parties.
- (2) The notice of motion must -
 - (a) call upon the person or body to show cause why the decision or proceedings should not be reviewed and corrected or set aside;
 - (b) call upon the person or body to dispatch, within 10 days after receipt of the notice of motion, to the registrar, the record of the proceedings sought to be corrected or set aside, together with such reasons as are required by law or desirable to provide, and to notify the applicant that this has been done; and
 - (c) be supported by an affidavit setting out the factual and legal grounds upon which the applicant relies to have the decision or proceedings corrected or set aside.
- (3) The person or body upon whom a notice of motion in terms of subrule (2) is served must timeously comply with the direction in the notice of motion.
- (4) If the person or body fails to comply with the direction or fails to apply for an extension of time to do so, any interested party may apply, on notice, for an order compelling compliance with the direction.

- (5) The registrar must make available to the applicant the record which is received on such terms as the registrar thinks appropriate to ensure its safety. The applicant must 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.
- (6) The applicant must furnish the registrar and each of the other parties with a copy of the record or portion of the record, as the case may be, and a copy of the reasons filed by the person or body.

...

It is clear that the Rules provide for the lodging of a complete record of the proceedings before the decision of the second respondent could be reviewed. The applicable rules of the CCMA and in particular Rule 36(1) obliged the CCMA to keep a record of any sworn testimony given in any proceedings before the Commission and any arbitration award made by a Commissioner. In terms of Rule 36(2), such a record may be kept by legible hand-written notes or by means of an electronic recording

[7]In this matter all that was discovered as the record of the proceedings was the arbitration award and the documents before the 2nd respondent, and that unfortunately is all that we have at our disposal to adjudicate this matter. Clearly the first and second respondent failed to lodge the record as contemplated by the aforesaid rules of the CCMA.

[8]The appellant appears to have adopted a *non possumus* position *apropos* the obtaining of a complete record since as is evident from Rule 7A(4) the appellant could have compelled the second respondent to furnish the record and applied for the postponement of the hearing in the court below until such time as the first and second respondents complied with their statutory obligation (see *Uee-Dantex Explosives (Pty) Ltd v Maseko & Others* (2001) 22 ILJ 1905 at 1909-1910). Despite this option being available to the appellant, it proceeded with the review application. Ex facie the papers before us there is no documentary evidence that the record could not be constructed because the tapes or the manuscript notes of the second respondent had gone astray. Submissions made from the bar in this respect have little or no value. It cannot be gainsaid that the appellant had a right to take the matter on review but in exercising such right the appellant cannot flout the rules or for that matter ignore them. An appellant does so at its peril.

[9]It is trite law that the failure to keep and provide a proper record may in certain circumstances be an adequate ground for the setting aside of an arbitration award and remitting the matter to the CCMA for the hearing of the matter *de novo* (see *Shoprite Checkers Ltd v Commission for Conciliation, Mediation & Arbitration & Others* (2002) 23 ILJ 943 (LC) at

para 16 and 17). As pointed out earlier this was indeed an option available to the appellant in the court below. The record however shows that the appellant proceeded with the review application without exercising this option. This is most unfortunate since this is one of those matters which would have been properly ventilated, both in the court below and before us if the complete record was available.

[10]This court has held over and over again that a review is impossible without a record, and has dismissed matters if the applicant is unable to furnish a transcript of the record. In the case of *JDG Trading (Pty) Ltd t/a Russells v Whitcher NO & others (2001) 22 ILJ 648 (LAC)* this Court found that in the absence of the transcribed proceedings before the commissioner, the court a quo was in no position to adjudicate properly the review application before it and ought accordingly to have dismissed it. Further the court found that the court a quo was not entitled to have interfered at all with the order made by the commissioner without having the full record of the proceedings since like in this case ‘a multifaceted’ attack was made on the findings of the Commissioner. The learned Judge of Appeal went on to say at para [9]:

“Clearly these attacks could not be properly assessed without having regard to such evidence, which as I proceed to indicate, was not or not properly available to Lyster AJ”

The Court after adverting to Rule 7A (*supra*) concluded that the court below should have dismissed the review application and accordingly substituted that as being the appropriate order.

[11] In the matter before us, clearly Kruger AJ did not have the record of the arbitration proceedings before him and thus there was not enough information before him to firstly proceed with the review application and secondly to dismiss the application. Counsel for the appellant however attempted to dissuade us from following the above decision and adverted to the case of *Department of Justice v Hartzenberg* (2001) 22 ILJ 1806 (LAC) in which case this court in the absence of a complete record remitted the matter for a rehearing. In that case the reason for the non availability of a complete record was properly before the court. We have no information as to why the record was not before the Kruger AJ and what efforts were made by the appellant to obtain the record.

[12] Counsel for the appellant also sought to persuade us that the appeal should proceed in its favour by merely assessing the probabilities which emerge from the award of the second respondent. In my view this would be a dangerous course to follow since the award does not traverse the factual evidence in any detail for us to select a conclusion “which seems to be the more natural, or plausible, conclusion from amongst several conceivable ones, even though that conclusion be not the only reasonable one” (see *Govan v Skidmore* 1952(1) SA 732(N) at p.734). Moreover probabilities are closely allied to credibility findings since facts elicited by evidence only become such facts if the evidence given in support of such fact is reliable and credible.

[13] I now turn to consider the prejudice to the parties should the matter be remitted for a complete rehearing. The third respondent was dismissed after a disciplinary hearing on the 3 March 2003. The third respondent was reinstated on 9 September 2003. The matter is before us on appeal some 4 years after the dismissal. The fundamental consideration behind the enactment of the LRA includes a commitment to expeditious and efficient dispute resolution which is transparent and accountable. In my view the reluctance or tardiness on the part of the first and second respondents and the appellant is inconsistent with this. In the recent

constitutional court case of *Sidumo and COSATU v Rustenburg Platinum Mines Ltd*, the Constitutional Court Case No CCT 85/06, reconfirmed this objective.

[14] Finally, there are too many cases in the Labour Court where litigants simply do not comply with the rules. Applicants ultimately run the risk of having their applications dismissed. There is merit in the position adopted by counsel acting on behalf of the third respondent that where an applicant in the position of the appellant persists with review proceedings despite the success of its review depending on the production of the record, it must deal with the consequences thereof. It is the duty of legal practitioners to acquaint themselves with the relevant rules of the court and to provide their clients with proper advice and instructions. In the present matter, Takalani has not shown what, if any, steps had been taken to obtain the record. Furthermore I am uncertain as to whether Takalani was aware that the rules made provision for the compelling of the production of the record.

[15] This in my view is not a case where the issues are so narrow that the Labour Court could have proceeded without the record. The outcome of the decision is important since firstly, Kgole was dismissed for a serious charge and secondly

because the decision affects the lives of other people, namely the patients in general. The Court accepts that the appellant has a fundamental right to review. However in this case and in the absence of agreed facts, the exercise is impossible because no record exists. I am mindful of the decision in *Lifecare Special Health Services (Pty) Ltd t/a Ekuhlengeni Care Centre v CCMA & others [2003] 5 BLLR 416 (LAC); (2003) 24 ILJ 931 (LAC)*, where the Labour Court held that since the company had not sought a postponement to enable it to make attempts to “reconstruct” the record, it dismissed the matter with costs. The Labour Appeal Court noted the stage had not been reached when it could be concluded with confidence that the record could not be reconstructed. The order dismissing the review application was set aside and replaced with an order postponing the matter.

[16]As pointed out earlier, the Constitutional Court has recently dealt with the review function of the Labour Court in the case of *Sidumo*(*supra*). The majority of the Court per Navsa AJ, held that the standard to be applied when a decision by a commissioner on a dismissal dispute is sought to be reviewed is the following:

“Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?”

In my view when this test is applied it would seem most unlikely that a rehearing would have a different result from that which the appellant seeks to review. Upon a conspectus of all that is before us, the appellant has made no allegations which, if true would make it likely that another Commissioner would come to a different conclusion.

[17]It is not in dispute that the appellant relies on donations to continue with its work. Counsel for the third respondent, as is his wont, properly conceded that in the event we were disposed to dismissing the appeal, then and in that event the third respondent would not be seeking an order for costs.

[18]In the premises the following order is made:-

The appeal is dismissed.

Patel JA

I agree,

Willis JA

I agree,

Sangoni AJA

Appearance:

For the Appellant: Mr S Snyman

Instructed by: Snyman Attorneys

For the Respondent: Adv F A Boda

Instructed by: Thaanyane Attorneys