

**REPUBLIC OF SOUTH AFRICA****THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG****JUDGMENT**

Reportable
of interest to other Judges

Case no: JR 1114/09

In the matter between:

SAMUEL MOLEKE MABOGOANE

Applicant

and

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

First Respondent

COMMISSIONER E. LERUMO N.O.

Second Respondent

GOLDENMARC (PTY) LTD

Third Respondent

Heard on: 14 December 2011

Delivered on: 14 February 2012

JUDGMENT

MAHOMED AJ

Introduction

1. The Third Respondent is incorrectly cited in the review application as "Golden Mark". At the hearing of this application, I made an order in terms of Rule 22 amending the citation of the Third Respondent to

"Goldenmarc (Pty) Ltd". This being the correct citation of the Third Respondent entity.

2. The Applicant is a former employee of the Third Respondent. It is alleged that the Applicant resigned from his employment. The Applicant is aggrieved with a default arbitration award issued by the Second Respondent wherein the Second Respondent found that the Applicant failed to establish his dismissal. The Second Respondent accordingly proceeds to conclude that she is not required to decide whether the termination was "fair".¹ The Third Respondent did not appear at the arbitration.
3. The Applicant represented himself in the review proceedings whilst the Third Respondent was represented by an attorney, Ms. Wessels. There was no opposition to the application by either of the First and/or Second Respondents. The First and Second Respondents filed a notice to abide the decision of this court on 8 June 2009. The further notices and an opposing affidavit were filed subsequent thereto.

The dispute which came before the second respondent commissioner

4. The Applicant alleged that he was coerced into signing a letter of resignation in September 2008. The effect of such allegation, in the face of the written letter of resignation, is that the Applicant bears the onus in terms of section 192 of the Labour Relations Act, 1995 ("the LRA") to establish the existence of the dismissal. As set out above, the Second Respondent found that the dismissal was not established.
5. The Applicant gave evidence that he was accused of theft on 29 September 2008. The Applicant's version was that such allegation was made by a person merely referred to as "Colby" in the award.
6. I proceed to quote the further evidence as recorded in the award of the Second Respondent:

¹ This is obviously a correct conclusion to the extent that the finding of the Second Respondent is not found to be reviewable in relation to the first question relating to the existence of the dismissal.

3.1.2 He further submitted the said Colby told him that the Respondent's (i.e. the employer) is in possession of the CD showing him stealing. He further submitted that he requested to watch the CD but he was told it is not available. He stated the said Colby is the person that the Respondent use when wanting to dismiss its employees. He further submitted that Colby said why he does not want to sign the resignation letter because the other employee confessed to stealing and he has signed the resignation letter. He submitted that on 29 September 2008 he was forced to sign the resignation letter.

3.1.3 The Applicant submitted that on 1 October 2008 his manager David told him that he has been suspended. He further submitted that on 19 December 2008 his manager David told him that he was not dismissed but the Respondent has accepted his resignation of the 29th September 2008.

3.1.4 The Applicant submitted on that 30 November 2008 he went to the Advice Centre and on 5 January 2009 the Respondent told them that Applicant can do what ever he wants because he resigned. The Applicant stated the he wrote 5 January 2009 as date of dismissal because he was told that he resigned on 29 September 2008.' (sic)

7. Under the heading "Analysis of Evidence in Argument", the Second Respondent, in her award, notes the following:

4.2 In the absence of an alternative version, I have no option but to accept the evidence presented to me by the Applicant.

4.3 On the Applicant's own version he submitted that he was forced to sign the resignation letter. Further on perusal of documents the Applicant signed a resignation letter and on the said letter it is stated that "I do this written resignation letter out of my own free will". I am unable to find how the Applicant was forced to resign.' (sic)

8. The Applicant completed a standard *pro forma* review application. This being a *pro forma* template obtained from the Registrar's office.
9. Inasmuch as the review application was late, the Applicant makes certain allegations in support of his condonation application. The condonation application was not opposed on the papers. Ms Wessels, at the hearing, also confirmed that the Applicant's application for condonation was not opposed. In the absence of opposition to the condonation application and for reasons set out in this judgment, essentially relating to prospects of success, I have condoned the late filing of the review application.
10. On 9 June 2009, the First Respondent filed a notice in terms of Rule 7A(3) of the Rules of the Labour Court. This constituted notice of the filing of the record of the arbitration proceedings with the Registrar of this court. The Rule 7A(3) notice provides that the CCMA "evenly herewith" files the following:
- 10.1 LRA Form 7.11;
 - 10.2 Certificate of Outcome;
 - 10.3 Default Arbitration Award;
 - 10.4 No audio recordings as the matter was not electronically recorded (sic). (The Rule 7A(3) Notice itself highlighted this provision).
11. It is apparent from the Notice filed that no hand written notes of the arbitration were kept either. Had there been hand written notes the Rule 7A(3) Notice would have made reference thereto. There was no contrary submission and/or evidence before the court. This court is accordingly saddled with having to determine the review application without a record of the arbitration proceedings. The Second Respondent's failure to produce the record, on its own, constitutes a reviewable irregularity.²

² See *UEE-Dantex Explosives (Pty) Ltd v Maseko and Others* (2001) 22 ILJ 1905 (LC) and *Shoprite Checkers Ltd v CCMA and Others* (2002) 23 ILJ 943 (LAC).

The absence of a record of the arbitration proceedings

12. I must point out that no issue is raised in the opposing affidavit registering any protest with regard to the failure of the Applicant to place before this court a record of the proceedings. It appeared that it had only become apparent to Ms Wessels during the course of submissions on the day of the hearing that there was indeed no audio recording of the CCMA proceedings. This was when same was drawn to the attention of Ms Wessels.
13. Ms Wessels sought to convince me that the Third Respondent had taken issue with the "incomplete record" filed by the Applicant. She drew my attention to Item 5 in the Index to the court bundle which makes references to "Applicant's Purported Notice in terms of Rule 7A(6)" (my emphasis). This was the high watermark of Ms Wessels' submission in this regard. I was at a loss as to what "Purported Notice in terms of Rule 7A(6)" meant and Ms Wessels was unable to convince me that "purported" was an objection to the filing of the inadequate record. Ms Wessels was also unable to direct me to any further evidence where it was brought to the attention of the Applicant that the record was lacking and/or the consequence thereof.
14. This is an appropriate juncture to interpose and note that the issue of the missing record was raised *mero motu* by the court and not the parties. Whilst I accept that the general principle is that the role of the reviewing court is limited to deciding issues raised in the review proceedings (and this submission was not made by either party) and the court may not, on its own, raise issues which were not raised by the party who seeks to review an arbitration award, this proposition was recently dealt with by the Constitutional Court in *Commercial Workers Union of South Africa v Tao Ying Metal Industries and Others*.³ In this regard, the court held that there is much to be said 'for the submission by the workers that it is not for the reviewing court to tell a litigant what it should complain about'.⁴ The Constitutional Court went further to say

³ (2008) 29 ILJ 2461 (CC).

⁴ *Id* at para 67.

) that in particular, the LRA specifies the grounds upon which arbitration awards may be reviewed. A party who seeks to review an arbitral award is bound by the grounds contained in the review application. These principles are, however, subject to one qualification it was held (by the Constitutional Court in *CUSA v Tao Ying (supra)*) - where a point of law is apparent on the papers, and the parties proceed on a wrong perception of what the law is, the court is not only entitled, but is, in fact, also obliged, *mero motu*, to raise the point of law and require the parties to deal therewith. The failure of a court to do so, would be a decision premised on an incorrect application of the law and an infringement of the principle of legality. I accordingly raised my concerns with regard to the lack of the record and heard submissions from the parties on this issue at the hearing of this application.

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15. No attempt has been made by any of the parties to reconstruct a record of the arbitration proceedings. Obviously, the Third Respondent would not have been in a position to assist in this regard inasmuch as it was not a party to the arbitration proceedings.
 16. It is trite that there is an obligation upon an Applicant in a review application to place before a court the record of the proceedings which are subject to the review application. Where the Applicant neglects to do so, the Applicant obviously runs the risk of the application either being struck off the role or being dismissed.⁵
 17. Molahlehi J in *Solidarity obo Botha v CCMA and Others (supra)* held that the exception to the aforementioned rule is that the court "may consider the review even in the absence of the transcript where it has been shown that the cassette tapes are missing or the parties are unable to reconstruct the record".⁶ This is an important exception. For reasons set out below, I am of the view that a further exception exists in the interests of both fairness and justice. My reasons in support of this view and the basis of the exception are dealt with further below.

⁵ See *Boale v National Prosecuting Authority of South Africa and Others* (2003) 10 BLLR 988 (LC) at para 5 and *Solidarity obo Botha v CCMA and Others* (2009) 3 BLLR 257 (LC) at para 14.

⁶ *Solidarity obo Botha v CCMA and Others (supra)* at para 15.

However, it is necessary to initially commence with an analysis of the law relating to an absent record.

18. The CCMA is obviously not a court of law. This was confirmed in the landmark decision of *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*.⁷ CCMA commissioners, however, exercise public power which impacts upon the parties before them. Navsa AJ concluded that an arbitrating CCMA commissioner performs an administrative function. As an administrative functionary the CCMA arbitrator essentially derives her power and obligations from the LRA.
19. In *CUSA v Tao Ying (supra)* Ngcobo J reiterated that the role of the Labour Court was to oversee the arbitration process.⁸ This overseeing function is conducted by way of the review power granted to the Labour Court in terms of Section 145 of the LRA.
20. Curiously though, the LRA is silent with regard to the obligation of the Commissioner to keep a record of the arbitration proceedings. This apparent lacuna is plugged by Rule 36 of the Rules for the Conduct of Proceedings before the CCMA.
21. Rule 36(1) of the CCMA Rules provides that a Commissioner must keep a record of:
 - 21.1 Any evidence given in an arbitration hearing;
 - 21.2 Any sworn testimony given in any proceedings before the Commissioner; and
 - 21.3 Any arbitration award ruling made by a Commissioner.
22. Rule 36(2) provides that the record may be kept by "legible" handwritten notes or by means of an electronic recording. Rule 36 is couched in peremptory terms and must accordingly in my view (as would appear in any event to be the prevailing practice) be complied with by the Commissioner.

⁷ (2007) 28 ILJ 2405 (CC) at para 88.

⁸ *CUSA v Tao Ying (supra)* at para 57.

23. The Commissioner obviously has an option of either recording the proceedings electronically or by means of "legible" handwritten notes. In *Lifecare Special Heath Services (Pty) Ltd t/a Ekuhlengeni Care Centre v CCMA and Others*,⁹ the Labour Appeal Court, however, noted that it "is certainly true that Commissioners are encouraged to make use of electronic recording equipment whenever possible". This was said in the context of an affidavit filed by the CCMA in which the following was alleged:

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

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

24. In this matter, the Second Respondent chose not to keep an audio recording of the default arbitration proceedings. It would also appear, having regard to *inter alia* the Rule 7A(3) Notice, that the Second Respondent neglected to keep any handwritten notes of the proceedings. No explanation is furnished for such omission. It is not too much for a review court to expect an explanation for such omission from a functionary of State. An explanation would have been useful to the parties and the court.

25. Basson J in *Doompoort Kwik Spar CC v Odendaal and Others*,¹⁰ summarised the law in respect of absent records in the following terms (and I can do no better than quote from the dicta of Basson J):

'[4] An Applicant has a right to a reasoned award in respect of the dispute that was adjudicated before the CCMA. When an award is the subject of a review application, the record of the proceedings before the statutory body will also become important. See *Uee-Dantex Explosives (Pty) Ltd (supra)*. In fact, once a party has filed its notice of motion and

⁹ (2003) 24 ILJ 931 (LAC) at para 6.

¹⁰ (2008) 29 ILJ 1019 (LC) at paras 4 - 7.

founding affidavit, he or she has the right to the record of the proceedings insofar as it may be necessary for the purposes of the review. In this regard Rule 7A(8) of the Rules specifically provides that an Applicant in review proceedings may ... supplement the supporting affidavit filed in the review application in light of the record of the proceedings. An applicant who is not afforded this opportunity by virtue of an incomplete or non-existent record may well be prejudiced. The CCMA is a creature of statute and as such it derives its powers and obligations from the LRA. It is therefore obliged to adhere to these statutory imposed duties – most notable for purposes of this judgment – to keep a proper record of the proceedings conducted before it.

- [5] There is, however, clear authority to the effect that the mere fact that there is not a record, does not necessarily imply that the matter should as a matter of course be remitted to the CCMA. Even where parties have endeavoured to reconstruct the record and it is not possible, the court will likewise not as a matter of course remit the dispute to the CCMA. See *Nathaniel v Northern Cleaners Kya Sands (Pty) Ltd and Others* (2004) 25 ILJ 1286 (LC) where the court declined to remit the matter to the CCMA but decided to proceed to determine the case on all the available evidential material before it. See also *Fidelity Cash Management Services (Pty) Ltd v Muvhango NO and Others* (2005) 26 ILJ 876 (LC). In the latter case, the court followed the decision in the *Kya* case. However, in two cases the court was willing to refer the matter back to the CCMA: See *Uee-Dantex Explosives (Pty) Ltd (supra)* and *Shoprite Checkers Ltd (supra)*. In these two cases it was taken into account that no record was available. It was concluded that the commissioner's failure to produce the recorded constituted a reviewable irregularity.
- [7] Where there has been no mechanical transcribing of the proceedings, the applicant is still obliged to reconstruct the record as far as possible. See *Ndlovu vs Mullins N.O and Another* (1999) 20 ILJ 177 (LC). Parties who seek relief on the basis of an incomplete record run the risk of being unsuccessful purely on this basis. See *Metalogik Engineering and Manufacturing CC v Fernandes and Others* (2002) 23 ILJ 1592 (LC).

) Where an applicant in review proceedings fails to provide a transcription of the handwritten records and/or the cassette tapes, the court will be unable to adjudicate the review application and may find that it is not entitled to interfere with the award. The court will not, as already stated, as a matter of course set aside an award and remit the matter to the CCMA for rehearing merely on the basis that the record is incomplete especially in circumstances where the applicant has taken no steps to reconstruct the record. In such circumstances the court will decide whether or not the award is reviewable by looking at all the evidence available, the documentary evidence and the record as incomplete as it may be.' (footnote omitted)

-) 26. From the above, it is apparent that the line of authority regarding the failure of an applicant (and/or the parties) to place before a court a proper record of the proceedings is now well established.
27. The Second Respondent in paragraph 4.1 of the award specifically provides that 'if, in this analysis, certain evidence is not referred to, this does not imply it has not been considered'. It was the undisputed evidence of the Applicant that he was "forced to sign" a letter of resignation. Notwithstanding such uncontroverted evidence, the Second Respondent proceeds to conclude in paragraph 4.3 of the award that having regard to the letter of resignation which provides that 'I do this written resignation out of my own free will' that she is 'unable to find how the Applicant was forced to resign'. I pause to mention that the Applicant in paragraph 8 of his founding affidavit alleges "*Commissioner Elizabeth Lerumo ... interviewed me, and I gave her my whole clear story of exactly what has happened*" (my emphasis). In the absence of a record of the arbitration proceedings, this court is not in a position to properly adjudicate on the review application or even determine whether the Second Respondent properly applied her mind to the Applicant's "whole clear story". I put this to Ms Wessels who was unable to advance a solution on how I was to overcome such dilemma.
-) 28. Ms Wessels did, however, seek to persuade me that inasmuch as the Applicant was *dominus litus* he bore the full responsibility in placing the

record before the court. His failure to do so, so the argument went, must result in the dismissal of the review application. On the facts of this case, I am not convinced that there is force in such argument. I set out below the reasons why I am not inclined to dismiss the review application which interlinks with the question of the further exception, I made reference to earlier.

The dismissal/striking of the review application on the basis of the absent record.

29. It is certainly not the fault of the Applicant that neither electronic recording nor handwritten notes of the arbitration proceedings were kept by the Second Respondent. (This was also not suggested by the Third Respondent in argument) Such responsibility lies solely with the Second Respondent.
30. In *Sidumo (supra)* Navsa AJ, concluded that a reading of the just administrative right clause in the Bill of Rights contained in section 33, provides that national legislation must be enacted to give effect to the right to administrative action that is lawful, reasonable and procedurally fair.¹¹ I have already mentioned the authority which confirms that the CCMA is not a court but an administrative organ. Section 145 of the LRA, concluded the court in *Sidumo* constitutes such national legislation in respect of "administrative action" within the specialised labour law sphere. The right of review which the Applicant seeks to assert is accordingly not a "mere" statutory right but effectively a constitutional right. I put it to Ms Wessels that a dismissal of the review application, as suggested by the Third Respondent, would in the circumstances of this case prejudice the Applicants right of review. Ms Wessels reluctantly conceded this point.
31. Section 34 of the Bill of Rights guarantees everyone the right to access to courts. This right and, consequently, the right to seek justice, which in a constitutional democracy must never be a mirage, is an important "self-standing" right which must be jealously safeguarded by our courts.

¹¹ *Sidumo (supra)* at para 89.

- 35.1 the requirements of Rule 7A;
- 35.2 the requirement to place before this court a complete record,
- 35.3 where the record is incomplete - to advise such party of the obligations to reconstruct the record and of the consequences of a failure to place before the court a complete record; and
- 35.4 that she may in appropriate circumstances be able to obtain pro bono legal advice from a community legal center, a University Law Clinic, the SASLAW pro bono legal office (established at the various Labour Courts), Legal Aid of South Africa (and furnish the particulars of such offices).
36. Where the lay litigant does not heed such advice, I submit that an absent record in such circumstances would, depending upon the facts, warrant the consequences' referred to by Molahlehi J in *Solidarity obo Botha v CCMA and Others (supra)*.
37. It is necessary that I make reference to the *Boale* decision even though same was not referred to in argument. In *Boale* Francis J dismissed a review application instituted by *Boale* an individual who represented himself. The *Boale* decision is distinguishable from the present case in that *Boale* himself was legally trained and in fact, was a prosecutor who was dismissed by the National Prosecuting Authority. *Boale* was legally represented prior to the termination of the mandate of his counsel. He accordingly had the services of both an attorney and counsel. A further distinguishing factor in the *Boale* decision is that a transcript of the proceedings was already in existence and *Boale* had neglected to have the full transcript placed before the court. The facts in *Boale* are entirely distinct from the present matter.
38. For these reasons, I accordingly do not believe that this case falls within the general rule endorsed by Molahlehi J in *Solidarity obo Botha and Others (supra)* that where an applicant fails to provide a full transcript of the proceedings that the review application either be struck off the role or dismissed. The Applicant *in casu* is not to blame and to saddle him

with such a drastic consequence would be to deny him his right of review and the right of access to the Labour Court. This cannot be countenanced on the facts of this case.

39. In remitting the matter back to the CCMA, Ms Wessels argued that the Third Respondent would be forced to incur further costs. There is force to such argument. The Third Respondent did not appear at the arbitration proceedings and in remitting the matter back to the CCMA this will give the Third Respondent an opportunity to place its version of events before another commissioner. Whilst mindful of the issue of costs, on balance, it appears to me that the Applicant's right of review and access to the Labour Court is the overriding consideration.

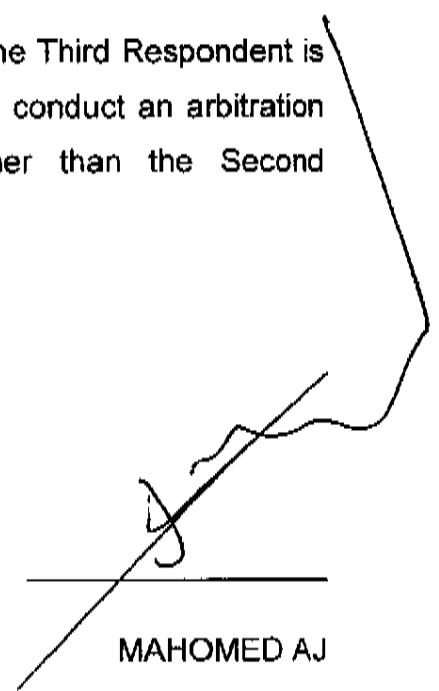
40. I am therefore of the view that it would be fair to remit this dispute to the CCMA for a hearing *de novo* before a Commissioner other than the Second Respondent.

41. The following order is accordingly hereby made:

41.1 The default arbitration award issued by the Second Respondent under the auspices of the First Respondent under case number GAJB 496-09 dated 9 February 2009 is reviewed and set aside.

41.2 The dispute between the Applicant and the Third Respondent is remitted back to the First Respondent to conduct an arbitration *de novo* before a Commissioner other than the Second Respondent.

41.3 There is no order for costs



MAHOMED AJ

ACTING JUDGE OF THE LABOUR COURT

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Appearances

For the Applicant:

In person

For the Third Respondent:

Ms E Wessels

Instructed by :

Du Randt Du Toit Pelser Attorneys