



REPUBLIC OF SOUTH AFRICA

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

**JUDGMENT**

Reportable

Case no: JR 1127/07

In the matter between

**K M LIWAMBANO**

**Applicant**

and

**DEPARTMENT OF LAND AFFAIRS**

**First Respondent**

**GPSSBC**

**Second Respondent**

**PRAKESH ROOPA N.O.**

**Third Respondent**

**Heard: 19 January 2012**

**Delivered: 17 February 2012**

**Summary:**

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**JUDGMENT**

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LEPPAN AJ

- [1] The Applicant seeks to review and set aside the arbitration award handed down by the Third Respondent on 5 April 2007. The date when the Applicant's review application was filed at Court was 31 May 2007.
- [2] The Applicant's application was brought in terms of Section 145(1) of the Labour Relations Act, as amended ("the LRA")<sup>1</sup>.
- [3] In terms of Section 145(1)(a) of the LRA, such a review application must be brought within six weeks of the date of receipt of the arbitration award.
- [4] According to the information available on the Court file, the six week period in this matter expired on 17 May 2007.
- [5] The Applicant attested to his founding affidavit in Bloemfontein on 17 May 2007. The Applicant's attorneys, Mr M Khang, signed the notice of motion in Bloemfontein on 17 May 2007. Mr Khang's covering letter to the Registrar of this Court is dated 18 May 2007 and it enclosed the review application.
- [6] There is no explanation why the review application was only filed at this Court on 31 May 2007. Furthermore, the Applicant has not instituted an application for condonation for such late filing.
- [7] On the face of it, the Applicant has not complied with the provision of Section 145(1) of the LRA and on this ground alone the review should ordinarily fail.
- [8] This is not the only material difficulty posed by the Applicant's conduct in this matter.
- [9] On 6 June 2007, the secretary of the Second Respondent despatched to the Registrar of this Court the following documentation and materials, in compliance with its obligations in terms of Rule 7A(2)(b) of the Rules of Practice and Procedure in this Court, namely -

9.1 the arbitration award;

9.2 the Applicant's dispute referral form to the First and Second Respondent;

9.3 notices of set down of the arbitration hearing;

9.4 attendance registers indicating the names of the persons in attendance at the arbitration;

9.5 a certificate of outcome of non-resolution of the dispute;

9.6 the handwritten notes of the Third Respondent;

9.7 three cassette tapes containing the evidence led at the arbitration hearing.

[10] The Second Respondent's Rule 7A (2) (b) notice was received by the Registrar of this Court on 18 June 2007.

[11] In terms of Rule 7A(6), the Applicant was obliged to furnish the Registrar and each of the parties with a copy of the record or portion of the record relied upon and any additional reasons as may have been supplied by the relevant trier of facts. Thereafter, the Applicant had 10 Court days, calculated from the date when the Registrar made the record available, in which period it is incumbent upon the Applicant to deliver a notice indicating whether he stood by, or wished to amplify, his notice of motion and deliver a supplementary affidavit if required.

[12] On 28 November 2007, the Applicant served the following-

12.1 the handwritten notes of the Third Respondent;

12.2 the "record of documents" comprising those items listed at paragraphs 9.1 to 9.5 of this judgment;

12.3 a transcript of the evidence led at the arbitration hearing prepared by Lubbe and Meintjies Inc ("the transcribers") on 30 October 2007.

[13] The record of proceedings and the Applicant's notice in terms of Rule 7A (8) (b) was delivered to the parties and filed with the Registrar on 29 November 2007, some six months later. No explanation for this delay has been proffered by the Applicant.

[14] The transcript of the evidence prepared by the transcribers starts with a caveat by its typist as follows:

‘Typist Note: sound quality extremely poor. Struggled to hear what is being said. Plenty inaudible...’

[15] Attempting to read this transcription was taxing. Often enough important questions that were posed, for which it was apparent that answers were given, could not be read or understood due to the numerous inaudible portions.

[16] The handwritten notes of the Third Respondent were illegible. These handwritten notes comprise 77 pages.

[17] These obvious defects in the record of proceedings were brought to the attention of the Applicant and his attorneys on 19 November 2008 when the First Respondent delivered its answering affidavit. These problems were set out in the answering affidavit of Mr Thandukwazi Mtethwa ("Mtethwa") who is the Legal Administration Officer of the First Respondent –

‘The record of proceedings of the arbitration has been despatched by the Bargaining Council (Second Respondent). The transcribed record is not much helpful because of many inaudible (sic) in it. Together with the transcribed record, was attached the handwritten notes of the arbitrator. However the handwritten notes are also not much helpful because of the handwriting...The First Respondent has since suggested to the Applicant that the handwritten notes be transcribed by the Applicant as dominus litis and have them served on the First Respondent in order that an answering affidavit be filed. To date, the Applicant has neglected to have the handwritten notes transcribed nor has the Applicant taken steps to

reconstruct the inaudible record'.<sup>2</sup>

- [18] On 19 November 2008, the First Respondent delivered its answering affidavit, because the Applicant had taken steps to try and prevent it from doing so even though the record of proceedings did not constitute a complete or proper record at that time.
- [19] In response to these averments, the Applicant attested to his replying affidavit on 31 December 2008, some 23 days late and again with no explanation why the five day period provided for in Rule 7A(10) was ignored. In his replying affidavit, the Applicant averred that the complaint about an incomplete and unintelligible record of proceedings arose only on 4 November 2008. Be that as it may, the record of proceedings has always been and remains unintelligible.
- [20] On 4 February 2010, this matter came before Mr Justice A van Niekerk and was postponed *sine die*. When this matter was re-enrolled on 19 January 2012, this Court enquired about the reason for this postponement. The Applicant's attorney, who has been involved throughout this matter, stated that it was because one aspect of the Third Respondent's award appeared to be incomplete. This portion of the award under scrutiny reads as follows:

Page 25 of the Record

'... I therefore find no merit for the proposition that the Applicant had a legitimate expectation of being permanently employed indefinitely. The same can be said about the argument that he had an expectation that his

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His employment status and informed of the reasons the Respondent did not convert his contract, so it can hardly be the case that he was not given an opportunity to deal with the refusal of the Respondent to do so...'

- [21] The Applicant's attorney claimed he had queried this aspect with the Third

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<sup>2</sup> (See: pages 163 and 164 of indexed pleadings).

Respondent and was subsequently informed by the Third Respondent that the award was complete. On a scrutiny of the correspondence between the Applicant's attorney and the Third Respondent, in which confirmation was received to this effect, it was evident that the letter was dated in advance of the date when this matter was before Mr Justice van Niekerk.

- [22] According to the First Respondent's Counsel, Mr W R Mokhari SC, there was a different reason for the postponement. This was articulated in his supplementary heads of argument where it is stated that-

‘The purpose of these supplementary heads is to deal with certain matters which impact on the review application. Those matters relate to steps that the Applicant failed to take despite being alerted to by the First Respondent in the answering affidavit, and despite the fact that the matter was postponed on the previous occasion due to non compliance by the Applicant with the rules of the Court relating to the filing of a complete record with the Court.’

- [23] The point remains that for the period from 28 November 2007 to 19 January 2012, a period of over four years, the Applicant has made just about no effort to have the Third Respondent's bench notes transcribed and nor did he attempt a reconstruction of the transcript of evidence inspite of the willingness of the First Respondent to co-operate in that regard.

- [24] At the hearing of this matter, the Applicant's attorney informed this Court that he would place no reliance on the transcript of evidence given the fact that it was pockmarked with enumerable passages marked inaudible. After the argument presented by the First Respondent's Counsel, the Applicant's attorney, on realising his difficulties in this matter, requested this Court to have regard to the Third Respondent's handwritten bench notes in order that this Court should determine what is relevant and what is not. This Court has obviously declined to do so. It is not the place of this Court, even as a Court of equity, to aid a litigant who has acted in a tardy and grossly negligent fashion in prosecuting a review application that has been contaminated by egregious delays.

[25] In the case of *Metalogik Engineering and Manufacturing CC v Fernandes and Others*,<sup>3</sup> the Labour Court held that it cannot review an arbitration award on its merits without a proper record of what transpired in the arbitration hearing. The Applicant is obliged, in the absence of a coherent transcription of the record of evidence led at the arbitration, to reconstruct the record.

[26] In the case of *Lifecare Special Health Services (Pty) Ltd t/a Ekuhlengeni Care Centre v CCMA and Others*,<sup>4</sup> the Labour Appeal Court explained how a reconstruction of a record should be undertaken as follows:

‘the tribunal (in this case the Commissioner) and the representatives... come together, bringing their extract notes and such other documentation as may be relevant. They then endeavour to the best of their ability and recollection to reconstruct as full and accurate a record of proceedings as the circumstances allow. This is then placed before the relevant Court with such reservations as the parties may wish to note...’

[27] The Applicant was mindful that the Third Respondent's bench notes were largely illegible. In fact, on 29 March 2010, the Applicant's attorney sent a letter to Krino Transcription Services to have these handwritten notes transcribed. This never materialised and there is no indication that the Applicant bothered to pursue the issue.

[28] All that was necessary in this matter was for the Applicant to:

28.1 call upon the Third Respondent to read his handwritten notes into the record and have same transcribed;

28.2 call upon the Second Respondent to convene a meeting of the parties, attended by the Third Respondent, to reconstruct the missing portions of the record of evidence already prepared by the transcribers on 30 October 2007.

[29] There is no good and sufficient reason why the Applicant did not seize upon

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<sup>3</sup> [2002] 10 BLLR 985 (LC).

<sup>4</sup> [2003] 5 BLLR 416 (LAC) at para 17..

these initiatives in order to produce a proper record. In fact, no attempt has been made by the Applicant to reconstruct, yet it was his obligation to do so.

[30] In the case of *JDG Trading (Pty) Ltd t/a Russells vs Whitcher NO and Others*,<sup>5</sup> the Labour Appeal Court made it clear that an Applicant who seeks relief in a review on the basis of a defective record runs the risk that it will be unsuccessful on that ground alone. This must be based on the simple principle that 'evidence at the heart of the attack on the decision of a Commissioner must be "properly available" to the reviewing Court.'

[31] In as much as the Applicant's attorney suggested that the record of the evidence led at the arbitration hearing before the Third Respondent be ignored, it is interesting to note that in the review application, the grounds for review were that the Third Respondent committed a gross irregularity by-

31.1 failing to apply his mind to the facts of the matter and applicable legal principles;

31.2 failing to consider relevant facts and considering irrelevant ones instead; and

31.3 his decision is not supported by the facts and evidence led at the arbitration.

[32] The Applicant never amplified his papers upon delivering the record. This led the Applicant to the following argument, on one hand, the Applicant expected this Court to consider his challenge to the Third Respondent's alleged misdirection on the facts established in the arbitration proceedings, and simultaneously the Applicant expected this Court to ignore the incomplete transcript of evidence. These approaches were manifestly incompatible. This is not what this Court is tasked to do nor is it acceptable for a Court to entertain a guessing game about what evidence was tendered in the arbitration proceedings.

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<sup>5</sup> [2001] 3 BLLR 300 (LAC).



[33] Lastly, and as an aside, what is apparent from the Third Respondent's detailed award is that the Applicant was dissatisfied that after three of his fixed term contracts with the First Respondent were renewed, his employment was not made permanent by the First Respondent. In that regard, he claimed an unfair dismissal and an unfair labour practice.

[34] The Third Respondent stated at page 19 of the arbitration award:

‘the Department (of Land Affairs) is tasked to deal with the issue of land restitution in terms of the Land Restitution project. The period during which it was to finalise its work was extended on a number of occasions, which resulted in its offering fixed period contracts to its employees which were extended on a number of occasions. The fixed term contracts of the Applicant were extended on at least 3 occasions. Initially, the project was to have been completed by December 2005, which was then extended to 2008. As a result thereof, and as result of the concerns of employees as to their situation beyond that period, the Respondent sometime in 2003 – 2004, agreed to convert the fixed term period contracts to permanent contracts in order to create stability and job security for the contract employees who opted for such conversion.’

[35] It was common cause on the affidavits exchanged between the parties in the review that the Applicant had been employed as one of these fixed term contract employees who was given the option to apply to convert his fixed term contract status to that of a permanent employee of the First Respondent. In opting to apply for such conversion, the Applicant's attorney conceded in argument that the Applicant had no guarantee, or legitimate expectation, that he would be appointed to a permanent position. The Applicant had specifically agreed in the written application for conversion that in the event that his conversion application failed he would simply be required to serve out the remaining unexpired portion of his third and last fixed term contract.

[36] It is also common cause that the Applicant, in the same manner as the other fixed term contract employees, was subjected to an internal and external assessment to determine his suitability for appointment to such permanent positions. The internal process was reliant on various factors

such as performance, disciplinary and work records and the like. The external assessment was conducted by a completely external and independent service provider to the First Respondent, SHL Consultants. The Third Respondent found that these two assessments were complementary to each other.

[37] It was also common cause that the Applicant was unsuccessful in his application to be converted to a permanent employee and he served out the remaining period of his fixed term contract. However, upon that expiry date passing, the Applicant claimed an unfair dismissal, yet at that very time he had agreed the outcome of his conversion application if he was unsuccessful.

[38] I concur with the First Respondent's Counsel that these concessions obtained from the Applicant's attorney in argument drove a wedge through the *causa* of the review application.

[39] In the circumstances, I find as follows:

The review application is dismissed with costs.

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LEPPAN

Acting Judge of the Labour Court

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## APPEARANCES:

FOR THE APPLICANT: Mr M Khang of Mphafu Khang Inc.

FOR THE FIRST RESPONDENT: Adv W R Mokhari SC

Instructed by the State Attorney