



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case No: JR 993/08

In the matter between:

NEHAWU obo NTULI

Applicant

and

COMMISSIONER FOR CONCILIATION

MEDIATION AND ARBITRATION

First Respondent

KAREN KLIENOT N.O

Second Respondent

UNIVERSITY OF THE WITSWATERSRAND

Third Respondent

Heard: 10 August 2012

Delivered: 18 January 2013

Summary: Parties may be required or allowed to file further affidavits under exceptional circumstances.

JUDGMENT

LALLIE J

Introduction

- [1] This is an application in terms of section 145 of the Labour Relation Act 66 of 1995 (the LRA) in which the applicant seeks an order reviewing and setting aside an arbitration award issued by the second respondent (the arbitrator) on

8 April 2008. In the award, the arbitrator upheld the third respondent's decision to dismiss the individual applicant, Mr Ntuli (Ntuli).

Factual Background

- [2] Ntuli was employed by the third respondent as a security guard. On 18 April 2007, two bags containing abdominal swabs (swabs) were found by a security guard at the premises of the third respondent. The swabs were the property of the Johannesburg Hospital which is attached to the third respondent. An investigation was conducted and the viewing of surveillance cameras revealed that Ntuli was responsible for the unauthorised moving of the swabs from the hospital side to the premises of the third respondent. Ntuli was subjected to a disciplinary enquiry whose chairperson found him guilty of being in unauthorised possession of the swabs and dismissed him. It is the decision to dismiss Ntuli that was upheld by the arbitrator which forms the subject of the present application. This application is opposed by the third respondent.

Grounds for review

- [3] The applicant's main ground for review is that the arbitrator committed a gross irregularity in the manner in which she conducted the arbitration proceedings which resulted in the applicant being prejudiced. Substantiating the above submission the applicant alleged that the video footage tendered as evidence at the arbitration which the arbitrator relied on, should not have been allowed as it was not clear. The award was further attacked on the grounds that on the last day of the arbitration proceedings evidence on a compact disk was tendered as opposed to the first day when evidence on a video cassette was used. The compact disk contained evidence which differed materially from evidence led at the disciplinary enquiry. In the supplementary affidavit the applicant raised a ground of review that this matter be remitted to the first respondent to be arbitrated *de novo* by a different commissioner owing to the absence of the full record of the arbitration proceedings whose award is sought to be reviewed and set aside. It is common cause that the third respondent retrieved the video cassette which was used at the arbitration and submitted a compact disk of the footage which, on its version was viewed at

the arbitration. The applicant submitted that the evidence on the compact disc was a manipulated version of the evidence led at the arbitration. The third respondent refused to hand over to the applicant's attorneys the original video footage and suggested a joint viewing of the video be held by both parties at the offices of the third respondent's attorneys. The joint viewing did not materialise until the original footage went missing.

- [5] The applicant submitted that the original video footage is of vital importance in the present application as all the third respondent's witnesses who testified at the arbitration relied on its contents. The applicant further submitted that in the absence of the original video footage neither its attorneys who were not present at the arbitration nor this court will be in a position to determine whether the arbitrator applied her mind to all the evidence which served before her. Another effect of the absence of the original video recording is that the applicant's ability to prosecute this review is curtailed as a substantial part of its case is captured in the unavailable video footage.
- [6] This application is opposed by the third respondent on the grounds that the applicant's submissions are incorrect and unsound in law. The third respondent submitted that the applicant is in possession of a compact disc in which footage is located which the applicant has not placed before court. It further submitted that the omission is irregular and fatal to the applicant's review application.
- [7] It is trite that in a review application in which the grounds for review are not limited to the contents of arbitration award but included the contents of the arbitration record, the applicant has a duty to provide all the evidence which served before the arbitrator whose award forms the subject of the review application. It is common cause that part of the evidence tendered at the arbitration was in the form of a recording which was not filed with the record of the arbitration proceedings as envisaged in Rule 7A(6). In the arbitration award, the arbitrator referred to video footage and video evidence which she used extensively in reaching her decision. In the founding affidavit, the applicant refers to video footage evidence which was allegedly not clear but the arbitrator relied on. The applicant further refers to the use of evidence of

both video cassette and compact disc on different days on which the arbitration hearing was held.

- [8] In its answering affidavit, the third respondent alleged that it appears from the record that the surveillance footage as contained in the compact disc was the evidence which was led at the arbitration during 3 April 2008 before the second respondent on which her findings were based. It is however common cause that the applicant's attorneys addressed a number of letters to the attorneys of the third respondent requesting to view the video footage which had been tendered as evidence at the arbitration. When the applicant's attorneys demanded the video from the second respondent they were advised that the third respondent had furnished the applicant with a compact disc which, according to the applicant, did not depict the incidents on the footage that was viewed at the arbitration hearing. In June 2012, the third respondent's attorneys invited the applicant's attorneys to a joint viewing of the original video footage on a date to be arranged, however, before the video footage could be viewed the first respondent's attorneys informed the applicant's attorneys that the original video footage had gone missing and that the only video footage available was the one which they had already furnished on a compact disc.
- [9] The material difference between the video footage which, according to the third respondent was tendered as evidence at the arbitration and other evidence which served before the arbitrator is that the applicant did not uplift the video footage from the first respondent for filing at this court. The third respondent took it from the first respondent after the arbitration. Whether the evidence tendered at the arbitration was contained in a video cassette or compact discs, it was received by the applicant for filing at this court for purposes of this review application some time after the arbitration had been held, not from the first respondent as envisaged in Rule 7 A (3) but from the third respondent.
- [10] The applicant alleged that the compact disc that it received from the first respondent in April 2010 is not the same video cassette or compact disc which was tendered as evidence at the arbitration. As the evidence on the

video footage is material and was used by the arbitrator in reaching her decision, the applicant seeks an order reviewing and setting aside the arbitration award because of the absence of the video footage. A decision to review and set aside an arbitration award is not taken lightly. It must have a valid basis. This court cannot set aside an award as a result of opportunistic conduct by one of the parties. I accept that the full record of the arbitration proceedings has not been filed. This court therefore has not been favoured with all the evidence which served before the arbitrator. The applicant has not filed the compact disc which according to the third respondent, contains evidence which served before the arbitrator, an allegation denied by the applicant. Even if the footage is in dispute there was a duty on the applicant to file the compact disc and give the court an opportunity to deal with it and make a determination irrespective of its opinion of its contents.

[11] I have considered the third respondent's submission that this matter stands to be dismissed owing to the applicant's failure to file the discs. Considering the circumstances surrounding the applicant's failure to file the disc and the third respondent's contribution to the inability, I am not convinced that dismissing the matter is a correct and fair decision. I am of the view that it will be appropriate to order the parties to file further affidavits.

[12] In the circumstances, the following order is made:

12.1 The applicant files a reconstructed record by filing the compact disc it received from the third respondent in April 2010 within ten days.

12.2 The applicant files any supplementary affidavit within ten days of the filing of the reconstructed record.

12.3 The third respondent files an answering affidavit to the supplementary affidavit within ten days of the filing of the supplementary affidavit.

12.4 The applicant files a replying supplementary affidavit within five days of the filing of the supplementary answering affidavit.

12.5 Costs reserved.

LALLIE J

Judge of the Labour Court

APPEARANCES

FOR THE APPLICANT: M Manetje of Thaanyane Attorneys

FOR THE RESPONDENT: Advocate MA Lenox

Instructed by: Mahons Attorneys

Labour Court