



REPUBLIC OF SOUTH AFRICA

Not reportable

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR 868/13

In the matter between:

PASSENGER RAIL AGENCY OF SOUTH AFRICA

APPLICANT

and

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

FIRST RESPONDENT

JOSEPH TSABADI N.O

SECOND RESPONDENT

TUMISHO MICHAEL MASHIGE

THIRD RESPONDENT

Heard: 9 September 2015

Delivered: 11 September 2015

JUDGMENT

VAN NIEKERK J

- [1] The third respondent, Mr. Michael Mashige, is a train driver. He was dismissed by the applicant (PRASA) on 23 October 2012 after a disciplinary hearing into charges of misconduct, in particular, that he brought the company to disrepute and that he made false allegations of corruption against the then group CEO, Mr. Lucky Montana. Mashige (the employee) disputed the fairness of his dismissal and referred the matter to the first respondent for arbitration. The arbitration was conducted by the second respondent, to whom I shall refer as the arbitrator. PRASA failed to attend the arbitration proceedings, for reasons that are not disclosed. The proceedings continued in PRASA's absence and after hearing evidence from the employee, the arbitrator made an award in his favour. Specifically, he ordered that the employee be reinstated with four months' back pay.
- [2] In these proceedings, PRASA seeks to review and set aside the arbitrator's award. It does so on three grounds. The first is a challenge to the arbitrator's finding that the employee services were terminated without there being a formal disciplinary hearing; the second is that the employee's dismissal had been effected without regard to the statutory code of practice; the third is that the arbitrator erred in making a finding that the reasons for the employee's dismissal were trumped up and designed with the sole purpose of getting rid of him.
- [3] I deal first with the issue of the absence of the record of the proceedings under review. The documentary evidence produced at the arbitration hearing has been filed. What is missing from the record is a transcript of the evidence that was proffered by the employee. In paragraph [3] of his award, the arbitrator pertinently notes that the arbitration proceedings were digitally recorded. He

also took handwritten notes. As long ago as 3 October 2013, the employee's current attorney of record notified the applicant's attorneys that there was no transcription of the record of proceedings nor was there any transcript of the commissioner's handwritten note. The employee's attorneys specifically recorded that having regard to the grounds for review articulated in the founding affidavit, it was essential to have a proper record of the arbitration proceedings. On 8 October 2013, and in the absence of any reply to the enquiry relating to the availability of the record, the employee's attorney again wrote to the applicant's attorney making enquiry as to the availability of the record. A further letter was sent on 10 October 2013, after telephone discussions between the parties' respective attorneys on the availability of the arbitrator's handwritten notes. The employee's attorney had herself, on 8 October 2013, enquired from the CCMA as to the availability of a record. Despite these persistent enquiries, PRASA failed to file either a transcription of the arbitrator's handwritten notes, or transcription of the recording of the arbitration proceeding. There is no explanation on affidavit as to the fate of either record – in submissions from the bar, PRASA's representative seemed to apportion at least part of the blame onto the employee's attorney.

- [4] The provisions of Rule 7A are clear. It is incumbent on an applicant in the review proceedings to file the record of the proceedings under review. The practice manual applicable in this court requires the record to be filed within 60 days of the applicant being notified by the registrar of the availability of the record and goes further to provide that in the absence of any application to extend the 60 day period, the failure to file the record timeously has the consequence of the application being regarded as having been withdrawn. These provisions are, of course, consistent with the statutory purpose of the expeditious resolution of labour disputes and indeed, are intended to advance that purpose.
- [5] In *Karabo Terrence Kgoadi v CCMA & others* (JR 2127/2010, 29 November 2013), this court reviewed a number of judgments concerning an applicant's obligation to file a record and the consequences of a failure to do so. The general

rule is that the failure to file a record (at least that part of it that is relevant to the review application) has the consequence that the court ought properly to dismiss the application on that ground alone. This approach has received the imprimatur of the Labour Appeal Court, which in *JDG Trading (Pty) Ltd t/a Russells v Whitcher NO & others* (2001) 22 ILJ 648 (LAC) said at paragraph [13] of the judgment that in the absence of a transcribed record of the proceedings, the court is not in a position to properly adjudicate on the application before it and ought in those circumstances to dismiss the application. Later cases (e.g. *Solidarity obo Botha v CCMA & others* (2009) 30 ILJ 1363 (LC) have suggested that where an applicant is in breach of the duty to provide the review court with a full transcript of the proceedings, the review application must be dismissed or struck from the roll. In any event, it is incumbent on an applicant where there is no record or where the record is inadequate, to explain why the record is not complete and to indicate in full the steps taken to ensure that the record was placed before the court.

- [6] In the present instance, there is no such explanation before the court. PRASA's representative boldly asserted that certain steps had been taken and referred to correspondence between the parties' respective legal representatives. This explanation, coming as it does from the bar, carries no weight and to the extent that it was implied that the failure to file the record was somehow the fault of the employee's attorney, there is absolutely no merit in this assertion. In short, PRASA's failure to file a complete record, compounded by its failure to furnish an acceptable explanation for that failure, as the result of that the application stands to be dismissed
- [7] The importance of a record cannot be overemphasised. The test for review that has recently been affirmed by the Supreme Court of appeal and the Labour Appeal Court requires this court to examine the record and to determine ultimately whether notwithstanding any defects in an arbitrator's reasoning or any other reviewable irregularities on the arbitrator's part, the result of the proceedings can nonetheless be sustained by reference to the record. Where

there is no complete record, this is obviously impossible especially where, as in a case such as the present, the grounds for review are predicated on what are contended to be conclusions and findings that are not supported by the evidence. It is not open to an applicant, and in the present instance to PRASA, who failed to file a complete record and then to make submissions regarding the arbitrator's evaluation of the evidence by reference to that evidence. The summary of evidence contained in an arbitrator's award is intended to be precisely that. It is not a substitute for record and it is by no means a basis from which the reasonableness of any conclusion reached by the arbitrator can be ascertained.

- [8] Even if I am wrong in my view that the application should be dismissed on account of PRASA's failure to comply with its obligations in respect of the record, none of the grounds for review advanced by PRASA have any merit. In relation to the first ground, a careful reading of the arbitration award discloses that the arbitrator did not find, as PRASA avers, that there was no formal disciplinary hearing. The relevant sentence in paragraph [12] of the award reads as follows:

The reason for the termination of the applicant services was not objectively established in a formal disciplinary hearing.

What the arbitrator clearly intended to convey is that the applicant had failed to establish a substantively good reason for dismissal at the disciplinary hearing that was held. This reading is consistent with paragraph [9] of the award in which the arbitrator specifically acknowledges that PRASA held a disciplinary hearing on 8 June 2012 and that the enquiry was postponed to various dates until the employee was ultimately dismissed on 22 October 2012. PRASA's submission that the arbitrator committed a reviewable irregularity by making a finding to the effect that they had been no disciplinary hearing is therefore simply incorrect.

- [9] The second ground for review, an averment to the effect that the arbitrator committed a reviewable irregularity by finding that PRASA had failed to comply with the relevant statutory code of good practice, is similarly predicated on a misreading of the arbitrator's award. What the arbitrator found, in paragraph [12]

of the award, is that the employee's dismissal had been effected without due regard to the code of good practice 'which emphasises both procedural and substantive fairness when effecting dismissal related to conduct and/or incapacity.' The arbitrator goes on in the same paragraph to find that the employee's dismissal was substantively unfair. The context of the reference to the statutory code of good practice is clearly one related to the arbitrator's finding, i.e. that PRASA had failed to establish a substantively sufficient reason for dismissal. The arbitrator does not suggest that PRASA failed to comply with the code of practice simply because it failed to convene a disciplinary hearing. Again, the premise on which the submission is advanced is entirely incorrect.

- [10] The third ground for review, as I understand it, suggests that the arbitrator committed a reviewable irregularity by finding that the charges against the employee had been trumped up. Is understood the submission, the arbitrator's finding is irrational because the evidence recorded in the arbitration award does not indicate the employee's response to the charges that were brought against him. In my view, does not open to PRASA to make submissions based on evidence which is not disclosed in that part of the record that is not available to the court in circumstances where it has failed in its statutory obligation to make the full record available to the court. A cursory reading of the arbitration award suggests that the employee had testified before the arbitrator that in his view, the charges brought against him were trumped up and that in the absence of any conflicting evidence and bound as he was, to make a finding only on the version proffered by the employee, the arbitrator made such a finding. In these circumstances, there is nothing irregular about the arbitrator's conduct. In any event, it is incumbent on the applicant to show more than any flaw in the arbitrator's reasoning or his conduct of the proceedings. The applicant must establish that despite any such lapses, the result or outcome of the proceedings falls outside of a band of decisions to which reasonable decision-maker could come on the available material. This is not the case that is made in the applicant's papers.

[11] For all of the above reasons, the application stands to be dismissed. In relation to costs, this court has a broad discretion in terms of s 162 to make orders for costs according to the requirements of the law and fairness. The employee was found to have been unfairly dismissed in arbitration proceedings that PRASA did not oppose. Notwithstanding the inevitable award made by default in favour of the employee, PRASA has initiated these review proceedings on grounds that patently have no merit. I was advised from the Bar that the employee has been unemployed since his dismissal some three years ago. I fail to appreciate on what basis he should not be entitled to his costs.

I make the following order:

1. The application is dismissed with costs.

ANDRÉ VAN NIEKERK

JUDGE OF THE LABOUR COURT

REPRESENTATION:

For the applicant: Mr. P Mosebo, Maserumule Attorneys

For the third respondent: Ms. C Gray, Charmain Gray Attorneys

Labour Court