



IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Not Reportable

Case no: D638/10

In the matter between:

PHUMULANI VITALIS NDAWO

Applicant

and

TANKER SERVICES

First Respondent

COMMISSIONER K. CHARLES

Second Respondent

THE NATIONAL BARGAINING COUNCIL

FOR THE ROAD FREIGHT INDUSTRY

Third respondent

Heard: 27 October 2016

Delivered: 2 December 2016

Summary: review. Application dismissed

JUDGMENT

GUSH J

- [1] The applicant in this matter applies to review and set aside the award handed down by the second respondent under the auspices of the third respondent and for the matter to be referred back to the third respondent to be considered *de*

novo. The application includes an application for condonation for the late filing of the review application. The condonation application was not opposed by the first respondent but taken no further in argument than the papers by the applicant

- [2] The applicant was employed by the first respondent as a driver. His duties involved driving a petrol tanker and making deliveries of fuel to specified service stations on a particular authorised route. On a number of occasions the applicant was found to have deviated from his route and stopped in Buccus road an area well-known as a “hot spot” where thefts of petrol occurred. The presence of his vehicle was determined by reference to a tracking system. On some of these occasions the applicant’s tachograph report had been defaced to obscure the detail.
- [3] The evidence relating to the applicants misconduct involved both the evidence from the tachograph and from a separate satellite tracking system. Coupled with the misconduct relating to the applicant being and stopping in an area where he was not supposed to be was evidence that after his return to the depot the clients to whom he had made deliveries complained that the amount delivered was short.
- [4] At the conclusion of the disciplinary enquiry the applicant was found guilty of the misconduct and dismissed. Dissatisfied the applicant referred a dispute to the third respondent who in turn appointed the second respondent to arbitrate the dispute
- [5] It is important at the outset to record the chronology of events leading to the review application being argued in October 2016:
 - a. The applicant was employed by the first respondent in August 2005 and was dismissed on 25 June 2008.
 - b. A dispute was referred to the third respondent on 8 August 2008 and a certificate reflecting that the dispute had not been resolved was issued on 5 September 2008.

- c. The bundle of documents filed in the matter contains an undated request for arbitration; a notice issued by the third respondent setting the arbitration down to 14 July 2009; documentation relating to the request that the matter be adjourned and confirmation that the arbitration proceeded on 19 February and 19 April 2010. There is no explanation of what caused the delay between the certificate issued on 5 September 2008 and the commencement of the arbitration on 19 February 2010.
- d. At the conclusion of the arbitration, the second respondent issued an award dated 4 May 2010 which award, the applicant avers he received on 13 May 2010.
- e. The review application was filed on 15 July 2010, 3 weeks late.
- f. On 5 November 2010, the third respondent filed a notice in terms of rule 7A(2)(b), 7A(3) and 7(9) of the Rules of this Court. This notice confirmed that the second and third respondents did not oppose the application and attached an index to the record comprising the arbitration award and proof of service; the bundle of documents used at the arbitration; the third respondent's documents relating to the matter and to compact discs.
- g. On 8 November 2010, the applicant's attorneys uplifted the record from the registrar of the court.
- h. On 24 January 2011, the registrar wrote to the applicant's attorneys recording that the documents uplifted in November 2010 had not been returned nor had the record be transcribed.
- i. On 25 January 2011, the applicant's attorneys wrote to the transcribers suggesting that only one of the CDs had been transcribed.
- j. It is clear from the papers that the applicant did not comply with the requirements of rule 7(8) in that having uplifted the record filed neither an

amendment nor variation to the notice of motion or delivered a notice that he stood by his notice of motion.

- k. On a March 2011, despite the failure of the applicant to comply with the rules, the first respondent having given notice of its intention to oppose the application filed an opposing affidavit.
- l. Nothing appears to have happened in the matter between March 2011 and April 2014 when the applicant's attorney appears to have realised that the record was incomplete and that steps should be taken to reconstruct it.
- m. In May 2014, the first respondent applied to the registrar for the matter to be archived in accordance with the practice directive and the matter was placed before Cele J in chambers. Cele J directed that the parties were to attempt to reconstruct the record. This directive was issued on 9 September 2014.
- n. There is nothing in the pleadings or notices to indicate when an attempt was made to reconstruct the record or the outcome of such attempt or attempts.
- o. On 12 June 2015, the applicant filed:
 - i. the arbitration award;
 - ii. a bundle of documents used in the arbitration;
 - iii. third respondent's documents relating to the matter;
 - iv. Transcript; and
 - v. A rule 7A(8) notice, somewhat surprisingly given the background to the matter simply stating: "**KINDLY TAKE NOTICE** that the applicant hereby **stands by** the Notice of Motion of 15 July 2010" (my emphasis).

- p. In response to this notice, the first respondent filed a further answering affidavit on 27 October 2015.
- q. The applicant filed a replying affidavit on 9 November 2015. Conspicuous by its absence in this affidavit is any reference whatsoever to the directive that the parties were to attempt to reconstruct the record or the outcome of such attempted reconstruction. The affidavit essentially suggests that the matter should be referred back to the third respondent be heard *de novo* on the grounds that the record is incomplete. It identifies the missing portions as being the evidence in chief of the witness Collin Nadar and the evidence of the witness Southwick. As will become clearer, the averment made in respect of Nadar borders on dishonesty.
- r. The pleadings having eventually closed, the matter was enrolled to be heard on 11 February 2016 when it was adjourned *sine die* by consent.
- s. Finally, the matter was set down and argued on 27 October 2016.

[6] Three indexed and paginated bundles of documents were filed:

- a. The pleadings: comprising the notice of motion, the first respondent's opposing affidavit, the first respondent's answering affidavit and the applicant's replying affidavit.
- b. Notices: including the rule 7A(8) Notice;
- c. The record including the documents used at the arbitration, the award and the transcript.

[7] In argument, the applicant averred that on the strength of the decision of the Constitutional Court in the matter of *Baloyi v Member of the Executive Committee for Health and Social Development, Limpopo and Others*¹ the mere fact that the

¹ (2016) 4 BLLR 319 (CC) (*Baloyi*).

evidence in chief of Nadar and the evidence of Southwick was missing, the dispute to be referred back to be considered *de novo*.

- [8] I do not understand the decision in *Baloyi* to be authority for the simple proposition that in all matters where the record may be incomplete that the award should be set aside and the matter referred back to be heard again.
- [9] Unlike the facts in *Baloyi*, the first respondent had not withdrawn its opposition to the application, a substantial portion of the record was available, an attempt to reconstruct the record had taken place and as I will deal with below an agreement had been reached on the evidence of one of the witnesses during the reconstruction exercise.
- [10] Before turning to the merits of the applicant's review and reliance on the missing portions of the record, it is necessary to deal with the directive issued by this Court and the issue of the reconstruction exercise undertaken by the parties.
- [11] As I have indicated above, conspicuous by its absence is any reference whatsoever in the pleadings to any attempt to reconstruct the missing portions of the record. The applicant's attorney however, who filed his heads of argument the day before the hearing (25 October 2016) saw fit to attach to his heads of argument a ruling issued by the second respondent following the reconstruction hearing.
- [12] It is not filed as a pleading nor is there an accompanying affidavit explaining it. The ruling reads:
1. Mr. Mhlanga represented the applicant and Mr. Ncingwana represented the respondent.
 2. The parties have agreed that the evidence of Colin Nadar as set out in the Commissioner's award is a true and correct reflection of his testimony at the arbitration.

[13] In his heads, Mr. Mhlanga simply records the following:

'In the reconstruction meeting held between parties and 24 October 2014 agreement was reached on the evidence of Mr. Colin Nadar as set out in the Commissioner's award as having been correctly captured and in respect of which the court can rely on. (sic) no agreement was reached on the evidence of Mr. Southwick nor could his testimony be reconstructed.'

[14] A number of issues arise from this averment. Firstly, in the answering affidavit filed 12 months after the reconstruction ruling, the applicant fails to deal with the reconstruction process or ruling, but makes the averment that the evidence of Nadar is missing despite the ruling and avers that the Commissioner's summary is not accurate and that the record is inadequate. This is at best for the applicant an apparent attempt to mislead the court.

[15] There is no record, or at least no record or ruling that has been filed by the applicant, regarding any agreement in respect to Southwick's evidence.

[16] In the applicant's founding affidavit under the heading grounds of review, the introduction avers that the second respondent's findings in her award constituted a gross irregularity and that her decision was one that no reasonable decision-maker could not have arrived at and that the award is irrational considering the evidence placed before her. The concluding paragraphs of the founding affidavit simply repeat these averments and add the suggestion that the second respondent committed misconduct.

[17] In between, the applicant disagrees with the second respondent's finding on the facts. These averments are akin to an appeal and in no way establish that the second respondent's award is reviewable.

[18] What the applicant fails to deal with is the finding by the second respondent that the applicant's evidence was not credible. In contrast the second respondent accepted the evidence of Colin Nadar and that the parties had agreed that her

summary of his evidence was “a true and correct reflection of his testimony at the arbitration.”

- [19] The replying affidavit filed by the applicant takes a matter no further. On the merits of the application, the applicant continues to raise what is in essence grounds of appeal. The applicant during the arbitration and the disciplinary hearing simply offered a bare denial in the face of the evidence of Nadar and Southwick. In the replying affidavit, apart from mendaciously attacking the second respondents summary of Nadar’s evidence simply refers to Southwick’s evidence being missing.
- [20] What is even more startling is that Mr. Mhlanga suggest in his heads of argument that the applicant in his replying affidavit “canvassed at great length the aspects that the record of proceedings provided by the 3rd respondent is completely inadequate” sic is simply not correct. What the applicant does, is to refer to what is missing from the record and suggests that in particular in his founding affidavit he attacks the second respondent’s summary of the evidence. This is not so. There is nothing in the founding affidavit to substantiate this averment.
- [21] Most importantly, a consideration of the award suggests that the second respondent:
- [22] ‘Deal[t] with the matter with the minimum of legal formalities [gave] the parties a full opportunity to have their say in respect of the dispute; identif[ied] the dispute [s]he was required to arbitrate; understood the nature of the dispute ... she was required to arbitrate; deal[t] with the substantial merits of the dispute; and [arrived at a] decision that another decision-maker could reasonably have arrived at based on the evidence.’²I am not satisfied that the applicant has in any way established that the second respondent’s award is reviewable. The second respondent has properly considered the dispute, recorded the evidence, analysed the evidence and come

² The *Sidumo* test. *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA and Others* [2014] 1 BLLR 20 (LAC).

to a decision that is eminently one to which a reasonable arbitrator could have arrived at.

[23] It is so that the applicant did not address the issue of condonation and only dealt with the merits. I am satisfied that as the applicant cannot succeed on the merits I therefore grant condonation for the late filing of the review and dismiss the application.

[24] As far as costs are concerned, the tardiness and manner in which the applicant has approached this matter is an anathema to the requirement of expediency when dealing with dismissal disputes. Not only has the applicant not explained the extensive and unacceptable delays but the failure to appropriately deal with the reconstruction and properly file the ruling is culpable. However, the first respondent must shoulder some of the blame for the inordinate delay. It is inappropriate for the first respondent to simply wait for the matter to be dealt with. Likewise, in the absence of the applicant filing the reconstruction ruling it was incumbent upon the first respondent to do so. In the circumstances an order for costs is inappropriate.

[25] Accordingly and for the reasons set out above, I make the following order:

- a. Condonation for the late filing is granted
- b. the applicant's application is dismissed;
- c. there is no order as to costs.

D H Gush

Judge of the Labour Court of South Africa
Johannesburg

APPEARANCES:

FOR THE APPLICANT:

S Mhlanga

Mhlanga Inc

FOR THE RESPONDENT:

Adv. C Goosen

Instructed by: Ngcingwana
Attorneys

LABOUR COURT