



Not reportable

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

Case no: JR 1992/2010

In the matter between:

PAULOS NKOSI

Applicant

and

**COMMISSIONER AHMED
CACHALIA N.O.**

First Respondent

**METAL AND ENGINEERING
INDUSTRIES BARGAINING
COUNCIL**

Second Respondent

WELLMAX METAL PRESSING

Third Respondent

**JEANINE EXECUTIVE
PLACEMENTS**

Fourth Respondent

Heard: 19 September 2018

Delivered: 25 September 2018

Summary: (Review – failure to file relevant portions of the record – application dismissed)

JUDGMENT

LAGRANGE J

Background

- [1] There were two applications before the court when it sat on 19 September 2018. The first is an application to review and set aside a ruling by an arbitrator that the fourth respondent ('JEP') was his employer and his unfair dismissal dispute should be arbitrated on that basis. The second is a counter-application by the third respondent ('Wellmax') to dismiss the review application. Since the second application could result in the substantive review application not being considered, that application was dealt with and judgment was reserved.

The arbitrator's jurisdictional ruling

- [2] On the basis that the termination of the applicant's employment had been affected by the JEP and his unemployment insurance form had been issued by JEP, by so doing, the arbitrator found that JEP had admitted being the applicant's employer. He also considered evidence that the third respondent ('Wellmax') had paid the fourth respondent monthly for salaries of employees placed by the fourth respondent with it. He considered the fact that the applicant had chaired disciplinary enquiries on behalf of Wellmax but held that did not indicate that he was an employee of Wellmax, as it was also consistent with him being contracted by JEP to work for Wellmax.
- [3] The arbitrator did not find it was necessary to determine whether or not the purported contract of employment between himself and Wellmax, which was adduced by the applicant in the course of his evidence was a fraudulent or not. At the hearing, both parties provided oral and documentary evidence and witnesses were cross-examined.

Previous Labour Court proceedings

- [4] The review and related applications have come before this court on a number of occasions. I will only outline those earlier proceedings most relevant to the background of the applications before the court. The record was lodged with the registrar by the second respondent on 3 September 2010, and included one compact disc containing the mechanical recording of the proceedings. The applicant chose not to transcribe the record at that stage.
- [5] The review application was initially enrolled on 14 July 2017. It was heard by the Honourable Acting Justice De Heuss but he was unable to deliver judgment and the matter was re-enrolled for a hearing *de novo* on 20 July 2018.
- [6] At the end of the hearing on 20 July 2018, Boda AJ made the following order
1. The record has not been transcribed and the notes of the arbitrator are very difficult to comprehend.
 2. The Applicant is ordered to deliver the transcribed record of the proceedings under review within 14 days of the order after which the normal rules will apply.
 3. The matter is postponed sine die.
 4. Each party to pay its own costs.
- [7] At that hearing, the applicant represented himself. When the matter was re-enrolled on 19 September 2018, he was represented by an attorney.
- [8] On 25 July 2018, the applicant filed an explanatory affidavit, in which he claimed that he had approached the bargaining council and had been advised that the recording of the proceedings was no longer available as the bargaining council does not retain records after five years. He also claimed that Boda AJ, had said that if the recordings could not be obtained, the matter should proceed on the available record. He made no attempt to have the notes of the commissioner typed up which the judge had stated were very difficult to comprehend.

- [9] On 17 August 2018, Wellmax launched the counter application to dismiss the review application in which some of the contentions of the applicant about what had transpired at the hearing before Boda AJ were disputed.
- [10] Mr Du Randt, who appeared for Wellmax, claimed that at the previous hearing before Boda AJ, the applicant had informed Du Randt that he had the mechanical record of the arbitration proceedings. He also said that the judge had explained at length to the applicant the need to transcribe the record and to have the arbitrator's notes typed. Mr Mashego, who appeared for the applicant on 19 September could not shed any light on this as he was not present.
- [11] In order to clarify what transpired at the hearing, I have listened to the digital audio record thereof. What is abundantly clear is the following:
- 11.1 Acting Judge Boda spent considerable time patiently explaining to the applicant that it would be in the applicant's own best interests to have the mechanical record transcribed.
- 11.2 The applicant repeatedly made it clear that he intended to rely on pages 23 to 28 of the applicant's bundle of documents. These pages contained the arbitrator's handwritten notes of the evidence.
- 11.3 He also made it clear that the reason he had not had the mechanical record transcribed was that, he did not see it as necessary for the purposes of the review proceedings and that he was relying on the provisions of Rule 7A(5) and (6) of the Labour Court rules which state:
- (5) The registrar must make available to the applicant the record which is received on such terms as the registrar thinks appropriate to ensure its safety. The applicant must make copies of such portions of the record as may be necessary for the purposes of the review and certify each copy as true and correct.
- (6) The applicant must furnish the registrar and each of the other parties with a copy of the record or portion of the record, as the case may be, and a copy of the reasons filed by the person or body.

11.4 The judge also advised that if the applicant wished to rely on the arbitrator's notes of the evidence he should have them typed and confirmed by the arbitrator.

11.5 During the hearing, Mr Du Randt told the court that the applicant had informed him that he had the mechanical record of the hearing. The applicant never disputed this during the hearing.

11.6 Before handing down his order, Judge Boda asked the applicant to elect whether or not to proceed without transcribing the record.

11.7 The applicant then agreed that he would have the record transcribed within 14 court days.

11.8 Although the order does not say so, the judge also made it clear that if the applicant wished to rely on the arbitrator's notes of the evidence that, he must have those typed up so they are legible.

11.9 The applicant then sought to argue the merits of his case relying on what he claims transpired in the hearing as set out in his heads of argument.

11.10 It was at that juncture that the judge explained again that he could not consider an account of the evidence at the arbitration, which was presented in argument by the applicant, and he proceeded to hand down the order above.

[12] Irrespective of what transpired at the previous hearing, when the matter came before me, the applicant had neither transcribed the record, nor had the arbitrator's notes been typed up and confirmed by the arbitrator. Accordingly, he had not complied with the express terms of the written order. No doubt his 'explanatory affidavit' was filed to explain his non-compliance therewith. In his explanatory affidavit he made no effort to justify why he did not at least have the arbitrator's handwritten notes typed and confirmed, if that is what he was content to rely on. What is patently misleading in the applicant's affidavit is his allegation in paragraph 3 of his affidavit that:

The Honourable Acting Justice Boda indicated that if the recordings could not be obtained from the Second Respondent, the matter would proceed on the record that is currently before the court.

That was clearly not a true reflection of what Judge Boda said and was also denied in Wellmax's founding affidavit in the dismissal application. The applicant did not respond to that denial by filing any answering affidavit.

The dismissal application

- [13] The third respondent seeks the dismissal of the review essentially on the basis that the applicant has failed to file the portions of the record relevant to the review and ignored a court order to that effect. It further points out that, it would face enormous prejudice in having to defend a dispute which is so old and where JEP, which was held to be the applicant's employer by the arbitrator was already liquidated in 2010.

Evaluation

- [14] The central issue to determine is whether the review can be determined without either the record of the evidence being transcribed or the arbitrator's handwritten notes being typed and confirmed by the arbitrator.
- [15] An applicant in review proceedings can elect only to rely on certain portions of the record. See e.g. **Lubbe v Roop NO ¹** where the court held

Rule 7A(5) ... does not require a party to reproduce the whole record of the arbitration proceedings when bringing a review application. ... Obviously, where it is not necessary to reproduce the whole record an applicant must nonetheless reproduce those portions which both support and tend to contradict its case on review. If a respondent believes the record produced is inadequate, it should indicate this in its replying affidavit, so any deficiencies in the record for the purposes of a proper consideration of the application may be remedied.

¹ (2012) 33 ILJ 1695 (LC) at par 7

- [16] In this application, the Wellmax contends the transcription of the record is necessary, so the parties do not agree that only a limited portion of the record is necessary for the purposes of the review.
- [17] The difficulty the applicant has is that, he does not contend that no portion of the record of oral evidence needs to be relied on. He claimed that the arbitrator's notes were sufficient, but then declined to even have these typed up and verified despite the clearest indication from Judge Boda that he must do that if he wanted to rely on them. Secondly, those notes were notes of evidence given by witnesses at the hearing. The best record of that evidence ought to be the transcription of the mechanical recording, but the applicant and his attorneys decided not to transcribe that. The applicant cannot rely on heads of argument which purport to recount evidence. Further, if regard is had to the applicant's grounds of review set out in his founding affidavit, those essentially are that the arbitrator's award was one that was unreasonable based on his alleged failure to consider certain evidence. That being the case, the applicant cannot hardly expect the court on review to consider those allegations without an appreciation of other evidence before the arbitrator having a bearing on the evidence that was supposedly ignored. Accordingly, in my view the applicant has failed to provide an adequate record of the relevant evidence.
- [18] Further, in ***JDG Trading (Pty) Ltd t/a Russells v Whitcher***², the Labour Appeal Court held that the Labour Court should not have considered the review application before it because it had only been provided with the commissioner's handwritten notes and an untranscribed tape recording. "In the absence of the transcribed record", Goldstein AJA held, "the court a quo was in no position to adjudicate properly on the application before it and ought accordingly to have dismissed it"
- [19] In light of the above, I am satisfied that, quite apart from any delays in the prosecution of the review which the applicant might be responsible for, the court is not in a position to adjudicate the review application properly on

² [2001] 3 BLLR 300 (LAC) 41 At 303 pars 11–13

the limited record filed by the applicant and the application should be dismissed.

[20] As Wellmax did not seek an order of costs, no order of costs will be made. The applicant did not seek costs either.

Order

[1] The review application is dismissed

[2] No order is made as to costs.

Lagrange J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:

R K Mashego

RESPONDENT:

J Du Randt of Du Randt, Du
Toit, Pelser Attorneys