

IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

Case Nos: C352 and C329 of 2017

In the consolidated matters between:

NATIONAL UNION OF METAL WORKERS

OF SOUTH AFRICA

First Applicant

B ABRAHAMS & 5 OTHERS

Second to Further Applicants

and

SOUTH AFRICAN ROAD PASSENGER

BARGAINING COUNCIL

First Respondent

STEPHEN BHANA N.O.

Second Respondent

AUTOPAX PASSENGER SERVICES

Third Respondent

ZUKISANI MBUSI

Applicant

and

SOUTH AFRICAN ROAD PASSENGER

BARGAINING COUNCIL

First Respondent

COMMISSIONER STEPHAN BHANA N.O.

Second Respondent

AUTOPAX PASSENGER SERVICE SOC LTD

Third Respondent

Date heard: 19 June 2019

Delivered: 14 August 2019

JUDGMENT

RABKIN-NAICKER, J

- [1] The Arbitration Award that is sought to be reviewed in the above matters¹, was handed down on the 24 March 2017. The applicants before the arbitrator were drivers of buses carrying passengers between Pretoria and Cape Town. The Arbitrator made the following award:

“The applicants’ dismissal was substantively fair. The application for relief is hereby dismissed.”

- [2] The Award in question does not have numbered paragraphs and the “Background to the Dispute and Evidence” is contained under one heading. In his analysis of the evidence, the Arbitrator stated the following:

“It is common cause that the applicants did not drive their return journeys from Pretoria to Cape Town. The union’s defence was twofold i.e. there was no instruction to drive and secondly that they were not well rested to drive. The first defence is unsustainable in that it is the norm to drive to and from Pretoria as one instruction. In this scenario, the roster acts as the specific instruction. There was thus an instruction to drive both legs of the trip before they left Cape Town, which they did not comply with.

The applicants, by means of their witnesses, tried to prove that there was noise which prevented them from resting. The video shown is inconclusive as it was not made when they were there or by themselves. The author of the video could not recall when he made it. Furthermore the source of the noise cannot be determined and as the company witness pointed out, the window was opened to explanation of being show noise. The video is thus not reliable evidence.

The union’s witnesses were not very credible. Parts of their versions were never put to the company witness and thus have very little weight. In addition they could not dispute that only six of them out of a total of 33 people have complained about the noise. Their own witnesses had complied and driven back. These witnesses’ explanation of being afraid to be suspended if they complained is utterly without foundation. There was no uniformity about the cause of the noise. The notion that it might have been a geyser was not proven. Surely if they thought that it was the cause, someone should have found the

¹ Consolidated by order of this Court on 5/2/19

noisy geyser. Also it is unlikely a geyser would be stored inside a flat roofed structure.

The respondent's version was more credible and probable and it had proven that the applicants were guilty of the allegations on the balance of probabilities. Given the level of trust that is inherent in the job, I can see no reason to interfere with the sanction and thus I find the dismissal to be fair. In the light of this I furthermore see no reason to deal with Mr. Abraham's from the arbitration separately²."

[3] The arbitration was heard on the 11th November 2016, and 2 and 3 March 2017. The digital recording of the proceedings did not function. The only record of the proceedings before this Court are hand written notes by the Arbitrator and a document entitled 'reconstructive transcript' which was compiled to agree the atyped version of those minutes. This was done in a meeting between the third respondent's HR manager and the applicants' union official, together with the applicants on March 8 2017. On the 17 September 2017 a directive was issued by the late Judge Steenkamp that the parties should meet to reconstruct the record. The 'reconstructive transcript' was filed on the 29 May 2018. There is no indication that any attempt was made to meet with the Arbitrator.

[4] The issue of the scanty nature of the record was raised by the applicant in case number C329/17. The third respondent's attitude is well summarized in its submissions on this issue, which I record as follows:

"During the reconstruction proceedings, Applicant and/or his legal representative had the opportunity to address issues and evidence that had been led but may not have been included in Second Respondent's notes in order for the parties to reach agreement in respect thereof or for it to be placed on record whether the presentation of certain evidence was in dispute. As the applicant in the review application, it was Applicant's responsibility to ensure that he placed the best record before this Honourable Court. However, neither Applicant nor his legal representative raised the issues that he attempts relying upon in his supplementary affidavit during the reconstruction proceedings. Applicant therefore failed to utilize the opportunity afforded to him to fully

² Abrahams was not present at the arbitration but was one of the employees who referred the dispute.

address any alleged deficiencies in the record and did not take all the reasonable steps to ensure that a record as complete as possible is placed before this Honourable Court. It is submitted that Applicant's attempt to now rely on alleged deficiencies in the record in an attempt to bolster his review application is purely opportunistic. Accordingly, any prejudice allegedly suffered by Applicant (which Third Respondent denies) is as a result of his failure to fully utilize the opportunity afforded to him and is as a result of his own conduct."

- [4] The third respondent cites **Lifecare Special Health Services (Pty) Ltd t/a Ekuhlengani Care Centre v CCMA & Others**³ as a footnote to the above submissions and in particular paragraph 17 of that Judgment, which reads as follows:

"[17] A reconstruction of a record (or part thereof) is usually undertaken in the following way. The tribunal (in this case the commissioner) and the representatives (in this case Ms Reddy for the employee and Mr Mbelengwa for the employer) come together, bringing their extant 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 the proceedings as the circumstances allow. This is then placed before the relevant court with such reservations as the participants may wish to note. Whether the product of their endeavours is adequate for the purpose of the appeal or review is for the court hearing same to decide, after listening to argument in the event of a dispute as to accuracy or completeness."

- [5] From the quotation above, it was perfectly in order for the applicant in C329/2017 to note his concerns about the record. In addition, Lifecare's dictum that it is the Court that must decide on the adequacy of the record in a review application in this Court, has been underscored by the Constitutional Court per Moseneke DCJ (as he then was) in **Baloyi v Member of the Executive Committee for Health & Social Development, Limpopo & others**⁴ as follows:

"[28] At some stage, the Labour Court ordered the parties to reconstruct the record of the arbitration proceedings. According to the applicant, the

³ (2003) 24 ILJ 931 (LAC)

⁴ (2016) 37 ILJ 549 (CC)

reconstruction proved impossible. The applicant says that the arbitrator then delivered to the registrar his handwritten notes without consulting him. Those were later typed out and filed in the Labour Court. The result was that the court had both the handwritten and typed versions of the notes. The applicant says that he disputed those of the arbitrator's notes in which the arbitrator recorded that he had made certain concessions. Of this, the Labour Court noted that the applicant 'had the opportunity when filing his initial supplementary affidavit with the transcript of the proceedings, to deal with the correctness of the arbitrator's notes containing the concessions. Instead, he elected to stand by his founding affidavit and filed the notes with the concessions'.

[29] Despite acknowledging the applicant's objections, the Labour Court felt it apt to adjudicate the review application on the merits even though there was no complete record of the arbitration proceedings before it. It seems to have accepted that the handwritten notes and typed version constituted a transcript of the arbitration proceedings. It dealt with the matter as if it had the complete record of the proceedings...

[36] There may be cases where it will be contentious to determine a review of arbitration proceedings in the absence of a record, or what remedy should follow when no proper record is available. In this case, it was improper of the Labour Court to dismiss the review without a proper record of the arbitration proceedings in the face of evidence that no record existed. This presents this court with a choice: we can send the matter back for rehearing before another arbitrator, which will be cumbersome and unduly hard on the applicant, or intervene on the merits now..."

- [6] In these applications, the Court is dealing with a dispute that led to the dismissal of several employees. At issue was whether long distance bus drivers could refuse to obey an instruction to report for duty when they alleged they were not rested enough to drive. The matter before me does not only concern the parties to the dispute, but also the wider public who are passengers on these buses. It appears to the Court that in such a situation it is not apt for it to make a decision on review without a proper record of the proceedings. It would be in the interests of all parties to the dispute, and in the

public interest, for the dispute to be arbitrated anew, even though this will mean a delay in the finality of the matter.

[7] For the above reasons, I grant the condonation applications sought in these reviews and make the following order:

Order

1. The arbitration award under case number RPNT3675 is hereby reviewed and set aside.
2. The dispute is remitted to the SARPBC for rehearing before an arbitrator other than S. Bhana N.O.

H. Rabkin-Naicker

Judge of the Labour Court

Appearances:

Applicants: ML Davis instructed by Van Rooi Attorneys

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Third Respondent: Maserumule Attorneys