



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case no: JR 1611/16

In the matter between:

MOGALE CITY LOCAL MUNICIPALITY

Applicant

and

IMATU OBO KGOMOTSO MOREKI

First Respondent

**THE SOUTH AFRICAN LOCAL
GOVERNMENT BARGAINING COUNCIL**

Second Respondent

COMMISSIONER M.N.S DAWSON NO

Third Respondent

Heard: 17 July 2019

Delivered: 29 January 2020

Summary: Rule 11 Application to dismiss the Review Application due to lack of prosecution – Section 158 (1) (c) to make the arbitration award and order of court – whether the missing parts of the record is material to the determination of the review – delay in the reconstruction of the record – whether all reasonable steps were undertaken to reconstruct the record – Rule 11 and s158 (1) (c) applications dismissed – matter remitted to the Second Respondent to be heard *de novo* by another Commissioner.

JUDGMENT

MOGANE, AJIntroduction

- [1] This is an opposed application to dismiss a review application due to lack of prosecution and an application to make an arbitration award an order of this Court.

Background facts

- [2] Kgomotso Moreki (the employee), a member of the First Respondent, IMATU, was employed by the Applicant as an Administrative Officer: Credit Control. The First Respondent was dismissed on the 05th of June 2015 after being found guilty in a disciplinary inquiry on charges of fraud and corruption.
- [3] Aggrieved thereby he/she referred a dispute concerning the fairness of the dismissal to the Second Respondent. The dispute was arbitrated upon by the Third Respondent, who on 1 August 2016 issued an award which reinstated the First Respondent with back pay without loss of benefits from the date of the dismissal.
- [4] There is a dispute between the First Respondent and the Applicant in terms of when the award came to the attention of the Applicant. The Applicant asserts that the award came to its attention on 10 August 2016, whereas the First Respondent states that the award was served on the parties on 4 August 2016.
- [5] The Applicant, aggrieved by the award launched an application in terms of section 145 of The Labour Relations Act¹ (LRA) on 22 September 2016.
- [6] The Second Respondent was, according to the notice of motion, supposed to file the record of the arbitration proceedings with the Registrar of this Court on 6 October 2016. Instead, such a record was only filed by the Second Respondent on 4 November 2016.

¹ No 66 of 1995, as amended.

- [7] On 7 November 2016, the Applicant uplifted the record and same was sent to the transcribers for transcription.
- [8] The Applicant perused the transcribed record on 28 November 2016 and discovered that the record was incomplete in that the testimony of the Applicant's witness, Ms Francina Mokoto was missing. Furthermore, the transcribed record did not capture the proceedings on 13, 20 and 26 May 2016.
- [9] On the very same 28 November 2016, the Applicant wrote to the Second Respondent advising the Second Respondent that the recordings of the arbitration are incomplete. On 29 November 2016, the Second Respondent advised the Applicant that a reconstruction of the evidence is recommended.
- [10] On or about 15 December 2016, 13 January 2017 and 24 February 2017, the Applicant wrote letters to the Second Respondent requesting a date upon which the reconstruction exercise could take place. Such letters did not yield any results from the Second Respondent which then necessitated the Applicant to address a letter on 2 March 2017 to the Second Respondent's Head Office.
- [11] On 14 March 2017, the Second Respondent sent a letter to the Applicant informing the Applicant that the Third Respondent was on sick leave and that the Second Respondent is not certain when the Third Respondent could be available for reconstruction purposes.
- [12] On 15 March 2017, The Applicant sent a letter to the Second Respondent requesting a date for reconstruction, and a further letter was also sent on the 7 April 2017.
- [13] On 24 April 2017, the Second Respondent issued a notice of set down for the reconstruction. In terms of the notice of set down, the reconstruction was set to take place on 18 May 2017.
- [14] The reconstruction failed to take place on 18 May 2017 due to the fact that the Applicant's representative did not have his handwritten notes with him, and

further, that the third respondent had misplaced the file. The matter was thus postponed to 6 June 2017

- [15] The reconstruction did not proceed on 6 June 2017 as the First Respondent's representative (IMATU) failed to attend to the Second Respondent for purposes of reconstruction and had without consent from the Applicant, requested a postponement.
- [16] On 9 June 2017, the Applicant wrote a letter to the Second Respondent, requesting that the reconstruction be enrolled on an urgent basis, and another follow up letter was sent on 6 July 2017 by the Applicant.
- [17] The Second respondent then set the matter down for reconstruction on 28 July 2017. Such reconstruction however failed to take place as the Third Respondent was sick and therefore could not attend the reconstruction. It is on the very same day that the Applicant further wrote to the Second Respondent, requesting another date for the reconstruction.
- [18] Several follow up letters were again made the Applicant and on 23 August, 20 and 21 September 2017. Moreover, on 21 September 2017, the Applicant was advised telephonically that the Third Respondent is still incapacitated and the Second Respondent would respond by no later than 26 September 2017
- [19] On 2 October 2017, the Applicant wrote another letter to the Second Respondent expressing prejudice suffered due to the fact that the reconstruction is taking long to occur. This was preceded by a telephone conversation between the Applicant and the Second Respondent on the same day.
- [20] Seeing that the Second Respondent failed to respond to the Applicant's letter dated 2 October 2017, the Applicant then on 23 October 2017 wrote a letter to the First Respondent requesting that due to the challenges encountered in reconstructing the record, the Applicant suggested that the matter be remitted to the Second Respondent for a hearing *de novo* by another Commissioner other than the Third Respondent, alternatively, that the First Respondent consent to a request to be made to the Judge President for a directive on the further conduct as envisaged in paragraph 11.2.4 of the Practice Manual.

- [21] On 20 December 2017, a directive was issued by Barnes AJ which stated that the parties were to convene a meeting to effect the reconstruction of the missing portions of the record on or before 22 January 2018. Furthermore, the Applicant was to report to the Court, on affidavit on or before 31 January 2018, on the outcome of the aforesaid meeting.
- [22] The reconstruction as per the directive failed to take place due to the fact that the Third Respondent was no longer a Commissioner at the Second Respondent. The Applicant reported same to the Court as per the Court's directive.
- [23] Subsequent thereto, on 23 January 2018, the Applicant wrote to the First Respondent requesting the First Respondent's consent that the matter be remitted to the Second Respondent for a hearing *de novo* due to the fact that the Third Respondent is no longer a Commissioner at the Second Respondent.
- [24] On 19 March 2018, a further directive was issued by Judge Nkutha-Nkontwana calling upon the First Respondent to file an answering affidavit to the Applicant's report in terms of the directive by Acting Judge Barnes by no later than 25 March 2018.
- [25] On 27 March 2018, the First Respondent filed its answering affidavit as per the directive, stating that the matter should not be remitted to the Second Respondent for a hearing *de novo* due to the fact that the Applicant failed to arrange a meeting with the First Respondent to discuss the reconstruction of the record and that there was no need to involve the Second Respondent and the Third Respondent in the process of reconstruction.
- [26] On the very same day the First Respondent filed a Rule 11 application for the dismissal of the Applicant's Review Application and a s158 (1) (c) application, calling upon the Court to make the arbitration award an order of Court.

Evaluation

- [27] It is appropriate, in cases such as this one, where there are missing parts of the record and there has been a delay in the reconstruction of the record to

enquire firstly, whether the missing part of the record is material and secondly, whether the Applicant took all the reasonable steps to get the missing part or to reconstruct the record².

[28] The Applicant perused the transcribed record on 28 November 2016 and upon perusal discovered that the record was incomplete. The testimony of the Applicant's witness being Ms Francina Mokoto was missing. Over and above that, the transcribed record failed to capture the arbitration proceedings of 13, 20 and 26 May 2016.

[29] The Applicant, in its answering affidavit to this dismissal application stated that the testimony of Francina Mokoto adduced on 18 April 2016 as well as the proceedings of 13, 20 and 26 May 2016 do not form part of the record³. There seems to be no dispute to this assertion by the First Respondent⁴.

[30] The Applicant in its Heads of Argument has stated that the evidence of Mokoto and the further evidence adduced on 13, 20 and 26 May 2016 are vital for its Review Application.

[31] The conclusion I therefore reach is that the first step of the inquiry has been met i.e. the missing part of the record is material.

[32] That then, in my view enables me to consider whether the Applicant took reasonable steps to reconstruct the record. The background facts mentioned *supra* in the main capture the steps that have been undertaken by the Applicant in an attempt to reconstruct the record and I shall not repeat them here.

[33] While the attempts at reconstruction and the reasons for the failures therefore are common cause, the First Respondent's complaints with regards to the steps undertaken by the Applicant can be summarised as follows:

33.1 The applicant in requesting a reconstruction exercise in their various letters did not give the Second Respondent any deadlines within which the reconstruction process was to be finalised.

² *Francis Baard District Municipality v Rex N.O. and others* [2016] 10 BLLR 1009 (LAC).

³ Applicants answering affidavit at paragraph 19.

⁴ First Respondent's replying affidavit at paragraph 19.

33.2 From 29 July to 22 August 2017, the Applicant took no action to pursue its Review Application.

33.3 The Applicant should have attempted to do a reconstruction exercise with the First Respondent without involving the Second Respondent. The Second Respondent should only be approached in the event that the Applicant and the First Respondent failed to reconstruct on their own.

[34] I do not agree with the First Respondent's assertion that the Applicant failed to take appropriate and diligent steps to speedily prosecute the Review Application. The Applicant, upon realising that the transcribed record was incomplete, immediately wrote to the Second Respondent advising them of same. The letter written on 28 November 2016 by the Applicant to the Second Respondent solicited a response from the Second Respondent. The Second Respondent, upon receipt of that letter, responded to the Applicant and suggested a reconstruction of the record and that the Second Respondent will revert with dates for such purposes.

[35] Subsequent letters written by the Applicant to the Second Respondent between December 2016 and March 2017, still stressed to the Second Respondent to provide dates for the reconstruction. The Second Respondent at some stage indicated that the Third Respondent was on sick leave. Between May 2017 and June 2017, a reconstruction date was issued and for various reasons, not of the fault of the Applicant, the reconstruction failed to take place. In the period of July 2017, a notice of set down again was issued, and the reconstruction failed to take place due to the ill health of the Third Respondent. Therefore, the assertion by the First Respondent that from July 2017 to August 2017 the Applicant did nothing is unfounded. The facts point otherwise.

[36] In the period of October 2017, the Second Respondent failed to respond to the Applicant's letters. This then prompted the Applicant to write to the First Respondent requesting consent to remit the matter to the Second Respondent for a hearing *de novo*. It is thus worth mentioning that this letter was never responded to.

[37] I don't share the same sentiments by the First Respondent that they never responded to this letter because it was too little too late. At all material times, when the Applicant wrote letters to the Second Respondent about reconstruction, the First Respondent was copied in those letters. The First Respondent was therefore aware of the steps undertaken by the Applicant.

[38] In my view, if the First Respondent had issues in the way the Applicant was going about this reconstruction exercise, then the First Respondent should have made the Applicant aware of such. The First Respondent failed to do so. In *Toyota SA Motors (Pty) Ltd v CCMA and Others*⁵, criticisms levelled against Toyota for failing to prosecute the review timeously was, amongst others that for some period of time Toyota had left the Respondent in the dark about the status of the record and did not yield the Respondent's request for a meeting with a view to reconstruct the records.

[39] It is thus opportunistic in my view, for the First Respondent to want to have the Review Application dismissed when the First Respondent failed to respond to the Applicant's letters seeking consent for remittal due to the difficulty⁶ in reconstructing the record⁷. Furthermore, a directive was issued on 20 December 2017, directing the parties with regards to the reconstruction. Whilst the Applicant made attempts of reconstruction, the First Respondent did nothing. The criticism by the First Respondent that the Applicant should have scheduled a meeting with it instead of going back to the Second Respondent is without merit. The manner in which a reconstruction ought to be done was properly explained by the Labour Appeal Court in *Lifecare Special Health Services (Pty) Ltd t/a Ekuhlengeni Care Centre v CCMA and Others*⁸ as follows:

"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

⁵ (2016) 37 ILJ 313 (CC).

⁶ Applicant's letter dated 23 October 2017.

⁷ Applicant's letter dated 23 January 2018

⁸ (2003) 24 ILJ 931 (LAC).

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 dispute as to accuracy or completeness.”

- [40] It therefore follows that for the Applicant to comply with the issued directive, the Applicant had to still engage the Second Respondent with the view of having the First Respondent to be involved in the reconstruction exercise.
- [41] The normal practice in this Court is that before one party (the Applicant) could invoke a Rule 11 dismissal application, at least the other party (the Respondent) should be placed on terms first. It is only after those terms have not been complied with, that a Rule 11 dismissal application can be instituted. This version is supported by the judgement in *Karan t/a Karan Beef Feedlot and Another v Randall*⁹.
- [42] Further, in *MEC, Department of Sport, Recreation, Arts and Culture v GPSSBC and Others*¹⁰, the Labour Court held that a Rule 11 application should not be granted unless the dilatory party had been placed on terms, and when appropriate, after any further steps as may have been available to the aggrieved party to bring the matter to finality, have been taken. This means that the conduct of the aggrieved party is to be considered as well.
- [43] At no stage did the First Respondent place the Applicant on terms before instituting this dismissal application. In my view, the Applicant did what was necessary under the circumstances to have the reconstruction of the record ensue. At some stage, the Third Respondent was sick, and eventually, the Third Respondent was no longer a commissioner at the Second Respondent.
- [44] This inability to reconstruct cannot squarely lay at the door of the Applicant. The Applicant did what it could under the circumstances to have the reconstruction done, but it proved to be impossible. There can be no reconstruction in the absence of the Commissioner and the Commissioner's notes. The Applicant took all reasonable steps to reconstruct.

⁹ (2009) 30 ILJ 2937 (LC).

¹⁰ (2015) 36 ILJ 2893 (LC).

- [45] Faced with this, what then should happen when parties are unable to reconstruct. In *Balasana v The Motor Bargaining Council and Others*¹¹ the Court held that failure to provide a complete record, which is due to the fault of the Commissioner not properly recording the proceedings, and where the reconstruction is futile, the matter should be remitted to the CCMA for a fresh hearing. In this matter, just like in the *Balasana* judgment, reconstruction is futile. The matter should therefore be remitted to the Second Respondent for a hearing *de novo*.
- [46] Furthermore, should the Court not remit, I am of the view that the Applicant would suffer more prejudice as opposed to the First Respondent. The Applicant would have its review application dismissed without being adjudicated on the merits. The First Respondent would not be prejudiced as it would have a chance to have its merits adjudicated upon in due course.
- [47] The First Respondent, in its Heads of Argument and in Court argued that the Review Application is deemed to be withdrawn as the record has not been filed timeously. In my view, this argument by the First Respondent is non-suited.
- [48] The argument advanced by the First Responded is relevant in situations where a record is eventually available, but it has been filed out of time. In this case, there is no record to file. Even if there was a record to file, but it was filed late, it is trite that in that case, the Court would strike the matter off the roll and give the defaulting party an opportunity to apply for condonation for the late filing of the record and to apply for the reinstatement of the Review Application.
- [49] The Court in *Ralo v Transnet Port Terminals and Others*¹² held the plain and unambiguous wording of clause 11.2.3 of the Practice Manual is to the effect that the Applicant must be regarded as having withdrawn the Review Application, but that the Applicant could apply to reinstate the Review Application together with an application for condonation for the late filing of the record. The Court then in *Ralo* proceeded to strike the matter from the roll. As I have already mentioned, this finds no application in this matter.

¹¹ (2011) 32 ILJ 297 (LC).

¹² (2015) 36 ILJ 2653 (LC).

[50] I now turn to the s158 (1) (c) application. Having established that the matter should be remitted to the Second Respondent to be heard by another Commissioner other than the Third Respondent, it consequently follows that the s158 (1) (c) application fails.

[51] On the issue of costs, it is my view that law and fairness dictates that no costs order should be made.

[52] In the premises the following order is made:

Order

1. The application to dismiss the Review Application is dismissed.
2. The application to make the arbitration award an order of Court in terms of s158 (1) (c) is dismissed.
3. The matter is remitted to the Second Respondent to be heard *de novo* by another Commissioner other than the Third Respondent.

C. Mogane

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Sibuyi SC,

Instructed by: Phungo Incorporated.

For the First Respondent: IMATU Union Official