



IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Case No: D26/2021

Not Reportable

In the matter between:

FAWU OBO SIFISO ZULU AND 11 OTHERS

Applicant

and

HILDA GROBLER N.O.

First Respondent

COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION

Second Respondent

UNILEVER SOUTH AFRICA

Third Respondent

Heard: 13 June 2024

Delivered: This judgment was handed down electronically by circulation to the parties and / or their legal representatives by email. The date and time for handing-down is deemed 12h00 on 4 April 2025

JUDGMENT

ALLEN-YAMAN J

Introduction

[1] An arbitration award unfavourable to the applicants (referred to herein as 'FAWU' and 'the employees' where it is necessary to distinguish them) having been published on 3 December 2020, the applicants applied to this court for its review. This application was initiated outside the permissible six week time period and they accordingly applied for condonation for the delay.

[2] The third respondent delivered answering affidavits in opposition to both the applicant's application for condonation for the late institution of their review application as well as the review application itself, whilst the applicants delivered notices of objection to the late delivery of both the aforementioned affidavits, which resulted in the third respondent applying for condonation therefor.

[3] At the outset of the hearing the parties resolved these interlocutory issues as follows:

- The third respondent withdrew its opposition to the late delivery of the applicant's review application; and
- The applicant withdrew its objection to the late delivery of the third respondent's answering affidavit in the review application.

[4] With this, the only interlocutory issue which remained to be determined on an opposed basis was the application initiated by the applicants for the reinstatement of their review application, the record having been delivered outside of the permissible period of 60 days, and not all the documentation necessary for the prosecution of the review having been delivered within a period of one year from the date on which the review application had been launched. In the event that such an order is granted, the applicant's application for condonation for the late delivery of its review application is to be decided on an unopposed basis.

Background

[5] On 3 December 2020 the first respondent issued an award in which she dismissed the applicants' referral, having found that the dismissals of the employees had been substantively and procedurally fair. The applicants were dissatisfied with the outcome of the arbitration and, on 27 January 2021, initiated their review application.

[6] The second respondent delivered a Notice in terms of R7A(2)(b) read with R7A(3) on 9 February 2021 which led this court to transmit its Notice in terms of R7A(5) to the applicants one week later, on 16 February 2021. The applicants were thereby notified that the first respondent's handwritten notes, a bundle of documents and a mechanical recording were available for collection.

[7] It subsequently transpired the mechanical recording was not a complete recording of the arbitration which had been convened over a number of sittings, having commenced in February 2020 and having concluded on 26 November 2020. The particularity of the issues experienced by the applicants in obtaining a complete recording and the steps taken by them in that process will be considered hereafter. The recordings which had not been provided by the second respondent were ultimately furnished to the applicants by the third respondent's attorney in June 2022 which enabled the applicants to deliver the complete record by 18 July 2022.

[8] The delay in the delivery of the record resulted non-compliance by the applicants with the provisions of clauses 11.2.2 and 11.2.7 of the Practice Manual, which necessitated the initiation of the applicants' application for reinstatement.

Analysis

[9] This court's Notice in terms of Rule 7A(5) having been furnished to the applicants on 16 February 2021, the record was required to have been delivered on or before 17 May 2021. Having been delivered on 18 July 2022, the length of the delay was approximately fourteen months.

[10] Notwithstanding that the applicants had appointed FAWU's Johannesburg branch as the address at which it required notices and proceedings to be delivered to it in its Notice of Motion in the review application, this court transmitted its Notice in terms of R7A(5) to the telefax number of its Durban branch, as was the second respondent's Notice in terms of R7A(2)(b) read with R7A(3). Mr Sello Kuane, the FAWU legal officer who was responsible for the prosecution of the review application, explained that the transmission of the notification that the record had been filed with this court to Mr Sipiwe Dlomo, FAWU's provincial secretary for KwaZulu-Natal, caused the first of the delays as Mr Dlomo had been wholly uninvolved in the review application or, for that matter, any other Labour Court litigation.

[11] Not having received any notification that the record had been made available by March 2021, Mr Kuane attempted to contact FAWU's organiser at the third respondent, Ms Abigail Diko. He was then unable to reach her as she had been placed on incapacity leave. On 29 March 2021 he transmitted an email to the second respondent to which a letter was attached in which the second respondent was reminded of the need on its part to deliver the record. He received no response to his email and so attempted thereafter to reach an official of the second respondent telephonically, which attempts were unsuccessful until the middle of April 2021. He was then advised by one of the second respondent's case management officers, Ms Kirsty Payne, that the second respondent did not have the electronic record of the proceedings, however she advised him that she would contact the first respondent to locate it.

[12] This she must have done for, on 21 April 2021, the first respondent addressed an email to both Mr Kuane and the third respondent's attorney, Mr Brian Denny, in which she requested their assistance regarding the recordings of the arbitration proceedings,

'Could you perhaps assist by providing me with copies of the recordings in KNDB10415-19 on the following days: 27 – 30 October 2020?

I made the recordings on my cell phone at the time. Unfortunately I did not keep a copy of the recordings for myself in a separate file, and when my cell

phone was damaged beyond repair in December 2020, I lost those recordings.

I would appreciate it if you are able to assist by sending me the requested recordings via WeTransfer to my email address.'

[13] Mr Kuane had not himself made any recordings but, on the basis that Mr Denny had been able to provide transcriptions of the proceedings throughout the arbitration, believed that Mr Denny would be able to assist the first respondent. In the circumstances, a short while later he requested a local organiser, Mr Thembinkosi Ngubo, to contact the second respondent to establish whether the further recordings had been made available. Mr Ngubo subsequently advised him that he had been informed that recordings had been filed with the Labour Court. Upon request by Mr Kuane, Mr Ngubo attended at the Labour Court and uplifted the record which had been made available. This was conveyed to Mr Kuane who requested Mr Ngubo to convey the recording to Ms Diko, in order that she could facilitate the transcription thereof. That she was not then back at work, and that Mr Ngubo had then been unable to comply with Mr Kuane's request, was not conveyed to him.

[14] One of the employees, Mr Phumlani Ndumo, contacted Mr Kuane to ascertain the status of the review application in May 2021. Mr Kuane requested he direct his enquiry to Ms Diko, at FAWU's Durban branch. Ms Diko, then wholly unaware of the matter, requested Mr Ndumo to revert back to Mr Kuane, which he did. It was only then that Mr Ngubo informed Mr Kuane that he had been unable to ask Ms Diko attend to the transcription of the recording which he had uplifted, as she had been on leave at the time, and that he had left the recording with an administrator. It was also then that Mr Kuane became aware that no steps had been taken to have the recordings transcribed. He issued an instruction to Ms Diko to send the recording to Sneller as a matter of urgency, to have the recording transcribed, in response to which he was informed that the recording had since been lost.

[15] This led Mr Kuane to requesting Mr Ndumo to attend at the offices of the second respondent to download the recordings on a memory stick and to take the recording directly to Sneller, which he did. A quotation was provided by Sneller on 2 June 2021, and payment was approved by FAWU's Head Office on 25 June 2021.

Transcription of the recording was completed by 2 August 2021 and transmitted to Mr Dlomo, who in turn forwarded it to Mr Kuane on 3 August 2021. He did not immediately have the capacity to consider the transcriptions, but was able to do so towards the end of August 2021.

[16] Upon consideration of that which had been provided to him, he realised that the transcription was incomplete, and he requested Mr Dlomo to make enquiries from Sneller as to the cause thereof. The email transmitted by Mr Dlomo to Sneller on 31 August 2021 did not appear to convey Mr Kuane's request clearly. He stated,

'Kindly receive our humble request for the first copy of this matter which you have transcribed for us last year not the arbitration award you made two months ago. Our colleague from legal department have missed placed it. You may have emailed to both [M\[...\]](#) and or myself. We still have the recording of the same and only the transcribed document that we don't have.'

What previous transcription was then being referred to is unknown, however the response from Sneller the following day indicated that no transcriptions other than those which had recently been completed had ever been done.

[17] After a number of attempts by Mr Ndumo, he was given what he was led by the second respondent to believe were further recordings on 18 September 2021. By 21 September 2021 these had been delivered to FAWU's Durban branch and one of its employees, Mr Mpilo Makhathini was dispatched to deliver the recordings to Sneller. *En transit*, Mr Dlomo addressed an email to Sneller alerting it to the impending arrival of the recordings, and requesting a quotation for payment. Subsequent consideration thereof by Sneller revealed that the most recent recordings which had been provided were those which had already been transcribed. This caused Mr Kuane to believe that Mr Dlomo must have conveyed the incorrect recording to Sneller, and his request that Mr Dlomo ensure that a complete set of recordings be sent to Sneller. Mr Ndumo went again to Sneller and provided it with that which he had obtained from the second respondent. On 3 December 2021 Mr Dlomo once again requested Sneller to provide a quotation which was again met with the response by Sneller that the recordings provided had already been

transcribed. It was then that Mr Kuane discovered that the recordings provided by the second respondent remained incomplete.

[18] In consideration of the efforts which had by then been expended by FAWU and the employee, Mr Ndumo, to obtain the recordings, and the failure on the part of the second respondent to have provided the complete recordings, he then formed the view that a reconstruction exercise would be necessary and, to that end, he would be required to travel to Durban.

[19] No further attempts were made by Mr Kuane, or anyone else in the employ of FAWU, to secure the outstanding portion of the record until May the following year. In February 2022 FAWU's Deputy General Secretary requested all its Provincial Secretaries to provide the details of all outstanding Labour Court matters to the National Office. Mr Dlomo's response included reference to the present matter and the need on the part of the local office for assistance.

[20] In April 2022 that Mr Kuane and Mr Dlomo met with a number of the applicants in Durban where the status of the review application was explained to them, and they were advised that a reconstruction exercise was required to be undertaken in order to further prosecute the review application.

[21] Mr Kuane expressed this belief to Mr Denny when he encountered him in Durban whilst attending to another matter in the week of 23 May 2022. It was this encounter which led to the applicants being able to deliver the complete record, for it was subsequently established that Mr Denny did, indeed, have either or both the recordings and/or the transcriptions of those portions of the arbitration which the applicants had not been able to obtain from the second respondent. Mr Kuane obtained permission to instruct attorneys in the matter, pursuant to which the applicants' attorneys liaised with Mr Denny during the month of June 2022 who provided the applicants with those portions of the record which had been missing, thereby enabling them to deliver the complete record by 18 July 2022.

[22] Insofar as their prospects of success are concerned, the applicants raised a number of issues which were intended to be addressed in the review application.

[23] The dismissal of the applicants had occurred as a result of their participation in a protected strike. Pursuant to a picketing agreement having been concluded, conduct by certain of the third respondent's striking workers led to it having approached this court on 17 February 2019 to interdict such conduct. An order was obtained that day, in terms of which FAWU and the striking workers were interdicted from perpetuating certain violent conduct in breach of the picketing rules. Despite the interdict, the violent actions ensued the following day. The employees were dismissed pursuant to a disciplinary enquiry which was subsequently convened, the allegations of misconduct having been that they had each participated in having thrown glass bottles and/or stones at security officials and third party contractors, and/or having rolled rocks onto the road outside the third respondent's premises in order to impede access.

[24] The first respondent having found each of their dismissals to have been substantively fair, it was the applicants' case that she had committed a number of gross irregularities in the arbitration proceedings. These issues were asserted to have the likely result of the award being reviewed and corrected in due course. These concerned (1) the first respondent's conclusion that the employees had made material concessions from which it could be discerned that they had each committed the misconduct in question; (2) her acceptance that an employee, Mr Powerman Ngcobo, had been positively identified by the third respondent and had faced disciplinary action, despite the fact that it had been only Mr Denny's assertion to this effect; and (3) her failure to have taken into account certain of the applicants' evidence that a number of other employees had been identifiable as having committed misconduct, yet were not disciplined by the third respondent. The third respondent, on the other hand, denied that the award was reviewable.

[25] Self-evidently, the degree of delay is significant. It is also apparent from explanation provided that the fault therefor lies with both the second respondent and a number of FAWU's officials.

[26] The details of the delays in the production of the record have been set out above and will not be repeated. Considered holistically, the first period which

covered almost the entirety of 2021 was as a result of the failure on the part of the second respondent to have unequivocally advised the applicants that a portion of the record was unavailable. When it became apparent to the first respondent and officials of the second respondent that certain of the recordings had become irrevocably lost, the only step taken by them was to send an email to the parties in which a request for assistance was conveyed. When that was not forthcoming, the fact of the inability on the part of the first and second respondents to be of any further assistance was left to the applicants to determine on their own.

[27] Mr Kuane faced, in the course of 2021, the obstacle of having to rely on individuals who were themselves not familiar with Labour Court processes to assist him. The result of this was that the assistance rendered by the local organisers was haphazard and not of the standard which he may have been able to have expected had he been able to rely upon another legal officer, locally placed. It is evident that miscommunications and misunderstandings marred his ability to achieve the end he sought to achieve, being the production of the complete record.

[28] In this period, from January 2021 until the beginning of December 2021, it is clear that Mr Kuane made consistent efforts, within his own abilities in consideration of the exceptionally demanding workload under which he laboured, to obtain the records. Given the challenges which he faced, he may be forgiven for the periods of time in that year in which his attempts to secure the record were left in temporary abeyance.

[29] It does appear, however, that by the beginning of December 2021 his belief then formed that a reconstruction exercise would be necessary impeded him from taking any further steps in the matter. Insofar as the second period is concerned, it is evident that he did nothing to further the matter for a period of almost six months until May 2022. Save for a singular meeting which took place between FAWU officials and the employees, this period of time was wholly unexplained.

[30] It was only a chance encounter with Mr Denny, and Mr Denny's willing co-operation which ultimately led to the production of the record, rather than any proactive steps taken by Mr Kuane. It may be noted, however, that despite his failure to

have done anything in the furtherance of the review application in that six month period, it was he who raised the issue with Mr Denny, and expressed the belief that a reconstruction exercise was necessary. This was itself demonstrative of:

- the *bona fides* of his belief previously formed that Mr Denny did not have the further recordings which the first respondent had previously sought;
- the *bona fides* of his belief that a reconstruction exercise would be necessary; and
- the fact that the review application remained one which he, as a representative of FAWU, was intent on pursuing.

[31] Despite the deficiencies in the manner in which the review application was dealt with by FAWU's various officials, it is nonetheless clear that the employees themselves had no part to play in the delay. It is also apparent that they took an active interest in the review, their conduct having evinced a continued interest in the furtherance of the matter. Having made enquiries concerning the status of the review in May 2021, Mr Ndumo himself took an active part in efforts to obtain the recordings, having attended at the offices of both the second respondent and Sneller on at least two occasions. Other employees made regular enquiries concerning the progress of their claim. The last of the interactions between FAWU officials and the employees took place only one month before Mr Kuane discovered that the recordings could potentially be obtained.

[32] Whilst there may be circumstances in which the negligence of a litigant's representative may be imputed to the litigant itself, this court can conceive of no reason to do so in the present instance.

[33] As to the issue of the applicants' prospects of success, this court is not required to find in reinstatement applications that these are certain. The applicants were required to set out facts which, if established in due course, would entitle them to the relief which they seek in the review application. In consideration of the parties' respective affidavits read with the award itself, the applicants' various challenges to the award are compelling.

[34] Firstly, the applicants were correct in their assertion that the third respondent bore the onus to establish the fairness of the employees' dismissals. Despite this, the singular basis upon which the first respondent appears to have concluded that all but four of the employees had committed the acts of misconduct for which they were dismissed was by reason of certain concessions which she found to have been made by the employees themselves. Any concessions which were made by the employees that they had taken the actions described in the allegations of misconduct were required to have been assessed in relation to the categorisation of the actions by the third respondent as having been '*wrongful and unlawful*'. It was alleged by the applicants that, where concessions had been made, it had been their further evidence that their conduct had been the result of provocation and / or self-defence. If this is correct, then it would appear that in having found certain of the employees guilty on the basis of their own concessions alone, without contemporaneously having considered their defences of lawfulness and / or justification, the first respondent's finding may be susceptible to review and correction.

[35] The further issue complained of by the applicants was that of inconsistency in the application of discipline, an issue in respect of which the first respondent was alleged to have misdirected herself in relation to her treatment of the evidence relevant thereto.

[36] The first aspect of inconsistency concerned the manner in which the third respondent had treated another of its employees, Mr Powerman Ngcobo, it having been the applicants' case that he had been clearly identifiable in the video footage relied upon by the third respondent and appeared to have participated in the commission of the very same misconduct for which they had been dismissed. The first respondent's rejection of the argument that there had been any inconsistency by the third respondent in relation to Mr Ngcobo appears from the award to have been predicated, at least in part, on the reliance placed by her on the statement made by the third respondent's attorney that Mr Ngcobo had, subsequent to the dismissal of the employees, been positively identified and had been disciplined upon his return to work from paternity leave. This being the case the applicants' assertion that the first respondent had relied on a statement not made under oath in having rejected their claim of inconsistency may well be correct.

[37] Furthermore, it appears from the award that although a number of the third respondent's other employees could be seen participating in the misconduct in question, they were not disciplined for the reason that they had not been identified by the third respondent. Also from the award, the third respondent's evidence concerning the identification of the employees who were said to have participated in the misconduct was given by Mr Ruan Bezuidenhout who,

'... testified that he did not know any of the applicants and relied on the assistance and guidance from the respondent's managers to put names to the applicants who he had identified committing the alleged misconduct.'

[38] That portion of the applicants' evidence recorded in the award concerning this aspect evinced that one of the employees, Mr Jabulani Ngcobo testified to the effect that the people in the video footage were clearly visible and, this being the case, they were each perfectly capable of having been identified by the self-same person who had identified the employees who had been dismissed. The individual or individuals who had identified the employees, and who relayed this information to Mr Bezuidenhout, appears not to have testified at the arbitration. Without this evidence, the first respondent's conclusion that there had been no inconsistency was based on the evidence of Mr Bezuidenhout who himself had personally been unable to identify any of the employees without the assistance of the third respondent's management, or give any direct evidence concerning the alleged inability on the part of the third respondent to have identified the remaining workers. This finding may also be reviewable.

[39] The third respondent did not dispute that the employees would be prejudiced in the event that the review application is not reinstated. In the event that the award is, indeed, capable of being reviewed and set aside, to refuse to reinstate the application would result in employees who have potentially been unfairly dismissed being denied the opportunity to correct a potential wrong. Conversely, the third respondent's claim that it would sustain prejudice in the event of the converse order being granted was no more than the statement of such a conclusion without the assertion of any facts in substantiation thereof.

[40] It is clear that both the application to review the award and the reinstatement application are *bona fide* attempts to protect the rights of dismissed employees. In consideration of the factors dealt with herein, this court finds that the interests of justice require that the review application be reinstated, and that the applicants be granted condonation for the late delivery of the record.

[41] Insofar as condonation for the late initiation of their review application is concerned, in light of:

- the fact that the period of delay was very short, the application having been launched only 9 days outside the time period allowed;
- the conclusions which have been reached herein concerning the applicants' prospects of success and the question of potential prejudice to each of the parties; and
- the withdrawal of the third respondent's opposition thereto, there is no reason for this court not to exercise its discretion in favour of granting the applicants the relief they sought.

Costs

[42] The parties were in agreement that regardless of the result of this application, in view of the ongoing relationship between FAWU and the third respondent, each party would be responsible for the payment of their own costs.

Order

1. The applicants' application to review the arbitration award under case number KNDB 10415-19 dated 3 December 2020 is hereby reinstated.
2. The applicants are granted condonation for the late delivery of the record under case number KNDB 10415-19.

3. The applicants are granted condonation for the late institution of their application to review the arbitration award under case number KNDB 10415-19 dated 3 December 2020.
4. Each party is directed to pay its own costs.

K Allen-Yaman

Judge of the Labour Court of South Africa

Appearances

Applicant:

Ms P Naidoo, Cheadle Thompson and Haysom Inc.

Respondent:

Ms T Moodley, Norton Rose Fulbright South Africa Inc