REPUBLIC OF SOUTH AFRICA

Not reportable

Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR 761/2014

J 2289/2015

In the matter between:

DEPARTMENT OF AGRICULTURE: Applicant

FREE STATE

and

VUYO PEACH First respondent

Mzondi MOLAPO N.O. Second respondent

GPSSBC Third respondent

Heard: 3 November 2016

Delivered: 13 December 2016

SUMMARY: Review of arbitration award in terms of LRA s 145. Arbitrator held that employee's dismissal was unfair. Employer argues that employee was not dismissed but his employment was terminated by operation of law in terms of s 17(5) of Public Service Act. Record missing. Reviewed and remitted. *Baloyi v MEC for Health & Social Development, Limpopo* (2016) 37 *ILJ* 549 followed.

Counter-application in terms of rule 11 and s 158(1)(c) dismissed.

JUDGMENT

STEENKAMP J

Introduction

[1] Three issues serve before this Court:

1.1 An application by the Department of Agriculture in the Free State to review and set aside an arbitration award of the second respondent, Mr Mzondi Molapo, an arbitrator of the third respondent, the General Service Sectoral Bargaining Council (GPSSBC). The arbitrator had found that the Department had dismissed the first respondent, Mr Vuyo Peach (represented by his trade union, NEHAWU); and that the dismissal was unfair. That is the application under case number JR 761/2014.

1.2 A counter-application by the union and the employee in terms of rule 11 of this Court's rules to dismiss the review application due to the Department's delay in prosecuting it. That application was filed under case number J 2289/15.

1.3 Also under case number J2289/15, the union asks for an order in terms of s 158(1)(c) of the LRA that the arbitration award be made an order of court.

[2] After a case management meeting before Van Niekerk J on 3 June 2016, all three matters were placed on the opposed motion roll to be heard together on 3 November 2016.

[3] I will deal first with the rule 11 application in order to decide whether the review application should be heard. If not, the application in terms of s 158(1)(c) must succeed. If the review application is heard on the merits, the outcome of the application in terms of s 158(1)(c) depends on the outcome. If the review application succeeds, the award is set aside and cannot be made an order of court. If the review application fails, the award stands and can be made an order of court.

Background facts

[4] Mr Peach was suspended on full pay in February 2010. While he was on suspension, he was employed by the North West University at its Mafikeng campus in June 2010. He did not inform the Department. When the Department became aware of it in March 2011, it informed him that he was deemed to be discharged in terms of s 17(5) of the Public Service Act. The jurisdictional requirements for a deemed discharge are that an employee is absent without permission and assumes other employment without the employer's permission.

[5] The employee referred an unfair dismissal dispute to the Bargaining Council. Conciliation failed. He referred it to arbitration. The Department raised a point *in limine* that he had not been dismissed, but that his employment had been terminated by operation of law in terms of s 17(5) of the Public Service Act. The arbitrator disagreed. He found that the employee had been dismissed and that the dismissal was unfair.

[6] The Department lodged an application to review that award.

Application to dismiss in terms of rule 11

[7] The award was handed down on 24 February 2014. The Department delivered its review application in April 2014. It did not deliver a record of the arbitration proceedings until a year later. The union contends that the record is still incomplete, despite attempts by the Department to reconstruct it. For example, it does not contain the cross-examination of Mr Boiselo Mlambo, a key witness.

[8] Mr *Thaanyane,* for the union, argued that 'it is unclear how this Court shall determine the reasonableness or otherwise of the arbitration award … without all the evidence at its disposal'. He argued that the review application 'is incapable of being determined because the record is not complete'.

[9] The Department delivered its notice in terms of rule 7A(8)(b) in June 2016, together with the reconstructed portions of the record it had initially delivered in April 2015 and supplemented in April 2016. Mr *Thaanyane* argued that the review application should be dismissed because the

record is incomplete and because the Department has not adhered to the time periods set out in the Practice Manual of this Court.

[10] The Department offered this explanation for the delays:

10.1 The Department delivered its review application in April 2014. The Bargaining Council did not file the record, as it is obliged to do in terms of rule 7A(2) and (3).

10.2 On 13 June 2014 the State Attorney sent a letter to the Bargaining Council asking it to comply.

10.3 It appears that the Council did then file the audio recording, as the state attorney asked iAfrica Transcriptions to transcribe it on 24 June 2014.

10.4 On 27 June 2014 iAfrica raised concerns about the poor quality of the audio recording. The state attorney wrote to the Council again, pointing this out. On 20 November it asked for missing documents from the Council. The transcription went ahead despite the poor quality audio.

10.5 On 28 November 2014 the state attorney wrote to the transcribers, telling them that the transcription was incomplete. Amd on 2 December they wrote again, asking the transcribers if they had transcribed everything that was sent to them. The transcribers replied and said they only received one CD. It transpired that it was only the evidence of the Department's witnesses.

10.6 Further correspondence followed early in 2015. Nehawu disputed that the review application had been delivered in April 2014. The Department provided proof, but the one CD was still missing. The Department eventually attempted to reconstruct the record from its own recording device; but Mr *Thaanyane* says it is still not a complete record.

[11] I am satisfied that the Department has done what it could in order to place a complete record before the Court. There is no indication that it ever intended to abandon the review. And the absence of a complete record is

an issue to which I now turn when deciding on the merits of the review application.

Review application

[12] Mr *Mokoena*, for the Department, has raised a number of grounds of review. He argued that:

12.1 The arbitrator incorrectly found that the employee had been dismissed;[1]

12.2 The arbitrator ought to have granted the Department's application for recusal; [2]

12.3 The finding that the dismissal was unfair, was unreasonable.[3]

[13] But there is another reason why the award should be reviewed and set aside, and that is the issue raised by Mr Thaanyane in the rule 11 application. The record is incomplete. He says that the incomplete portions – such as the cross-examination of Mlambo – are crucial to the consideration of the merits on review. Mr Mokoena differs. He says that the merits can be decided without that evidence.

[14] Both parties referred to the decision of the LAC in *Francis Baard District Municipality v Rex N.O.*[4] where that Court held that, where material evidence is missing from the record despite attempts to reconstruct it, the Labour Court had properly exercised its discretion to dismiss the review application.

[15] The LAC in *Francis Baard* did not refer to the recent Constitutional Court authority in *Baloyi v MEC for Health and Social Development, Limpopo*.[5] The apex court held that, in the absence of a proper record, "the Labour Court ought at least to have remitted the matter for rehearing".

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[1] The test is correctness and not reasonableness: *SARPA v SA Rugby (Pty) Ltd* [2008] 9 BLLR 845 (LAC).

[2] On the principles set out in *President of the RSA v SARFU* 1999 (4) SA 147 (CC) para [48].

[3] On the test set out in *Sidumo v Rustenburg Platinum Mines Ltd* [2007] 12 BLLR 1097 (CC).

[4] [2016] 10 BLLR 1009 (LAC); (2016) 37 *ILJ* 2560 (LAC).

[5] (2016) 37 *ILJ* 549 (CC); 2016 (4) BCLR 443 (CC); [2016] 4 BLLR 319 (CC).

[16] This is such a case. I am not persuaded that this Court can do justice on the merits of the review application on a limping record. As the Constitutional Court suggested in *Baloyi*, it should be remitted to the Bargaining Council for a rehearing.

Conclusion

[17] Given the guidelines set out by the Constitutional Court in *Baloyi*, the dispute must be remitted to the Bargaining Council.

[18] The review having succeeded, the application to dismiss the review as well as the application to make the arbitration award an order of court in terms of s 158(1)(c) cannot succeed.

[19] I do not consider a costs award to be appropriate in law or fairness, given:

19.1 the delays in prosecuting the review application;

19.2 the fact that the dispute has not been finalised; and

19.3 the ongoing relationship between the Department and Nehawu.

Order

[20] I therefore make the following order:

20.1 In case number JR 761/14, the arbitration award of the second respondent, commissioner Mzondi Molapo, under case number GPBC 3386/2010 dated 24 February 2014 is reviewed and set aside.

20.2 The dispute is remitted to the General Public Service Sectoral Bargaining Council (the third respondent) for a fresh arbitration before an arbitrator other than Mr Molapo.

20.3 The applications in case number JR 2289/15 are dismissed.

20.4 There is no order as to costs.

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A J Steenkamp

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT (Dept of Agriculture):	P L Mokoena SC
	(with him T Molokomme)
Instructed by	the State Attorney.
FIRST RESPONDENT (NEHAWU):	N Thaanyane (attorney).