



REPUBLIC OF SOUTH AFRICA

Not reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 628/15

In the matter between:

Veronique RAVAT

First applicant

and

CCMA

First respondent

Bella GOLDMAN N.O.

Second respondent

**SOUTH AFRICAN ASTRONOMICAL
OBSERVATORY**

Third respondent

Heard: 16 March 2017

Delivered: 30 May 2017

SUMMARY: Review of award on unfair labour practice. Record defective. Remitted for fresh arbitration in the light of *Baloyi v MEC for Health & Social Development, Limpopo* [2016] 4 BLLR 319 (CC).

JUDGMENT

STEENKAMP J

Introduction

- [1] This is an application to have an arbitration award reviewed and set aside. Much of the application turns on a defective CCMA record and the application of the Constitutional Court judgment in *Baloyi v MEC for Health & Social Development, Limpopo*.¹

Background facts

- [2] The applicant, Ms Veronique Ravat, was employed by the third respondent, the South African Astronomical Observatory (part of the National Research Foundation) as an Information Technology Coordinator. She worked in the South African Large Telescope (SALT) Collateral Benefit Programme.
- [3] She was, firstly, issued with a final written warning, and subsequently dismissed for misconduct. The final written warning arose from disorderly behaviour in that she displayed aggression when communicating with her superiors; and disrespectful conduct. She referred an unfair labour practice dispute to the CCMA. Three months later she was dismissed for misconduct comprising gross insubordination and breach of the NRF code of ethics and human resources policies and procedures. It was found that she had refused to comply with reasonable and lawful instructions. She also referred an unfair dismissal dispute to the CCMA. The two disputes were consolidated.

Arbitration award

- [4] Commissioner Bella Goldman, the second respondent, found that the employee was given reasonable and lawful instructions; that she refused to carry them out; and that she had provided no valid reason for not doing so. The Commissioner found that the employee had committed the misconduct complained of and that dismissal was the appropriate sanction. The dismissal was procedurally and substantively fair. Having found that, the unfair labour practice dispute became moot as the employee only required the final written warning removed if she had been

¹ [2016] 4 BLLR 319 (CC); (2016) 37 ILJ 549 (CC) [*Baloyi*].

reinstated. For the sake of completeness, though, the Commissioner did address the final written warning and found that it was justified.

Grounds of review

- [5] Ms Ravat challenges the arbitration award on three grounds of review:
- 5.1 The record is incomplete.
 - 5.2 The Commissioner was biased.
 - 5.3 The Commissioner reached a decision that no reasonable Commissioner could have reached on the evidence before her.

Evaluation

- [6] I shall address the first ground of review at the outset, as it is not possible to consider the other two grounds in the absence of a complete record.
- [7] The record is an extensive one. The arbitration ran over 11 days. It was digitally recorded. The employee had it transcribed. Unfortunately, large parts are missing. Even though the parties did attempt to reconstruct it, it is not disputed that at least the following evidence has not been transcribed or adequately reconstructed:
- 7.1 Part of the employee's evidence on 7 October 2014. She alleges that this relates to her "many appeals for intervention from December 2013 to July 2014 to various levels of management". The evidence is relevant.
 - 7.2 Further cross-examination of Ms Linda Tobin, a witness for the employer, on 8 October 2014. Although the Commissioner made notes of the evidence, it was not recorded. The employee alleges that the transcript of the record would have shown that the witness "misrepresented evidence under oath".
 - 7.3 The recording for the whole day on 26 January 2015. This includes the full cross-examination of another employer witness, Mr Sivuyile Manxoyi. The employee alleges that this evidence is crucial. It dealt extensively with allegations of victimisation; and the employee alleges that the Commissioner stopped her cross-examination.

7.4 A discussion on 27 January 2015 regarding a request for documents. It appears that the Commissioner stopped the recording in order for her to read certain documentation, but did not switch it on again when the evidence continued.

7.5 A portion of the cross examination of Ms Buzani Khumalo on 28 January 2015.

7.6 Most of the employee's evidence on 20 May 2015. The parties did attempt to reconstructed, having regard to the Commissioner's handwritten notes, but the employee alleges that it is still incomplete; and that it is crucial to the allegations against her.

[8] The failure of the CCMA and bargaining councils to ensure that arbitration proceedings are properly recorded is unfortunately not an isolated one. Our courts have dealt with this vexed problem in different ways in review application. The constitutional court eventually provided some guidance in *Baloyi*.

[9] Moseneke DCJ, for the majority, raised the question upfront:² "What should the Labour Court do when faced with a review application where the record of the arbitration proceedings sought to be reviewed has gone missing, and there is been no proper attempt to reconstruct it?"

[10] In this matter, of course, and to their credit, the parties did try to reconstruct the record. Unfortunately, it appears from the employee's evidence on affidavit, which is not seriously disputed by the employer, that those efforts have not been sufficient. What is the court to do?

[11] In circumstances where the Labour Court had ordered the parties to reconstruct the record but, according to the applicant, the reconstruction proved impossible, the Labour Court³ in *Baloyi* nevertheless adjudicated the review application on the merits, accepting that the Commissioner's handwritten notes and typed version constituted a sufficient transcript. Moseneke DCJ, writing for the majority of the Constitutional Court, criticised this approach.

² *Baloyi* above par 1.

³ *Baloyi v MEC for Health and Social Development, Limpopo* [2010] ZALC 282.

[12] The majority held that the Labour Court ought at least to have remitted the matter for rehearing. Moseneke DCJ held:⁴

“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.”

[13] In a dissenting judgement, Cameron J that the order of the Labour Court confirming the arbitrator’s award should be confirmed. That was because, despite the limping record, he found that the applicant in his papers before the Labour Court made admissions about the arbitrator’s notes which justified his dismissal as not being substantively or procedurally unfair. But the majority did not support that conclusion; and this court is bound by the majority judgement in *Baloyi*.

[14] On the evidence before me, this court is faced with a “limping record” and the efforts to reconstruct it have not been successful. As guided by the Constitutional Court, the dispute will have to be remitted to the CCMA. This is regrettable, given that the arbitration took 11 days to complete in the first place. It is not an outcome that supports the LRA’s object of expeditious dispute resolution. But in this case, it appears to me to fall within one of those cases referred to by Moseneke DCJ where it would be contentious to determine the review in the absence of a full record.

Conclusion

[15] The award must be set aside and remitted to the CCMA due to the defective record. This state of affairs was brought about through no fault of the employer or the employee. In law or fairness, neither of them should bear the costs of this application.

⁴ *Baloyi* par 36.

Order

The arbitration award of Commissioner Bella Goldman dated 8 June 2015 under case number WECT 8579-14 is reviewed and set aside. The dispute is remitted to the CCMA for a fresh arbitration before a different commissioner.

Anton Steenkamp
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT: In person.

THIRD RESPONDENT: E Masombuka.

Instructed by Adams & Adams.