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THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 911/15

In the matter between:

BETAFENCE SOUTH AFRICA (PTY) LTD — **Applicant**

and

CCMA — **First Respondent**

E EDWARDS N.O. — **Second Respondent**

ELMARIE MOSTERT — **Third Respondent**

Heard: 4 May 2017

Delivered: 20 June 2017

Summary: Review – record incomplete – *Baloyi v MEC: Health & Social Development* followed – remitted to CCMA for fresh hearing.

JUDGMENT

STEENKAMP J

Introduction

[1] The third respondent, Elmarie Mostert, was employed by the applicant, Betafence South Africa (Pty) Ltd. She resigned. She referred a dispute to the CCMA (the first respondent), claiming constructive dismissal. The arbitrator, Commissioner Elridge Edwards (the second respondent), found in her favour. He ordered Betafence to pay her compensation.

[2] Betafence seeks to have the award reviewed and set aside. It argues that the decision of the arbitrator was one that a reasonable decision-maker could not reach.[1] But there is a prior issue, and that is that the record is incomplete – sadly not an isolated occurrence, as pointed out by the Constitutional Court in *Baloyi*.[2]

Background facts

[3] Ms Mostert was employed as an Internal Sales Office and Customer Service Manager. She earned a basic salary plus commission. She resigned on 2 December 2014. She referred a dispute to the CCMA alleging constructive dismissal, an unfair labour practice and unfair discrimination (victimisation). She alleged that Michael James, the commercial manager, withdrew her commission and victimised her which ultimately resulted in her concluding that she had no alternative but to resign.

[4] The arbitrator heard the evidence of Ms Mostert and, on behalf of the company, that of Messrs Gustav Bothma, Gene Wegener, Michael James, and Miko Kriel. With regard to the allegation of constructive dismissal in terms of s 186(1)(e) of the LRA[3], he correctly pointed out that the employee bore the onus of proving that the company had made her continued employment intolerable. He concluded that she did. The events over a number of months culminated in her coming to a point where she could not continue the employment relationship any longer. She

[1] *Sidumo v Rustenburg Platinum Mines Ltd* (2007) 28 *ILJ* 2405 (CC).

[2] *Baloyi v MEC for Health & Social Development, Limpopo* (2016) 37 *ILJ* 549 (CC); 2016 (4) BCLR 443 (CC); [2016] 4 BLLR 319 (CC) par 58.

[3] Labour Relations Act 66 of 1995.

persevered knowing that she had responsibilities and hoping that circumstances would change but they did not. He found that the employee was constructively dismissed as contemplated by s 186(1)(e); that it came about as a result of the company's unfair conduct; and that she was unfairly dismissed. He ordered the company to pay her the equivalent of six months' remuneration as well as her outstanding commission.

[5] The arbitrator further found that the employee was not victimised in terms of 6(3) of the Employment Equity Act[4]; and that she had not established an unfair labour practice in terms of s 186(2)(b) of the LRA. He did not make any order as to costs.

Review grounds

[6] The company initially alleged that the Commissioner committed a gross irregularity by failing to take into consideration the true facts as established by the evidence; and by reaching a conclusion that no reasonable arbitrator could reach.

[7] Once the application for review had been delivered, though, things went awry. The CCMA purported to comply with rule 7A(3) on 30 November 2015 by filing the record. However, when the company collected the purported record, it contained only the bundles of the parties used at the arbitration and not the audio recordings of the arbitration proceedings. The company's representatives wrote to the registrar and to the CCMA. Eventually, on 23 February 2016, the CCMA filed another notice purportedly in compliance with rules 7A(3) and 7A(2)(b). Attached to the notice was an affidavit by Commissioner Edwards that the audio recording had been lost. He stated: "I was under the impression that I had downloaded the audio recordings of the arbitration hearing in the matter onto a flash drive and then transferred it to the server in the archives department at the CCMA. I have searched but have not located the recordings." He surmised that the flash drive was in his laptop bag that had been stolen out of his car.

[4] Act 55 of 1998 [EEA].

[8] The company then asked for the Commissioner's hand written notes. Two months later, it had not received a response from the Commissioner or the CCMA. It wrote to the CCMA again on 25 April 2016 and requested that the matter be set down for reconstruction of the record with the Commissioner. The employee's attorney also wrote to the registrar where he stated that "to attempt to reconstruct the record of a four to five day trial [*sic*] to such an extent that [the Labour Court] can apply its mind on the issue, with certainty, is almost, if not at all, impossible…".

[9] The employee launched an application in terms of rule 11 to have the review application dismissed. The court ordered that the CCMA convene a reconstruction meeting with the Commissioner and with the parties' representatives; and ordered the Commissioner to provide both parties with copies of his handwritten notes. When the meeting was convened, it transpired that the Commissioner did not have any handwritten notes. It became impossible to reconstruct the record.

[10] The applicant then raised a further ground of review that the award should be reviewed and set aside because of the missing record, and the dispute remitted to the CCMA. In the absence of a record, it could not deliver further notices in terms of rule 7A(6) and 7A(8).

Evaluation / Analysis

[11] I shall, firstly, deal with the issue of the missing record. The Court needs to decide whether it can decide the merits of the review application, given the limping record. If not, the dispute will unfortunately have to be remitted to the CCMA – a lengthy and costly alternative that was not envisaged by the drafters of the LRA when they designed what should have been a quick and cheap dispute resolution process.

[12] In *Baloyi*[5] the majority of the Constitutional Court gave the following guidance:

> "[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

[5] Above paras 36 and 40.

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.

"[40] First, the Labour Court should have remitted the matter to the Bargaining Council as proposed by the arbitrator and the Bargaining Council itself. The mechanical recordings of the arbitration had been misplaced and could not be traced. This meant that the arbitration proceedings would commence afresh before a different arbitrator."

[13] The minority [per Cameron J][6] had a different view, but this Court is bound by the majority judgment:

"[58] What should the Labour Court do when faced with a review application where the record of the arbitration proceedings sought to be reviewed is incomplete? The adverse consequences to the applicant's right of access to courts and to fair practices are plain. Regrettably, incomplete, patched-up records caused by faulty mechanical equipment or lost tape recordings are not uncommon. But it is rarely appropriate for a court to proceed on patch work where the parties have not tried to reconstruct as full and as accurate a record of the proceedings as the circumstances allow. There may be circumstances where a court is able to scrutinise the arbitrator's award plus all the documentary evidence, including the arbitrator's transcribed handwritten notes and the applicant's supplementary affidavits, to determine whether the decision should be set aside."

[14] In this case, to their credit, the parties have tried to reconstruct the record. But even so, it is incomplete to the extent that this Court cannot properly decide on the merits of the review application. There is, quite simply, no record at all.

[15] The arbitration proceeded for five days. The applicant simply cannot amplify its review grounds without the record. Neither can it argue the merits of its review application in full; nor can the court properly applied mind to the initial grounds of review is without being able to consider the evidence that served before the arbitrator.

[6] At para 58.

[16] In the absence of any record – not even the Commissioner's handwritten notes – the parties have not been able to reconstruct the record. That is despite a previous order of this court ordering the Commissioner to assist the parties. In those circumstances, it is simply impossible to consider the review application on the merits. The only solution is to follow the guidance of the constitutional court in *Baloyi* and to remit the dispute to the CCMA. This is regrettable. It is not what the drafters of the LRA had in mind. And neither of the parties can be blamed. But it is the only solution open to this court.

Conclusion

[17] Because of the incomplete record, the dispute will regrettably have to be referred back to the CCMA to have it decided afresh. In those circumstances, a costs award is not warranted in law or fairness. Neither of the parties can be blamed for the delay; and both will regrettably have to incur further costs.

Order

The dispute is remitted to the CCMA for a fresh arbitration before a commissioner other than the second respondent.

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Anton Steenkamp

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	Bridgette Mokoetle of SEIFSA (employers' organisation).
THIRD RESPONDENT:	Anton van Loggerenberg Instructed by Awie Viljoen.