THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JR 1512/15

In the matter between:

POPCRU obo HAPPY VINCENT CINDI **Applicant**

and

THE GPSSBC **First Respondent**

COMMISSIONER THABANG SERERO N. O **Second Respondent**

DEPARTMENT OF CORRECTIONAL SERVICES **Third Respondent**

Heard: **27 May 2021**

Delivered: **2 June 2021 (This judgment was handed down electronically by emailing a copy to the parties. The 2nd June 2021 is deemed to be the date of delivery of this judgment).**

Summary: Interlocutory application in terms of rule 11 (3) seeking direction from Court. Where there are rules as supplemented by the practice manual which provides a specified procedure, it is inappropriate for a party to approach the Labour Court under the banner of rule 11 (3) for directions. The provisions of clause 11.2.4 of the practice manual interpreted. Remission can only happen if the impugned award is first reviewed and set aside. Otherwise two contradictory or agreeing administrative decisions may arise in contravention

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of the *functus officio* principle. Failure to keep a proper record is a reviewable irregularity. Where a party is faced with a limping record, the appropriate thing to do is to seek a review on a ground of a failure to keep proper record. Given the standard of review of arbitration awards, a rule 17 consent order is inappropriate. A Court of review must be satisfied that on application of a constitutional standard of review an arbitration award is reviewable, this despite a consent to the relief sought. A remittal of a matter is not necessarily a relief but a power of the Labour Court emanating from section 145 (4) of the LRA. Held: (1) The interlocutory application is dismissed. (2) There is no order as to costs.

JUDGMENT

MOSHOANA, J

Introduction

[1] This is an application brought in terms of rule 11 (3) of the rules of this Court. In it POPCRU on behalf of Cindi seeks an order or directive that the arbitrated dispute of unfair dismissal be remitted back to the bargaining council for a hearing *de novo* before another commissioner other than Commissioner Serero. This application was actuated by the absence of a record, in particular the transcript of the arbitration hearing, of the proceedings sought to be reviewed and set aside. The respondent filed a notice consenting to the matter being remitted and heard *de novo*. The application stands unopposed.

Background facts

[2] Given the fulcrum upon which this application rotates, it is unnecessary to punctiliously deal with the facts of the entire dispute. To a large degree this application turns on various questions of law. It suffices to mention that Mr Harry Vincent Cindi (Cindi) was dismissed on account of misconduct. Aggrieved by

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his dismissal, he referred a dispute to the GPSSBC alleging unfair dismissal. Commissioner Serero (Serero) was appointed to resolve the dispute through arbitration. He issued an arbitration award finding that the dismissal of Cindi was fair. POPCRU on behalf of Cindi was displeased by the award and launched a review application seeking an order to review and set aside the award and substituting it with an order that this Court deems fit.

[3] Despite all earnest efforts, the transcript of the arbitration hearing could not be reconstructed since the tapes could not be located. Having failed to produce the transcript, POPCRU approached the Judge President of this Court to provide a directive within the contemplation of clause 11.2.4 of the practice manual. My sister Nkutha-Nkontwana J was allocated the file for direction. On 12 February 2018, Nkutha-Nkontwana J issued a directive to the following effect:

> "(a) The parties are to file written submissions as to why the matter should not be remitted to the bargaining council for a fresh arbitration in light of the missing record of arbitration proceedings.
>
> (b) The parties are referred to the constitutional judgment in *Baloyi v MEC for Health & Social Development, Limpopo* [2016] BLLR 319 (CC)…"

[4] I interpose and remark that it is apparent that Nkutha-Nkontwana J was inclined to remit the matter. Withal there were no written submissions to the contrary. Instead, POPCRU submitted in writing that the matter be remitted. For reasons that are not entirely clear in the papers before me, Nkutha-Nkontwana J never actioned her inclination to remit the matter. At a point, the matter came before me for direction. On my assessment of the matter, I directed that the review application be enrolled on the unopposed roll. It does seem that the parties were not made aware of my directive. After a number of enquiries, POPCRU was allegedly advised by the Registrar to invoke the provisions of rule 17. Owing to that the present application was launched instead. The application featured on my unopposed roll. It was argued and a judgment on it was reserved.

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Evaluation

[5] As a point of departure, it is important to clarify the import of rule 11 of the rules of this Court. The heading of the rule is that it caters for interlocutory applications and procedures not specifically provided for in other rules. The applicable sub-rule in this matter is 11 (3). It provides that if a situation for which these rules do not provide arises in proceedings or contemplated proceedings, the Court may adopt any procedure that it deems appropriate in the circumstances. Sub-rule (1) (c) contemplates an application for directions to be sought from the Court.

[6] In April 2013, the practice manual of this Court came into operation. Although the practice manual was not intended to replace the rules, it is there to augment the rules in order to promote efficiency in the adjudication of disputes. The binding effect of the practice manual has already been decreed by the Labour Appeal Court (LAC).[1] Therefore, in my view, where the practice manual suggests a procedure, that procedure must be resorted to instead of invoking the provisions of rule 11.

[7] The rules do not make provisions for what should happen when the review parties are faced with a limping record. Comrie AJA in *Lifecare Special Health Services (Pty) Ltd v CCMA*[2] suggested the following:

> "[19] When it appeared that there were difficulties with regard to the record, it was the obligation of Lifecare, as the reviewing party, to initiate the enquiries and steps which have been set forth in this judgment. It should not be left to the Labour Court at the first instance, and to this Court on appeal, to resolve problems which were other than residual or intractable."

[8] POPCRU alleges that it had taken steps as contemplated in the *Lifecare* judgment. However, the case it makes in this application is that the bargaining

[1] *Samuels v Old Mutual Bank* [2017] 7 BLLR 681 (LAC).
[2] (DA15/02) [2003] ZALAC 3 (28 March 2003).

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council filed a materially incomplete record and the parties unsuccessfully attempted to reconstruct the record. This Court at this stage is unable to determine whether serious steps were taken to reconstruct the record. It ought to be borne in mind that a reviewing party may use the limping record as an advantage to obtain a review of an award which on application of the stricter constitutional test is otherwise not reviewable. That in mind, in my view, this Court must not be quick to set aside an arbitration award and remit without being satisfied that indeed the records are lost and cannot be reconstructed in any reasonable means.

[9] In *Beaumont v Anderson*[3] Broome J declined to remit a case for a hearing *de novo* and only ordered that the magistrate only re-hears the evidence of the plaintiff since it was the record of the evidence of the plaintiff that was lost. In the *Department of Justice v Hartzenberg*[4] Comrie AJA writing for the majority, faced with a situation where the records were lost gave the right of appeal an overriding consideration and set aside the judgment and order of the Industrial Court and referred the matter to the Commission for Conciliation, Mediation and Arbitration (CCMA) for a hearing *de novo*.

[10] The learned Moseneke DCJ writing for the majority in *Baloyi v MEC for Health and Social Development, Limpopo and Others*[5] suggested that where the Labour Court is faced with (a) an affidavit from the bargaining council that no record of the arbitration proceedings was available; (b) the arbitrator had no objection to a remittal for rehearing; (c) the respondents withdraws opposition; and (d) there are protestations on the contents of the reconstructed records, the Labour Court, in that matter, ought to have at least remitted the matter for rehearing. In dealing with the view expressed by Froneman J regarding the remittal of the matter, Moseneke DCJ stated the following:

> "[40] First, the Labour Court should have remitted the matter to the Bargaining Council as proposed by the arbitrator and the Bargaining

[3] 1949 (3) SA 562 (N).
[4] (JA16/00) [2001] ZALAC 7 (6 May 2001).
[5] (2016) 37 ILJ 549 (CC).

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> Council itself…None of the parties, including the applicant, were opposed to this proposal. The Court chose to decide the matter on the defective record before it and made an order adverse to the applicant, when it should not have done so."

[11] Ironically, the Constitutional Court itself determined the review with the same limping record and concluded that the award ought to be reviewed and set aside. The Labour Court determined the review with the same limping record but reached a conclusion that the review application must be dismissed as opposed to having the award reviewed and set aside. In my view, the dissenting view of Froneman J made sense when he said:

> "[50] …In these circumstances the applicant might be done a disservice if the matter is decided on an incomplete record of the arbitration proceedings. Remittal for arbitration might appear unjust in the face of the applicant's long unblemished record and the apparent injustice of the sanction of dismissal in those circumstances. But nevertheless the difficulty of deciding the merits of the case on an incomplete record remains. The applicant did not seek an order on the merits in the initial review, and it would be inappropriate to do so here. None of the parties objected to the remittal the applicant sought.
>
> [51] I would thus concur in granting condonation and leave to appeal, but would substitute the Labour Court order with one remitting the matter back for arbitration."

[12] I therefore take a view that the majority in *Baloyi* did not authoritatively decide that where the record is limping, the only route open is to remit and not to determine the review. Given the *ratio decidendi* by the majority, the remarks of Moseneke DCJ were in my view made *obiter*. The dissenting judgment of Froneman J is the one that decisively stated that determining a review with an incomplete record remains a difficulty. It is perspicuous from the order proposed by Froneman J that an order is to remit. It is however unclear whether his suggested order follows and order of setting aside or not. The view of Froneman J seems to be in line with the view of Comrie AJA in the *Hartzenberg* matter.

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Although Comrie AJA did first set aside the order and thereafter remitted the matter to the CCMA.

[13] As indicated earlier, the provisions of the practice manual are there to augment the rules, the provisions of clause 11.2.4 provides a solution in case of a limping record. As a result, rule 11 should not be invoked. The clause suggests that a party faced with a limping record may approach the Judge President for direction for the further conduct of the review application. It is important to note that two directions are possible; namely (a) remission of the matter; or (b) where practicable that the relevant parts of the record be reconstructed.

[14] The question that emerges in this instance is what does remission in this instance mean. Does it mean what Froneman J suggested in the *Baloyi* matter or the one that happened in the *Hartzenberg* matter? Unless one misreads the approach by Froneman J it seems that the remittal will happen without setting aside the impugned award. If it is a correct reading, then there will be a possibility of two conflicting or agreeing administrative decisions at the ultimate end. Also the *functus officio* principle shall be offended thereby. The better interpretation to Froneman J's view will be to assume that the award is reviewed and set aside and the dispute about the fairness of the dismissal is remitted. In *Hartzenberg*, the LAC did first set the Industrial Court orders aside and thereafter remitted.

[15] In my view, it shall be inappropriate to interpret clause 11.2.4 to mean that a judge may simply remit without an order setting aside the impugned award. If that were to be done a remitted matter shall produce another arbitration award in the face of the one issued earlier. Such could not have been the intention of the clause, regard being had to the *functus officio* principle. A further difficulty is that an arbitration award is an administrative decision. On application of the principle set out in *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*[6]

[6] [2004] 3 All SA 1 (SCA).

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the administrative decision exists with legal consequences until set aside by way of judicial review by a Court with competent jurisdiction.

[16] Assuming that the remission direction encapsulates the direction to set aside the award, then the conundrum, in my view, will be that, ordinarily directions are issued by judges in chambers, whilst orders are issued in an open Court after hearing the parties. The power of the Labour Court to set aside an arbitration award is legislated and controlled by a developed constitutional test. Section 145 (1) allows a party alleging a defect to apply to the Labour Court for an order to set aside the arbitration award. It is by now settled law that this Court can only set aside an arbitration award if it is one that a reasonable decision maker may not reach. The grounds set out in section 145 (2) are suffused in the constitutional standard. In *Standard Bank of SA Ltd v Leslie and others*[7], Savage AJA aptly posited the principle set out in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[8] thus:

> "[10] …A judge's task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution, cautioning against 'judicial overzealousness' in setting aside administrative decisions that do not coincides with the judge's own opinions."

[17] In my view, where parties are faced with an incomplete record they must still present a compelling case before a judge as to why on the applicable test the arbitration award must be reviewed and set aside, otherwise a willy-nilly setting aside and remittal is at odds with the *Sidumo* principle. Is rule 17 a solution perhaps? In order to address that question squarely, the starting point must be section 143 (1) of the Labour Relations Act (LRA)[9]. In terms thereof an arbitration award issued by a commissioner is final and binding. Such implies that it is final and binding to the parties. However the parties may, to my mind,

[7] (2021) 42 ILJ 1080 (LAC)
[8] [2007] 12 BLLR 1097 (CC)
[9] No. 66 of 1995, as amended.

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enter into an agreement to forgo the final and binding effect of an arbitration award. Having so agreed, parties may seek an order to review and set aside that award. Under those circumstances perhaps rule 17 might apply.

[18] I however take a view that since an arbitration award is an administrative decision, it requires a setting aside by a Court with competent review powers. Regard being had to the applicable test, mere consent to the relief, is not, in my view, enough. In terms of section 165 of the Constitution of the Republic of South Africa, 1996 judicial authority vests in the Courts. Rule 17 to my mind is there for orders that would not require application of a test like the one in reviews. The fact that the legislature chose a review over an appeal on arbitration awards ought to be appreciated and respected. A consent to an order to review and set aside an arbitration award without application of the constitutional standard clearly offends the rule of law and undermines the legislated powers of review of arbitration awards.

[19] The approach taken by this Court in unopposed reviews is that unless it is shown that an arbitration award is reviewable in terms of the applicable constitutional test, the arbitration award shall not be reviewed simply because there is no opposition. Similarly, in instances where a party consents to the relief, which is akin to a party not opposing a relief, an arbitration award must not be reviewed if the constitutional test is not shown to exist. As it was held in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*[10] Courts should defer to the specialty of administrative agencies. There shall be anarchy and a travesty of justice the day an administrative body or agency wake up to a situation where a host of their supposed reasonable, final and binding decisions are reviewed and set aside by a Court simply because parties have consented to such orders. Finality of disputes is a cornerstone of a constitutional democracy and the rule of law. Section 1 (d) of the LRA provides that the LRA is there to promote the effective resolution of labour disputes. An

[10] 2004 (4) SA 490 (CC)

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administrative decision must only be set aside if the constitutional test is satisfied.

[20] The conclusion I reach is that regard being had to the test developed in *Sidumo* consent to a relief is not a solution to the limping record. It is important not to overstate and elevate the absence of the record to something akin to an unreasonable award. Presence of a record only assists a reviewing Court to assess the punted grounds of review. Where the absent portions are irrelevant to the assessment of the grounds, absence of those portions of the record is meaningless. A general sweeping statement that in the absence of a record a review must follow as a matter of course is in itself problematic. A failure to keep a record is a misconduct on the part of the administrative body[11], but it may be the case that such a misconduct does not distort the outcome reached[12].

[21] In any event, I see the power to remit not as a relief *per se* but a statutory power that emanates from section 145 (4) (b) of the LRA, which can only be exercised after setting aside an arbitration award. Such that even if remittal is not prayed for, if the Labour Court is unable to exercise its powers set out in section 145 (4) (a), it must as a matter of course remit because such will be an appropriate procedure to determine the dispute so improperly arbitrated. Besides, in this matter, the applicant did not seek a relief that the matter be remitted back in its notice of motion. The consent of the other is to not object to something which was not prayed for is meaningless. Rule 17 (2) requires consent to the relief sought.

Conclusion

[22] For all the reasons set out above, I am not satisfied that this Court should in this application remit the dispute back to the first respondent. In the circumstances the application must fail. Of course the remaining question is what the applicant with an automatic right of review must do in such

[11] See: *Uee-Dantex Explosives (Pty) Ltd v Maseko and Others* [2001] 7 BLLR 842 (LC).
[12] *Head of the Education Department v Mofokeng and Others* [2015] 1 BLLR 50 (LAC).

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circumstances. In as much as clause 11.2.4 offers a solution, when it comes to the remission solution, something more must, in my view, happen. In my view, the majority in *Baloyi* demonstrated that a review application may still be determined with a limping record. Although the transcript in this matter cannot be produced, the arbitration award of the commissioner in this matter provided a summary of the evidence that was tendered before him. It does not appear to be POPCRU's case that the evidence as summarised does not suffice or is completely incorrect and inadequate. Cameron J in a dissenting, but concurred to by Madlanga J and Molemela J, judgment reached the following conclusion.

> "[68] Both Moseneke DCJ and Froneman J rightly note that 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, the Labour Court was correct to dismiss Mr Baloyi's review even though it lacked a transcript of the mechanically recorded arbitration proceedings. The arbitrator's notes, together with Mr Baloyi's further supplementary affidavits were sufficient.

[23] I had indicated earlier that in this application, this Court is not in a better position to conclude that the evidence as recorded by Commissioner Serero together with the records already submitted are sufficient to sustain the punted for grounds for review. Therefore, in my view, the most appropriate route is to enrol the review for determination. Depending on the grounds punted for, the judge hearing the review application might reach a conclusion that the absence of the record taints the reasonableness of the arbitration award and the award is thus reviewable in law. Having reviewed and set aside the award, the reviewing judge may remit the dispute to be heard *de novo*. In short, the interest of justice dictates that the review application must still serve before an open Court for the consideration of the question whether the arbitration award is reviewable in law or not. Once that conclusion is reached, in exercising powers emanating from section 145 (4) the dispute may be remitted for a hearing *de novo*. To simply

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remit in chambers due to the absence of the record leads to an untenable situation where there shall be two administrative decision over one dispute. It may happen that the same outcome is reached, but that is still undesirable because the principle of *functus officio* commands that once an administrative body performs a function it cannot, unless permitted by law, perform the same function twice. Often times a remission order disqualifies the first arbitrator to hear the dispute. Now in an instance where the first arbitrator notionally did nothing wrong, why should he or she be disqualified to hear the dispute again? It seems to me that in a proper case for remission, the same commissioner must hear the matter again as opposed to another commissioner. A remission somewhat takes a form of a re-referral to arbitration. In such circumstances the remittal order wishes away the arbitration process and its outcome – the arbitration award. Such wishing away exercise is at odds with the *Oudekraal* principle.

[24] In the result the following order is made:

Order

1. The application is dismissed.
2. There is no order as to costs.

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G. N. Moshoana

Judge of the Labour Court of South Africa

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Appearances:

For the Applicant: Mr Mohale Magoshi of Majang Inc Attorneys, Northriding.

For the Respondent: No appearance.

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