THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: JR 2295/23

In the matter between:

PARSONS TRANSPORT OPERATIONS (PTY) LTD **Applicant**

and

PIETER MKANSI **First Respondent**

COMMISSIONER NOKO NKGOENG **Second Respondent**

NATIONAL BARGAINING COUNCIL FOR

THE ROAD FREIGHT & LOGISTICS INDUSTRY **Third Respondent**

Heard: 10 October 2024

Delivered: 27 February 2025

This judgment was handed down electronically by consent of the parties' representatives by circulation to them via email. The date for hand-down is deemed to be on 27 February 2025.

JUDGMENT

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MILO, AJ

Introduction

[1] This application highlights the importance of ensuring that a proper record is placed before the Labour Court in review proceedings to enable it to exercise its powers of review.

[2] *In casu*, the applicant seeks to review and set aside the enforcement arbitration award (the arbitration award) dated 2 November 2023, issued by the second respondent (the commissioner) under the auspices of the third respondent. This application is unopposed.

[3] The arbitration award directs the applicant to comply with the collective agreement(s) of the third respondent by (i) complying with a compliance order and a statement of contraventions (ii) ensuring that the applicant's business and all of its employees are registered with the third respondent, and (iii) making payment to the third respondent in the amount of R50 645.91, comprised of penalties and other payments required in terms of the collective agreement which the commissioner found had been breached by the applicant.

[4] The review application is problematic in several aspects, the most pertinent of which, for present purposes, will be outlined below.

Factual Background

[5] Based on the limited details provided in the founding affidavit and that incomplete portion of the arbitration award that has been placed before this Court, the following salient facts may be discerned.

[6] On 11 July 2023[1], a compliance order was served on the applicant. The arbitration award states that the compliance order is attached as Annexure 'A,'

[1] The year is not specified in the arbitration award, and it is presumed that the compliance order was issued in 2023.

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which presumably explains the absence of further details regarding the order within the award itself. However, the applicant has failed to include the compliance order in its application. It is absent from the record, and no meaningful details regarding its content are provided in the founding affidavit.

[7] It was alleged, presumably by the designated agent of the third respondent, that the applicant failed to comply with the compliance order.

[8] As a result of the applicant's alleged non-compliance, a statement of contraventions was issued. The arbitration award references this document as Annexure 'B' but, once again, does not elaborate on its contents, presumably because it was attached as an annexure. The applicant has similarly failed to place this document before the Court, and the founding affidavit provides no substantive details regarding its content.

[9] The matter was set down for arbitration on 30 October 2023 before the commissioner. The third respondent was represented by Mr Mdlalose Mkhethwa, a designated agent, and the applicant was represented by Mr Stefan van Blerk, an official of an employer's organisation, who is also the deponent to the founding affidavit.

[10] Under the heading "*Summary of Evidence and Argument*" the commissioner records that:

> "The Designated Agent stated that the 1st Respondent [the applicant in these proceedings] contravened the Collective Agreement as set out in the Compliance Order (Annexure "A") and the Statement of Contraventions (Annexure "B").
>
> The representative of the 1st Respondent requested time until the following day, 31 October, to revert back to the Designated. [sic] According to the latter, he failed to adhere to the arrangements."

[11] The arbitration award does not clarify what exactly the applicant was expected to revert to the designated agent about. In the founding affidavit the applicant

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merely asserts, without any further clarification or elaboration, that the applicant had undertaken to provide "*returns*".

[12] Furthermore, the arbitration award does not specify the nature or terms of the arrangements referenced, and it provides no indication of what was envisaged and understood to occur in the event that the applicant failed to revert to the designated agent timeously or at all. Similarly, it does not address what the consequences would be if the applicant did revert as required, but a dispute nevertheless remained between the parties. It is also unclear whether these arrangements were formally agreed upon by the parties or unilaterally imposed by the commissioner.

[13] The commissioner proceeded to state in the arbitration award that, in the absence of any evidence from the applicant, the uncontested evidence of the designated agent was accepted.

[14] On this basis, the commissioner concluded that there was a contravention of the relevant collective agreement and the award was issued on 3 November 2023.

[15] Dissatisfied with the arbitration award, on 15 November 2023 the applicant instituted the review application against the respondents.

[16] In this application, the applicant contends that the arbitration award is reviewable on several grounds.

[17] Firstly, the applicant contends that there was a failure on the part of the commissioner to apply his or her mind to the evidence. In this regard, the applicant alleges that it was not in default in respect of the alleged contraventions. The deponent states merely that the third respondent "*was provided with the necessary information*", by which it is presumed that the applicant refers to returns which demonstrate in some or other manner that there was no cause for the issuance of the compliance order in the first place or, perhaps, that any amounts due in terms of the compliance order had since been paid.

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[18] However, this statement is vague and opaque, and lacking in important information. The applicant does not, for example, inform the Court when this information was supplied, to whom within the third respondent this information was supplied, whether it was supplied to the commissioner or whether in supplying the information it complied with the undertakings made by the applicant at the arbitration. Indeed, on the record presently before this Court, this statement is not supported by any document in the record or otherwise. Unfortunately, this is a characteristic of the application that commonly features elsewhere in the founding affidavit.

[19] Secondly, the applicant complains that the commissioner committed a gross irregularity in the conduct of the proceedings, alternatively misconduct in that, so the applicant contends, the arbitration "*did not continue*" on 30 October 2023 to allow the applicant the opportunity to provide information, yet the commissioner rendered the arbitration award based on assumptions and without any evidence having been led by the first respondent.

[20] The applicant's final ground of review is that the commissioner merely used a *pro-forma* award template and without providing an analysis of the period and computation of the award.

[21] In compliance with the former applicable rules of court, specifically rule 7A(2), the review application called upon the third respondent, within ten days, to dispatch to the registrar of this Court the record of the proceedings sought to be corrected or set aside, together with such reasons as are required by law or desirable to provide, and to notify the applicant that this has been done.

[22] The third respondent did not comply with its obligations in this regard. It has not dispatched to the registrar of this Court the record of the proceedings or any reasons as it was required by law or desirable to provide. The applicant has not brought an application to compel it do so, as it was entitled to do in terms of

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former rule 7A(4). I may mention that in terms of the new Labour Court rules[2], specifically rule 37 (8), which came into effect in July 2024, this remedy remains available to the parties in a review application. Consequently, it is unsurprising that no rule 7A(5) notice was ever sent out by the registrar.

[23] Despite non-compliance with former rule 7A(2), on 26 August 2023 the applicant filed a notice in terms of former rule 7A(6) under cover of which it filed what was described as a "*bundle of documents*". As an aside, it should be noted that because the new rules of court had by then already come into effect and had repealed the former rules, any record of proceedings should have been filed in terms of rule 37(13) of the new rules. Nothing of substance turns on this.

[24] No explanation is provided by the applicant as to how it came to file a bundle under rule 7A(6) in circumstances where the third respondent failed to provide the record to the registrar, as it was required to do. It appears from the content of this bundle that on 5 August 2024 the applicant's attorneys had requested directly of the third respondent to provide it with the third respondent's entire file contents "*along with all associated records*" related to the matter. It is presumed that the third respondent then provided the applicant's attorneys, directly, with the documents forming the bundle of documents, such that the applicant then filed those documents under its rule 7A(6) notice.

[25] Also on 26 August 2024, the applicant delivered a notice in terms of former rule 7A(8) stating simply that it stands by its notice of motion. The applicant did not file an affidavit supplementing its founding affidavit.

Evaluation

[26] Leaving aside for the time being considerations on the appropriateness or otherwise of attempting to obtain the record in this manner, the filing by the applicant on 26 August 2024 does not contain the record of the proceedings. To be clear, it does not contain the transcript of the arbitration proceedings held on

[2] GN 50608 of 3 May 2024: Rules regulating the conduct of the proceedings of the Labour Court.

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30 October 2023 nor does it contain any record whatsoever relating to that arbitration. The compliance order and statement of contraventions are likewise not included. In fact, a perusal of the bundle does not even hint that a compliance order and statement of contraventions had been issued, or that an arbitration had been held.

[27] It is trite that an arbitrating commissioner of a Bargaining Council or the Commission for Conciliation, Mediation and Arbitration (CCMA) has a duty to ensure that a proper and complete record of those proceedings are kept and to ensure that in the event that there is a review application, the proper and complete record is made available to the registrar of the Labour Court.[3]

[28] The registrar is then required to make this record available to the applicant. The applicant is then required to collect the record and make copies of such portions of the record as may be necessary for the purposes of the review, and to provide copies thereof to all parties in the application and to file same with the registrar of the Labour Court.

[29] In *South African Social Security Agency v Hartley and others*[4] this Court, per Prinsloo J, aptly pointed out that:

> "The keeping of a record of the arbitration proceedings is not only practical and required by the CCMA Rules, but is also necessary as it provides objective material about what transpired at the arbitration proceedings, which assists the court in the proper exercise of its review powers. As a general rule, it will always be necessary to have the record of the arbitration proceedings available to this Court when arbitration awards are reviewed under section 145 of the LRA."

[30] The omitted record is material to the determination of this review application. Quite apart from the applicant's duty to place the record or relevant portion thereof before the Court, a consideration of the issues for determination reveals

[3] *Doornpoort Kwik Spar CC v Odendaal and others* (2008) 29 ILJ 1019 (LC).
[4] [2023] JOL 58191 (LC) at para 49.

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why this obligation is particularly significant in this matter. I shall deal with only two examples *in casu*.

[31] It is accepted that an arbitration was held on 30 October 2023 and that there was at least evidence led by the designated agent. To the extent that the applicant asserts as a ground of review that the commissioner committed a gross irregularity in the conduct of the proceedings by rendering an arbitration award without any evidence having led by the first respondent, without the record it is simply not possible for this Court to determine whether any evidence was even required by the first respondent, particularly given that evidence had been provided by the designated agent (on what, this Court is not informed) and there must have been submissions before the commissioner related to this aspect which resulted in the applicant providing certain undertakings. Absent the record, this Court is simply in no position to make a determination on whether the commissioner committed a gross irregularity in this respect.

[32] The applicant also complains that another gross irregularity in the conduct of the arbitration proceedings was that relating to the opportunity provided to the applicant to provide the designated agent with certain information. I have already pointed out how important this detail is in this regard and that it is entirely absent from the arbitration award and the founding papers. This makes it crucial for this Court to be informed precisely what transpired in proceedings before the commissioner, before this Court is able to make any findings on the conduct of the commissioner. The record is essential in this regard.

[33] At the hearing of this matter Ms Kleynhans, who appeared for the applicant, could not deny that the omitted record is material to the determination of the application. Ms Kleynhans ultimately requested that the application be postponed to allow the applicant the opportunity to make the necessary inquiries and to take appropriate steps to remedy this concern.

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[34] There are several judgments of this Court, the Labour Appeal Court (the LAC)[5] and the Constitutional Court (the CC)[6] which provide guidance on what the Labour Court should do when faced with a review application where the record of arbitration proceedings sought to be reviewed is not placed before Court. There can, of course, be various reasons as to why the record has not been placed before Court. For example, the record may have gone missing through no fault of the applicant and there may or may not have been attempts at a reconstruction thereof; the person or body whose decision is being reviewed may be obstructive and not make the record available; or the applicant may, despite the record being made available, simply not take appropriate steps to place it before Court. Naturally, the Labour Court's approach to dealing with such cases depends on the particular circumstances of each case.

[35] It is trite that the Court should not consider the merits of a review application where material portions of the record are not placed before the Court. In *Fountas v Brolaz Projects (Pty) Limited and Others*[7] the LAC pointed out that a Court in such circumstances is first required to consider whether the applicant in the review application has taken all reasonable steps to search for such evidence and or to reconstruct the record.

[36] The LAC went on to explain that if the Court is of the view that the applicant has not taken all reasonable steps that it could and should have taken, the Labour Court hearing the review application would have to choose between one of two options, described thus[8]:

> "[32] The one would be to dismiss the application on the basis that the [applicant] had had ample opportunity to take those steps and had no acceptable explanation for not having done so. This is not an option that the Court a quo could have taken lightly because it would have shut the

[5] See: *Johannesburg Road Agency v Makhari* [2024] JOL 67275 (LAC).
[6] See: *Baloyi v Member of the Executive Committee for Health and Social Development, Limpopo and Others* [2016] 4 BLLR 319 (CC)
[7] [2016] JOL 35703 (LAC).
[8] Ibid at paras 32 and 33.

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door in the face of the [applicant] who would not have been able to have set aside an arbitration award that may well not have deserved to stand. However, it is a decision that a Court may take in an appropriate case.

[33] The other option that the Court a quo could take would have been to postpone the review application or to strike it off the roll to enable the [applicant] or all parties to take such steps as might not have been taken earlier to search for the missing evidence or to reconstruct the record. The latter option is one that a Court will usually adopt unless it is dealing with a case where considerations of fair play between the parties, finality of litigation and others demand that the application be dismissed without the consideration of the merits. This would occur where, for example, the matter had dragged on for a long time and the relevant party had had ample opportunity to reconstruct the record but had, for no acceptable reason, failed to do so."

[37] *In casu* although the commissioner and the third respondent were duty bound to keep a record of the proceedings, it is not known whether such a record as a matter of fact exists. The applicant's attorneys had, *albeit* directly to the third respondent, requested the entire file contents along with "*all associated records*". Despite this request, the record does not feature in the bundle delivered by the applicant under cover of its rule7A (6) notice.

[38] Had the applicant taken the requisite steps to compel the third respondent to comply with its obligations to make the record available to this Court, this information would be known. If the record exists, it must obviously be placed before this Court. If the record does not exist, then there are other avenues which the applicant may pursue, including reconstruction.

[39] Whilst the applicant has clearly not pursued all reasonable steps that it could and should have taken in relation to the record, it has attempted to procure the record, *albeit* in the misguided manner outlined above.

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[40] In this application there is insufficient evidence before the Court as to the status of the record, whether it in fact is available and whether its omission at this point is due entirely to the fault of the applicant.

[41] For all these reasons, I do not consider it appropriate, in the circumstances of this matter, to dismiss the application as it would saddle the applicant with an arbitration award that may well not deserve to stand. Additional considerations include the fact that the matter is unopposed and there have been no excessive delays by the applicant in pursuing this application. This is not a matter where considerations of fair play between the parties or finality of litigation demand the dismissal of the application at this juncture.

[42] As Ms Kleynhans for the applicant ultimately requested in argument, I consider it to be appropriate that the application be postponed in order to allow the applicant further opportunity to make the necessary inquiries referred to above and to take such steps as might not have been taken earlier to place the record or a reconstructed record if necessary, before this Court.

[43] In the premises, the following order is made:

Order

1. The application is postponed *sine die* to enable the applicant to take appropriate steps to address the concerns regarding the omitted record of proceedings, as outlined in this judgment.

2. There is no order as to costs.

S. Milo

Acting Judge of the Labour Court of South Africa.

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Appearances:

For the Applicant: Ms Aquila Kleynhans of Yusuf Nagdee Attorneys

For the First, Second and Third Respondent: No appearance

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