THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JR 1876/21

In the matter between:

SHANE VAN STRAATEN **Applicant**

and

COMMISSIONER JULIUS WEHNKE N. O **First Respondent**

THE CCMA **Second Respondent**

ORGANISATION UNDOING TAX ABUSE (OUTA) **Third Respondent**

Heard: **6 September 2023**

Delivered: **12 September 2023**

Summary: Application in terms of Rule 11 (1) (c) of the Labour Court Rules. The applicant seeks direction from this Court with regard to the acceptability of a record of the proceedings sought to be reviewed and set aside. For impecuniosity reasons, the applicant in the review application opted to transcribe the electronic version of the record of the CCMA proceedings on his own and not use a transcription company. The respondent in the review proceedings objected to such a transcription and suggested that the record of the proceedings was "incomplete", as a result of which it is not obliged to answer to the review application. The respondent takes a view that rule 7A (2)

of the Labour Court Rules compels an applicant for review to use only paid-for transcription in order to prosecute the review. The applicant for review disagrees with the view. Given this difference of opinion, the review proceedings are halted. Rule 7A (7) must be interpreted within the prism of the Constitution of the Republic of South Africa, 1996.

Held: (1) The transcription provided by the applicant for review is sufficient for the purposes of the review application and the application in terms of rule 11 is dismissed. Held: (2) The respondent in the review application is directed to file its answering affidavit, if any, within 14 days of this order. Held: (3) There is no order as to costs.

JUDGMENT

MOSHOANA, J

Introduction

[1] Our Constitution[1] has been revered to be the most progressive piece of legislation in the world. In its preamble, it provides, amongst others, the following:

> 'Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights.' [Own emphasis]

[2] Social justice demands some effective means of getting legal justice. We have Courts, certainly. Do they give the service that we need and, in particular, do they give it to the poor? We do not here impugn the motives of judges. Generally speaking, they are honest; but the whole system of Court procedure is hampered by detailed statutes and technical rules, which means

[1] Constitution of the Republic of South Africa, 1996.

an amount of costs and delay which in itself is the very quintessence of injustice[2].

[3] On 10 May 1944, the Declaration of Philadelphia was adopted.[3] It was at its 26th conference that the International Labour Organisation (ILO*)*, adopted the declaration. In 1946, when the ILO Constitution was being revised, the declaration was annexed to the Constitution and it forms an integral part of it in Article 1. On 18 June 1998, at its 86th conference in Geneva, the ILO adopted a declaration on fundamental principles and rights at work and its follow-up. The Declaration was revised on 15 June 2010. In this Declaration, it was recalled by the conference that in freely joining the ILO, all members have endorsed the principles and rights set out in its Constitution and the Declaration of Philadelphia and have undertaken to work towards attaining the overall objectives of the *ILO*.

[4] In the Declaration of Philadelphia, it was recorded that:

> 'Believing that experience has fully demonstrated the truth of the statement in the Constitution of the International Labour Organisation that lasting peace can be established only if it is based **on social justice**, the Conference affirms that:
>
> (a) all human beings irrespective of race, creed or sex have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity[4].'[Own emphasis]

[2] JB Clark, "*Social Justice Without Socialism*", The Riverside Press Cambridge 1914 at 42.
[3] 10 May 1944.
[4] Paragraph *II* of the Declaration

[5] Courts are supposed to be agents or catalysts for social justice. Section 1 of the Labour Relations Act[5] (LRA) provides that the purpose of the LRA is to advance amongst other things, social justice.

[6] Section 34 of the Constitution guarantees everyone the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a Court. Section 2 of the Constitution provides that the Constitution is the supreme law of the Republic, law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled. Section 3 of the LRA provides that any person applying the LRA is obligated to interpret its provisions in compliance with the Constitution; and in compliance with the public international law obligations of the Republic. Section 159 (3) of the LRA authorises the Rules Board for the Labour Courts to, at its discretion, make rules to regulate the conduct of proceedings in the Labour Court.

[7] Having said that, a poignant issue that is pointedly raised in this matter is whether an impecunious litigant should be denuded of its right to a review as guaranteed in section 145 (1) of the LRA simply because that litigant cannot afford to pay for the transcription of the record of proceedings. This matter fulcrum on the proper interpretation of rule 7A (7) of the Labour Court Rules[6]. In terms of subrule (6) of Rule 7A, an applicant for review is obligated to furnish the registrar and each of the other parties with a copy of the record or portion of the record, as the case may be. In terms of subrule (7) of the same rule, the following obtains:

> '(7) The costs of transcription of the record …must be paid by the applicant and then becomes the costs in the cause.' [Own emphasis]

[8] The applicant before me interprets these provisions to mean that any transcription not generated by a transcription company, is unacceptable for the purposes of prosecuting a review application in this Court. This interpretation is occasioned by the fact that Mr Shane Van Straaten (Straaten)

[5] Act 66 of 1995, as amended
[6] GN 1665 of 1996: Rules for the conduct of proceedings in the Labour Court.

after being unable to afford the exorbitant fees charged by these transcription companies in order to produce a transcript, slogged it and generated his own transcript from the electronic disk provided by the CCMA. When the respondent, the Organisation Undoing Tax Abuse (OUTA), was served with the "*home brewed*" record, it adopted a stance that the record of the proceedings was incomplete and or limping.

Background facts

[9] A brief excursion of the factual matrix will suffice for the purposes of this judgment. Straaten was employed by OUTA as a General Assistant in the legal department. After facing allegations of racism and gross insubordination, he was found guilty and dismissed on 12 June 2020. Disenchanted by his dismissal, he referred a dispute to the CCMA and alleged unfair dismissal. After hearing evidence, the appointed learned Commissioner Julius Wehncke (Wehncke) published his arbitration award on 24 August 2021. Wehncke concluded that the dismissal of Straaten was both procedurally and substantively fair and he dismissed his claim.

[10] Chagrined thereby, Straaten launched a review application in this Court on 4 October 2021. On 22 December 2021, Straaten served and filed a *home-brewed* transcribed record. Owing to the fact that the respondent was not opposing the application, Straaten took steps to enrol the application on the unopposed roll. On 17 March 2022, the application emerged before my brother Tlhotlhalemaje J. On this day Tlhotlhalemaje J removed the application from the unopposed roll as OUTA indicated a wish to oppose the application. OUTA was directed to serve a notice of opposition together with the legal points to be raised within 14 days of the order.

[11] Around June 2022, OUTA launched the present application and sought the following reliefs.

11.1 'That the Applicant be directed by the above honourable Court to file transcription compiled by a professional transcriber, accompanied by the necessary affidavit of the transcriber deposing to the authenticity of the transcription as well as the transcribers' certificate of authenticity within a certain time frame to be determined by this Honourable Court';

11.2 'That the record remains incomplete until such time as the Applicant complies with part 1 above and that the First Respondent file its answering affidavit 10 days after the Applicant has complied with part 1 above, given that the Applicant has already filed a supplementary affidavit in terms of rule 7A (8) (b) and that no application for condonation for the late filing thereof is necessary';

11.3 'That the Applicant may thereafter, within 5 Court days, file his replying affidavit';

11.4 'That the Applicant file service affidavits of his service of any process in this matter';

11.5 'Costs of the application in the event of opposition by the Applicant';

11.6 'Further and/or alternative relief.'

[12] Straaten strenuously opposed the granting of the reliefs sought by OUTA. Ultimately, the present opposed motion emerged before me.

Evaluation

[13] As indicated at the dawn of this judgment, this matter agitates the correct and appropriate interpretation of subrule (7) of Rule 7A. Does the fact that an applicant for review must pay for the transcription compels, as it were, the applicant to use a transcription company to transcribe the record? Does the failure to do so (pay for the transcription) lead to that applicant being incapable of providing an acceptable record? It is so that the costs of transcription are prohibitively exorbitant, particularly for unemployed lay litigants like Straaten. What do the demands of social justice require in this instance? Does an interpretation that only a record by the transcription company is acceptable, implicate the automatic right of review and the

provisions of section 34 of the Constitution? What then is the correct and appropriate interpretation to be afforded to the provisions?

[14] In this judgment, an attempt shall be made to answer all the above questions. There is no doubt in my mind that the Rules of the Labour Court are effectively a part of the LRA. To that end, section 3 of the LRA finds application in an instance where any of the provisions of the Rules are interpreted.

Ambit of rule 7A and subrule (7)

[15] Undoubtedly, some of the provisions of this rule are influenced by Rule 53 of the Uniform Rules. For instance, Rule 53 (3) also provides that the costs of transcription, if any, shall be borne by the applicant and shall be costs in the cause. Subrule (7) is couched in almost identical terms. OUTA fervently argues that on the proper interpretation of subrule (7), it is only a transcription from the professional transcribers that is awaited in review proceedings. It is by now rested law that interpretation of any document, legislation included, requires a symbiotic consideration of (a) text; (b) context; and (c) purpose. In order to understand the context of the subrule, regard must be had to the fact that a transcription is but a part of a record. In a review, the obligation of an applicant in terms of subrule (6) is to furnish a record to the other parties, which record would have been availed by the registrar in terms of subrule (5). It is not always the case that the record uplifted from the registrar would require transcription at a cost. However, if an electronically kept record is provided, the need for transcription arises. The oddity stated in this matter arises in a situation where an electronic record is dispatched. Later, in this judgment, this Court shall express a view on the practice by the dispute resolution bodies of dispatching electronic records.

[16] *Erasmus Superior Court Practice Volume 2*[7] (*Erasmus*) delivers the following commentary with regard to a record of such proceedings sought to be corrected:

> 'The purpose of the record is to enable the applicant and the court fully to assess the lawfulness of the decision-making process[8]… Without the record a court cannot perform its constitutionally entrenched review function…
>
> Keeping of a record is not a prerequisite for the applicability of the rule; in other words, proceedings may be brought under review despite the fact that no record of the proceedings sought to be corrected or set aside had been kept.'[9] [Own emphasis]

[17] With regard to rule 53 (3) of the Uniform Rules, *Erasmus* delivered the following commentary:[10]

> 'The right to require the record of the proceedings is primarily intended to operate for the benefit of the applicant.[11] The purpose of the rule is, clearly, to provide to an aggrieved applicant, who might not necessarily have all the evidence at his disposal… Depending on the circumstances, the respondent is not prevented from placing the record, or the relevant parts thereof, before a court simply because the applicant does not do so.' [Own emphasis]

[18] Perspicuously, the presence of a record of the proceedings sought to be reviewed primarily benefits an applicant for review. Clearly, it is in the best interest of the applicant to place a record before a review Court. In *SACCAWU and others v President, Industrial Tribunal and another*[12], the SCA, per the mighty pen of Melunsky JA, had the following to say:

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[7] D E Loggerenberg, "*Erasmus: Superior Court Practice*", Juta, at D1 – 710B – C.
[8] *Turnbull-Jackson v Hibiscus Coast Municipality and others* 2014 (6) SA 592 (CC).
[9] See *Asla Construction (Pty) Ltd v Buffalo City Metropolitan Municipality* [2017] ZASCA 23; 2017 (6) SA 360 (SCA).
[10] Erasmus at D1-710E – F.
[11] 2001 (2) SA 277 (SCA) (*SACCAWU*).
[12] Ibid at para 7.

> 'Moreover – and this is of particular significance in the present matter – an applicant who does not furnish the record to the court runs the risk of not discharging the onus, especially where the allegations upon which it relies are put in issue.' [Own emphasis]

[19] Regard being had to the above, it is clear, that which the applicant contends to be the record of the proceedings to be reviewed is the record, despite its manner of creation and or formation. However, this Court hastens to state that if the other party does not trust, as it seems to be the case herein, the contents of the record placed by the applicant, there is nothing that shall prevent that party from placing a trusted record before a Court of review. The other party cannot gain what is clearly an unfair advantage to put a spoke on the review process simply because the record placed did not pass the hands of a professional transcriber. On the equality of arms, the Court and all the parties involved will be relying on the self-same *home-brewed* record.

The demands of social justice.

[20] In order to advance social justice, this Court should be slow to uphold technical points such as the one raised by OUTA. OUTA simply demands that a transcript must be one that is paid for. As indicated above, social justice finds that litigation costs quintessentially amount to the perpetuation of injustice. If this Court were to interpret the subrule to mean that only paid for transcript is sufficient, then cost implication impermissibly meddles in the course of advancing social justice. This would imply that poor litigants will begrudgingly abandon their automatic right of review simply because they are unable to afford the astronomical costs charged by the transcription companies. This abandonment puts social justice on a straight-jacketed path. In terms of section 151 (1) of the LRA, the Labour Court is established as a Court of Equity. A Court of Equity advances social justice and would not insist on a costly attainment of justice.

[21] In *casu*, Straaten offered to provide OUTA with the electronic disk obtained from the CCMA in order to verify the accuracy of the rejected *home-brewed*

transcript. This offer was rejected by OUTA for reasons that are not satisfactory at all. Clearly, if there is any demonstrable prejudice to be suffered by OUTA, same would have been adequately ameliorated by the offer to verify the transcription. Moreover, OUTA, which has the necessary financial muscles, is not prevented from taking the same disk to the professional transcribers so as to place before the review Court a "trusted record", of course for the benefit of the applicant.

[22] OUTA on its preferred interpretation places heavy reliance on what Tlhotlhalemaje J stated in *obiter* in *Osho Steel (Pty) Ltd v Ngobeni NO and others*[13] (*Osho*). My learned brother had this to say:

> '[19] …In the end however, it would lead to an untenable position for the Court and the parties to a dispute, where unofficial transcribed records are simply filed and served, **when there are clear rules governing that process**.' [Own emphasis]

[23] Since my brother referenced unofficial transcribed records in his judgment, OUTA argued that records provided by Straaten are unofficial and unacceptable. *Osho* is distinguishable from the facts of the present case. There, the applicant transcribed from the records kept by her and not the CCMA. In *casu*, what was transcribed was from the electronic record kept by the CCMA and most importantly submitted to the registrar of this Court. Correctly so, my brother found that Rule 7A (2) (b) requires a person whose decision is impugned to dispatch the record. Contrary to this subrule, the applicant in *Osho* transcribed a record that was not dispatched by the body whose decision was impugned. Accordingly, where my brother refers to rules governing the process, he was clearly referring to the subrule dealing with the dispatch of the record and not the one dealing with payment of the transcribers. Therefore, *Osho* is not an authority for the proposition that only professionally transcribed transcripts are acceptable.

[13] [2019] ZALCJHB 213; (2020) 41 ILJ 476 (LC).

The implications on section 34 of the Constitution.

[24] In order to fairly advance his review case, Straaten requires a record of the proceedings sought to be reviewed and set aside. *Erasmus* comments that the record furthers an applicant's right of access to Court by ensuring both that the Court has the relevant information before it and that there is equality of arms between the person challenging the decision and the decision-maker.

[25] Were this Court to interpret the record requirement to mean only an expensively acquired record, the right to access a Court guaranteed in section 34 would be unjustifiably limited. Any right guaranteed in the Bill of Rights can only be limited in terms of section 36 of the Constitution. Recently, the High Court per Victor J, in the matter of *Right to Know Campaign and Others v City Manager of Johannesburg Metropolitan and Another*[14]*,* declared, as constitutionally invalid, a provision of a policy of the municipality which required protesters to pay a fee in order to exercise their right guaranteed in section 17 of the Constitution. The levying of such a fee was found to be unconstitutional because it unjustifiably limits the exercise of the constitutionally guaranteed right.

[26] In my view, for the same reasons studiously advanced by Victor J, forcing an applicant to an exorbitant cost path in order for him to exercise a right of review is tantamount to limiting his access to this Court. Impliedly, if a dismissed employee cannot afford to pay the transcribers, s/he would be deprived of placing a record of review before a Court of review. Such deprivation would limit the right guaranteed in section 34 contrary to the provisions of section 36 of the Constitution.

The correct interpretation to be adopted.

[14] [2022] ZAGPJHC 388; [2022] 3 All SA 466 (GJ).

[27] As indicated earlier, this subrule (7) was adopted almost unchanged from the provisions of Rule 53. Undoubtedly, Rule 53 predates the Constitution. In the main, the rule was used to review decisions of the lower Courts. The LRA is a product of section 23 of the Constitution. Thus, in my view, a party exercising a right of review contemplated in section 145 of the LRA is effectively exercising a right to fair labour practices. Challenging administrative decisions of dispute resolution bodies equates an exercise of two constitutionally guaranteed rights; namely (a) section 23 (1)[15] right; and (b) section 33 (1)[16] right.

[28] In order not to stifle those fundamental rights, less inhibitions into them should be advanced. Therefore, where payment for the transcription is required, a party who is unable to afford must apply means – like Straaten did in *casu* – to lessen the inhibition on guaranteed rights. Accordingly, the purposive interpretation to adopt is that any transcription, irrespective of its creation, serves the purpose of a record contemplated in the rule. This purposive interpretation does not prevent the other party from challenging the authenticity of the transcript and where appropriate, place before Court an authentic record at its own costs. Such a party may even invoke the provisions of Rule 35 (10), (11) and (12) of the Uniform Rules.

[29] For the record (transcription) contemplated in Rule 7A, I propose that in order to avoid stifling the rights mentioned above, the dispute resolution bodies must not dispatch an electronic disk, which will force the poor and the vulnerable into the exorbitant costs of transcription. There is nothing in the LRA or the Rules to suggest that the dispute resolution bodies should continue to create a niche market for the transcribers by providing electronic records, which inevitably compels litigants into exorbitant costs. OUTA's counsel argued that the record must be certified by a professional. This is nothing but niching up the market for these transcribers. Subrule (5) of 7A

[15] Everyone has the right to fair labour practices.

[16] Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

provides that it is the applicant who must certify each copy as true and correct.

[30] Last but not least, I take the view that labour litigation is constitutional litigation. As such, the vulnerable and the downtrodden deserve some assistance with regard to the costs of obtaining transcriptions owing to the exorbitant fee charged by the transcription companies. In this judgment, I have already preferred a less restrictive and purposive interpretation – a transcription from any creation is acceptable. However, there may be indigent litigants who are not able to slog it like Straaten. Those litigants must be afforded some aid by the dispute resolution bodies by providing them with a less expensive form of record in order for them to champion their rights. After all, it is the decision of these bodies that is tested by a Court of review. Obliquely they have an interest in any review proceedings in the Labour Court.

Conclusions

[31] In summary, a transcription produced from an electronic record provided to the registrar of the Labour Court by a body contemplated in rule 7A (2) (b) of the Labour Court is sufficient irrespective of its manner of creation into a useable format. An applicant for review is the primary beneficiary of a record of review. A respondent is not barred from placing before Court a record it believes to be authentic. It must be remembered that a respondent also has a duty to ensure that a proper record is placed before a Court of review.[17] The contention that because the transcript has not been generated by a professional transcriber, then an incomplete record has been availed is not only against the principles discussed in this judgment, it is preposterous to the extreme. A transcription, irrespective of its manner of creation, completes a record of the proceedings sought to be reviewed and set aside. Accordingly, the present motion is doomed to fail.

[17] See para 27 of *Minister of Police v POPCRU obo Senti and others* (PA15/2021) [2023] ZALAC 19 (23 August 2023).

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

Order

1. The application in terms of rule 11 is dismissed.
2. OUTA is directed to file an answering affidavit, if any, within 14 days of this order.
3. There is no order as to costs.

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G. N. Moshoana

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr. David Londt of McCormick Londt Inc, Sandton.

For the Respondent: In Person.