Missing records

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"John Dalton's records, carefully preserved for a century, were destroyed during the World War II bombing of Manchester. It is not only the living who are killed in war". Isaac Asimov

Records are also integral to the judicial process. This is especially so where an aggrieved party seeks to review a decision of the CCMA. The right of review is also an important right under the Labour Relations Act, 1995 and one which must be jealously guarded in light of the fact that the right ousts an appeal to the Labour Court. Central to a proper determination of any review is the ability of the review court to consider the record of proceedings. This article examines the sorry state of affairs that all too often plays out in a review application where the records either have gone missing or are incomplete. We conclude with some practical solutions.

There has been a plethora of cases in the Labour Court over the past 20 years arising from this endemic problem, which deal with the issue of missing/incomplete records. The harshest repercussion is the dismissal of the application. The latest Practice Manual issued by the Judge President of the Labour Appeal Court now also makes provision on how to deal with the situation of lost/missing records.

In *Baloyi v Member of the Executive Committee for Health & Social Development, Limpopo & Others (2016) 37 ILJ 549 (CC)*, the Constitutional Court had the opportunity to address the issue relating to the consideration of a review application where the record of the arbitration proceedings was lost. The applicant employee was employed by the Limpopo Department of Health & Social Development in 1987. In his position as artisan foreman he was responsible for the maintenance of incinerators at various clinics. He was charged for various acts of misconduct that gave rise to his dismissal. The dispute was referred to the bargaining council were the arbitrator upheld the dismissal as being fair. The applicant approached the Labour Court to review the arbitration award. The bargaining council failed to deliver the record as it was missing. The council and the arbitrator had no objection to the remittal of the matter to be arbitrated afresh. The employee objected. The state did not oppose the review application. The tender to remit aside, the Labour Court believed it was appropriate to consider the review application on its merits, on an incomplete record. It subsequently dismissed the application.

The Constitutional Court found that it was improper of the Labour Court to dismiss the review application without a proper record of the arbitration proceedings in the face of evidence that no record existed. In our view, this is surely correct in law and also serves to protect the very limited right of review that exists under the LRA under the guise of the constitutional right to fair labour practices.

In December 2015, *Toyota SA Motors (Pty) Ltd v CCMA and Others [2015] ZACC 557* came up in the Constitutional Court with the consideration of the effect of failing to timeously prosecute a review in the Labour Court. The Labour Court found that Toyota's delay in prosecuting the review had been excessive and dismissed the review application on the basis of delay. The court refused leave to appeal and so did the Labour Appeal Court. The applicant then applied to the Constitutional Court for leave to appeal, the principal issue being whether the Labour Court was incorrect in dismissing the review application on the basis of the delay. In the majority judgment, the Constitutional Court confirmed that if the record of the proceedings under review had been lost, or if the recording of the proceeding was of poor quality, a party seeking review had an obligation to initiate steps towards reconstruction of the record and approach the Judge President for directions on the further conduct of the review application.

In a minority judgment, Justice Zondo elaborated on the CCMA's responsibility to ensure that a complete and proper record is provided to the Labour Court. Justice Zondo criticised the position of the Labour Court defending the CCMA and suggesting that the parties should themselves have kept proper notes or a recording of the arbitration proceedings. We submit that this must indeed be correct. It can hardly be the responsibility of parties to a statutorily imposed arbitration process to be responsible for the record of proceedings. This obligation lies solely with the tribunal of first instance.

In trying to minimise the risk of inadequate or lost records, Justice Zondo went on to propose certain measures that can be utilised by both the CCMA and the bargaining councils, in the creation of the audio recording:

- At the commencement of every arbitration the parties and the arbitrator should inspect the recording machine or device to satisfy themselves that it functions properly. The arbitrator and the parties should sign a certificate to confirm that they did this;
- Each morning, mid-day and evening of the arbitration, the arbitrator must also inspect the machine to satisfy himself or herself that it is still functioning properly;
- At the end of the arbitration proceedings, the arbitrator should once again check that the recording machine was still functioning properly when the hearing came to an end, and sign a certificate to the effect that during the proceedings he or she inspected the functioning of the recording machine at the given intervals and on each occasion found the machine to be functioning properly or not, as the case may be. If it had not functioned properly at any stage this must be stated, as must the steps taken to have the situation rectified; and
- If there are any tapes or documents to be handed over to anyone, such as employees of the

> CCMA or a bargaining council at the end of the arbitration proceedings, or should the arbitration be postponed, the arbitrator must certify to whom and when they were handed over and the recipient must sign a certificate to confirm this.

But, can this realistically be the way out. We submit not as this would be both laborious and too administrative a process in a technological era.

The legislature opted for this arduous section 145 "constitutionally suffused reasonableness review process" and it must now properly dance to the music.

That the CCMA cannot simply be fitted-out with proper audio recording equipment in its hearing rooms is an absolute wonder. With over-spending by the fiscus everywhere else, this is something the Minister of Labour and the portfolio committee needs to seriously consider. The only other alternative, we would think is: go vinyl, Mister Minister.

We'll now bow out in safe company, Navsa J (correctly we submit) held in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others (2007) 12 BLLR 1097 (CC)* that "Employees are entitled to assert their rights. If by so doing a greater volume of work is generated for the CCMA, then the State is obliged to provide the means to ensure that constitutional and labour law rights are protected and vindicated".

So, we dare say government needs to:
"Show us the money" or is it
"Pay back the money?"

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