IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: JR 1056/2018

In the matter between:

TSEBO MOGUDI **First Applicant**

SEJAKWADI MATLALA **Second Applicant**

and

AFRICAN EXPLOSIVES LTD
(Now trading as AECI MINING LIMITED) **First Respondent**

NATIONAL BARGAINING COUNCIL FOR THE
CHEMICAL INDUSTRY **Second Respondent**

S. OOSTHUIZEN *N.O.* **Third Respondent**

Decided on the Papers.
Delivered:This judgment was handed down electronically by circulation to the parties' legal representatives by email and publication on the Labour Court's website. The date and time for hand-down is deemed to be on 26 March 2024

JUDGMENT

TLHOTLHALEMAJE, J

*Introduction and background***:**

[1] The applicants had approached this Court seeking an order reviewing and setting aside the arbitration award issued by the third respondent (Arbitrator), acting

under the auspices of the second respondent (NBCCI). The first respondent's (Employer) correct name and citation is AECI Mining Limited. This followed the restructuring and renaming of African Explosives Limited, which had employed and dismissed the individual applicants.

[2] The two individual applicants were a group of 14 employees who were dismissed on 1 September 2017 by the Employer for misconduct related to insubordination. Of the 14 dismissed employees, four of them referred a dispute to the NBCCI. When attempts at conciliation failed, the dispute was referred for arbitration. It came before the Arbitrator, who had issued her award on 20 April 2018 in terms of which it was found that the dismissal of the applicants was procedurally and substantively fair.

[3] The applicants launched the review application on 20 July 2018. The review application was however filed outside the statutory time frames, and condonation is sought in that regard. The Employer in opposing the review application also contended that the applicants failed to prosecute the application timeously in that they failed to file a complete record of the arbitration proceedings.

[4] Notwithstanding the challenges faced by the applicants, the Employer has delivered its answering affidavit only in respect of the application for condonation. It also delivered a Rule 11 application to have the review application dismissed on account of lack of timeous prosecution. The Rule 11 application is not opposed, even though in the heads of argument, the applicants sought to address the issue of delays in prosecuting the matter.

Condonation for the late filing of the review application:

[5] As already indicated, the arbitration award having been issued on 20 April 2018, the review application was launched on 20 July 2019. The Employer had delivered its Notice of Intention to oppose the review application on 31 July 2018. What appears to be an application for condonation is incorporated in the review application. The Employer took issue with the fact that the application for condonation is not in compliance with the provisions of Rule 7 of the Rules of the

Court. However, as apparent from the applicants' pleadings, the individual applicants brought the review application to court on their own. To this end, the Court will in the interests of justice, exercise leniency and indulge them, and in a further attempt to bring this matter to finality.

[6] The review application is some 6 weeks out of the statutory time periods set out in section 145(1)(*a*) of the LRA. This much the applicants conceded. The principles applicable to condonation applications are trite and need not be re-hashed. It can only be reiterated that in such applications, the applicants need to show good cause why the Court should condone non-compliance with statutory time frames. Good cause ordinarily involves a consideration of various factors, including *inter alia*, the extent of the delay, a reasonable and satisfactory explanation for the delay, the parties' prospects of success, and the prejudice to the parties should condonation be granted or refused. These factors are interrelated and are not individually decisive. Ultimately, the interests of justice will dictate whether condonation ought to be granted or refused[1].

The delay and the explanation:

[7] The delay of about six weeks is indeed excessive *albeit* not in the extreme. The explanation proffered by the applicants was that their legal representative, (who had also represented them at arbitration proceedings), was only able to consult with them on 4 May 2018. At the consultations, they were informed of the need to raise funds for their application to be pursued. They contend that they could not raise the funds, resulting in two of the other applicants abandoning the matter.

[8] The two individual applicants however on their own obtained a case number from the Registrar of the Court in or about the end of May 2018. They contend that at the beginning of July 2018 they had raised about R2000.00, which was however not sufficient to fund legal representation and pursue the matter. At the time, they were

[1] See Melane v Santam Insurance Co. Ltd 1962 (4) SA 531 (A) at 532B – E; United Plant Hire (Pty) Ltd v Hills 1976(1) SA 717 (A) at 720 E – G; Grootboom v National Prosecuting Authority [2013] ZACC 37; 2014 (2) SA 68 (CC); 2014 (1) BCLR 65 (CC) at paras 22-3 and 51; Moila v Shai N.O. and Others (2007) 28 ILJ 1028 (LAC) at para 34; Brummer v Gorfil Brothers Investments (Pty) Ltd 2000 (2) SA 837 (CC)

also informed that they needed to apply for condonation. In a nutshell, they blamed lack of funding for their non-compliance with the time periods.

[9] The Employer in opposing the condonation correctly pointed out that the explanation for the excessive delay is inadequate, and that the delay is not explained with particularity to entitle the applicants to an indulgence. It was pointed out that the applicants were legally represented at the arbitration proceedings. Having consulted with their legal representatives on 4 May 2018, which was some less than two weeks after the award was issued, the employer's contention was that the applicants must have been informed of the applicable time frames within which to launch their review application.

[10] To the extent that the applicants had referred to various dates in explaining the delays, *i.e.*, 4 May 2018 when they consulted with their legal representative, the end of May when they obtained a case number, and beginning of July, these dates are merely a recordal of events without adding anything of value to their explanation. There is a requirement in such applications, for the applicants to give an explanation which covers the full length of the delay, in order for the Court to be in a proper position to assess whether or not that explanation is satisfactory[2]. The applicants failed in this regard.

[11] It was further pointed out that despite the applicants' alleged lack of funds, very little information is provided as to how and when they were able to secure the necessary funding, especially for the transcribed record. To the extent that the applicants pleaded lack of funds in complying with the time frames, again, it has been said that a claim of lack of funds on its own cannot constitute reasonable explanation for non-compliance with applicable time frames. Thus, when an allegation of lack of funds is made, there is a need for the applicants to inform the Court as to when and how funds were raised. Furthermore, there is a need for the

[2] Independent Municipal and Allied Trade Union on behalf of Zungu v SA Local Government Bargaining Council and others (2010) 31 ILJ 1413 (LC) at para 13.

applicants to indicate what effort if any, they took to enquire in regards to other available resources or avenues to assist them in pursuing the review[3].

[12] Arising from these principles, the applicants do not say much or attempt any explanation for the periods of the delay. Again, the applicants failed to take the court into its confidence as to how they raised funds for the transcription of the record, to the extent that they brought the review application on their own. On the whole however, there is no reasonable or acceptable explanation for the delays in complying with the stipulated time frames.

Applicants' prospects of success on review:

[13] Even if the Court was to be generous and accept that there is some explanation for the delay, and that the parties' prospects of success needed to be considered, it has been said that other than that there must be a compelling excuse for non-compliance with the time frames, there is also a need for the parties' prospects of success to be strong[4].

[14] The Employer's contention was that the applicants' prospects on the merits was weak, and I agree that indeed the applicants have an insurmountable hurdle regarding their prospects of success in the review. This is so based on the evidence led at arbitration proceedings and the findings of the Arbitrator.

[15] By way of background, it was common cause that the applicants were plant operators and were dismissed for gross insubordination, after they had refused to obey reasonable and lawful instructions issued to them on multiple occasions. As evident from the record and the arbitration award, the applicants refused to obey an instruction to resume work at Plant 'PE19'. This was after they were instructed by the plant manager, their direct supervisor, and HR Managers to undergo the necessary training before they could work on the new plant. The applicants had in all instances

[3] Du Plessis Wits Health Consortium (Pty) Ltd [2013] JOL 30060 (LC) at para 16; [2012] ZALCJHB 53 (14 June 2012); Balmer and others v Reddam (Bedfordview) (Pty) Ltd (2011) 32 ILJ 2121 LC at para 15

[4] A Hardrodt (SA) (Pty) Ltd v Behardien and Others (2002) 23 ILJ 1229 (LAC) at para 4.

refused to obey the instruction, demanding that the employer must first re-evaluate their positions.

[16] The employer had refused to accede to the demands because issues of re-evaluation of posts was to be dealt with at national, and not plant level. Following the involvement of recognised unions, the employer had relented, and agreed to re-evaluate the posts. The Employer however required the employees to start operating the plant whilst the process of re-evaluation of posts was on-going. The employees including the applicants however would have none of that, as they demanded that the employer should complete the re-evaluation process before they started operating the plant.

[17] The employer's contention before the Arbitrator was that other employees who were members of other unions had followed the instructions and performed their duties whilst the re-evaluation process was on-going. The applicants and the 12 other employees however had refused to resume duties on the plant.

[18] Evidence in support of the employer's case was led by its operations manager, Mr Sibiya. His evidence was that following an audit by the Department of Environmental Affairs, it was established that the employer's operations were not in compliance with applicable legislation. It is not necessary to elaborate into the details of how the employer was found wanting in this regard. The audit had however necessitated that a new plant be built in 2016 that would ensure that the employer's operations and plants were in compliance with legislative requirements. This was in particular reference to a plant that was used to treat, neutralise, and remove effluent in the waste material produced by the employer. A new plant (PE19) was finalised and had become operational. It was in reference to this new plant that the applicants had refused to undergo training or start operating it, as they demanded that their posts be re-evaluated.

[19] Sibiya testified that the applicants refused repeated instructions to work on the new plant. To keep operations going, this had necessitated that the team managers had to perform the applicants' tasks over three days. Discussions were held with the three representative unions, and at some point of the negotiations, the union shop

stewards gave feedback to management, indicating that the employees still refused to operate the plant until re-evaluation of posts was completed. Other employees had however agreed to resume their duties on the plant. Sibiya had then warned employees and informed them that they were in breach of their contractual obligations. He further implored them to start operating the plant, but to no avail.

[20] Sibiya testified that after the three days, the team leaders called employees to a refresher training. The applicants were part of the group that refused to undergo the training or start operating the plant. At all material times, they were demanding a re-evaluation of their posts. Sibiya had denied that the applicants had at any stage raised concerns surrounding health and safety issues in operating the plant. He contended that safety was not an issue as all that the applicants were interested in was a re-evaluation of their posts. Those employees that refused to obey the instructions were subsequently suspended, subjected to a disciplinary enquiry, and then dismissed.

[21] Another witness, Ms Mabaso, who was employed as a team leader, confirmed Sibiya's version of events as she had also conveyed to the employees that management had agreed to re-evaluation of positions, and that they should resume their duties whilst the process of re-evaluation took place. She had also explained to them that refresher training would be provided to the employees. She confirmed that the employees were insistent that the re-evaluation of posts should be done first.

[22] Mabaso had also personally called each of the employees to explain to them that they were refusing to obey instructions and there could be consequences. She contended that the employees confirmed that they were aware, but still refused to start operating the plant. She had then issued letters of suspension to those employees who refused to obey the instruction. She also denied that the employees had during her discussions with them, raised any safety concerns, and that had this been done, she would personally have involved the employer's engineering department to deal with those concerns.

[23] The applicants' case before the Arbitrator was that the employer had unilaterally changed their terms and conditions of employment, and committed an

unfair labour practice when it altered their contracts of employment. They had contended that they were pressurised into starting operations on the plant when there were safety concerns, and when the plant had not been assessed or certified as being safe.

[24] The summary of the applicants' testimony through the evidence of Messrs Mashua, Tsebo Mogudi, Matlala, and Ndawondwe, was that they had safety concerns about the new plant as they were not familiar with it. They were promised that they would be trained on the new plant but this never took place. They contended that they were merely told to start operating the new plant when no induction or training was offered in regard.

[25] They all denied that they had refused to obey an instruction, and that they had valid reasons for refusing to obey due to safety concerns. This was despite the fact it being put to them during cross-examination that the issue of safety was never raised before, inclusive of at the disciplinary hearing or in the pre-arbitration minutes, until at arbitration proceedings. They also denied that they had made a demand that their posts be re-evaluated. Mashau however confirmed under cross-examination that they were informed of the refresher training, which instruction was repeated on no less than three occasions.

[26] Having heard the evidence, the Arbitrator concluded that the employer had discharged its onus of proving that the dismissals were procedurally and substantively fair. She found that the applicants had repeatedly refused to obey instructions as they demanded a re-evaluation of their positions, and that there was no substance to the allegation that the employees had safety concerns as these would been appropriately dealt with. She found that issues of safety were raised for the first time at arbitration proceedings.

[27] The Arbitrator concluded that the instructions issued to the employees were lawful and reasonable; that the employees refused to obey those instructions, which refusal constituted an act of gross insubordination, making a dismissal appropriate in the circumstances. The Arbitrator further concluded that there was no basis for a finding to be made that the dismissals were procedurally unfair, in that the

documentary evidence presented regarding the hearings demonstrated that the employees' union representatives were present in those hearings, and that it was not necessary for each of the employees to have testified at those proceedings.

[28] In these proceedings, the individual applicants in their heads of argument submitted that they had 'staged a lawful protest in the form of legal go-slow' for the employer's non-compliance with applicable mining statutes, in order to highlight the unsafe working conditions at the plant. They contended that they were first offenders and ought to have been treated with leniency as they refused to carry out an unlawful instruction.

[29] They further submitted that the Arbitrator was 'wrong' with her findings and on issues of law, as she did not consider their health and safety concerns, and further that she did not consider their rights to a fair hearing at the internal disciplinary enquiry, inclusive of the fact the proceedings were not recorded. They further submitted that the proceedings were conducted in English, when they all spoke different languages, and that no interpreter was made available to assist them.

[30] The test on review is whether the decision of the Arbitrator can be said to fall outside of a band of decisions to which a reasonable arbitrator could arrive at[5]. On the facts of this case, there is no doubt that the reasonableness of the Arbitrator's decision is unassailable.

[31] The issue in dispute before the Arbitrator was clear, which was whether the dismissal of the applicants was procedurally and substantively fair following allegations of misconduct related to gross insubordination. In *Sylvania Metals (Pty) Ltd v M.C Mello N.O & others*[6] the Labour Appeal Court (LAC) held that insubordination in the workplace context generally refers to the disregard of an employer's authority or lawful and reasonable instructions. It occurs when an employee refuses to accept the authority of a person in a position of authority over

[5] Sidumo and Another v Rustenburg Platinum Mines Ltd and Others [2007] ZACC 22; [2007] 12 BLLR 1097 (CC); 2008 (2) SA 24 (CC) ; (2007) 28 ILJ 2405 (CC); 2008 (2) BCLR 158 (CC)

[6] (JA83/2015) [2016] ZALAC 52 (22 November 2016) at paras 17 – 18; See also Palluci Home Depot (Pty) Ltd v Herskowitz and Others [2014] ZALAC 81; [2015] 5 BLLR 484 (LAC) ; (2015) 36 ILJ 1511 (LAC)

him or her and, as such, it constitutes misconduct because it assumes a calculated breach by the employee of the obligation to adhere to and comply with the employer's lawful authority. The LAC further added that insubordination includes a wilful and serious refusal by an employee to adhere to a lawful and reasonable instruction of the employer, as well as conduct which poses a deliberate and serious challenge to the employer's authority, even where an instruction has not been given.

[32] Arising from the above, it has also been held that whether gross insubordination has been demonstrated involves an enquiry into three main considerations, *i.e.*, the action of the employer prior to the deed, the reasonableness of the instruction, and the presence of wilfulness by the employee[7]. In *TMT Services*, it was further held that the employer's prerogative to command its subordinates is the principle that is protected by the class of misconduct labelled "insubordination" and that it addresses operational requirements of the organisation that ensure that managerial paralysis does not occur. In this regard, it was further held that defiance of authority can be proven by a single act of defiance[8].

[33] Against the above principles, there is no doubt in this case that the applicants conducted themselves in a grossly insubordinate manner, in view of the numerous instructions issued to them to start operating the plant, and the equally numerous occasions that they had refused to obey those instructions issued by various senior management personnel. I agree with the submissions made on behalf of the employer that indeed the applicant's conduct was not only wilful, but also persistent and serious, and intended to challenge the authority of senior management over a long period.

[34] Even on the applicants' own evidence, it is apparent from the various reasons that they had advanced, that they had on numerous occasions refused to obey instructions. The Employer's consistent version was that the applicants refused to obey the instructions because they demanded a re-evaluation of their posts. It was further the employer's version that at no stage did the applicants raise safety

[7] TMT Services and Supplies (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and Others [2018] ZALAC 36; (2019) 40 ILJ 150 (LAC); [2019] 2 BLLR 142 (LAC) at para 4.
[8] At para 19.

concerns, and that it was for the first time at arbitration proceedings that they had done so.

[35] In the applicants' heads of argument, the applicants suddenly contended that they had staged 'a lawful protest in the form of legal go-slow' for the employer's non-compliance with applicable mining statutes, in order to highlight the unsafe working conditions. Before the Arbitrator, their case was that the employer had unilaterally changed their terms and conditions of employment or had committed an unfair labour practice. Any of their contentions however confirms that they were indeed insubordinate, irrespective of the multiple reasons they wished to proffer.

[36] To the extent that in these proceedings the applicants had contended that they were on a 'go-slow' or 'lawful protest', this contention however makes the applicants case worse, as if demonstrate that they were not willing to obey the instructions. Worst still, however, is that it is trite that it would be impermissible for litigants to raise issues in review proceedings, which were never placed before an arbitrator in the first place. All that can be said is that the applicants appear to be adapting their case as and when it progressed.

[37] In the end, I am satisfied that on the facts of this case, the employer's actions of having to effect changes to its operations and the creation of the new plant was to meet its statutory obligations as demanded by the Department of Environmental Affairs. The applicants were offered refresher training on the new plant and had resisted it. At the very least, Mashau confirmed that they were indeed informed of the refresher training, which instruction was repeated on no less than three occasions.

[38] There was nothing unlawful or unreasonable about the instructions to start operating the plant. If they had any safety concerns as Mabaso had testified, she would not have hesitated to involve the engineering department to deal with whatever safety concerns the applicants had. In the end, the excuse of safety concerns was nothing but a ruse.

[39] For three days the applicants refused to obey the instruction, even after the intervention of the unions. This had led to team leaders themselves having to

perform the applicants' tasks. The applicants despite their demands on a re-evaluation of their posts having been met, with the proviso that the process of re-evaluation would be on-going whilst they continued with their duties, had nonetheless persisted with their refusal, whilst other employees carried on with their functions. Clearly the applicants' posture was unreasonable in the circumstances.

[40] In the end, the applicants on the multiple occasions were begged to start operating the plant and had instead, displayed outright wilfulness not to follow the instructions, and ignored warnings. The employer under the circumstances was compelled to address operational requirements of the organisation and ensure that managerial paralysis did not occur, especially in the face of conduct which posed a deliberate and serious challenge to its authority. This meant that the circumstances dictated that the employer was obliged to take action and dismiss the applicants. Clearly the applicants put themselves in a position they find themselves currently, if they still remain without an income. They were warned of such consequences, but had nonetheless continued with their recalcitrant conduct.

[41] Furthermore, and in line with the approach in *Goldfields*[9], I am satisfied that the Arbitrator as apparent from the record and the award, dealt with the dispute before her with the minimum of legal formalities, and employed a process that gave all the parties a full opportunity to have their say in respect of that dispute. The Arbitrator further properly identified and understood the nature of the dispute she was required to arbitrate, and dealt with the substantial merits of the dispute. Based on the evidence before her, the Arbitrator thus arrived at a decision that another decision-maker could reasonably have arrived at.

Summary:

[42] In the light of the excessive nature of the delay in filing the review application, the inadequate nature of the explanation proffered for the delay and non-existent prospects of success on the merits in the main, it is apparent that it is the employer

[9] Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others [2013] ZALAC 28; [2014] 1 BLLR 20 (LAC); (2014) 35 ILJ 943 (LAC) at para 20.

that stands to be prejudiced in having to defend a protracted matter that enjoys no prospects of success. In the circumstances, the applicants have not demonstrated good cause in their condonation application, and accordingly, the interests of justice dictate that condonation for the late filing of the review application be refused.

[43] Against the above conclusions, it would not be necessary for the Court to deal with other matters arising from the employer's Rule 11 application.

[44] I have further had regard to the requirements of law and fairness insofar as an award of costs is concerned. The applicants represented themselves in this matter and against all other considerations, any award of costs is not deemed warranted.

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

<u>Order:</u>

1. The applicants' application for condonation for the late filing of the review application is dismissed.

2. The applicants' application for a review of the arbitration award issued by the third respondent under GPCHEM11-17/18 and as issued under the auspices of the second respondent is dismissed.

3. There is no order as to costs

Edwin Tlhotlhalemaje

Judge of the Labour Court of South Africa

REPRESENTATION:

For the Applicants: In person.

For the First Respondent: Mr D Cithi of Mervyn Taback Inc.