



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Case no: JA 37/2013

In the appeal between

KHIPHA, NKAMBULE PETRUS

Appellant

and

MINISTER OF HOME AFFAIRS AND OTHERS

First Respondent

DIRECTOR-GENERAL: DEPARTMENT

OF HOME AFFAIRS

Second Respondent

Date of judgment: 27 March 2014

Date edited: 20 May 2014

CORAM: DAVIS JA, NDLOVU JA, SUTHERLAND AJA

JUDGMENT

DAVIS, JA

- [1] The background to this case can be sketched thus. The appellant was employed by the 1st respondent as the Chief Financial Officer. He was charged with a number of acts of misconduct, found guilty and dismissed. The dismissal was made effective from 31 December 2008. It transpired that the appellant challenged the fairness of the dismissal and referred the matter for adjudication in the Labour Court. The Labour Court ruled that the referral to it was premature and it lacked jurisdiction. Finally, the matter was referred by the appellant to the Bargaining Council for conciliation.
- [2] It was at this point that the question of an application for condonation was raised. The appellant applied for condonation, and it was granted. It was against this ruling that the respondents applied to the Court *a quo* for review thereof.
- [3] I turn to deal with the condonation ruling of the arbitrator sitting within the framework of the General Public Service Sectoral Bargaining Council. The arbitrator noted that the dispute had arisen, as I have already noted, on 31 December 2008. It was only referred to the Bargaining Council on 01 February 2012. The appellant contended that this application was in effect only four days late because the order of the Labour Court with regard to the question of jurisdiction had only been issued on 9 December 2011.
- [4] The arbitrator then summarised the reasons that had been given for the late submission of the application by the appellant. In effect, the main point was that the delay had been caused by the matter having been referred to the Labour Court which found that it had no jurisdiction to deal with the matter as at December 2011.
- [5] The arbitrator then summarised, albeit it briefly, the respondent's submissions. The respondent had taken the approach that the application for referral was more than three years late, making:
- “The delay excessive.”
- [6] The respondent submitted further that the appellants' reasons which were

proffered for the late application were not acceptable. Reference was made to the correspondence generated by the respondent's attorneys to the attorneys of the appellant warning the latter that the matter could not be dealt with by the Labour Court and that the only legal course of action open to the appellant was to refer to the Bargaining Council, unless the appellant chose to ignore this advice and only found out how correct it was when the ruling from the Labour Court was delivered. According to the respondent, this meant that the reason for the delay was placed squarely at the door of the appellant. There is insufficient justification for the late application, and accordingly, condonation should be refused.

[7] The Arbitrator having summarised this set of arguments, said:

"I am baffled by the applicant's rationale on deciding to refer his matter to the Labour Court when he could have simply referred it to the GPSSBC and saved himself time and money. That being said, I believe that the applicant has given reasonable explanation for the delay."

[8] Accordingly, condonation was granted. When the matter was heard before Bhoola J, she found to the contrary, that the application for review by the respondent should succeed. Briefly, her reasons were thus:

"In regard to the grounds of review and applying the applicable legal principles, it is clear that the Arbitrator did have regard correctly to the test on review but made a number of contradictory findings. And therefore, in finding as she did above committed a gross irregularity and exceeded her powers. This resulted in an award that is unreasonable and falls to be set aside."

[9] Accordingly, the Court *a quo* found in favour of the respondent, namely that condonation had to be refused, although no costs were awarded .

[10] On appeal, the respondents relied to a considerable extent on the decision in *Metz Transport (Pty) Ltd v Furniture Bedding and Upholstery Industry Bargaining Council Greater Northern Regions and Others*¹, where Jammy AJ held:

¹ [2009] 10 BLLR 1137 (LC) at para 21

“Whilst it is correct that the granting of condonation and the issue of the non-resolution certificate by the 4th respondent occurred in the course of the dispute resolution procedure invoked by the third respondent and may, in the strict sense be defined as interlocutory, it seems to me that this is a semantic issue rather than a pragmatic one. The fourth respondent’s finding determined the entitlement of the third respondent to pursue the process. Had condonation been refused, that as the third respondent submits would have aborted the process, and in a proper case, been subject to review. It does not however follow, in my opinion, the contrary decision, allowing condonation and thereby the further pursuit of the process can be validly and differently categorised. The issue whether or not the late referral of the dispute for conciliation should or should not be allowed, stands alone as an independent matter for adjudication. In that context, the 4th respondent’s determination, is in a proper case, reviewable.”

- [12] By contrast, the appellant contends that matters of this particular interlocutory kind, namely the granting of a condonation represents a classic case of midstream review which would be pursued by Courts. In short, there is considerable amount of authority to the effect that Courts will hesitate to intervene during a process which has already been launched, but will allow the process to culminate before granting an application for review.
- [13] For this reason, it was contended that there was no basis by which the Court *a quo* should have interfered with the decision of an arbitrator in the course of arbitration proceedings and thereby adopt a different approach to that which had been taken by the arbitrator at the very commencement of proceedings, the merits of which still had to run their course.
- [14] As a counter to this argument the Respondents referred to a judgment of van Niekerk J in *Trustees for the Time Being of the National Bioinformatics Network Trust v Jacobson and Others*², where he, the learned Judge said this:

“This Court has jurisdiction in terms of section 158 (1) (g) to review interlocutory rulings made by Commissioners, and is empowered generally by

² [2009] 8 BLLR 833 (LC) at para 3

section 158(1)(a)(i) to grant urgent interim relief. In criminal and civil proceedings, intervention by way of interdict in uncompleted proceedings is exceptional – the exercise of this power has been held to be confined to those rare cases where a grave injustice might otherwise result or where justice might not be otherwise be attained. In general the court will hesitate to intervene, having regard to the effect on the continuity of the proceedings in the Court below and to the fact that redressed review or appeal will ordinarily be available [see *Wahlhaus and Others v Additional Magistrate, Wynberg and Another*³].

- [15] Suffice it to say that, in my view van Niekerk J is correct that section 158(1) bears the weight of the argument of respondent that Court would have jurisdiction to conduct a review of this kind of decision. The question remaining in what circumstances such a review application be appropriately entertained. Van Niekerk J provides helpful further insight at para 4:

“There are at least two reasons why the limited basis for intervention in criminal and civil proceedings ought to extend to uncompleted arbitration proceedings conducted under the auspices of the CCMA, and why this Court ought to be slow to intervene in those proceedings.

- [16] The first is a policy-related reason. For the Court to routinely intervene in uncompleted arbitration proceedings would undermine the informal nature of the system of dispute resolution established by the Act.

“The second (related) reason is that to permit applications to the review on a piecemeal basis would frustrate the expeditious resolution of labour disputes. In other words, in general terms, justice would be advanced rather than frustrated by permitting CCMA arbitration proceedings to run their course without intervention by this Court.”

- [17] I should add that in the case in which Judge van Niekerk was concerned to deal with, the question before the Court was whether the Commissioner was entitled to refuse legal representation in the proceedings. In my view, this is a

³see *Wahlhaus and Others v Additional Magistrate, Wynberg and Another*³, 1959 (3) SA 113 (A)].”

very different set of circumstances from the question of condonation thereof, which render the cases distinguishable. The fact that van Niekerk J was so cautious and fastidious in his formulation of whether it would be appropriate to intervene, given the circumstances of the case only compounds the importance of this decision for the present dispute.

- [18] The question, which must be asked, is what grave injustice would follow if condonation was granted and the arbitrator's decision had been allowed to stand, contrary to the approach which was adopted by Bhoola J? In short, what is the grave injustice?
- [19] The grave injustice cannot be the fact that the matter proceeded to fruition and the appellant was successful in the proceedings, reinstatement would inevitably follow which would prejudice an employer who may already have filled the post given the length of time between the dismissal and the proceedings. But that problem is cured by section 193 of the Labour Relations Act 66 of 1995 which affords the court flexibility in the tailoring of appropriate relief and does not make reinstatement inevitable.
- [20] Secondly, the question arises as to whether delay on its own is sufficient to justify the conclusion that it is in the interests of justice to permit a review. Given the fact that there is a delay in the first place which gave rise to the condonation, something more than mere delay, even of an extended kind, is surely required to justify the extraordinary approach, namely that a midstream review of a condonation decision be permitted.
- [21] What then did the respondent provide to the Court in order to justify that there would be a grave injustice perpetuated if the decision of the Arbitrator was allowed to stand?
- [22] In a review application, it behoves a party such as the respondent to show why there would be a grave injustice which would follow in the event that the condonation decision was allowed to stand, grave injustice which would be sufficient to allow a Court clothed with the jurisdiction to exercise a power to set aside the condonation decision.

- [23] This Court invited, respondents' counsel to provide evidence from the papers to the case that was made out by the respondent as to the grave injustice was concerned. In effect, the only relevant passage from the answering affidavit of Mr Oppelt, who deposed to an affidavit on behalf of the respondents, is the following:

"It is denied that the applicant stands to be prejudiced in the event that his application for condonation is not granted in this matter. The applicant elected to refer his dispute to the Labour Court at his own peril. He was informed in his letter of dismissal that he should refer any dispute to the GPSSBC. And thereafter, the respondents repeatedly informed the applicant's attorneys that there existed no basis on which to justify the bypassing of the GPSSBC. And the referral of the matter to the Labour Court was accordingly inappropriate given that the Labour Court lacked jurisdiction to determine the matter prematurely referred to. Accordingly, any prejudice which may be suffered is as a result of the applicant's own election to not refer the dispute to the GPSSBC timeously."

- [24] There is nothing in the affidavit by Mr Oppelt which would suggest, for example, that the respondent would be gravely prejudiced because of the length of time which had resulted, in the relevant documentation not being available so that the case could not be properly prosecuted or that relevant witnesses had died, left the country or disappeared, which again would add to the prejudice of a proper hearing. In short, there is not a scintillo of evidence of the kind which would justify a Court taking, what in my view, is an exceptional step, to engage in a form of midstream review, and set aside the decision taken by an Arbitrator to grant condonation.
- [25] For all of these reasons, this is a case in which the decision of the arbitrator should have been allowed to stand. In my view the Court *a quo* erred in its decision.
- [26] For this reason, the appeal is upheld and the Court *a quo*'s order is substituted with an order condoning the late filing for conciliation and arbitration by the appellant. The dispute is referred back to the Bargaining

Council for final determination. Given the nature of this case, there is no order as to costs.

Davis

Judge of Appeal

Ndlovu JA and Sutherland AJA concurred

Labour Appeal Court

Appearances:

For the Appellant: A.P Laka SC

Instructed by: Msiza & Associates

For the First Respondent: W.R Mkhari SC

Instructed by: Bowman Gilfillan Inc

Labour Appeal Court