INTHE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA 117/13

In the matter between:–

SOUTH AFRICAN TRANSPORT AND ALLIED

WORKERS' UNION (SATAWU) **First Appellant**

FRANS PHOKOBJE **Second Appellant**

And

TOKISO DISPUTE SETTLEMENT **First Respondent**

RUSSEL MOLETSANE **Second Respondent**

PUTCO LIMITED **Third Respondent**

Date heard: **05 March 2015**

Date delivered: **05 May 2015**

Summary: Review of private arbitration award – jurisdiction – dispute about the date of the publication of award – award faxed to parties on different date - assumption cannot be made that parties received award on same day – review application one day late – employee failing to file condonation – time limit peremptory and cannot be condoned without proper application. Appeal dismissed.

Coram: Waglay JP, Landman JA *et* Mngqibisa-Thusi AJA

JUDGMENT

LANDMAN JA

Introduction

[1] The South African Transport and Allied Workers Union (SATAWU) and Mr Frans Phokobje appeal against the whole of a judgment delivered by the Labour Court (Vatalidis AJ) on 27 September 2012 dismissing an application to review an award of Mr Russell Moletsane (the arbitrator) acting under the auspices of Tokiso Dispute Settlement concerning the second appellant and Putco Ltd. The appeal lies with leave of this Court.

Background

[2] The second appellant was employed by Putco as a ticket seller. He was dismissed for allegedly selling lost monthly tickets. A dispute was referred to arbitration in terms of the Arbitration Act 42 of 1965 (the Act). The arbitrator delivered or published an award. The second appellant was dissatisfied with the award and brought an application to review it. In terms of section 33(2) of the Act, an application to review an award must be made within six weeks after publication of the award to the parties. In the case of corruption, the period is longer but that is not relevant here.

[3] The Labour Court found that the application was launched out of time, without an application for condonation of the failure to launch the application timeously, and therefore the court lacked jurisdiction to entertain the application. It is therefore necessary to set out how the issue of jurisdiction was raised. The following facts and circumstances are relevant:

(a) The application for review was launched on 5 November 2005.

(b) The appellants state in their founding affidavit that "… the arbitrator issued an award dated 29 August 2005…"

(c) The award of this date is attached to the founding affidavit together with a fax coversheet bearing the Tokiso Logo and particulars. It is dated 5 October 2005 and is addressed to Mr Mataboge and says "Attached please find the award for your kind attention". The transmission details read: "Oct-5-2005 08:59 FROM: TOKISO 3255791 TO: 012328339."

(d) The award and coversheet are linked to the founding affidavit by virtue of the mention of the dispute number "P5/260".

(e) Putco raised the issue in an answering affidavit in the following manner:

'I am advised that as the arbitration was a private arbitration, it was subject to the provisions of the Arbitration Act 42 of 1965 ("the Arbitration Act"). I am further advised that in terms of section 33(2) of the Arbitration Act, an application for review should be brought within six weeks of the date of receipt of the award. The award is dated 29 August 2005 and was faxed by Tokiso to the Third Respondent on 8 September 2005. I assume that the award was also faxed by Tokiso to the first applicant on that date. A period of six weeks calculated from 8 September 2005 would have lapsed, according to my calculations on 20 October 2005. The review application is dated 11 November 2005 and was telefaxed to the Third Respondent on 14 November 2005. Accordingly, I submit that the review application was instituted outside the period prescribed in the Arbitration Act and that on this basis, the review stands to be dismissed with costs.'

(f) The appellants did not file a replying affidavit.

The court *a quo's* ruling

[4] The court *a quo* noted that the application had been filed with the registrar on 17 November 2005. The court was referred to the fax cover sheet but noted that the

appellants had not said under oath when the award was received. The court applied the test in *Plascon-Evans Paint Ltd v Van Riebeeck Paints (Pty) Ltd*[1] and said at paras 13 and 14 of the judgment:

> 'Applying the test set out in *Plascon-Evans,* this Court, in the absence of any pleaded response to the third respondent's claim that the arbitration award was delivered to the applicants on 8 September 2005, has no alternative but to accept the respondent's version that the applicants received the arbitration award at the same time as the third respondent on September 2005.
>
> Having accepted the respondent's version in this instance, it would seem that the applicants filed their review application outside the six week time period required for arbitration awards and have simultaneously failed to apply for condonation for their late filing of the review application.'

Evaluation

[5] Mr J S Mphahlani, who appeared on behalf of the appellants, submitted that the appellants sought to review the award in terms of section 145(1) of the Labour Relations Act 66 of 1995. This does not assist him. First because the arbitrator arbitrated the dispute in terms of the Arbitration Act 42 of 1965 and secondly the period within which to apply for the review of an award is six weeks under both Acts.

[6] In order for the court *a quo* to decide whether the application for review had been brought timeously, that is within the six week limit, it was essential for the court to determine when the award was "published". Section 25(1) provides that the award shall be delivered by the arbitration tribunal, the parties or their representatives being present or having been summoned to appear. (2) The award shall be deemed to have been published to the parties on that date on which it was so delivered.

[7] The parties and the court *a quo* were content to assume that an award was duly published when the parties received it. Implicit in this must be the further assumption that if the parties each received the award on different dates the award

[1] [1984] 2 All SA 366 (A) at 731.

would be assumed to have been published on the date that it is last received. It is unnecessary to decide when an award may be assumed to be published where it is not delivered in the presence of the parties. This appeal may be decided on the assumptions which the parties and the court *a quo* made.

Publication of the award

[8] The *onus*, generally speaking, was upon the appellants to show that the review application had been launched timeously because this is a fact or element which goes to establishing the jurisdiction of the Labour Court to hear the application for review. But the question of where the *onus* lies depends upon the form in which a challenge is mounted. In *Malherbe v Britstown Municipality*,[2] Ogilvie-Thompson AJ (as he then was) said the following:

> 'Under the procedure now prescribed by Act 32 of 1944 any question of onus which arises in connection with any challenge of the Court's jurisdiction must, in my judgment, be determined on a consideration of the particular form in which that challenge is raised on the pleadings in the particular case. It is the province of the plaintiff to establish the jurisdiction of the Court into which he, as *dominus litis*, has brought the defendant. In this sense the onus of establishing jurisdiction is, in my view, always on the plaintiff. But the form of defendant's plea may be such as to burden him with an onus to prove certain facts. As shown by VAN DEN HEEVER, J.P. (as he then was) in *Lubbe v Bosman*[3], there is weighty Roman-Dutch authority for the proposition that once a defendant raises the *exceptio fori declinatoria* as a substantive plea 'the onus rests upon him of proving the facts upon which his plea to the jurisdiction is based'. In such a case the defendant in his plea avers the existence of certain facts which, if proved, will defeat the jurisdiction. The onus of proof of such facts rests upon the defendant.'[4]

See also *Munsamy v Govender* 1950 (2) SA 622 (N) at 624.

[2] 1949 (1) SA 676 (C).
[3] 1948 (3) SA 909 (O) at 914-915.
[4] At 287.

[9] I am of the opinion that appellants bore the initial *onus* and it remained with them. Although the appellants may be excused for not filing an affidavit by Tokiso setting out when the award was delivered, it should have made an averment about when the award was received; more so when the date of receipt was challenged. The appellants placed before the court the award (this is common cause) and a coversheet *prima facie* showing that the award was faxed by Tokiso to the appellants on 5 October 2005 but without an affidavit stating when the award was received.

[10] The award was not delivered in the presence of the parties. This has the effect that the presumption in section 25(2) does not apply. The date of the award of 29 August 2005 is of no significance in this case. The arbitrator followed a procedure, which is fairly common, of providing a copy of the award to the parties by fax. This may well be in accordance with Tokiso's domestic rules but the rules have not been referred to in the papers.

[11] Where an award is not delivered in the presence of the parties, it would probably not be sent simultaneously. Some interval would elapse. Putco does not deny that the appellants received the award by fax on 5 October 2005. It may be that the deponent to Putco's answering affidavit overlooked the fax coversheet attached to the appellants' papers. In any event, the furthest that Putco is prepared to go is to say that the award was faxed by Tokiso to Putco on 5 September 2005 and it assumes that the award was also faxed by Tokiso to the appellants on that date.

[13] Of course, the appellants should have filed a replying affidavit which would have assisted the court but this was not done. But they were not obliged to do so.

[14] The court *a quo* overlooked the fact that the deponent to Putco's answering affidavit was making an assumption. It was incumbent on the court *a quo* to interrogate the assumption and to determine whether the assumption was such that it could be elevated to a fact. L Steynberg "Fair" Mathematics in Assessing Delictual Damages" 2011(14)2 *PER/PELJ* relying on Keynes *Treatise on Probability* points out that:

> 'Probabilities are not surrendered to human imagination, which means that a supposition or assumption is not probable merely because someone thinks so. The facts that establish the knowledge upon which the probability is based should be determined objectively and independently of human opinion.'[5] [footnote omitted]

[15] The assumption, in the light of the fax coversheet apparently sent with the award to the appellants, casts doubt on the correctness of that assumption. But it is unnecessary to rely on this as where an award is not delivered in the presence of parties but is faxed to one party it cannot be assumed as a fact that it reached the other party at the same time or on the same date. There are many reasons why it might have not been faxed to the appellants on the same date that it was faxed to Putco. The court *a quo* should have found that the award was published as regards the appellants on 5 October 2005.

[16] If the court *a quo* could not decide when the award was published, the court was empowered to remit the award to the arbitrator to deliver it in the presence of the parties. Cf M Jacobs *The Law of Arbitration in South Africa* (Juta 1978) 129 and *Anning v Hartley* (1885) 27 LJ Ex 145, 2 Dig (Repl) 453.

Timeous application

[17] What remains is to determine whether the application was filed within the period of six weeks after publication of the award to the parties on the basis that 5 October 2005 was the date of publication of the award. Mr Mphahlani initially submitted that the last day for delivery of the award was 16 November 2005. But when it was pointed out to him that this meant the application was delivered late, he submitted that 19 November was the last day. I do not agree with his second submission.

[18] The calculation of this period is done not in accordance with section 4 of the Interpretation of Statutes Act 33 of 1957 by excluding the first and including the last day unless the last day is a Sunday or public holiday which is then excluded, but in terms of the civil method. See LC Steyn *Die Uitleg van Wette* (Juta 1981 5th Ed) at

[5] At 13/226.

174-175. In terms of this method, the first day is excluded so that the period runs from the next day. Therefore the review application had to be filed before 17 November. As the application was filed on 17 November 2005, it was not filed timeously. It was one day late. Strictly speaking an application for condonation was required. Where an application is filed but a day or two out of time then in the absence of prejudice an application from the bar may have sufficed. Even this was not done.

[19] During his oral argument, Mr Mphahlani referred us to the judgment of this Court in *MTN v Pravin and Another* (unreported judgment dated 1 February 2002 in case JA4/01). This judgment is of no assistance to him as the respondent there had applied for condonation for his failure to refer a dispute timeously. We were also referred to a number of judgments, all to the effect that technical objections to less than perfect procedural steps should not be permitted in the absence of prejudice. See for example *Trans-African Insurance Co Ltd v Mauleleka* 1956 (2) SA 273 (A). This is correct but where the steps constitutes a jurisdictional step, a time limit, and the party is out of time then, in the absence of an application for condonation, a court cannot come to the party's assistance.

[20] In the result, the appeal fails and must be dismissed.

[21] It will be fair to make no order for costs.

Order

[22] I make the following order:

1. The appeal is dismissed.

2. There is no order as to costs.

Landman JA

I agree

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Waglay JP

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Mngqibisa-Thusi AJA

APPEARANCES:

FOR THE APPELLANTS:	Adv J S Mphahlani Instructed by MM Baloyi Attorneys.
FOR THE THIRD RESPONDENT:	Mr RM Carr of Bowman Gilfillan Inc.