

**THE LABOUR COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)**

CASE NO. JR 267/08

In the matter between:

M.J. MODIBA

Applicant

And

MR. I. SIRKHOT

1ST Respondent

**SAFETY AND SECURITY SECTORAL
BARGAINING COUNCIL**

2ND Respondent

MINISTER OF SAFETY AND SECURITY

3RD Respondent

**NATIONAL COMMISSIONER: SOUTH
AFRICAN POLICE SERVICES**

4TH Respondent

JUDGMENT

VAN NIEKERK J

Introduction

- [1] This is an application to review and set aside an arbitration award made by the first respondent (the arbitrator) in terms of which he found that the applicant's dismissal from the employ of the third and fourth respondents was fair. This application was filed some 6 months late. The applicant has sought condonation for the late filing, and I deal first with this element of the application.

Condonation

- [2] In applications for condonation, this Court has consistently applied the principles in *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A), where Holmes JA said the following:

"...the basic principle is that the Court has discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course if there are no prospects of success there would be no point in granting condonation. ...What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked."

In *NUM v Council for Mineral Technology* [1999] 3 BLLR 209 (LAC), the Labour Appeal Court added a gloss to this approach in respect of cases where the applicant is unable to furnish a reasonable and acceptable explanation for the delay - in this instance, the absence of an explanation is dispositive of the application, and the prospects of success are irrelevant.

- [3] The applicant states that his attorney received a copy of the arbitration award on the same day that it was issued, i.e. 5 July 2007. The applicant was informed of the outcome of the arbitration hearing on 16 July 2007, when he consulted his attorney. The applicant thereafter instructed his attorney to proceed with this application. After being

advised of the costs involved, on 21 August 2007, the applicant received a written estimate from his attorney. He realised that he would not be in a position to fund the application, and advised his attorney that he would be able to do so only after the sale of his house was finalised. The applicant's house was sold in December 2007. On 8 January 2008, he made a payment to his attorney toward the costs from the proceeds of the sale. This application was filed five weeks later, on 15 February 2008. The applicant submits that the respondents cannot be prejudiced by what he terms 'this very short delay', that his prospects of success in the main application are strong, and that condonation ought therefore to be granted.

[4] The delay in bringing this application is considerable. It is far from a 'very short delay' as the applicant has presumptuously elected to describe it. The explanation proffered by the applicant is cast in very general terms and less than detailed. A delay of some six months in filing a review application requires a full and proper explanation from the applicant that covers the entire period of the delay. This is not provided by the applicant, who appears content to believe that this Court was obliged to await the finalisation of the sale of his house before he was required to take any steps to prosecute this review. Further, it took the applicant's attorney some five weeks (almost the full period within which a review application must be filed) to file this application after he had been placed in funds. There is no explanation for this delay, or for what appears to have been a lack of urgency on the part of the applicant and his attorney, knowing as they did that the application was already considerably out of time. In short, I am not satisfied that the applicant has provided a full and frank explanation as to his inability to file this application timeously.

[5] On this basis alone, the application for condonation should fail. But even if I were to extend the benefit of the doubt to the applicant in this regard, in any event, for the reasons that appear below, the applicant's prospects of success are limited, if they exist at all. This is apparent

from a consideration of the factual background to this dispute, the evidence led at the proceedings under review, the arbitrator's award, and the test to be applied by this Court on review. Each of these elements is more fully canvassed below.

[6] At the time of his dismissal, the applicant was a captain in the SAPS. He was dismissed after being found guilty of corruption (he was alleged to have received an amount of R1000 from an illegal immigrant), and of releasing the illegal immigrant from custody without good cause. The respondents contend that on 16 September 2005, Thaienne Fall, an illegal immigrant, was arrested and detained in the cells at the Krugersdorp Police Station. The applicant was the cell commander on duty that day. The respondents contend that after Fall paid the applicant R1000, the applicant released Fall from the cells and arranged for another officer, Moabi, to transport Fall to the railway station. The applicant denies that Fall was detained in the Krugersdorp police station, and that he had any interaction with Fall.

[7] At the arbitration hearing, five witnesses testified on the respondents' behalf. Inspector Wolmarans testified that on 16 September 2005, he was patrolling the Key West Shopping Centre with Constables Molebatse and Henene. Wolmarans arrested Fall for being in the country illegally. Fall was driven to the Krugersdorp police station and booked into the cells, with all of the necessary documentation being completed. Wolmarans saw Fall the following day in the flea market. He asked Fall how he had got out of jail. Fall told Wolmarans that he had given the captain R1000 and the captain had released him. Wolmarans then rearrested Fall. Molebatsi testified that he was with Wolmarans when Fall was arrested on 16 September. Fall was booked into the cells. The following day, Wolmarans telephoned him and informed him that Fall was again at the flea market. Fall informed them that he had been released after paying the applicant and Constable Sokhela. Fall claimed to have identified the applicant by his nametag. Sokhela testified that he was working in the cells with the applicant on

16 September. He recalled that Wolmarans arrived at the cells with people that he had arrested. On the day, they could not find Fall in the cells. The applicant instructed him to strike Fall's name from the entry book and to insert Sibande's name. Moabi testified that on 16 September, the applicant asked him to take R100 to Sokhela and asked him to take a man whom he recognised as Fall to the railway station. He took the money to Sokhela who asked him to make sure that Wolmarans did not see him with Fall. He took Fall to the railway station and left him there. He recognized Fall because he had previously arrested him. Superintendent van der Merwe testified that it was the cell commander's duty to enter details of all detainees in the Occurrence Book. The procedure for scratching out Fall's name and inserting Sibanda's name was incorrect.

[8] The applicant testified on his own behalf. His version was that on 17 September, he was assisting Captain Sokhela by checking the cells. The number of people in the cells did not correspond with the register. No person had been released on his shift. He did not receive money from any prisoner arrested that day. The applicant denied knowing Fall and denied asking Moabi to take Fall to the railway station.

[9] The arbitrator summarised the evidence given by all the witnesses. In relation to statements made by Fall, he found these to be contradictory, and concluded that no weight could be attached to them since they had not been tested in cross examination.

[10] The test to be applied in a review under s 145 was explained in *Sidumo & another v Rustenburg Platinum Mines Ltd & others* [2007] 12 BLLR 1097 (CC) in the following terms:

"The better approach is that section 145 is now suffused by the constitutional standard of reasonableness. That standard is the one explained in Bato Star: Is the decision reached by the

commissioner one that a reasonable decision-maker could not reach? Applying it will give effect not only to the constitutional right to fair labour practices, but also to the right to administrative action which is lawful, reasonable and procedurally fair.”

- [11] In his majority judgment, Ngcobo J (as he then was) had occasion to assess the principle of fairness in the conduct of arbitration proceedings. At para 267, He concluded:

“[267] ...Fairness in the conduct of the proceedings requires a commissioner to apply his or her mind to the issues that are material to the determination of the dispute. One of the duties of a commissioner in conducting arbitration is to determine the material facts and then to apply the provisions of the LRA to those facts in answering the question whether the dismissal was for a fair reason. In my judgment where a commissioner fails to apply his or her mind to a matter which is material to the determination of the fairness of the sanction, it can hardly be said that there was a fair trial of the issues.

[268] It follows therefore that where a commissioner fails to have regard to material facts, the arbitration proceedings cannot in principle be said to be fair because the commissioner fails to perform his or her mandate. In so doing, in the words of Ellis, the commissioner’s action prevents the aggrieved party from having its case fully and fairly determined. This constitutes a gross irregularity in the conduct of the arbitration proceedings as contemplated by section 145(2)(a)(ii) of the LRA. And the ensuing award falls to be set aside not because the result is wrong but because the commissioner has committed a gross irregularity in the conduct of the arbitration proceedings.”

- [12] Thus, in addition to the result-based test established by *Sidumo* in terms of which an award will only be set aside on review if the result is

incapable of justification on all the material before the commissioner, an award will also be reviewable for process-related reasons, where the commissioner, for example, commits a (latent) gross irregularity in the form of a material error of law or the failure to apply the mind to materially relevant considerations. In addition to constituting a (latent) gross irregularity, these errors also constitute acts of (what may be termed) 'process-related' unreasonableness – see: *Minister of Health v New Clicks SA (Pty) Ltd & others* 2006 (2) SA 311 (CC) at para 511; *CUSA v Tao Ying Metal Industries & others* (2008) 29 ILJ 2461 (CC) at para 134.

[13] The hurdle set by the *Sidumo* judgment for an applicant in a review application is high. In *Palaborwa Mining Co Ltd v Cheetham & others* (2008) 29 ILJ 306 (LAC), the LAC emphasised that this Court may review a decision taken by an arbitrator if and only if the decision is one that a reasonable decision-maker could not reach. This requires the Court to defer (not in an absolute sense) to the decision of the commissioner. The LAC further emphasised the intention of the LRA that arbitration awards be interfered with only in limited circumstances, thus promoting the expeditious resolution of labour disputes.

[14] In the present matter, the decision of the arbitrator is unimpeachable in that, having regard to the evidence, it is not one which a reasonable decision-maker could not reach. The evidence by the various witnesses called on behalf of the respondents support the conclusions reached by the arbitrator, and the applicant had failed to adduce any evidence in support of his contention that each of the witnesses conspired against him. Neither the outcome nor the process of the arbitration hearing is impeachable.

[15] In the absence of a satisfactory explanation for the delay in filing this application and in view of the applicant's limited prospects of success, the application for condonation fails. There is no reason why costs should not follow the result.

I accordingly make the following order:

1. The application is dismissed, with costs.

ANDRE VAN NIEKERK

JUDGE OF THE LABOUR COURT

Date of hearing: 30 September 2009

Date of judgment: 14 January 2010

Appearances:

For the applicant: Mr. J M Gouws from Johan Gouws Attorneys

For the respondent: Adv K Pillay

Instructed by: The State Attorney