

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

HELD AT BRAAMFONTEIN

CASE NO. JR 307/09

In the matter between:

ISAAC T. SKHOSANA

APPLICANT

and

GAUTENG COACHES (PTY) LTD

FIRST RESPONDENT

COMMISSIONER K. KLEINOT

SECOND RESPONDENT

**SOUTH AFRICAN ROAD PASSENGER
BARGAINING COUNCIL**

THIRD RESPONDENT

JUDGMENT

LAGRANGE J:

Introduction

[1] After hearing the parties a judgment with brief reasons was handed down after hearing the matter on 09 February 2011. Below is the final edited version of the *ex tempore* judgment.

[2] The matter concerns the review of a condonation ruling by an arbitrator dismissing the late referral of the applicant's unfair dismissal dispute to a bargaining Council.

[3] The applicant, a bus driver, had been dismissed for instigating bus passengers against inspectors who had boarded his bus to check passengers' tickets.

The delay

[4] The applicant referral was approximately 9 months overdue when he finalized it. The applicant had been dismissed following a hearing on 19 July 2007. He attempted to refer his unfair dismissal dispute on 16 August 2007 but failed to provide any proof of service on the respondent employer as required by section 51(2)(c) of the Labour Relations Act 66 of 1995 ('the LRA').

The reasons given for the delay

[5] The applicant relied in his founding affidavit in the condonation application on illness as the reason he could not finalise the referral of his unfair dismissal dispute in good time. According to a certificate provided by any registered traditional healer, the applicant was unfit for work from 10 August 2007 to 5 May 2008. The illness described in the certificate is identified only as "STROKE" (sic). The certificate further states that the applicant was examined by the traditional practitioner at the start of his illness on 10 August 2007. Despite the apparent seriousness of the illness the applicant was able to file his incomplete dispute referral six days later.

[6] There also appears to have been evidence that by 7 December 2007 he was made aware that his initial referral was defective. However, he only corrected it when he filed his condonation application in May 2008. The applicant apparently received a letter from the bargaining Council advising him that the referral was defective and he spoke to a staff member at the Council to determine what steps he needed to take.

[7] A delay of nine months is excessive. Although the applicant had a medical certificate issued by a registered traditional practitioner, he was capable of making the initial referral it would appear that even at the onset of his illness. Logic dictates that if he had suffered

from a 'stroke' in early August but was still able to fill in forms and submit them to the council shortly afterwards, he ought to have been more able to do so with the passage of time. The fact that the traditional practitioner did not confirm having seen the applicant after 10 August 2007, yet booked him off for such a long period without any further consultation raises some serious questions about the credibility of the certificate, which is reflected in doubts expressed by the arbitrator about how he could have been ill for such a long period but still able to do what was necessary to file an application in the early stage of his illness.

[8] In the circumstances, the applicant's explanation in his founding affidavit for doing nothing further until May 2008 is not very satisfactory to say the least.

[9] At the hearing before this court, the applicant offered a number of other explanations for the late finalisation of his referral, including allegedly having to make payment of moneys to Tokiso¹, and not having an understanding the need to file a condonation application until May 2008. None of these were offered to the arbitrator as reasons for his lateness in his condonation application, and there is no reason why they would not have been mentioned if they had been factors delaying the progress of his matter. As I explained to the applicant, in these proceedings the court must evaluate the arbitrator's decision on what was before her, not on additional evidence he sought to place before me, which could have been raised before the arbitrator.

Merits of the applicant's unfair dismissal claim

[10] The arbitrator also found that the prospects of the applicant's success on the merits of his claim were slim. In the founding affidavit to his condonation application, the applicant placed precious little information before the arbitrator to explain why his dismissal was unfair. On the question of the substantive fairness of his dismissal, the applicant simply states that he did not commit any misconduct that would justify his dismissal. He also claimed that no pre-dismissal procedures were followed before the dismissal took place. It is only in this application to review the condonation ruling that he expands on the

¹ In passing, I note that it seems that Tokiso is accredited to perform the dispute resolution functions of the bargaining council.

merits of his case. In the review application he claims that the bus was full of passengers and the only space available on the bus was at the steps of the front of the bus. He says he 'humbly' asked the inspectors how they would manage to check tickets, while the bus was full.

[11] None of these allegations were placed before the arbitrator. However, what she did have before her were the incident report forms apparently completed by inspectors in question, which detailed how the applicant had shouted at them and how this had provoked the passengers to also become aggressive making it impossible for them to check the tickets. According to the signed incident forms matters escalated to the point where they could not conduct an inspection and the bus had to stop on the road so they could get out. It was also part of the information before the arbitrator that although the bus was full according to the inspectors' report, only one ticket was issued by the applicant for that trip.

[12] There was also ample documentary evidence before the arbitrator of a number of dates on which the applicant's internal disciplinary enquiry had been re-scheduled. Further, there is also a what appears to be a handwritten minutes of the enquiry hearing which was scheduled for 19 July 2007. This records that when the applicant and his representative failed to have the enquiry dismissed on account of the delays before it commenced, they then walked out of the enquiry and it proceeded in their absence. This documentation flies in the face of the applicant's bald claim that no pre-dismissal procedures were followed.

[13] In court the applicant also claimed that the company witnesses, namely the two inspectors, were not called as witnesses and accordingly he could not challenge them. The copy of the enquiry attendance register for 19 July 2007, which appears in the record, shows that on that day, which is the same day the applicant allegedly walked out the enquiry, one of the inspectors, Mr Shongwe, was present as a witness. So, even if the applicant's belated claim that he was unfairly treated because of the absence of company witnesses could be considered, an explanation would have to be given for the appearance of Shongwe's name on the attendance register. In any event, this claim by the applicant was not before the arbitrator, but the copy of the attendance register was.

[14] In the circumstances I cannot find anything wrong with the arbitrator's conclusion that the applicant's prospects of success are slim on the record before him.

Prejudice

[15] The arbitrator also evaluated the relative prejudice to the parties of the consequences of refusing or granting the condonation application. Apart from the prejudice to the applicant of not being employed the arbitrator also took account of the fact that the employer would be prejudiced as some of its witnesses were no longer available. There is nothing inherently unreasonable about the arbitrator's evaluation of this issue.

Conclusion

[16] Considering the evidence that was actually placed before the arbitrator for the purposes of considering the review application, it cannot be said that the arbitrator reached conclusions which no reasonable arbitrator could have drawn or that she did not exercise her discretion to refuse condonation in a judicious manner.

[17] In consequence, I'm satisfied that the applicant has not made out a case for setting aside the arbitrator's condonation ruling, and make the order below.

Order

[18] The application to set aside the second respondents condonation ruling dated 11 February 2009 under case number SARPBAC 08/69 is dismissed and no order is made as to costs.



ROBERT LAGRANGE

JUDGE OF THE LABOUR COURT

Date of hearing: 09 February 2011

Date of judgment: 09 February 2011

Appearances:

The applicant appeared in person

For the First Respondent: Ms N Koulountis of Koulountis Inc.