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Of interest to other judges

Edited 250211

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT BRAAMFONTEIN CASE NO: JR489/09

DATE: 2011-02-15

In the matter between

NGOEPE, MAFETA PAUL Applicant

and

SAPS 1st Respondent

CCMA 2nd Respondent

J U D G M E N T

VAN NIEKERK, J:

This is an application to review and set aside an arbitration award made by the second respondent. Prior to dealing with the application properly, I wish to deal with the circumstances in which this application was set down for hearing. The Registrar notified the parties in terms of a telefax sent on 24 November 2010, that the matter was enrolled for hearing today, 15 February 2011 at 14:00.

Some two weeks ago, the legal representative for the applicant, a Mr Johan Gouws, filed what purports to be a Notice of Postponement of the matter, indicating that he had come to an agreement with the legal representatives of the third and fourth respondents, that the matter should be removed from the roll and re-enrolled for hearing on some future date.

The applicant's attorney Mr Gouws, was advised that it was not open to the parties to unilaterally agree to remove the matter from the roll and that the matter would remain on the roll for 15 February 2011. Mr Gouws then indicated that he had another commitment in the CCMA and was unable to attend the proceedings on 15 February.

Ultimately in terms of a letter addressed to the Court on 14 February 2011, Mr Gouws said the following, I quote:

> "In order to finalise the matter on the said date [i.e. 15 February 2011] and to propose a solution to the situation, I indicated to Mr Sole that whether it shall be possible that I agree that the Honourable Judge consider the application on applicant's document filed. He indicated that I should forward such consent to the Judge's office, which shall consider such.
>
> I discussed the proposal with applicant on 11 February 2011, and he consented to the fact that the

> Judge may consider the application of applicant on the documents filed and that the applicant has no further submissions to forward pertaining to the application.
>
> The respondents' counsel therefore still has the right to submit verbal arguments pertaining to the application on the contents thereof, in absence of the applicant's legal representative."

On the same date, i.e.14 February 2011, my associate addressed a letter to Mr Gouws in which he recorded that he had been directed by me to advise him that the application would be considered on the basis of the papers filed and in the absence of any appearance by the applicant's legal representative.

On this basis then the proceedings continued in the absence of the applicant's legal representative, but with the applicant's consent and on the basis of brief verbal submissions made by Mr Dlamini, the counsel appearing for the third and fourth respondents.

In this regard, I wish to note briefly that one of the fundamental purposes of the Labour Relations Act, is expeditious dispute resolution. This purpose is not met by practitioners who reach agreements between themselves to the effect that matters be postponed and elect simply to advise the Court in terms of a Notice of Postponement, in this case filed a week before the scheduled hearing of a postponement to which they agree.

This matter was the subject of a notice of set down issued, as I have indicated, in November 2010. There is ample opportunity to any legal practitioner of the fact of the set down and the fact that a matter would proceed on the scheduled date.

It is not open to practitioners simply to agree that matters be postponed and removed from the roll. This court has a significant backlog and efforts are being made to address that backlog. Those efforts are not served by the conduct reflected by the applicant's attorney, especially since the Notice of Postponement was filed as I have indicated, five days prior to the date of the hearing.

Having said that, I am moving on the merits of the application. The application for review was filed some one year and four months late. There is an application for condonation contained in the Founding Affidavit. The facts are briefly the following, the arbitration award that is the subject to these proceedings, was issued on 27 November 2007. The award was delivered to the applicant's then legal representative, a Mr Lebea, on 29 November 2007.

The applicant states that he thereafter consulted Mr Lebea regarding the award, and that Mr Lebea advised him that he was no longer willing to assist the applicant. He then sought alternative representation which he obtained through the auspices of a Mr Makafola, a legal representative from Tshwane.

He had difficulty obtaining the documents from Mr Lebea, but eventually during the course of January or February 2008, these documents were obtained and submitted to Mr Makafola.

Nothing appears to have transpired between February 2008 and September 2008 when the applicant ultimately confronted

Mr Makafola about progress in his applicant. He was advised that Mr Makafola had spoken to a few policemen around Pretoria and was advised that the chances of success at the Labour Court were very slim.

During the course of March 2009, some six months later, the applicant states that he was advised by a former colleague to consult with the applicant's current attorney of record, Mr Gouws. The applicant consulted with Mr Gouws on 3 March 2009 and submitted all the relevant documents to him.

Mr Gouws on 5 March 2009, applied to this court for a case number. The review application was ultimately filed on 9 April. Well, the application was signed on 9 April 2009, it was received by the first and second respondents on 23 April 2009. It was served on the third respondent, the state attorney, on 15 May 2009 and ultimately filed in this court on the same date, i.e. 15 May 2009.

This is an excessive delay. Section 145 of the Labour Relations Act requires applications for review to be filed within a period of six weeks following the date of the arbitration award. This provision is fundamental to achieving the purpose of expeditious dispute resolution to which I have referred, and parties who fail to file applications for review within the required period, are expected or as the section permits to show good cause why the statutory time limit was not met.

The test to be applied in an application such as this, is the one enunciated almost 50 years ago by Holmes JA and *Melane v Santam Insurance Company Limited*, 1962 4 SA 531 A, where the Court said the following:

> "In deciding whether sufficient cause has been shown, the basic principle is that the Court has a 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 is the degree of lateness, the explanation therefore, the prospects of success and the importance of the case. Ordinarily these facts are inter-related: they are not individually decisive … save of course that if there are no prospects of success there would be no point in granting condonation."

These principles had been restated and applied in numerous instances, both by this court and the Labour Appeal Court, subject to the caveat that where the explanation for delay is unacceptable, the prospects of success are irrelevant.

The rule that without an acceptable explanation for delay, thus itself justifies the refusal of condonation, was reiterated by Myburgh JP in *NUM v Council for Mineral Technology*, [1999] 3 BLLR 670 (LAC), where the Court said the following:

> "These factors are interrelated, they are not individually decisive. A slight delay and a good explanation may help to compensate for prospects of success which are not strong. The importance of the issue and strong prospects of success may intend to compensate for a long delay. An unsatisfactory and unacceptable explanation for the delay

remain so, whatever the prospects of success on the merits."

Now in the present matter as I have indicated, the delay, a period of some one year and four months, is excessive. The explanation proffered for that delay as I have indicated, is broadly an inability by the applicant to secure a legal representative willing to take on his case.

Now it is trite that there is a limit to the extent to which an applicant in a condonation application, may seek to lay the blame for any delay, at the feet of his or her legal representatives. In the present matter, Mr Lebea, the applicant's representative at the arbitration hearing, indicated it would seem to the end of November 2007, that he was no longer willing to assist the applicant in the matter.

There is no indication from the applicant as to when he consulted with Mr Makafola, the representative from Tshwane, although he does aver that documents were ultimately provided to him during January or February 2008.

What remains then, is a period between at best for applicant, February 2008 and September 2008, which is completely unexplained. It seems to me from the affidavit, that the applicant was contend to leave the matter in the hands of his representative in circumstances where he failed to make enquiry, it would seem, as to any progress that would have been made.

This is particularly so where the applicant avers as he does, that he had paid for the legal services to be rendered by Mr Makafola. It was only in March 2009 that the applicant decided to seek alternative means to prosecute his interest in this matter. That is a period of more than a year since Mr Makafola was instructed.

Once Mr Gouws had been instructed, matters proceeded and the period of delay between the consultation with him, 3 March 2009 and the date on which the papers were ultimately filed, mid May 2009, is not excessive, but the Court must take into account the lapse or the delay between November 2007 and March 2009, which is not the subject of a satisfactory explanation to say the least.

Now in the absence of a satisfactory explanation, in terms of the authority to which I have referred and the *NUM Min Tech* case in particular, it is not necessary for this Court to consider the applicant's prospects of success. However, to the extent that those may be relevant on a perusal of the Founding Affidavit, it seems to me that the applicant has misconceived the nature of the proceedings.

The Constitutional Court has made it clear that despite the test of reasonableness that must be applied in the context of an application brought in terms of section 145, the distinction to be drawn between an appeal and a review, remains intact and this Court is not entitled to entertain what amounts to an appeal against an arbitration award under the guise of an application for review.

Now in the present circumstances, the applicant does not make out a case that meets the threshold for a review application, i.e. that the decision reached by the Arbitrator, is a decision to which no reasonable decision maker could come on the available evidence.

Instead, the review application is or comprises largely an attack on the Arbitrator’s consideration of the evidence before him and more particularly, the conclusions drawn from that evidence.

Now turning for a moment to the arbitration award itself, the award summarises accurately the evidence of each of the witnesses called by the applicant in these proceedings and the third and fourth respondents in these proceedings.

It records further the closing submissions made on behalf of both parties and concludes with an analysis of the evidence and submissions made.

The Arbitrator recorded that there were several inconsistencies in the evidence of one Smit, a witness for the fourth respondent in relation to his testimony at the disciplinary hearing, but given the length of time between the disciplinary hearing and the arbitration hearing, the Arbitrator was satisfied that on the whole, Smit was not an unreliable witness.

Similarly in respect of Captain Williamson and Captain (Inaudible), both were found to be reliable, forthright and honest witnesses. On the other hand, the employee’s evidence was confounded to a bare denial. The Arbitrator found that his version of events given at the arbitration hearing, differed quite markedly from what he stated in the disciplinary hearing, and the basis for that finding is recorded in paragraph 13.10 of the award.

Similarly the discrepancies in the evidence given by the employee’s witness, his girlfriend, are recorded in the arbitration award and the Arbitrator was clearly left in no doubt that the evidence of the applicant and his girlfriend was unsatisfactory and applying the test of a balance of probabilities, the fourth respondent’s version was found to be the more probable.

Now again it is not apparent to me from these papers and from the award itself, that it can be said that the Arbitrator’s decision falls into a band of decisions to which no reasonable decision maker could come on this evidence.

The hurdle that has to be overcome in these proceedings, is set high for an applicant. Indeed the Labour Appeal Court has gone so far as to say that after the *Sidumo* judgment by the Constitutional Court, it would be rare for this court to interfere with an arbitration award.

In short, I am not satisfied that any basis for interference with the award has been made out on the papers before me. In so far as the applicant’s prospects of success are concerned, in my view these are minimal.

In summary then, the delay in filing this application is excessive. The explanation for the delay is wholly unsatisfactory. The applicant’s prospects of success in the main application are minimal. In those circumstances, the application for condonation must fail.

With regard to costs, I see no reason why the rule that costs are to follow the result, should not be applied and for those reasons, I make the following order:

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

2. The applicant is to pay the costs of these proceedings.