

IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

Not reportable

Case No: JR210/09

In the matter between:

TSEKO JOHANNES CHAWE

Applicant

AND

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

1st Respondent

VAN VUUREN NO

2nd Respondent

WACO AFRICA (PTY) LTD/ SANAITECH

3RD Respondent

JUDGMENT

Molahlehi J

Introduction

[1] This is an application to review and set aside the arbitration award issued by the second respondent (the commissioner) under case number GAJB 31582/07 and dated 31 July 2008. In terms of that arbitration award the commissioner found the dismissal of the applicant not to have been unfair and accordingly confirmed the dismissal.

- [2] The applicant has also applied for condonation for the late filing of the review application which the third respondent is opposing.

Background facts

- [3] The brief background facts of this matter are that the applicant was charged with dishonesty and gross negligence. He was found guilty by the disciplinary hearing and accordingly dismissed. He challenged the dismissal as being unfair at the CCMA. He was unsuccessful in the arbitration proceedings hence this review application.
- [4] In his ground for review the applicant contends that the commissioner committed gross irregularity in respect of both his assessment of the procedural and substantive fairness. In respect of the procedural fairness the applicant contends that he was not given enough time to prepare for his case and make arrangements with his witnesses to attend the hearing. The applicant further contends that the commissioner failed to explain to him his rights under the LRA.

The condonation application

- [5] It is trite that in considering whether or not to grant condonation the court has a judicial discretion to exercise. The principles dealing with the approach to be adopted when considering an application for condonation is summarized by this court in *Gaubushubekwe & others*

v Pie Man's Pantry (Pty) Ltd [2008] JOL 22302 (LC). In that case the court held that in an application for condonation the applicant is in essence seeking the extension of the time frames provided for in the Act, through the indulgence of the court. The factors which the courts have taken into account in considering whether or not to grant condonation are set out in that judgment as follows:

- (a) to show that the degree of lateness or non-compliance with the prescribed time frame is not excessive;
- (b) to provide an explanation for every aspect of the period of the lateness or the failure to comply with time frames;
- (c) to show that there (*sic*) prospects of succeeding or has bona fide defence when the matter is considered in the main case;
- (d) to show the importance of the case;
- (e) to show interest in the finality of the matter and the convenience of the court; and
- (g) has to show avoidance of unnecessary delay in the administration of justice.

[6] The above factors are not individually decisive and have to be weighed together in assessing whether or not condonation should be granted. And in weighing these factors for instance, a good explanation for the lateness may assist the applicant in compensating for weak prospects of success. Similarly,

strong prospects of success may compensate the inadequate explanation and the long delay.

- [7] An applicant in an application for condonation has to show good cause by providing an explanation that shows how and why the default occurred. There is authority that the court could decline the granting of condonation if it appears that the default was wilful or was due to gross negligence on the part of the applicant. In fact the court could on this ground alone decline to grant an indulgence to the applicant.
- [8] This court has previously stated that whilst the factors mentioned above are interrelated and have to be weighed together, however the two factors that carry more weight are the reasonableness of the explanation and prospects of success. It is trite that without reasonable explanation for the delay, condonation is generally refused. The approach to be adopted where the explanation is unsatisfactory or where there is no reasonable explanation was set out in *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532C–F, where the court held that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused. Another important consideration of whether or not to grant condonation is the steps that the applicant took as soon as it became aware that he or she was late in terms of the required time frames. In other words the applicant should bring the application for condonation as soon as he or she becomes aware of the lateness of its case.
- [9] In *National Union of Mineworkers v Council for Mineral Technology* [1999] 3 BLLR 209 (LAC), the court held that:

“What is needed is an objective conspectus of all the facts. 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 tend to compensate for a long delay. There is a further principle which is applied and that is that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused.”

- [10] In applying the above legal principles the question I have to ask myself is whether the applicant has made out a case for granting him condonation for the late filing of his review application. Put differently the question in the present instance is whether the applicant has made out a case showing good cause as to why the condonation application was not filed in time.
- [11] In my view the applicant has not made out a case for condonation. In fact the applicant does not deal with the above factors in his condonation application. In what appears to be the explanation for the late filing of the review application the applicant says the following:

“I immediately approached a legal call centre on the said day for advice on what appeared to me to be a malicious Arbitration Award. The legal call centre advised that the Award was a closed book and they would prefer to get transcript of proceedings and/or comments from the legal representative who represented me during the proceedings whereafter they would be able to advise me meaningfully. They advised that it would take time and had to give them several weeks to obtain and study the records. I

went to the call centre several times until 07 January 2009 when they advised that they obtained a record which manifest gross irregularity on the part of the Commissioner. They advised that they have posted to MKANSI ATTORNEYS instruction to assist me in having the matter brought to the Labour Court.”

- [12] Mr Mkansi for the applicant explained that the legal call center referred to above is the insurance policy taken by the applicant to cover him whenever he was faced with litigation. He sought to lead evidence from the bar to suggest that the insurance company was the cause of the delay because it took too long to approve payments for attorneys. He also in this respect tried to introduce from the bar evidence of what he did regarding the conduct of the insurance in initially seeking to comply with the terms of the policy. He says he reported them to the insurance ombudsman. He could not however explain why if this was indeed the case, that was not included in the founding affidavit.
- [13] The explanation tendered from the bar would still not have assisted the case of the applicant because no details are given with regards to the dates when the insurance company was taken to task. And also there is no explanation as to what happened after the 7th July 2009, after the applicant went to see the insurance company, when he was advised that they had obtained the record and was advised that the award was grossly irregular. There is no explanation as to what happened between the 7th January 2009 and 2nd February 2009 when the founding affidavit was signed.
- [14] In summary the applicant has therefore failed to provide a reasonable and satisfactory explanation as to why his review was filed 14 weeks later. The applicant's application stands to fail on this ground alone. The applicant's application would still stand to fail even if I was wrong regarding the

- reasonableness of the explanation. The application has to fail because there are no prospects of succeeding if the late filling of the review application was to be condoned.
- [15] The reading of the arbitration award reveals that the commissioner arrived at his conclusion that the applicant was guilty as charged after canvassing the evidence which was presented before him detailed. It seems from the proper reading of the applicant's papers that the commissioner was incorrect in the manner he addressed the evidence presented.
- [16] It has to be remembered that the function of this court in review matters is not to find fault with the commissioner but to consider whether the arbitration award made by the commissioner is a reasonable one. In my view the only conclusion that can be reached when reading the arbitration award properly is that the conclusion reached by the commissioner is reasonable and thus satisfies the test as set out in *Sidumo & another v Rustenburg Platinum Mines Ltd & others* [2007] 12 BLLR 1097(CC). The commissioner can therefore not be faulted for unreasonableness.
- [17] The case of the applicant in as far as prospects of success is concerned is further weakened by the fact that he seeks to rely on averments that are not supported by the record. In this respect the averments in support of the allegation of gross irregularity as made in the founding affidavit cannot be found in the transcribed record as tapes 1-11 of the proceedings were not filed. It was submitted on behalf of the applicant that compelling the CCMA to produce the tapes would have been a futile exercise. The applicant did not however attempt to restructure the record or solicit the hand written notes of the commissioner.
- [18] The third respondent argued that whilst the applicant is an individual, he can afford to pay the costs because he has an insurance cover. Whilst the general

policy of this court is not to grant costs orders against individuals who approach the court for a relief, different consideration applies in this case. The facts and circumstances of this case strongly support the view that in law and fairness costs should follow the results.

[19] In the premises the following order is made:

1. The condonation application is dismissed.
2. The review application is dismissed.
3. The applicant is to pay the costs.

Molahlehi J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

Date of Hearing : 17 February 2011

Date of Judgment: March 2011.

Appearances

For the Applicant : M.N. Mkansi from Mkansi & Associates Attorneys

For the Respondent: A.M. Dippenaar from Du Randt Du Toit Pelser Attorneys