

IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

CASE NO: JR 269/2008

NOT REPORTABLE

In the matter between:

KHAZAMULA PHINEAS TSHABALALA

Applicant

and

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION (CCMA)**

First Respondent

THSEPO MASHIGO

Second Respondent

IQ SECURITY CONSULTANT

Third Respondent

JUDGEMENT

MOSAM AJ :

1. This matter concerns a review application to set aside a decision taken by the Second Respondent (*"the Arbitrator"*) on 30 November 2007 under case number GAPT 7469/07 wherein the Second Respondent made a finding that the Applicant had not established the existence of a dismissal.

2. When this matter was dealt with, Adv Gideon Scheepers kindly requested permission from the Honourable Court to assist the Applicant, who was a lay litigant. I expressed my sincere appreciation for his timely intervention.

The relevant facts

3. It is not necessary for the purpose of this judgment to restate the facts, but the salient ones are mentioned below.
4. The Applicant referred a dispute to the First Respondent wherein he complained that he was unfairly dismissed.
5. At the arbitration hearing held under the auspices of the First Respondent, the issue to be determined by the Arbitrator was whether the Applicant was dismissed or not.
6. The Applicant applied to be legally represented, which application was refused by the Arbitrator.
7. Mr Scheepers correctly submitted, in my view, that the dispute did not concern misconduct or incapacity and therefore the Applicant was entitled in terms of Rule 25 of the CCMA Rules (*"the Rules"*) to be automatically entitled to legal representation, if he so desired.

8. Mr Scheepers further submitted that in light of the above, the decision rendered by the Arbitrator was unreasonable.
9. In respect of condonation for the late filing of the application to the Honourable Court, it was submitted on behalf of the Applicant that the application was filed eight days late and a proper explanation was provided for the late filing.
10. Insofar as the prospects of success are concerned, the Arbitrator committed a gross irregularity in that he did not allow the Applicant legal representation.

Condonation

11. The legal authorities on condonation are clear. The fundamental question that an arbitrator or Court must decide in dealing with a condonation application is whether or not it is in the interests of justice to grant condonation.
12. In **Brummer v Gorfield Bros. Investments (Pty) Ltd & Others 2000 (2) SA 837 (CC)** the Constitutional Court said :

"Ultimately condonation should be granted if it is in the interests of justice to do so."

13. In **Toyota S A Marketing v Shemizer 2002 (12) BLLR 1164 (LAC)** the Court said that the decision whether or not to grant condonation is *“to be based on fairness having regard to all the relevant facts.”*

14. In **Nehawu obo Mofokeng & Others v Charlotte Theron Children’s Home (2004) 10 BLLR 979 (LAC)** Davis AJ with the concurrence of the Court said :

*“The approach in **Miya** was qualified with a measure of flexibility, in that failure to provide a reasonable and acceptable explanation for a delay was not regarded necessarily as an absolute bar to condonation.”* The Court was referring to **Miya v Putco Ltd (LAC) Case No. DA17198.**

See also: **National Bargaining Council for the Road Freight Industry v Snyman NO & Others (2004) 8 BLLR 784 (CC).**

15. The Labour Court has on a number of occasions set aside the refusal to grant condonation where the Commissioner’s decision reflected either an over-emphasis of one requirement rather than another or was irrational (See for instance the **Shoprite Checkers v Steenberg** case number JR1912/3).

Review for reasonableness

16. In **Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Others** 2004 (4) SA 490 (CC), the Constitutional Court at paragraph 47 set out the factors that a Review Court should consider in deciding whether a decision was reasonable. The specific factor highlighted is the nature of the decision and another is the competing interest involved.

17. In **Fidelity Cash Management Services v CCMA & Others** (2008) 3 (BLLR) 197 (LAC), the Court said:

"Whether or not an arbitration award or decision of finding of a CCMA Commissioner is reasonable must be determined objectively with due regard to all the evidence that was before the Commissioner and what the issues were that were before him or her."

18. In **Fidelity Cash** it was also said:

"There is obviously an overlap between the ground of review based on a failure to take into consideration a relevant factor and one based on the unreasonableness of the decision. A consideration of the factors that a decision maker is bound to take into account, is essential to a reasonable decision. If a decision maker fails to take into account a factor that he or she is bound to take into consideration, the resultant

decision can hardly be said to be that of a reasonable maker." Ngcobo J in **Minister of Health v New Clicks SA** 2006 (2) SA 311 (CC).

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Discussion

19. In respect of condonation, I am satisfied that it is in the interests of justice that the Applicant be granted condonation for the late filing of the application.
20. I am further satisfied that the Arbitrator rendered a decision that is unreasonable in not allowing the Applicant to be represented by a legal practitioner at the arbitration proceedings.

Order

21. In light of the above, the following Order is made:
- a) The arbitration award rendered by the Second Respondent on 7 December 2007 is reviewed and set aside.
 - b) The matter is referred back to the First Respondent to be heard by a Commissioner other than the Second Respondent.
 - c) There is no order as to costs.

A MOSAM

Acting Judge of the Labour Court

13 July 2011

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