



REPUBLIC OF SOUTH AFRICA

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Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: J1039/07

In the matter between

MARTIN PULENG MASHIGO

First Applicant

SIPHO NORMA SKOSANA

Second Applicant

and

Z.S SIBEKO (ARBITRATOR)

First Respondent

SAFETY & SECTORAL BARGAINING COUNCIL

Second Respondent

MINISTER OF SAFETY & SECURITY

Third Respondent

SOUTH AFRICAN POLICE SERVICE AND OTHER

Fourth Respondent

Heard: 09 September 2011

Delivered: 09 September 2011

Summary: Application for condonation in a review application to set aside a ruling dismissing a condonation application for late referral of dispute. Application for condonation dismissed for unsatisfactory explanation for lengthy delay and weak prospects of success in the review application.

JUDGMENT

REDDY AJ:

This is an *ex tempore* judgment

[1] This is an application for various prayers:

- 1) condoning the late filing of the application for review by the first and second applicants;
- 2) reviewing and setting aside the arbitration award of the Arbitrator, which award is dated 11 November 2005;
- 3) to substitute the Arbitrator's award that condonation is granted for the late referral of the applicants' dismissal dispute to the Bargaining Council and that the matter is re-enrolled for arbitration before the Safety and Security Sectoral Bargaining Council; and
- 4) for costs to be paid by the fourth respondent, alternatively that no order of costs be made. The applications are opposed by the 4th respondent.

Condonation

[2] The main application for review starts off with a condonation application.

The Delay

[3] The review application was due on 3 January 2006; the award being delivered to the applicants' previous attorney on 22 November 2005. The application for review was delivered on 27 June 2007 which is approximately one year and six months late.

The Explanation for the Delay

[4] The explanation for the delay is as follows: the applicants in their Founding Affidavit submit that they instructed their erstwhile attorney, Mr Maseka, to launch review proceedings when the award dismissing their condonation application was received on 22 November 2005. They believed that he was carrying out their mandate.

[5] Approximately a year later they found out that the Director of Public Prosecutions had issued a letter dated 20 December 2006 wherein a decision not to prosecute them criminally for robbery was communicated. The letter was addressed to their attorney and somehow or the other the applicants found out about this decision.

[6] It was at this point in time that the applicants found out that the review application before this Court had not been launched. There is no explanation by the applicants as to what they did for more than a year whilst they were waiting for the review application to be launched. All that they say is that they paid Mr Maseka money from time to time and that they were informed that the matter was proceeding.

[7] There is no detail as to when they met with him, how often they met with him, what details they required of him insofar as the progress in their matter is concerned. These are all relevant issues that would have been discussed by any client with his attorney, especially clients who want to have their names cleared of a dismissal and who want to be reinstated.

[8] On 26 March 2007, the applicants submit that they consulted with a second attorney, a Mr Gouws. They instructed this attorney to launch the review

application however their file remained with their erstwhile attorney, secondly they needed to place Gouws in funds. As a result further delays occurred.

[9] Eventually Gouws obtained the file from Maseka and applied for a case number in May 2007. Gouws was placed in funds by the applicants at the end of May 2007 and the review application was served on 22 June and filed on 27 June 2007. There is no explanation for the delay between the end of May when Gouws was placed in funds and for approximately one month later when he served and filed the review application. If they were not properly represented by Maseka they took no steps with Gouws to make sure that their matter was filed in court without delay when they placed him in funds at the end of May. Neither is there an explanation for the delay between 26th March 2007 and May 2007.

[10] There is no confirmatory affidavit by Maseka; there is also no confirmatory affidavit by Gouws. I find that the explanation is weak and highly improbable. I am also bound by previous case law of this Court and other courts in this country which hold that litigants are bound by the conduct of their attorneys and that they cannot escape the conduct of their attorneys especially when they do not take any steps themselves. There are no averments in the papers that lead me to believe and accept that the applicants took steps of their own accord to ensure that the matter was prosecuted without delay.

Prospects of success

[11] Insofar as the grounds of review are concerned, the review application is in respect of a condonation ruling dismissing an application for condonation for the late filing of the referral of the dismissal dispute to the Bargaining Council.

[12] The facts of the matter are briefly that the applicants were two policemen and they were charged, with robbery of R3 680 and of a cellphone belonging to ET Sihlangu. They were also charged, with the misappropriation of state property for personal use, being a state vehicle, a pistol and uniforms.

[13] The facts relating to the charge are set out in the award and it is not

necessary for me to repeat them. The dismissal occurred on 2 March 2004, there was a dispute as to whether the dismissal was in March or April, but the Arbitrator correctly found that this was not an issue that determined whether condonation should be granted.

[14] The applicants appealed against the decision of dismissal. The appeal hearing was held in September 2004 and on 16 September 2004 the outcome of the appeal was issued. The finding and the sanction of the disciplinary hearing were upheld.

[15] The referral to the Bargaining Council should have been made 30 days from 16 September which would have been around 16 October 2004. The matter was only referred to the Bargaining Council on 7 July 2005, approximately nine months later.

[16] The explanation that was placed before the Arbitrator for the delay is contained in documents before this Court from page 37 of the record to page 55. These documents are the referral of the matter to the Bargaining Council together with the applicants' condonation application and the opposing affidavit by the fourth respondent.

[17] The explanation for the delay that was presented to the Arbitrator was twofold: 1) that they were awaiting the transcript of the disciplinary hearing from the fourth respondent; and 2) that the matter had been referred to the CCMA and that referral was incorrect and after a month from the date of referring the matter to the CCMA they were informed that the CCMA did not have jurisdiction.

[18] The Arbitrator finds in his award that: 1) there were no steps whatsoever taken by the legal practitioner who represented them at the disciplinary hearing to obtain the transcript and that the applicants are bound by such omission by their representatives; and 2) that the applicants were not clear as to when they referred the dispute to the CCMA.

[19] From the documents before this Court, the CCMA's response is dated 23 June 2005. The applicants do not state exactly when they received this information from the CCMA. The matter was then referred to an incorrect Bargaining Council. Even though they referred the dispute to the wrong Bargaining Council, there is no explanation as to what they did between the date of receipt and 7 July 2005 when the matter was referred to the Bargaining Council.

[20] I am also aware of the fact that in their condonation application, they refer to a period of one month after referring the matter to the CCMA that they were informed that the CCMA did not have jurisdiction. If that is so and if we are guided by the date of the letter from the CCMA which is 23 June 2005, then it must be that the referral to the CCMA was made approximately on 23 May 2005. There is no explanation before the Arbitrator as to what the applicants did from 16 September 2004 to approximately 23 May 2005, which is a period of eight months before they referred the matter to the CCMA.

[21] On the prospects of success, the Arbitrator summarised the evidence that was before him at paragraphs 4, 5 and 6 of the award, and in there, he dealt with the evidence that was dealt with by the parties. He analysed the evidence on page 31 of the record before me and despite the fact of the applicants denying any misconduct and denying the robbery that took place, he found that the complainant knew Skosana's name and that he could also identify them in the identity parade.

[22] He came to the conclusion that the applicants do not have good prospects of success in the main matter as the complainant was not known to the applicants prior to the incident and he therefore could not possibly have positively identified them had they not committed the misconduct in question.

[23] After making reasonable findings on the papers that were before him, he dismissed the application for condonation because there was a long delay which was approximately nine months without a good explanation and the prospects of success in the main matter were slim.

[24] In this application for review before me, the applicants cite several grounds of review. The first ground is that the Arbitrator should have taken cognisance of the fact that: 1) the appeal decision was not communicated to the applicants on 16 September 2004 but at some later date. There is no explanation by the applicants as to when exactly they were informed of the appeal decision if it was on any date other than 16 September. It is assumed that they would know and would be in the knowledge of this information as this matter concerns them.

[25] Even if their explanation, and it is a vague explanation, (that they would only have found out about the appeal decision a month after September) is accepted, this would take us to October 2004: 30 days run from October 2004 and the matter should have been referred to the Bargaining Council or the CCMA (even though it would have been incorrectly done) around November 2004.

[26] There is no explanation for the delay from November 2004 to the date that the matter was referred to the CCMA which I assume to be around May 2005. Also I find that the submission that they would not have known about the appeal decision until a month after September 2004 to be unbelievable and improbable because the applicants in their own documents refer to 2 March 2004 as the date of dismissal and this can be found in the referral form to the Bargaining Council at pages 41, 45 and 47 of the record.

[27] There is no reason for them to have referred to any other date if they believed at the time of referring the matter to the Bargaining Council that the dismissal was any date other than 2 March 2004.

[28] The second ground of review is that the matter was referred to the CCMA: I have dealt with this ground already, and even if I accept the applicants' contention that they only found out about the appeal decision in October, there is no explanation for the delay from October 2004 to May 2005 and I find this submission also to be highly improbable and unacceptable.

[29] The third ground is that the Arbitrator found that the applicants did nothing since finding out about the CCMA's lack of jurisdiction. It is submitted that the applicants took two weeks since 23 June 2005 to refer the matter to the Bargaining Council on 7 July.

[30] It is submitted on behalf of the applicants that they took immediate action and it is without delay. I disagree with this as a further two-week delay is not immediate action and it certainly is with delay. There was no explanation before the Arbitrator as to the two-week delay.

[31] The fourth ground of review is that the Arbitrator should have been provided with the transcript of the disciplinary hearing by the employer. From the record there is no agreement between the parties to this effect. There was also no application by the applicants to compel the fourth respondent to produce the transcript to the Arbitrator prior to him making his decision known.

[32] It was therefore not necessary for the Arbitrator to have regard to the transcript.

[33] I find that the grounds of review that are submitted are without merit and that the Arbitrator in any event did what a reasonable Commissioner would have done by arriving at a decision that was reasonable on the evidence that was placed before him. It is not for applicants in a review application to provide information which was not before the Arbitrator before the Labour Court and expect the Labour Court then to substitute the decision of the Arbitrator. That is not the test for review. I am bound by the evidence that was placed before the Arbitrator and on the evidence that was placed before him I find that he made reasonable decision.

[34] Coming back to the application for condonation for the late filing of the review application, the fourth respondent submits that the complainant in this matter is a private citizen, this matter is seven years old, there is going to be difficulty in locating the complainant should the matter go back to be reheard. There are also other witnesses who dealt with the investigation and the

disciplinary hearing who no longer work for the fourth respondent and it will not be able to mount its case should it be reheard.

[35] Further, it was submitted by the fourth respondent's counsel that the matter was twice before this Court. There have been many delays in this matter. I am satisfied that the fourth respondent will be prejudiced should the matter be remitted back to another Commissioner. I am satisfied that the evidence that was placed before the Arbitrator was sufficient for him to make a decision in respect of the application for condonation.

[36] Having regard to all the issues that are before me and a conspectus of all the factors as set out in the Appellate Division case of *Melane v Santam Insurance Company Limited* 1962 (4) SA 531 AD, I am of the view that there is a weak explanation for the delay in bringing the review application. The review application is very late; it is one year and six months late. There are no prospects of success that can be found. I find that the Arbitrator concluded reasonably, correctly and justifiably on the evidence before him that it was appropriate to dismiss the application for condonation for the late referral of the matter to the Bargaining Council.

[37] In the circumstances, I make the following order:

1. The application for condonation for the late filing of the review application is dismissed.
2. The applicants are to pay the costs of the fourth respondent.

Reddy AJ

APPEARANCES:

FOR THE APPLICANT: Adv Molobedi instructed by Johan Gouws Attorneys

FOR THE RESPONDENT: Adv T Makhuble instructed by the state attorney