



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Case no: J 2731/10

In the matter between:

PHEAGA VICTOR & 36 OTHERS

Applicants

and

COMMISSION FOR CONCILIATION

MEDIATION AND

ARBITRATION (JOHANNESBURG)

First Respondent

THOMAS NEMUSHUNGWA

(COMMISSIONER)

Second Respondent

SET POINT LABORATORIES

Third Respondent

Heard: 03 November 2011

Delivered: 02 February 2012

Summary: Application for condonation refused.

JUDGMENT

GUSH J

- [1] The applicants in this matter who had been employed by the Third Respondent filed this application on 9 November 2010 in which application the applicants sought the following relief:

‘1. That the ruling made by the Second Respondent under case number GAB13487-10 dated 7 July 2010 faxed on 8 July 2010 be reviewed and set aside.

2. Directing that the matter be referred back to the first respondent for conciliation *de novo* before a panellist other than the second respondent

3. Directing that such of the respondents who oppose the relief sought herein be ordered to pay the costs of the application ...’

- [2] The second respondent’s ruling which the applicants seek to be reviewed and set aside was that the first respondent did not have jurisdiction to hear the matter.

- [3] It is clear from the above that the applicants’ notice of motion was filed well outside the statutory time period within which an applicant is entitled to bring an application for the review and setting aside of an award of a Commissioner of the first respondent.

- [4] The notice of motion in support for the review of the second respondent’s ruling states that an affidavit by Pheaga Victor (first applicant) and annexures thereto ‘will be used in support of the application’. There is no such affidavit filed. In fact, the applicants have filed no affidavits at all in support of the application to review the second respondent’s ruling. (The only affidavits which the applicants have filed are in support of the application for condonation.) When the applicants filed the record of the proceedings in accordance with rule 7A of the Labour Court Rules, their notice merely records that they “stand by their notice of motion”.

- [5] Contemporaneously with their so called review application, the applicants filed an ‘application for condonation in support of the notice of motion’. As with the notice of motion in the review application, reference is made to an affidavit by Pheaga in support of the condonation application. In the case of the condonation application, the affidavit is duly attached.

[6] The background to the matter is as follows;

- 6.1 The applicants were dismissed by the third respondent on 6 April 2010.
- 6.2 On 6 May 2010, on their behalf, their erstwhile union National Union of Mineworkers (NUM) referred a dispute concerning their dismissal to the first respondent.
- 6.3 The first respondent enrolled the matter for conciliation on 7 July 2010.
- 6.4 At the conciliation, the third respondent raised, in *limine*, a jurisdictional issue relating to the jurisdiction of the CCMA to conciliate the matter as the dispute between the parties had been settled.
- 6.5 The settlement agreement which is dated 10 May 2010, a copy of which is attached to the third respondent's papers, reflects that pursuant to the dismissals and after subsequent meetings between the applicants' union official and the third respondent regarding the dispute over their dismissals, the matter was settled by the third respondent and the NUM official who was at the time representing the applicants.
- 6.6 The applicants had been dismissed for embarking on unprotected industrial action and a series of stoppages which had taken place during the course of consultations between the applicants' then union and the third respondent regarding possible retrenchments.
- 6.7 The meeting at which the dispute was settled took place on 29 April 2010 and was recorded in writing and signed by the third respondent on 3 May 2010 and forwarded to the union official on that day.
- 6.8 The union official who represented the applicants at the meeting on 29 April 2010 signed the agreement on 10 May 2010 and returned it to the third respondent.

- 6.9 The nature of the settlement agreement was an agreement that the applicants' dismissal would be deemed to be a retrenchment and that they would be paid such severance pay as would be due in accordance with the Basic Conditions of Employment Act.
- 6.10 Somewhat surprisingly in his ruling regarding jurisdiction, the second respondent surprisingly does not deal with the issue regarding the settlement but found erroneously that the referral was 1 (one) day late and that the referral itself was incomplete.
- 6.11 The ruling was issued by the second respondent on 8 July 2010.
- [7] The applicants then applied to the first respondent for the rescission of the ruling and for the condonation for the late filing of the rescission application.
- [8] On 20 September 2010, the second respondent dismissed the applicants' application for rescission.
- [9] On 9 November 2010, the applicants filed this application for the review of the original jurisdictional ruling and for condonation for the late filing thereof.
- [10] The review application was filed some 84 days late. It is important to record that in their application for condonation, the first applicant who deposed to the founding affidavit explains that the reason for the lateness was due to the applicants having applied unsuccessfully for the rescission of the ruling. No other reason is offered. What the deponent to the affidavit fails to mention or explain, however is the fact that even assuming that the six week period is to be calculated from the date of which the rescission application was refused the applicants' application for review was filed outside the statutory six week period, and accordingly there is no explanation at all for this delay.
- [11] As for addressing the applicants' prospects of success regarding the review application all that the deponent to the affidavit in support of the condonation application says is:

‘....on the merits of application the 1st to 37th applicants has good prospect of success

It is the applicants submission that the third respondent was inconsistent in dismissing 37 employees and called some back to the employment (work)

The third respondent failed to consider that the applicants have a right to a fair hearing. Applicants submit that the third respondent took them as no voice to the matter, in that the disciplinary hearing was finalized in their absents

the applicants submit that the third respondent failed to consider that consultation have to take place before a shop steward is to be charged.’ (sic)

- [12] Despite the fact that there is no doubt that at the time the applicants referred their dispute to the first respondent that they were aware of the settlement agreement entered into between their union and the third respondent, there is no mention made by the applicants of the settlement agreement in their founding affidavit.
- [13] The first time the applicants deal with the settlement agreement is in their replying affidavit to the third respondent’s affidavit opposing the application for condonation. Save for simply averring that the person who signed the settlement agreement on their behalf was at the time no longer authorised to sign the agreement, the applicants take the matter no further.
- [14] It is clear from the above that the applicants have not provided an adequate explanation for the late filing of the review application in that specifically there is no explanation at all for the delay between the outcome of the rescission application and the filing of the review application.
- [15] Even if their explanation was found to be reasonable, the applicants’ application for the review of the award is not supported by any affidavit. The applicants have not put up any affidavit at all in support of their application to review the second respondent’s ruling. Neither do the affidavits filed in support of the application for condonation in any way whatsoever establish on what grounds the applicants rely in seeking to

review the ruling nor do they reflect any prospects that the review application will succeed. *Prima facie* the papers reveal that the matter has been settled.

[16] In considering the question of costs, I am of the view that given the specific circumstances of this case that it would not be just nor equitable to order the applicants to pay the costs.

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

The applicants' application for the late filing of the application for the review of the jurisdictional ruling issued by the second respondent is refused.

Gush J

APPEARANCES

FOR THE APPLICANTS:

Victor Pheaga (First applicant)

FOR THE RESPONDENT:

A. E Solomon

Instructed by: Solomon Holmes
Attorneys

LABOUR COURT