



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

NOT REPORTABLE

CASE NO. JR1470/08

In the matter between:-

T C JANSEN

APPLICANT

and

GENERAL PUBLIC SERVICE SECTORAL

BARGAINING COUNCIL

1ST RESPONDENT

I M SHONGWE NO

2ND RESPONDENT

and

NATIONAL PROSECUTING AUTHORITY

3RD RESPONDENT

Date of hearing: 13 December 2011

Date of Judgment: 15 March 2012

Summary: Dismissal and Review Application. Condonation for the delay in prosecuting the matter.

JUDGMENT

SESELE AJ

Introduction

- [1] There are two applications in this matter. The first one is the application for dismissal of the review application and the second one is the application to review and set aside the award dated 25 March 2008 issued by the second respondent under case number PSGA1024-06/07.

Background facts

- [2] The following are common cause in both applications:-
- that application for dismissal was filed on 4 June 2009. The third respondent filed its notice of intention to oppose on 16 September 2009 followed by its answering affidavit on 4 November 2009.
 - that the application for review was filed on 30 July 2008 after the award was issued on 25 March 2008;
 - that the application was filed outside the six week prescribed in terms of section 145 of the LRA;
 - that the first respondent filed the notice in terms of Rule 7A(2)(b) on 9 February 2009 and the explanatory affidavit confirming having dispatched the conciliation referral form; arbitration referral form; outcome certificate, notices of set-down, reports, the award and 1XCD;
 - that on 20 January 2009 a letter was sent on behalf of the third respondent to the first respondent advising that the contents of the CD were transcribed and part thereof was missing and that the exhibits handed in at the arbitration hearing were also missing;
 - that the first respondent filed the supplementary affidavit on 9 February 2009 confirming that the exhibits and the second respondent's hand-written notes could not be found;
 - that the second respondent filed his explanatory affidavit confirming that the second respondent could not trace the hand-written notes or the annexures used in the arbitration hearing; and that second respondent further advised that

the documents handed in at the arbitration hearing were common cause to both parties.

Condonation Applications

- [3] There are applications for condonation in both the application to dismiss the review application and the application for review itself. Both parties basically rely on similar background for and against both applications for condonation. They further refer to more or less similar authorities to advance their respective cases. For convenience both applications for condonation are dealt with under this heading.
- [4] The third respondent concedes that it is twenty one weeks late in filing its answering affidavit in opposition to the application to dismiss the review application. The third respondent refers to the background that I outlined in paragraph 2 above and I shall accordingly not repeat same at this stage. The third respondent's explanation for the delay is that the notice of intention to oppose was drafted upon receipt of the application to dismiss on 3 June 2009 but that its file was subsequently misfiled and placed in a pile marked "Closed files". The notice of intention to oppose was only filed on 12 August 2009 when the file was found. The deponent deals with many files and oversees ten Assistant State Attorneys and three Candidate Attorneys. As a result of his work load it was an oversight not to take immediate steps to instruct Counsel to file the opposing papers. This was therefore a *bona fide* error.
- [5] Even if it is found that the explanation does not constitute a reasonable and acceptable explanation it will not be necessarily regarded as an absolute bar to condonation. (PPWAWUN & Others v AF Dreyer & Co (Pty) Ltd¹).
- [6] In terms of Rule 7(A) and (7) the applicant in the review application has to file a record of the proceedings. The purpose hereof is to ensure the Court has all the evidence and documentation which were used before the Commissioner to enable proper adjudication of the matter (JDG Trading (Pty) Ltd t/a Russels v Whitcher NO & Others²).
- [7] The first respondent convened a reconstruction hearing on 4 March 2010 at the request of the third respondent. The second respondent issued the reconstruction report on 24 June 2010. The second respondent reports as follows regarding the reconstruction hearing:-

¹ (1997) 9 BLLR 1141 (LAC)

² [2001] 3 BLLR 300 (LAC) at 304

“The applicant’s advocate indicated that he was no longer going to be available for the reconstruction of the record, though he was prepared to consider documentation exchanges between the parties. The applicant himself indicated a similar position but I cautioned him against this as this approach may negatively affect him in the final analysis when a determination has to be made if adequate effort was made to reconstruct the record.”

- [8] The applicant did not attend the reconstruction hearing which the parties agreed to hold on 3 December 2010. The second respondent issued the Cost Ruling against the applicant for failure to attend the reconstruction hearing.
- [9] The third respondent thus took all necessary steps to comply with Rule 7(A)(6) and (7) of the Rules of Court but the applicant did not co-operate. The third respondent’s attorneys further sent to the applicant the letter dated 29 July 2010 to which the paginated bundle of the reconstructed record of the arbitration proceedings was attached. In the letter which seems to be incorrectly dated 10 July 2010 the applicant indicated disagreement to the reconstructed bundle. The applicant further concluded in the letter that “... **it is the applicant’s submission that the record cannot be reconstructed**”
- [10] The third respondent took necessary steps in an attempt to reconstruct the record. It is not prudent for the applicant to argue that notwithstanding the failure of the various reconstruction hearings this Honourable Court will be capable of adjudicating the application for review. *Lifecare Special Health Services (Pty) Ltd t/a Ekuhlengeni Care Centre v CCMA & Other*³.
- [11] The applicant argues that Rule 12(2) entitles a party to compel another where there has been no compliance with the Rules. The applicant did not compel the third respondent. (*Bezuidenhout v Johnston & others*⁴) The applicant submits he did not compel the third respondent to comply in terms of Rule 12(2) because of lack of financial resources. The third respondent should be penalized for failure to timeously prosecute the application for no acceptable reasons. (*NEHAWU obo Vermeulen v Director-General: Department of Labour*⁵ and *Bezuidenhout v Johnston NO & Others*⁶)

³ [2003] 5 BLLR 417 (LAC)

⁴ [2006] 12 BLLR 1131 (LC)

⁵ [2005] 8 BLLR 840 (LC)

⁶ [2006] 27 ILJ 2337 (LC).

- [12] The applicant submits that the third respondent did not expeditiously prosecute the application for review. The Court has authority to dismiss the review application. (*Solidarity obo Botha v CCM & Others*⁷)
- [13] The applicant submits that the third respondent did nothing to reconstruct the record even though the first respondent so advised during 2009. The applicant's application to dismiss the review application is what prompted the third respondent to file the notice to oppose. The third respondent only started the reconstruction process two years after the award was made. Three reconstruction meetings were held. The applicant subsequently expressed his frustrations with the process relating Counsel's costs. The applicant did assist in the reconstruction process in line with *Lifecare Special Health Services t/a Ekuhlengeni Case Centre v CCM & Others*⁸. If the record could not be reconstructed notwithstanding efforts to his effect certain material evidence could be dealt with as in *Nathaniel v Northern Cleaners Kya Sands (Pty) Ltd*⁹.
- [14] The third respondent's explanation for non-compliance is vague and lack substance. The third respondent showed gross non-compliance with the Rules of Court. The delay of five months to launch the review application in terms of section 158(1) (g) was found excessive and no reasonable explanation could be given. (*Rustenburg Gearbox Centre v Geldmaak Motors CC t/a MEJ Motors*¹⁰, *Weltevrede Kwekery (Pt) Ltd v CCMA & Others*¹¹, *Shoprite Checkers (Pty) Ltd v CCMA & Others*¹², *Moila v Shai & others*¹³)

Prejudice

- [15] The third respondent submits that the second respondent award pays no regard to the third respondent's constitutional duty to uphold the rule of law. The award does not reasonably appreciate the caliber of prosecutors required. The delay to prosecute the review application, however, long cannot outweigh the harm to the public arising from the applicant's continued employment as public prosecutor. The third respondent can

⁷ [2009] 3 BLLR 257 (LC).

⁸ [2003] 5 BLLR 16(LAC)

⁹ [2004] 2 BLLR 157 (LC).

¹⁰ [2003] 5 SA 468 (T)

¹¹ [2006] 7 BLLR

¹² [2009] 39A 493 (SCA)

¹³ [2007] 5 BLLR 432 (LAC)

simply not continue to employ the applicant as a result of the allegations against the applicant.

- [16] The third respondent feels duty bound to pursue this matter as it involves serious misconduct of fraud and corruption for which the applicant was dismissed. The second respondent's award was mainly based on the insufficiency of the evidence which the third respondent presented at the arbitration hearing. A witness whose evidence was crucial was not brought to the hearing. Instead, the police officer who was tasked with this responsibility brought a different person sharing the same surname with the intended witness. When realising the mistake an application for postponement was made on behalf of the third respondent but the second respondent refused the application. The second respondent further refused to admit the transcript of the disciplinary hearing where the intended witness testified same.
- [17] The factors to be considered in the application for condonation are set out in the *Melane v Santam Insurance Co Ltd*¹⁴ are the degree of lateness, the explanation thereof, prospects of success and the importance of the case. The Court said:-

"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 matter of fairness to both sides.

Among the factors usually relevant are the degree of lateness, their explanation thereof, the prospects of success and the importance of the case.

Ordinarily these facts are inter-related: they are not individually decisive, for that would be a piece-meal approach incompatible with the true discretion, save of course that if there are no prospects of success there would be no point in granting condonation.

What is needed is an objective conspectus of all the facts. Thus a slight delay in 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."

- [18] In *Brummer v Gorfield Bros Investments (Pty) Ltd & Others*¹⁵, the Constitutional Court said "Ultimately condonation should be granted if it is in the interest of justice to do so"

¹⁴ 1962(4) SA 531(A) at 532 C-F

¹⁵ 2000 (2) SA 837 (CC)

The Labour Court in *Toyota SA Marketing v Shemzer*¹⁶ said the decision whether or not to grant condonation is “to be based on fairness having regard to all the relevant facts”

- [19] In *Gqwetha v Transkei Development Corporation Ltd & Others*¹⁷, the court said this which is particularly apposite to the present matter:-

“In the present case, it cannot be assumed that if the challenged decision were to be set aside the Appellant’s further employment is assured. The first respondent would not be obliged to sweep under the carpet the serious allegations that led to the applicant’s dismissal and permit her employment to continue as before. It will be entitled to pursue its enquiry de novo (indeed, it might be duty bound to do so before again permitting the Appellant to assume her position of trust) provided that the enquiry is not conducted irregularly. I see no reason for confidence that the setting aside of the decision to dismiss the Appellant on the grounds that there were procedural irregularities which were necessarily having a meaningful result ...”

- [20] The applicant suffered emotionally and financially due to the unwarranted delay including the reconstruction hearings.

Prospects of success

- [21] The third respondent states that the matter was not being pursued until certain information came to light pertaining to the alleged agreement to have used the transcript of Mthombeni’s evidence which agreement the applicant reneged from. Reneging from this agreement precipitated the application for a postponement which the second respondent did not grant. The importance of the matter, so the third respondent submits, lies in the fact that the allegations of fraud and corruption against the applicant are a matter of public interest since the applicant was a prosecutor.
- [22] The applicant opposes this application on the grounds that the explanation for lateness is unacceptable, there are no prospects of success and that the application is frivolous and vexatious.
- [23] The third respondent filed unattested affidavit of Derrick Mahlangu and has not been able to locate its witness Mr Mthombeni. Inspector Mtsweni denied having brought Mr. Mthombeni to the disciplinary hearing as alleged by the third respondent.

¹⁶ 2002 (12) BLLR 1164 (LAC)

¹⁷ 2006 (2) SA 603 SCA

- [24] It is irresponsible, misleading and defaming to allege that the applicant conducted his prosecutorial duties in a corrupt fashion. The second respondent found no evidence in this regard hence the award went in favour of the applicant.
- [25] The second respondent did not commit gross irregularity by refusing to grant a postponement since a postponement is not a right (*Madzivhndila v Law Society of the Northern Provinces*¹⁸).

Analysis of applications for condonation

- [26] The third respondent conceded that the delay to file its answering affidavit in opposition the application for dismissal was long. In fact all other processes filed on behalf of the third respondent were way out of time. The question is whether the delay should be condoned.
- [27] The factors for consideration in this application were formulated in *Melane v Santam Insurance Co Ltd*¹⁹ as the degree of lateness, the explanation thereof, prospect of success and the importance of the case. The explanation pertaining to administrative problems are not necessarily decisive. These should however also be seen in the light of the conduct of both parties regarding the reconstruction of the record. This process might have been undertaken after some delay but the applicant's approach to it is not entirely without blame. In this regard the second respondent made a cost ruling against the applicant and has indeed expressed unfavourable findings against the applicant in the Way forward Report.
- [28] The applicant was dismissed for serious misconduct involving corruption. It obviously speaks for itself that this allegation, given the applicant's position as public prosecutor, ultimately affects the administration of justice. It is apparent from the third respondent's intention to pursue this matter that it is one which will not just be "swept under the carpet" as it was remarked in *Gqwetha v Transkei Development Corp Ltd & Others*²⁰.
- [29] The third respondent has shown good cause why its application for condonation to oppose the application to dismiss the review application should be condoned. The application to dismiss therefore fails.
- [30] The arguments in respect of the condonation application in the application to dismiss apply with equal effect to the condonation application for the late filing of the review

¹⁸ [200] 1 ALC 129 (SCA)

¹⁹ 1962(4) SA 531 A

²⁰ 2006 (2) SA 603 (SCA)

application. I accordingly find that the third respondent's application for condonation should succeed.

Grounds for review

- [31] The third respondent contends that the second respondent found in favour of the third respondent based on insufficient evidence presented. The second respondent refused to grant the application for a postponement to secure the attendance of the correct witness called Mthombeni. The police officer had brought a different Mthombeni to the arbitration hearing. The refusal to grant the postponement was therefore prejudicial to the applicant's case.

Submissions

- [32] The applicant concedes that the part of record pertaining to the application for a postponement and exhibits thereto cannot be traced thus rendering it impossible for the applicant to answer the third respondent's allegations.
- [33] The applicant contends that the granting of a postponement is not a right but involves the exercise of discretion by the Court. (*Madzivhandila v Law Society of the Northern Provinces*²¹)
- [34] The applicant submits the test for review requires that the administrative action must be lawful, reasonable and procedurally fair (*Sidumo & another v Rustenburg Platinum Mines Ltd & Others*²²). The review court's task is to pronounce on the correctness or otherwise of the administrative decision maker. (*MEC for Public Works, Roads and Transport, Free State & Another v Morning Star Minibus Hiring Service (Pty) Ltd & Others*²³).
- [35] It cannot be contended that the award is not rationally justifiable because evidence could not be placed before the Commissioner (*Nathaniel v Northern Cleaners Kya Sands (Pty) Ltd & Others*²⁴).
- [36] The courts should be slow to intervene with arbitration awards unless there is a clear case for interference. (*Lefumo Mphadluli & Associates (Pty) Ltd v Andrews*²⁵).

²¹ [2009] 1 ALL SA 124 (SCA)

²² [2007] 28 ILJ 2405 (CC)

²³ 2003(4) SA 429(O)

²⁴ [2004] 2 BLLR 157 (LC)

²⁵ 2009(4) SA 529 CC

Analysis

- [37] The crux of the third respondent's case is that it was denied a postponement to secure attendance of the witness called Mthombeni. This witness had apparently testified at the disciplinary hearing hence the applicant requested to hand in the transcript of the record of the disciplinary hearing which request was refused. The reasoning of the second respondent is that the disciplinary hearing proceeded in the absence of the applicant and Mthombeni was therefore not subjected to cross-examination.
- [38] The application for a postponement in this case is not captured in the award. There is thus no indication that the second respondent applied her mind to the application for postponement. The third respondent's case is that the witness it intended to call had the postponement been granted is material to its case. The second respondent seems to have been alive to this fact because second respondent's records as follows in paragraph 15 of the award: - **The evidence is clear in a number of respects as testified by the respondent's witnesses, and to some extent the applicant. Had a witness called Mthombeni attended the hearing to confirm what van Heerden said, there is a chance that applicant's case was going to be done a severe blow.**
- [39] The law on postponement is restated in the Bargaining Council for the Building Industry v Mabalane NO & Others²⁶ where the court said:-
- “It is trite that the granting of an application for postponement is not a right but an indulgence granted by the CCMA or the Court in the exercise of judicial discretion see Real Estate Services (Pty) Ltd v Smith (1999) 20 ILJ 196 (LC). It is also trite that an application for a postponement must be bona fide and not used simply as a technical maneuver for the purpose of obtaining an unfair advantage over the opposing party. In considering an application for a postponement, the Court or the CCMA must also weigh up whether any prejudice caused by a postponement can fairly be compensated by an appropriate cost order. The CCMA must also weigh up the balance of convenience or inconvenience to both parties which will be caused by a postponement against the prejudice or inconvenience which will be caused to the applicant for a postponement if the application is not granted”.
- [40] In the Mabalane decision the commissioner relied on the prior decision of the senior commissioner in his refusal to grant the postponement. This is similar to the approach

²⁶ JR 1546/02 [2007] ZAL (55)

of the second respondent to the applicant's application for a postponement. In the absence of the record or some indication in the award of what transpired on this aspect the inescapable conclusion is that the second respondent did not apply her mind to the application for the postponement. The result hereof is therefore that the third respondent was prejudiced in its case.

[41] On reconstruction of the record the court said in *Lifecare Special Health Services (Pty) Ltd t/a Ekuhlengeni Care Centre v CCMA & others*²⁷ the court said:-

"A reconstruction of a record (or part thereof) is usually undertaken in the following way: The tribunal (in this case the commissioner) and the representatives (in this case and Ms Reddy for the employee and Mr. Mbelengwa for the employer) come together, bringing their exact notes and such other documentation as to the best of their ability and recollection to reconstruct as full and accurate a record of the proceedings as the circumstances allow. This is then placed before the relevant court with such reservations as the participant may endeavor is adequate for the purpose of the appeal or review is for the court hearing same to decide, after listening to argument in the event of a dispute as to accuracy or completeness.

[42] In the present case three reconstruction hearings were held. The second respondent found that no progress was made to reconstruct the record. Both the applicant and the third respondent concede that the process was not successful for one or other reason. Even the bundle of documents could not be reconstructed. These suggest that nothing can be placed before this court to decide. The Lifecare Special Health Services approach can therefore not be followed in the present case.

[43] The third respondent has been tardy in filing the review application, the notice to oppose the application to dismiss and the answering affidavit thereto. On the other hand the applicant was found by the second respondent to have been obstructive to the reconstruction process. The conduct of both parties in these applications is such that each party should bear own costs.

Order

I therefore make the following order:-

1. The application for condonation in the application to dismiss the application for review is granted.

²⁷ [2003] 5 BLLR 417 (LAC)

2. The application to dismiss the application for review is dismissed.
3. The application for condonation of the late filing of the review application is granted.
4. The arbitration award dated 25 March 2008 under case number PSGA1024-06/07 is reviewed and set aside
5. The matter is remitted to the first respondent for hearing before a commissioner other than the second respondent; and
6. There is no order as to costs.

SESELE AJ

Appearances:

For the applicant Mr. S Hardie, Stephen Hardie Attorneys

For the respondent Adv A Mosam, instructed by the State Attorney