

## REPUBLIC OF SOUTH AFRICA



## THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

## JUDGMENT

Not Reportable

Case no: JR 1014/2008

In the matter between:

COCA-COLA FORTUNE (PTY) LTD

Applicant

and

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION

First Respondent

MOHLOMELELE CHRISTOPHER MELLO N.O

Second Respondent

MARIA JANE MOGAILA

Third Respondent

Heard : 22 June 2012

Order : 22 June 2012

Summary : Review Application. Application for Condonation dismissed with costs.

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JUDGMENT-REASONS FOR ORDER

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AC BASSON J

## Introduction

- [1] This was an application to review and set aside an arbitration award in terms of which the second respondent (“the commissioner”) found the dismissal of the third respondent (Ms Mogaila - hereinafter referred to as “the respondent”) to be substantively unfair but procedurally fair. The applicant was ordered to reinstate the respondent. The review application served before this Court on 22 June 2012. I dismissed the condonation application for the late filing of the record. I should point out that I have also considered the merits of the review in the event this Court ought to have granted condonation for the late filing of the record. In respect of the review application I have concluded that the review has no merits and that it falls to be dismissed on that basis too.

### Application for condonation for the late filing of the record

- [2] In her opposing affidavit, the respondent raised the point that the applicant has failed to file its notice in terms of Rule 7A(6) of the Rules<sup>1</sup> and that the respondent has only filed its notice in terms of Rule 7A(8) on 11 May 2010 which is approximately 16 months after the first respondent (the CCMA) has availed the record in respect of the arbitration proceedings. It further appears from the papers that the commissioner issued the written award on 29 April 2008. The CCMA has availed to record in December 2008. Only on 11 May 2010 (approximately 16 months later) did the applicant file its notice in terms of Rule 7A(8) of the Rules.
- [3] It is not clear from the papers as to when exactly did the applicant file the review application as the Notice of Motion accompanying the review application does not display a Court stamp confirming service. The service affidavit attached to the founding affidavit, however, states that the review application was served by registered mail in June 2008. The date of the registered slip is recorded as 11 June 2008.
- [4] The respondent was dismissed as far back as 26 November 2007. This matter only served before this Court near the end of 2012. This is a substantial delay in reaching finality in this matter and it appears from the

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<sup>1</sup> Rules of the Labour Court

papers that the applicant is solely to blame for this unacceptable delay in bringing finality to this matter.

- [5] From the papers it appears that the review application was served on the offices of the respondent's former attorneys on 9 June 2008. As already pointed out, the CCMA duly availed the arbitration record in December 2008. From that time the applicant apparently did nothing to expedite the transcript of the record. Furthermore, from August 2009 until approximately February 2010 the respondent's attorneys unsuccessfully communicated with the applicant's attorneys in respect of the record: As early as 17 August 2009 the respondent's attorneys explicitly recorded that the record had already been filed by the CCMA and that they (the respondent's attorneys) were awaiting the Rule 7A(8)(a) or (b) notice. Notwithstanding these letters, the applicant failed to avail the record to the respondent expeditiously and failed to formally file a notice in terms of Rule 7A(6) of the Labour Relations Act<sup>2</sup>. In fact, the applicant only filed its notice in terms of Rule 7A(8) 16 months after the record was made available by the CCMA.
- [6] What makes matters worse for the applicant is the fact that it only filed the application for condonation (for the late filing of the Rule 7A(8) notice) on 11 June 2012 – approximately three days before the hearing of the review application.
- [7] The applicant has also never formally filed its notice in terms of Rule 7A(6) of the Rules. Furthermore, despite the fact that the respondent had alerted the applicant as early as 25 May 2010 that the record had been filed late, the applicant waited until 3 days before the hearing before filling an application for condonation.
- [8] I have considered the application for condonation. The affidavit contains a feeble explanation of the fact that a secretary incorrectly informed the respondent's attorneys that a copy of the transcript will be made available to the respondents upon tendering the costs thereof. I do not understand how this can explain the length of the delay. Furthermore, the applicant explains that the matter had previously been dealt with by a certain Ms Murray who has

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<sup>2</sup> Act 66 of 1995.

since left the firm and when the matter was taken over by the deponent of the condonation application he was not made aware of a pending review application. Again this is an unacceptable explanation for the delay. A further explanation tendered is the fact that the file was misplaced. All of these reasons reflect on the competence of the applicant's attorneys and does not constitute a proper or reasonable explanation for the delay. I am further of the view that there exists no reason why the respondent should be denied justice as a result of the negligence of the applicant's attorneys. Furthermore, our law subscribes to the doctrine of *vigilantibus non dormientibus lex subvenit*<sup>3</sup>. This established principle has been accepted by our Courts in numerous decisions. Furthermore, the applicant did not tender any explanation whatsoever to explain why the condonation application was not filed timeously.

- [9] The applicant and its attorneys have displayed a flagrant disregard of the procedures of this Court and should therefore not be assisted by this Court to the detriment of the respondent. The application for condonation is therefore dismissed with costs. I should also add that the applicant has not even addressed the prospects of success in the application for condonation but merely referred to the review application. This is not sufficient. The applicant must make out a case in respect of the prospects in the founding affidavit. In any event I am of the view that the prospects are irrelevant in light of the fact that the applicant has not tendered a reasonable explanation for the delay.

Merits of the review application

- [10] I have also considered the award and the merits thereof notwithstanding the fact that I am of the view that the matter should be dismissed for the aforesaid reasons.
- [11] In respect of the review application I am not persuaded that the applicant has made out a case for the relief sought. I am persuaded that the commissioner correctly evaluated the evidence in coming to a conclusion and that the conclusion reached by the commissioner is reasonable. It is clear that the commissioner was alive to the facts and that he has properly applied his mind.

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<sup>3</sup>*Mkhize v Tanker Services (Pty) Ltd*(1993) 14 ILJ 688 (LAC:

The applicant states that the commissioner did not take into account the evidence of a certain Erasmus who testified that the applicant had apologised to Moleme (the victim) in his presence for slapping her (the victim) on 27 October 2007. This is completely wrong. Erasmus only stated that “Jane apologised to Pam for the incident that had happened”. The evidence was not that she had apologised for an assault. Furthermore, if regard is had to page 76 of the transcript where the victim testified that the respondent did not mention that she had slapped her. The applicant further offered no explanation for not having called the one person (Mr Hendrik Seakamela) who saw the victim after the assault. The applicant contends that the commissioner should not have drawn a negative inference from this fact. This is not correct if regard is had to the award. The commissioner did not draw a negative inference from this fact. What the commissioner stated was that because Seakamela did not testify, no other evidence was placed before the commissioner to consider.

[12] I have considered the award and I am in agreement with the conclusion reached by the commissioner that there was no evidence of the alleged assault. The conclusion is therefore reasonable and I can find no reason to interfere neither with the decision nor with the conclusions in respect of sanction.

[13] In the event the application for condonation is dismissed with costs.

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AC Basson J.

Judge of the Labour Court

APPEARANCES

For the Applicant : Verveen Attorneys

For the Third Respondent : Lombard Attorneys

LABOUR COURT