



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Case no: JR 804/2011

In the matter between:

FAST FREIGHT (PTY) LTD

Applicant

and

THE NATIONAL BARGAINING COUNCIL FOR

THE FREIGHT INDUSTRY

First Respondent

COMMISSIONER NM LEDWABA

Second Respondent

SIBUSISO GODFREY MAHLANGU

Third Respondent

Heard: 09 January 2013

Delivered: 06 March 2013

Summary: Employee failing to make substantive condonation application for late filing of answering affidavit. Rescission application – notice sent to correct fax number only creates a presumption of proper service.

JUDGMENT

Naidoo AJ

Introduction

- [1] This is an application to review and set aside a rescission ruling made by the second respondent (the arbitrator) under case number NELRFBC13745, in terms of which the applicant's rescission application was dismissed.
- [2] Despite opposing the application, the third respondent was not represented at the hearing. Once satisfied that proper notice had been sent to the third respondent, I continued to hear the application in the absence of the third respondent.
- [3] Ms. Duvenage, appearing for the applicant argued that the third respondent's replying affidavit was not filed within the prescribed time frame and without an application for condonation, should not be considered.
- [4] The applicant filed its review application on 21 April 2011 and thereafter filed its notice in terms of Rule 7A (8)(b) on 10 June 2011. The third respondent filed his answering affidavit on 7 September 2011. Thus the third respondent is some 53 days late in filing his papers.
- [5] In his affidavit the third respondent, with respect to his late submission, states his insurance company confirmed cover with his attorneys 'late' and on this ground his late filing should be condoned. The applicant's attorneys in its replying affidavit, served on 19 September 2011, advised the applicant and his attorneys that a proper substantive application for condonation needs to be made. The applicant's attorney again, in its Heads of Argument, raised the issue of condonation. To date the third respondent has not made out a case for condonation nor has Heads of Argument been filed on his behalf despite being directed to do so by the Registrar of this Court.
- [6] In *NUMSA and Another v Hillside Aluminium*,¹ on this issue of condonation the court held:

¹ [2005] 6 BLLR 601 (LC) at para 12

'Additionally, there should be an acceptable explanation tendered in respect of each period of delay. Condonation is not there simply for the asking. Applications for condonation are not a mere formality. The onus rests on the applicant to satisfy the court of the existence of good cause and this requires a full, acceptable and ultimately reasonable explanation. One of the primary purposes of the Labour Relations Act is to ensure that disputes are resolved expeditiously, especially dismissal disputes. The intention is that disputes alleging unfair dismissal should be referred to conciliation within 30 days of the dismissal (section 191(1)(b)(i) (Act 66 of 1995)); that the conciliation process be completed within 30 days (section 191(5) (Act 66 of 1995)) and that disputes for adjudication by the Labour Court should then be referred within 90 days of the end of the conciliation process. For a variety of reasons, these time periods are often not complied with in practice. Nevertheless, to do justice to the aims of the legislation, parties seeking condonation for non-compliance are obliged to set out full explanations for each and every delay throughout the process. An unsatisfactory and unacceptable explanation for any of the periods of delay will normally exclude the grant of condonation, no matter what the prospects of success on the merits. The latter principle was stated by Myburgh, JP in NUM v Council for Mineral Technology [1999] 3 BLLR 209 (LAC) at 211G-H

'There is a further principle which is applied and that is that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without prospects of success, no matter how good the explanation for delay, an application for condonation should be refused'

- [7] The third respondent has failed to set out a proper explanation for the late filing of his answering affidavit. He has not set out when his insurance company confirmed the necessary cover for his attorneys to act on his behalf or what efforts he made with his insurance company while in pursuit of obtaining such cover. Furthermore there is no confirmatory affidavit from the third respondent's insurance company confirming the reason for late filing as alleged by the third respondent.
- [8] For the above reasons and on the strength of the decision in NUMSA (supra) I am inclined to accept Ms. Duvenage's argument. The third respondent has not tendered a suitable or satisfactory explanation for the late filing of his papers and

as such, his answering affidavit stands to be dismissed. In any event, as will appear later in this judgment, the third respondent would have had limited prospects of success in his argument with regard to the main application.

Background facts

- [9] Before addressing the review application, it would be pertinent to set out the factual background to this dispute, as set out in the applicant's founding affidavit.
- [10] The third respondent was dismissed from the applicant's employ on or around 17 November 2009 and referred a dismissal dispute to the first respondent on 8 September 2010. On 7 October the applicant's representative attended a conciliation scheduled by the first respondent. Despite raising the point that the third respondent was nearly 11 months late in referring his dispute, the conciliator issued a certificate of non resolution.
- [11] An arbitration was set down at the Commission for Conciliation Mediation and Arbitration on 15 November 2010. The applicant's representative raised the point that both parties fell under the jurisdiction of the first respondent and further altered the arbitrator that parties had already attended conciliation scheduled by the first respondent. A ruling by the arbitrator held that the Commission for Conciliation Mediation and Arbitration did not have jurisdiction to continue and that the matter should be referred to the first respondent.
- [12] Sometime in February 2011 the applicant became aware of a default award involving the applicant and third respondent, handed down by an arbitrator acting under the auspices of the first respondent. On 24 February 2011 the applicant filed its rescission application. The second respondent handed down his ruling on 18 March 2011 dismissing the applicant's rescission application. It is this decision which forms the subject matter of this review application.

Grounds of Review

- [13] Ms. Duvenage set out 2 grounds for review. The first is that the second respondent misunderstood the applicable law in that he accepted, as conclusive proof the applicant did receive the notice once it was common cause that same

was faxed to the applicant's satellite offices, this despite the applicant alleging it did not receive notification.

[14] The second ground for review was that the second respondent was incorrect in his view that an applicant to a rescission application needs to establish good cause. Ms Duvenage, correctly in my view, abandoned the second ground of review.

The rescission ruling

[15] In his ruling the second respondent found that once it was common cause that notice was sent to the applicant's satellite office, proper notice had been effected and that the applicant intentionally did not attend the arbitration. Critical to this application, the second respondent says the following in his ruling;

'The only reasonable inference one can draw out of the application is that, the employer undermined the process of the Bargaining Council and prioritised what he attended to as he failed to attempt and or to even send a delegate for appearance purposes and presentation of the interlocutory application and now he would like to flout and abuse the system, maybe because they have received adverse award. It is therefore the employer's turn to live with the outcome of its own misfortune. The employer's Mr. Loughton, in his application was not being honest about the reasons for the employer's default.....'

Evaluation

[16] The first point to note is that the third respondent did not oppose the rescission application, leaving the second respondent to deal with the matter on an unopposed basis.

[17] It is inconceivable how the second respondent arrives at the inference that the applicant prioritised another engagement over that of the arbitration and in doing so undermined the process, or the conclusion that Loughton was being dishonest with the reasons as to why the applicant did not attend.

[18] One can only surmise that the second respondent's reasoning is based on the fact that notice was sent to a fax number belonging to the applicant. It becomes

apparent that once the second respondent ascertained notice was sent to the correct fax number, he further concluded the applicant did in fact receive the notice, chose not to attend the arbitration and was further dishonest in alleging it did not receive notification.

- [19] In arriving at these somewhat irrational conclusions, the second applicant has clearly not understood, or was not aware that the premise on which he sought to reply on in justifying his opinions, that being the notice was sent to the correct faxnumber, creates nothing more than a rebuttable presumption regarding service. It is a presumption which is open for the applicant to rebut. In this case the applicant duly did so in its rescission application and there was nothing before the second respondent not to accept such a version, more so if he was alive to the fact that the applicant attended both the conciliation and the arbitration set down at the Commission for Conciliation Mediation and Arbitration. On this point the court in *Gay Transport (Pty) Ltd v SA Transport and Allied Workers Union and Others*² held:

‘As indicated above the fax slip creates a presumption of receipt but does not constitute conclusive proof of receipt. The applicant in the present matter does not deny the correctness of the fax number used to fax the statement of case. It however denies ever receiving the same, thereby refuting the presumption of receipt. The burden is then on the respondents to show that the applicant did indeed receive the statement of case through the fax transmission. The evidence that the applicant did receive other documents through the same fax number previously is not in my view sufficient to discharge the duty on the respondents to show that the applicant did receive the statement of case sent through the same fax number.’

- [20] There was further nothing before the second respondent to suggest, let alone conclude that the applicant chose not to attend the arbitration or that Loughton was dishonest in his rescission affidavit. For these reasons the ruling stands to be set aside.

² (2011) 32 ILJ 1917 (LC).

[21] It is worthy to note that in his answering affidavit the third respondent opposes the review on the sole ground that the notice was sent to the correct fax number. To this end he does not take into account, like the second respondent, the correct legal principle on this point and thus he would have been without any prospects of success in opposing the review if condonation had been granted.

[22] In light of the above I am satisfied that the applicant has made out a case which warrants the setting aside of the rescission ruling.

[23] It is for the applicant to supplement its rescission application to include the issue of good cause and for the first respondent to condone the late filing of these submissions or not.

Order

[24] In the premises the following order is made:

- 25.1 The rescission ruling made by the second respondent under case number NELRFBC 13745 is reviewed and set aside
- 25.2 The matter is remitted to the first respondent to be considered afresh by a commissioner other than the third respondent.
- 25.3 There is no order as to costs.

Moksha Naidoo

Acting Judge of the Labour Court

APPEARANCES

For the Applicant: Ms Duvenage of Duvenage Attorneys.

For the Respondent:

LABOUR COURT