



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Case no: JR 2597-11

In the matter between:

PHASWANE DANIEL MALEKA

Applicant

and

AUGUSTA PROFILES (PTY) LTD

First Respondent

METAL AND ENGINEERING

INDUSTRIAL BARGAINING COUNCIL

Second Respondent

KEVIN MULLIGAN N.O.

Third Respondent

Heard: 30 April 2013

Delivered: 30 April 2013

EX TEMPORE JUDGMENT

Lagrange J

- [1] The applicant has applied to review a rescission ruling handed down on 31 August 2011 which he received in 5 September 2011. The applicant filed his

review application on 27 October 2011, and accordingly is approximately one and a half weeks late. The applicant has applied for condonation for the late filing of the review application.

- [2] The reason for the delay is the applicant's difficulty in obtaining confirmation of a case number which was only obtained in 20 October 2011. The applicant identifies the person he was communicating with in the registrar's office and provides sufficient detail to make his explanation plausible. In my view of the delay is not excessive given that the applicant completed the application by 20 October 2011. It is not entirely clear why it took a further week to file the application, but I am satisfied that the explanation is sufficient given the brevity of the time period of the delay. The first respondent is not opposing the review application, nor has it opposed the application for condonation. As it is the party best able to state any prejudice it might have suffered, it is safe to assume that it suffered no material prejudice as result of the delay. On the merits of the review application of dealt with below and in the light of my conclusions on that issue condonation of the late filing of the review application should be granted.
- [3] The applicant had applied to rescind a dismissal ruling issued on 21 July 2011 following his failure to appear at the arbitration process set down for that day. He arrived at the dispute resolution Centre where the arbitration hearing was being held one hour late. The reason given by the applicant for his lateness was that the arbitration was set down during a national strike in the petroleum sector and filling stations in the area where he lives (Ga Rankuwa) had run dry and his car ran out of petrol. By the time he had managed to obtain more petrol he was already out of time and he made two calls to one Dudu Mahlangu at the CDR reception to inform them that he was running late. In his review application the applicant says that when he arrived at the DRC the arbitrator advised him that he had received his messages but the employer was not prepared to wait any longer.
- [4] In deciding whether to accept that the applicant had a justifiable explanation for his lateness, the arbitrator took account of the employer's submission that the applicant had provided no proof of his claims that he was unable to obtain petrol in and stated that the petrol strike only impacted on the public during its first week and by the time the arbitration was convened almost all petrol

stations were receiving regular deliveries of petrol. The employer also argued that because the applicant said he was already out of time by the time he managed to find petrol, if he had prepared properly it could have avoided being late for the proceedings.

[5] In evaluating the applicant's justification the arbitrator stated:

"It is significant that the applicant did in fact arrived at the arbitration venue, although nearly an hour late. This in itself highlights the fact that the applicant was actually able to obtain petrol enough to get into the venue. He was aware of the time at which he was expected to appear at the arbitration. Had he started earlier or make proper provision he ought to have been able to arrive in time. If the ready availability of petrol was genuinely a problem, he was aware of the situation in ought to have taken it into account in his planning."

[1] The arbitrator then went on to evaluate whether the applicant's prospects of success were sufficient to outweigh the inadequacy of his explanation. In doing so, the arbitrator appears to have applied the test for condonation rather than the test for rescission. An applicant for rescission of an award must show:

- 1.1 that its absence at the hearing has been reasonably explained; and
- 1.2 that it has a *bona fide* case to place before the CCMA and that it has not lost interest in having its case heard.¹

[6] In **SA Democratic Teachers Union v Commission For Conciliation, Mediation & Arbitration & Others (2007) 28 ILJ 1124 (LC)**, Molahlehi J restated the well known principle of assessing a bona fide case as opposed to the test for reasonable prospects of success applied in condonation applications:

"[38] A commissioner in considering prospects of success does not have to pronounce on the merits of the case. All that the commissioner needs to do is to investigate whether on the averments made by the applicant there is a prima facie case, that there is a chance of succeeding when the main case is

¹ *Northern Province Local Government Association v Commission for Conciliation, Mediation and Arbitration and Others* (2001) 22 ILJ 1173 at paras 15 – 17; *Foschini Group (Pty) Ltd v Commission for Conciliation, Mediation and Others* (2002) 23 ILJ 1048 (LC) at para 16.

heard. In other words to establish whether there is a reasonable prospect of success on the merits, it suffices if an applicant can show a prima facie case through setting out averments which if established at the proceedings of the main case would entitle the applicant to some relief. a bone fide case is not the same as a case with reasonable prospects of success. It is simply a case in which the applicant can succeed if his version were to be upheld."

- [7] The applicant appears to be dogged by problems of lateness and was dismissed after arriving 20 min late at work while he was in a final written warning. The respondents premises are in Boksburg and the applicant was travelling from Ga-Rankuwa where he had his permanent residence at the time. He claimed he left at 4:30 AM and it took him nearly 3 hours to get to work as opposed to the normal hour. He was not feeling well as he had a toothache, which appears to have been confirmed by evidence that he had a tooth extracted later that day. The arbitrator's comment was that he could not see the relevance of this to the applicant's lateness on that occasion. In the applicant's version if he was in fact given half a day off to attend a dentist, and it appears to be an implicit part of his case that his lateness on that occasion ought to be mitigated by the fact that he should have gone to the dentist in any event that morning, and in the circumstances the fact that he did first report for work albeit 20 min late should be seen in that context as mitigating factor. On the face of it, the applicant's case seems weak, but I cannot say that an arbitrator might not find mitigating factors in the context in which the lateness occurred or in the degree of lateness, which militate against dismissal being an appropriate sanction.
- [8] In the circumstances, I am satisfied that the third respondent did not apply his mind to the criteria for rescission, and misconstrued the nature of a bona fide case. In relation to his evaluation of the justification for the applicant's lateness at the arbitration hearing he failed to have consideration to the phone calls made by the applicant demonstrating his intention to attend the hearing and preferred the evidence of the employer on the general effect of the strike in the petroleum sector without explaining why he dismissed the applicants evidence of the prevailing situation at petrol stations in the area where he lived, when the employer's representative had no particular knowledge of this. Everything

pointed to the applicant taking steps to attend the hearing, but being thwarted by logistical obstacles caused by the strike in getting to the dispute resolution Centre in Johannesburg from Ga-Rankuwa on time. The arbitrator failed to evaluate whether the applicant was in wilful default, when assessing the justification for his lateness.

Order

[9] in light of the evaluation above,

- 9.1 The applicant's late filing of his application to review the arbitrator's rescission ruling issued under case number MEGA 30659 dated 31 August 2011 is condoned.
- 9.2 They said ruling is reviewed and set aside and substituted with a ruling resending the dismissal ruling issued in the same matter on 21 July 2011.
- 9.3 The registrar must remit of the applicant's unfair dismissal dispute under case number MEGA30659 to the dispute resolution Centre of the second respondent which must set the matter down for a fresh hearing before an arbitrator other than the third respondent.
- 9.4 As the matter is unopposed no order is made as to costs.



R LAGRANGE, J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:

Self representing