



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

CASE NO: JR1906/10

In the matter between:

FISHER SIDNEY,

Applicant

and

MARCUS. MICHAEL N.O.

First Respondent

THE METAL AND ENGINEERING

Second Respondent

INDUSTRIES BARGAINING COUNCIL

WEST RAND ENGINEERING (PTY) LTD

Third Respondent

Heard: 25 July 2013

Delivered: 17 January 2014

SUMMARY: The applicant filed the review application six weeks late and the record of the arbitration hearing some two years after the mechanical recording was made available. The reason for these delays was lack of funds to prosecute the review application. The applicant pleaded that the most important portion of the arbitration hearing which is crucial for determining the dispute between the parties does not form part of the record as that part was either not recorded or that the relevant

recordal has gone missing. No reconstruction of the record could be undertaken by use of the arbitrator's notes.

Held that, the lack of funds alone, without special circumstances, is not a valid reason to condone the inordinate delays to prosecute the review application. It was held also that the applicant has failed to show reasonable prospects of success where the important part of the record that is crucial for the resolution of the dispute is missing.

Held that, for these two reasons, that is, the late filing of the application and the record of proceedings, and lack of prospects of success, condonation is refused.

JUDGMENT

MALINDI AJ

Introduction

- [1] On 11 August 2010, the applicant filed a notice of motion, seeking an order that the arbitration award issued by Marcus, the first respondent, under The Metal and Engineering Industries Bargaining Council (MEIBC), the second respondent, under case number MEGA9591 delivered on 13 May 2010 be reviewed and set aside, and simultaneously that the late filing of his application be condoned.
- [2] The applicant received the award on 17 May 2010. The applicant was required to file his review application on or about 28 June 2010. The application is approximately 6 weeks and a few days late.
- [3] The applicant submits that the application is not inordinately late and that its lateness is not due to any deliberate delay on his part. The reasons for the lateness are that since his dismissal by West Rand Engineering Works, the third respondent, he has been unemployed and therefore unable to pay for the services of a legal representative to prosecute the review application.

Background facts

- [4] The applicant at all times material hereto was a member of Legal Wise but was not satisfied with their services and therefore sought to transfer his file from Legal Wise Attorneys to his current attorneys of record, D W Morgan Attorneys.
- [5] His attorneys would not commence with any work until Legal Wise had paid into their account the requisite fees. This payment was finally processed on 16 July 2010.
- [6] In addition, the applicant had to settle outstanding fees to his attorneys of record from previous representation when they successfully represented him in a review of the second respondent's refusal of condonation for the late referral of the dispute to the second respondent.
- [7] The applicant was able to conduct the first consultation with Mr Morgan on 21 July 2010 and preparations for the application could commence on 22 July 2010 after the applicant had settled his outstanding fees.
- [8] In his supplementary affidavit filed on 7 August 2012, the applicant states that the second respondent made the record of the arbitration proceedings available on or about 13 August 2010 but that due to lack of financial ability he was unable to cause the mechanical recording to be transcribed, hence the delivery of the record took some 2 years. It would have caused him R4 200,33 to have the record transcribed.
- [9] The transcription of the record was completed on or about 6 December 2011, at which stage the applicant realised that the record was incomplete. After many attempts to obtain outstanding CDs, including a letter from his attorneys dated 7 March 2012, he was advised that no further CDs could be found.
- [10] Eventually, on 13 April 2012, the applicant requested the first respondent's notes which were obtained on 18 April 2012. The notes were found to be "completely illegible."
- [11] Proposals were made to have a meeting to reconstruct the record with the first respondent. On 16 July 2012, the second respondent advised the applicant that

the first respondent was no longer accredited by the CCMA and no longer a commissioner of the second respondent. The only option, he was advised, was to bring proceedings to compel the first respondent to reconstruct the proceedings. As the applicant has limited funds, bringing such an application would have been too costly for him. He therefore advised his attorney to proceed with this application on the basis of the incomplete record.

Prospects of success

[12] Regarding the grounds for review, the applicant states that his and the third respondents' versions of what transpired on or about 20 June 2005, and as to whether the applicant justifiably switched off two of several machines which were running because they were unattended, compared to the third respondent's version that these machines were running because there was an urgent job to be done, which the applicant says he had no knowledge of, 'are mutually destructive and are critical to the events which took place subsequently, ultimately leading to my dismissal'.

[13] The applicant states that the evidence of the third respondent's first witness on the first day of the proceedings does not appear on the record. He states that this has prejudiced him in that this evidence was the most important. Furthermore, the evidence corroborating that of the third respondent's first witness does not appear on the record either.

[14] The applicant emphasises that 'the fact that the missing portions of the record are of critical importance'.

[15] The third respondent's answering affidavit states as follows:

'11. On or about 20 June 2005, the Applicant was asked by the foreman Mr Boshoff to work overtime as there was an urgent job which needed to be completed.

12. The employees of the third respondent work until 16h00 on any given day. As the foreman left work at 16h00 on 20 June 2005, the applicant deliberately switched off the machines at 15h10 which were set to complete the urgent job.

13. The applicant thereafter proceeded to read the newspaper until his overtime shift was over’.

[16] In his replying affidavit, the applicant states that there was no mention of an urgent job to be completed.

Analysis

[17] Regarding the incompleteness of the record, the applicant submits, first, that while it has been held that a failure to reconstruct a record may result in the dismissal of a review, this is not appropriate in the present matter. I was referred to the cases of *Liwambano v Department of Land Affairs and Others*¹ and *Mabogoane v CCMA and Others*² in this regard. Alternatively, that the matter be remitted to the second respondent for a fresh adjudication.

[18] In *Antoinette du Plessis v Wits Health Consortium (Pty) Ltd*³ Molahlehi J said the following:

‘The delay in the present matter whilst not excessive it is not insignificant. The explanation is grossly unsatisfactory. The applicant says that she could not file her statement of case because she did not have funds. She in this respect in the heads of argument relies on the decision of this court in *Gaoshubelwe and Others v Pieman’s Pantry (Pty) Ltd* where the court accepted as reasonable the explanation that the delay was caused by lack of funds on the part of the applicants...

In other words, when pleading lack of funds as the cause of delay, the applicant needs to provide more than a mere claim that the reason for the delay is lack of funds. In this respect, the applicant has to take the court into his or her confidence in seeking indulgence by explaining “when” not only he or she finally raised funds to conduct a case but also how and when did she receive those funds...’.

¹ [2012] 33 ILJ 1862 (LC)

² [2012] 33 ILJ 1874 (LC)

³ JS 122/2011 [2012] ZALC JHB 53 (14 June 2012) at para 14 and 16.

[19] In *Michael Mkhize v CCMA and Others*⁴ Gush J found that a delay of 5 weeks to launch a review application 'is a substantial and excessive delay'.

[21] I have no doubt that the sole reliance on lack of funds for the delay in both launching the application for review and securing a transcript of the record and providing a copy thereof to the respondent does not constitute valid grounds for condonation. This was conceded by Mr Morgan, appearing for the applicant. Special circumstances need to be pleaded in order for a lack of funds to constitute a proper ground for condonation for the late compliance with the provisions of the rules. The fact that the applicant was at the relevant times a member of Legal Wise, which provides in-house legal representatives to its members, or provides a portion of the legal fees to the legal representative of a member's choice, severely weakens the applicant's claim that lack of funds was the only cause for the delay in prosecuting this matter.

[22] Even when prospects of success on review are considered, this factor does not come to the applicant's assistance. The applicant has conceded that the missing portions of the record are very important to the adjudication of this matter. He has stated that his and the third respondent's version regarding whether his dismissal was fair are mutually destructive. In the circumstances, in the absence of a full record of the arbitration proceedings, the dispute between the parties is incapable of resolution on the record. Hence it was stated in *JDG Trading (Pty) Ltd t/a Russels v Whitcher N.O. and Others*⁵:

'An applicant who seeks relief in a review on the basis of a defective record runs the risk that it will be unsuccessful on that ground alone. This must be based on the simple principle that evidence at the heart of the attack on the decision of a commissioner must be "properly available" to the review in court'.

[23] The applicant has run such risk and his application would fail on this ground alone.

⁴ Case no. D95/2011 [2013] ZALCD (13 June 2013).

⁵ [2001] 3 BLLR 300 (LAC)

[24] It was submitted by the applicant that in view of the inadequate record before court the matter should be remitted to the second respondent. I find this proposition particularly inappropriate in the circumstances where the dismissal took place already in 2005 and that the applicant is responsible for the delay of more than two years in prosecuting this matter. It is in the interest of the third respondent that this matter reaches finality⁶. I therefore, decline to remit the matter to the second respondent.

[25] The application therefore stands to be dismissed. I therefore make the following order:-

- 1 The application for condonation is dismissed.
- 2 There is no order as to costs.

Malindi,AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicants: Mr DW Morgan (Attorney)

Instructed by D W Morgan Attorneys

For the Respondents: Mr B Joubert

Instructed by Joubert Attorneys

⁶ See Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd & Others (Case No. 619/12) [2013] ZA SCA 5 (11 March 2013) at para [11]