



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

CASE NO JR 506/13

In the matter between:

THADISHE PHOKU

APPLICANT

and

TELKOM SA LTD

1ST RESPONDENT

L NOWOSENETZ NO

2ND RESPONDENT

THE COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

3RD RESPONDENT

Date heard: 25 April 2014

Judgment delivered: 29 April 2014

JUDGMENT

VAN NIEKERK J

- [1] This is an application to review and set aside a ruling made by the second respondent (the commissioner). In his ruling, the commissioner refused to condone the late referral of the applicant's unfair dismissal dispute to the CCMA.
- [2] The material facts are not in dispute. The applicant was dismissed in 2008. On 25 June 2008, he referred a dispute to this court in circumstances where there had been no prior referral of the dispute to the CCMA. The matter proceeded court to the point of trial where the jurisdictional point (i.e. that there had been no referral to conciliation as required by s 191 of the LRA) was upheld. During the course of this litigation, until 7 February 2013, the applicant was represented by an attorney. The terms of the order granted on 7 February 2013 were that the proceedings should be stayed until such time as the matter had been referred to the CCMA for conciliation. The applicant was further directed to file such an application.
- [3] On 9 February 2013, the applicant filed an application in the CCMA seeking condonation for the late referral of his dismissal dispute. In the application, the applicant recorded that the matter had been referred late on account of the erroneous direct referral of the dispute to this court. In relation to his prospects of success, the applicant stated that he had been dismissed without the proper procedure having been followed and his prospects were "very high". It does not appear that the first respondent in these proceedings filed any affidavit opposing the application for condonation. However, handwritten notes made by the commissioner indicate that the application was indeed opposed. In his ruling, made on for March 2013, the commissioner recorded the reasons for the late referral of the dispute and the applicant's prospects of success. He found that the reason for the late referral was unreasonable in that the applicant had been legally represented and had failed to show good cause why the referral was not made timeously. In regard to the prospects of success, the commissioner noted that the existence of the dismissal had been placed in dispute and in regard to prejudice, the commissioner found that the first respondent would be prejudiced by the granting of condonation since material witnesses would no longer be

available to testify at any arbitration hearing. The application for condonation was accordingly refused.

- [4] The lead basis on which this court is entitled to interfere with the commissioner's decision is limited. This court is entitled to intervene if and only if the decision to which the commissioner came was so unreasonable that no reasonable decision maker, having regard to the available material, could have come to that decision. This court is not entitled to interfere only because it considers that the commissioner's decision was wrong. In addition, it is incumbent's on an applicant in an application such as the present to articulate properly his or her grounds for review. These must obviously set out on the basis on which the applicant contends that the decision under review fails to meet the reasonableness threshold.
- [5] In his founding affidavit, the applicant does not directly attack the reasonableness of the commissioner's decision. Rather, he contends that the decision was wrong. In relation to the commissioner's point concerning legal representation, the applicant avers that he was not legally represented when the jurisdictional point was argued in this court. That may be so, but a reading of the commissioner's ruling indicates that throughout the course of the litigation process, and in particular when the matter was referred to this court without a prior referral for conciliation and to the point of the pre-trial conference, the applicant had been assisted by an attorney. I do not understand the applicant to contest this. The applicant's legal representative was fully aware of the jurisdictional point that had been taken by the first respondent; indeed, it is specifically recorded in the pre-trial minutes signed by the applicant's attorney. In relation to the prospects of success, the applicant contends that the first respondent had failed to produce evidence of what it averred was a mutual separation agreement, i.e. the basis on which it contended that the applicant had no prospects of success. While it is true that no written agreement was produced, this is not necessarily definitive. The applicant's real complaint appears to be captured in paragraph 3.3 of his founding affidavit where he contends that the

dismissal occurred during the course of the implementation of an order for reinstatement previously granted by this court and that for that reason, he deemed it appropriate to refer the dispute directly to this court. The applicant's view, however genuinely it may have been held, was simply wrong. Whether the mistake made by the applicant is in itself a basis on which condonation ought to be granted is clearly a matter that the commissioner reflected upon. As I have indicated, the test is not whether the commissioner was wrong; what matters is that his decision was one to which a reasonable decision-maker could come on the evidence. What weighed with the commissioner was the excessive period of the delay. When the application for condonation was filed, the period of delay was some four years and nine months. The delay was clearly inordinate and served to outweigh any factors that were to the applicant's advantage. One of the fundamental principles underlying the LRA is the expeditious and efficient resolution of disputes. This objective would be wholly undermined if applications for condonation were to be granted in circumstances such as the present, where through ignorance or bad advice, employees fail to make proper referrals (or, as in this case, make any referral at all) and then seek condonation years later. In the present instance the applicant had, for at least a significant period of the litigation process, the assistance of an attorney. The applicant's attempt to cast the bulk of the blame on him, however reprehensible the conduct of the attorney may have been, weighed heavily with the commissioner.

- [6] When regard is had to the evidence observed before the commissioner, even the applicant's version, I am not persuaded that the decision made by the commissioner falls outside of a band of decisions to which reasonable person could come. The application to review and set aside the commissioner's ruling therefore stands to be dismissed.
- [7] In relation to costs, Mr Mosebo, who appeared for the first respondent, charitably did not pursue any order for costs as against the applicant.

For these reasons, I make the following order:

1. The application is dismissed.

ANDRE VAN NIEKERK
JUDGE OF THE LABOUR COURT

APPEARANCES

For the applicant: In person

For the first respondent: Mr P Mosebo, Maserumule Inc.