



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case No. JR 1850/13

In the matter between:

MANKELE B.MOLEFE

Applicant

and

Dr. KENNETH KAUNDA DISTRICT MUNICIPALITY

First Respondent

**THE SOUTH AFRICAN LOCAL GOVERNMENT
BARGAINING COUNCIL**

Second Respondent

LINDOKUHLE DLAMINI, N.O.

Third Respondent

Heard: 29 April 2014

Delivered: 11 June 2014

Summary:

JUDGEMENT

SHAI A.J.

Introduction

- [1] This is an application in terms of Section 145 of the Labour Relations Act no.66 of 1995, to review and set aside the commissioner's ruling dated 05 August 2013 under case no. NWD 071308 and secondly, that the said condonation ruling be substituted with an order to the effect that the 1st Respondent is in breach of Clause 6.3. of the South African Local Government Bargaining Council's Collective Agreement Disciplinary Code and Procedure and be precluded from proceeding with the intended disciplinary hearing against the applicant.
- [2] The application for review is unopposed.

The facts

- [3] The Applicant is employed as the 1st Respondent's Legal Advisor since 01 September 2007.
- [4] The Applicant was formally charged with misconduct in the terms of notice to attend a disciplinary hearing dated 23 May 2013, which was served on the applicant on 14 June.
- [5] The applicant was in essence charged of fraud and breach of duty as more fully captured at page 20-21 of the paginated index.
- [7] Following the application for postponement of the disciplinary hearing by applicant, the First Respondent applied for the condonation to proceed with the disciplinary hearing, which application was filed on the 2nd of July 2013.
- [8] The 3rd Respondent was appointed to determine the said application for condonation, a ruling of which was issued on the 5th August 2013, and it is the subject of this review application.

Grounds of Review

- [9] The grounds of review are not clearly stated, mainly couched in argument form and take the form of appeal in that the applicant seems to challenge the correctness of the decision of the commissioner. I will therefore summarise them as follows:

The degree of lateness.

9.1. The commissioner in his ruling either erred or neglected to diligently apply himself in analysing the facts before him. MM5 and MM6 are very explicit. Their dates are 28 February 2012 and not 28 February 2013. The alleged misconduct could not have transpired on 28 February 2013. Had he carefully analysed these documents he would in no way have arrived at a time frame of (10) days after the prescribed 90 day period.

[10] Explanation for the lateness or the failure to comply with the time frame.

- 10.1. 1st Respondent alleges that it had to conduct further investigation into other charges against applicant, which is a confirmation that it was aware of the misconduct around 28 August, a point the commissioner should have easily picked up.
- 10.2. The appointment of the new manager has got no bearing on the knowledge or awareness of the alleged misconduct.
- 10.3. The commissioner ignored the fact that the 1st respondent was assisted by a firm of attorneys alleging speciality in labour matters.

Prospect of success

[11] The respondent had no prospects of success in that:

- 11.1 The respondent agrees that during the pre-arb in August 2012 the said document was shared with them.
- 11.2 The respondent accedes that indeed they were at all times aware of the alleged entry.
- 11.3 The charges are faulty, badly drafted and do not reflect the true facts of the alleged case.
- 11.4 The applicant's defence is stronger regarding the fact that he acted and the respondent endorsed that as per annexure "D" even though the latter refused to issue an acting letter and payment.

- 11.5 The payment of an official on sick leave alleging that she performed the work during such a period does not have substance and is not reasonable.
- 11.6 The entry alleged was made on the copy and not on the original attendance register and the applicant did attend such meeting in his capacity as both Acting Director and Manager Legal and the respondent did not refute this fact.

Prejudice to parties and the importance of the case

- [12] The main complaint herein is that the respondent would not suffer prejudice if the condonation is not granted in that it has been aware of the misconduct for the past +-10 months. On the other hand the applicant submits that it will suffer most for non-consideration of his acting and payment for the official who never acted during that month.

Legal Exposition

- [13] The test for review of arbitration awards has been laid out in the well-known case of **Sidumo & another v Rustenburg Platinum Mines LTD & others [2007] 12 BLLR 1097 (LC)**. In this case the court held that the provisions of section 145 of the Labour Relations Act 66 of 1995(*“the Act”*) were suffused by the Constitutional Standard of reasonableness. This is arrived at by answering the question which has formulated in **Batu Star Fishing (Pty)Ltd v Minister of Enviromental Affairs & Tourism & others 2004 (7) BLLR 687 (CC)** as follows:

Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?

- [14] To succeed in the application, the applicant must therefore satisfy this court that the Third Respondent’s decision is one that a reasonable arbitrator could not have reached.

Degree of lateness

- [15] In the award the commissioner accepted that the application was late by 10 days. This time frame was calculated from the date on which the First Respondent became aware of the intended usage of the documents by the applicant. The First Respondent was so informed by its legal representative who represented it at the arbitration hearing held on 1st March 2013. At this hearing parties exchanged documents and amongst the documents applicant exchanged with the respondent were the documents in issue viz a copy of an attendance register of the special meeting on 28th February 2012 marked 'Annexure MM5' and contained at page 35 of paginated index being a copy of original attendance register as both Acting Director of Corporate and as Manager Legal Services, and a copy of the same document marked 'Annexure MM6' appearing at page 36-37 in which the applicant attended as Manager Legal Services only.
- [16] The legal representative for the respondent wrote a letter on the 15 March 2013 informing the former of the intended usage of the document at the arbitration hearing. That is the date on which 1st Respondent contended that it became aware of the fraud and falsification of the documents. On the other hand the applicant contended that since the documents were dated the 28 August 2012, and not 28 August 2013, the misconduct could not have been committed on 28 February 2013, hence the period of delay cannot be 10 days after the expiry of the 90 days.
- [17] My view is that the alteration may have been effected on the 28 February 2012, but the 90 days period is calculated from the date on which the employer became aware of the misconduct, in other words when the applicant submitted them to the arbitrator and indicated that he intended to use them to prove his claim. Further that, the fact that the applicant exchanged documents with the legal representative earlier does not mean that the employer was aware of the misconduct. However, once the applicant indicated to the 1st Respondent's legal representative that he wants to use the documents for the specific purpose and the latter inform the 1st Respondent, this constitute the date on which the 1st Respondent became aware of the commission of the

misconduct. I therefore do not find any fault with the commissioner's reasoning when she accepted that the period of delay was 10 days from the lapse of the 90 day.

Explanation for lateness or failure to comply with the time frame

- [18] In the application for condonation the 1st Respondent through Mrs. Matlakala Irene Matthews explained that the reason for delay was because at the time the legal representative made the 1st Respondent aware of the misconduct she had just been appointed as municipal manager and therefore was in a process of takeover and had to attend to the investigation of the dispute to satisfy herself that indeed a misconduct was committed. The Commissioner considered this matter and decided that although the reason may not be sufficient on its own, together with other factors constituted a good cause for granting condonation. This is in line with our jurisprudence on application for condonation. The factors that need to be taken into account when determining whether there is sufficient cause to grant condonation were set out in **Melane v Santam Insurance Co Ltd 1962 (4) SA at 532** and involves weighing together the following factors; which are interrelated : degree of lateness, explanation thereof, the prospects of success and the importance of the case. The court went on and said that although these factors are interrelated, are not individually decisive, if there are no prospects of success there would be no point in granting condonation. Further that, in the case of **Kritzinger v CCMA and Others (JR 2254/05 (2007) ZALC 85 (November 2007)** Molahlehi J said the following in relation to the test as initiated in **Melane v Santam Insurance Co. Ltd. 1962 (4) SA A532**:

"These factors are not individually decisive but are interrelated and must be weighed against each other. In weighing the factors for instance, a good explanation for the delay in lateness may assist the application in compensation for weak prospects of success. Similarly strong prospects of success may compensate for the inadequate explanation and the long delays".

I therefore find no fault with the commissioner's reasoning on this point.

Prospect of success and bonafide defence in the main case

- [19] In the main the applicant contended that he has better prospect of success than respondent. The commissioner dealt with the matter as follows:

“This brings (‘me’) to the most important aspect of any condonation , the prospect of success, (merits of the case). This is an important aspect of condonation. Basson J held that ‘of all the considerations or factors, it is the prospect of success which is most important.’ In terms of this case, there are interesting facts that lays the basis for more to grant condonation. It is not disputed that on the 1st March 2013, the Respondent did produce a document that raised an alarm bell with the Applicant. It is on the basis of this document that the Applicant seeks to bring charges of misconduct against the Respondent. To prove that the Respondent committed misconduct is a different matter altogether. Consequently, it must be dealt with by the appropriate person designated as such. In the main, the Respondent seeks to rely on the witch hunt theory to show that the applicant has no case. He does not deal with the core issue here, whether he altered the attendance register as alleged by the applicant. This is glaring omission which must be properly investigated and ventilated before an impartial tribunal to determine whether indeed he is guilty or not.”

- [20] It is clear to me that the commissioner considered the prospect of success for both parties and concluded that because there is prima facie evidence of the alteration of the documents, which the applicant does not deny he felt that both parties needed to be given opportunity to explain the alteration hence he found that the respondent has prospect of success. This does not necessarily mean that the latter will in the end win but that there is that prospect. I therefore found no fault with this reasoning.

Prejudice to parties and the importance of the case

- [21] In the main the applicant argues that he will suffer more prejudice than the 1st Respondent that it was comfortable with the matter and knew the matter for about 10 months, while he acting allowance remains unpaid.
- [22] The applicant does not show in what respect the commissioner has dealt with the matter in unreasonable manner. Nevertheless, the commissioner dealt with this matter as follows:

“This matter is fairly new and all the witnesses are still accessible to all parties. Consequently, there would be no prejudice suffered by either party when the disciplinary hearing is held. It would create a wrong perception to the rest of the employees in the applicant’s workplace if such serious allegations are not properly investigated.”

[23] I am satisfied that the commissioner considered all the factors before him and came to a conclusion as aforesaid. I therefore do not find anything wrong with the reasoning of the commissioner.

[24] Has the commissioner arrived at a decision a reasonable commissioner could not have reached? I do not think so.

[25] In the premise I make the following order:

(a) The application for the review and setting aside of the condonation ruling made by the 3rd Respondent dated 5th August 2013 under case number **NWD 0713-08** is dismissed.

(b) No order as to cost is made.

Shai, AJ

Acting Judge of the Labour Court

Appearances:

For the Applicants:

For the Respondent: