



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR 1724/13

SATAWU obo I SEMATE

Applicant

And

**NATIONAL BARGAINING COUNCIL
FOR THE ROAD FREIGHT AND
LOGISTIC INDUSTRIES**

First Respondent

COMMISSIONER A KRIEL

Second Respondent

VALUE LOGISTICS LTD

Third Respondent

Heard: 16 January 2015

Delivered: 17 February 2015

Summary:

JUDGMENT

ORR AJ

Introduction:

- [1] This is an application for the review and setting aside of an arbitration award issued by the second respondent (“the arbitrator”) acting under the auspices of the first respondent (“the NBCRFI”). In terms of the award the arbitrator found that the dismissal of the applicant’s member (“Semate”) by the third respondent (“Value Logistics”) was substantively unfair but procedurally fair. The arbitrator declined to reinstate Semate but instead awarded him one month’s compensation. Aggrieved by this the applicant has brought this application. The applicant contends that the arbitrator erred, in a reviewable manner, in finding the dismissal procedurally fair and in declining to reinstate Semate. Value Logistics opposes the review.
- [2] In their papers Value Logistics contended that Semate had waived any right to bring the current application. This contention was based on the fact that they had paid the one month’s compensation to Semate shortly after receipt of the award and that Semate had accepted this payment. All of this occurred prior to the launching of the review. Semate’s conduct in accepting the payment and not making any tender of repayment amounted, according to Value Logistics, to a tacit waiver. This point was explicitly abandoned by Mr Van Niekerk, on behalf of Value Logistics, during argument of this matter and I need not deal with it any further.
- [3] The review application was brought out of time. Application for condonation was made and opposed by Value Logistics. In order to ensure that this matter be expeditiously dealt with, at the hearing of this matter, I asked both parties to address me on the condonation application as well as the merits of the review itself.
- [4] According to the applicant the arbitration award was received on 9 May 2013. This application should, therefore, have been brought on or before 20 June 2013. The application was in fact delivered on 19 August 2013, some two months late. Mr Baloyi who appeared on behalf of the applicant accepted that this was a significant delay.

- [5] The explanation for the delay is one which is presented all too often in this Court, delay on the part of an employee's union in ensuring that review are brought timeously. According to the founding affidavit on 20 June 2013, the day on which the application should have been launched, the union organiser concerned informed Semate that a legal opinion was required. This was obtained by 24 June but the current attorneys of record were only instructed to proceed with the review on 8 August 2013.
- [6] This period, 24 June to 8 August, represents the bulk of the period of delay, a period of six weeks. The reason for this was, according to the founding affidavit, *"that the business activities in the head office of the union came to a halt for a period of approximately 4 weeks due to the relocation to the new premises"* In support of this the applicant attaches a memorandum from the General Secretary of the applicant sent out to all the provincial offices. However, the memorandum, whilst confirming the head office move, provides no support for the contention that the business activities in the head office came to a halt for four weeks. On the contrary the General Secretary confirms that the head office would be up and running as from the 1st of July, three days after the move.
- [7] When tasked about this apparent contradiction Mr Baloyi submitted that notwithstanding the wording of the affidavit it should not be understood that the business of the head office literally came to a halt for four weeks. Instead it should be understood to mean that the applicants matter was overlooked as a result of the inevitable disruptions which follow a move of this magnitude.
- [8] Before moving to the merits of the review itself it is necessary to set out some of the background to the dismissal of Semate and the subsequent arbitration proceedings. Semate was employed by Value Logistics as a site supervisor. Several complaints about his conduct were received from customers.
- [9] This led to him being summoned to a disciplinary hearing on 15 February 2012. At the hearing he sought to be represented by a person who was not a fellow employee. A serious altercation developed between this individual and members of management developed, resulting in persons from Value

Logistics loss control being called in to remove this individual. It was alleged that during the ensuing scuffle Semate shouted out “*kill him, kill him*”.

- [10] Semate faced a subsequent hearing where the same charges were dealt with as well as an additional charge relating to his alleged conduct on 15 February 2012. A finding of guilty led to his dismissal on 13 March 2012 and the subsequent arbitration proceedings which are the subject of this review.
- [11] At the arbitration three witnesses on behalf of Value Logistics testified that Semate had used the words “*kill him, kill him*” on 15 February 2012. Value Logistics also played a recording which had been made on 15 February 2012 on one of the witness’s cell phone. The recording did not pick up the words. Semate denied that he had ever uttered these words.
- [12] The arbitrator found that no misconduct had been proved against Semate in respect of the other charges but found that Semate had uttered the words “*kill him, kill him*” during the incidents of 15 February 2015. The arbitrator found that this conduct “*resulted in a total breakdown of the trust relationship between the parties.*” However, somewhat confusingly, despite finding that the trust relationship between the parties had been totally destroyed, the arbitrator found that the dismissal was substantively unfair on the basis that Value Logistics had not considered any disciplinary measures short of dismissal. I do not understand how the arbitrator, having concluded that the conduct of Semate was destructive of the employment relationship, could take issue with Value Logistics not looking at alternative penalties to dismissal. However neither party took issue with this and I take it no further. Semate was awarded one month’s compensation. The dismissal was found to be procedurally fair.
- [13] As already indicated the applicant originally sought to review the finding of procedural fairness, but this was abandoned by Mr Baloyi during the course of argument. Mr Baloyi also clarified the challenges to the findings on substance, which were not entirely clear from the founding papers. The applicant’s case stood on two legs according to Mr Baloyi. Firstly, no reasonable decision maker, considering the evidence before him, could have come to the finding that Semate uttered the words “*kill him, kill him*” on 15 February 2015.

Secondly no reasonable decision maker could have concluded that the mere utterance of these words was destructive of the employment relationship between Value Logistics and Semate.

- [14] In respect of the first leg the applicant relied on the fact that the arbitrator did not set out any basis for accepting the version of value logistics and rejecting that of Semate. In respect of the second leg the applicant argued that there was insufficient evidence before the arbitrator to conclude that the relationship was destroyed. Furthermore, because Semate's conduct did not involve any element of dishonesty, the arbitrator could not assume that his conduct would be destructive of the relationship.
- [15] The applicant went on to argue that, were I persuaded of the merits of either of these arguments, the award should be reviewed and set aside and I should determine the matter myself. Both parties agreed that the record was sufficient for me to determine the matter myself and that there was no need to refer it back to the NBCRFI.
- [16] Mr Baloyi specifically disavowed any review based on allegation that the arbitrator had incorrectly applied section 193(2) of the Labour Relations Act 66 of 1995. This was correctly so in my view, as no mention of this was made in the papers.
- [17] Value Logistics on the other hand contended that the award issued by the arbitrator was eminently reasonable given the evidence before him. It was also argued that given the significant delay in launching the review application, and the paucity of the explanation in that regard, the merits of this matter were not sufficiently strong to overcome these deficits and condonation should be refused.

Analysis:

- [18] In considering the application for condonation it is trite that I must take into account the length of the delay, the reason for the delay and the prospects of success in the matter (*Melane v Santam Insurance Company Limited* 1962 (4) SA 532 A). However I asked the representatives of both parties whether the

principles set out in *Queenstown Fuel Distributors CC v Labuschagne NO & others* [2000] 1 BLLR 45 (LAC) were still apposite. In that matter the Labour Appeal Court held that condonation in reviews relating to single individuals should not be readily granted. The excuse for non-compliance would need to be compelling, the attack on the award cogent, and the defect would have to result in a miscarriage of justice were it to be allowed to stand. Neither party were able to point me to any authority to suggest that these principles are no longer good law.

[19] I intend to apply the *Queenstown Fuel* principles then in determining whether I should grant condonation or not.

[20] As I have already indicated it was accepted by the applicant that the delay was a significant one. The explanation for the bulk of the delay, the six weeks that the matter ostensibly lay at the applicants head office can hardly be described as compelling. There are a number of problems with the explanation. Firstly, the explanation, even on its own terms deals with only four of the six weeks of the delay. Secondly the explanation is barely credible. It is extremely difficult to accept that the head office of a union of the size of the applicant “*came to a halt for a period of approximately four weeks*”. Furthermore this is belied by the memorandum from the General Secretary attached to the founding affidavit. From the memorandum it is apparent that the General Secretary envisaged that the business activities of the head office should be interrupted by only a few days as a result of the move.

[21] Presumably alert to these problems Mr Baloyi sought to persuade me that the explanation tendered in the founding affidavit should not be understood literally. Instead I should understand that as a result of the move a state of administrative chaos existed in the applicant's legal department. This resulted in delays in attorneys being instructed to deal with the review application.

[22] I do not think it is acceptable for an applicant for condonation to ask the Court to infer anything about an explanation for the delay. An applicant should forthrightly and fully set out an explanation for the delay to enable a Court to properly assess whether good cause has been shown. Furthermore a party

who wishes to oppose an application for condonation must be given an opportunity to deal with the explanation. It cannot be that a respondent must be required to infer that the explanation for the delay is something other than what was set out in the founding affidavit. I therefore conclude that far from a compelling explanation being given for the delay there is effectively no explanation at all before me.

[23] I move on to the prospects of success in the review. I am not of the view that either of the attacks on the award have any merit. As set out above the first challenge to the award was that the arbitrator could not reasonably have concluded that Semate uttered the words “*kill him, kill him*” on 15 February. Three witnesses testified to this effect before the arbitrator. Semate denied that he had said the words and the tape recording was inconclusive. In answer to my question why it was unreasonable of the arbitrator to have accepted the evidence of the three witnesses over that of Semate Mr Baloyi could only point to the fact that the reasons for the arbitrator doing so were not set out in his award. To my mind this is a reference to the type of “process based unreasonableness” that was rejected by the Supreme Court of Appeal in *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curiae)* [2013] 11 BLLR 1074 (SCA). On the evidence before him the arbitrator reasonably concluded that Semate uttered the words “*kill him, kill him*”.

[24] The second challenge to the award was that the arbitrator unreasonably concluded that by uttering these words Semate destroyed the employment relationship. I find even less merit in this challenge than in the first. Mr Baloyi suggested that the arbitrator’s finding was unreasonable for two reasons. Firstly the offence did not involve an element of dishonesty and secondly that Value Logistics had not led any convincing evidence to show that the employment relationship was broken.

[25] Although dishonesty is almost always destructive of the employment relationship, it is by no means axiomatic that an offence which does not involve dishonesty does not destroy the employment relationship. Mr Baloyi accepted that an employee who is grossly insubordinate to a superior would

also destroy the employment relationship. The fact that Semate's conduct did not involve dishonesty in no way suggests that the arbitrator's finding that it was destructive of the employment relationship was unreasonable.

[26] Two of the witnesses for Value Logistics, both of them managers, testified that they could no longer work with Semate after the events of 15 February. This evidence was left unchallenged in cross examination. Given the evidence before him there was nothing unreasonable in the arbitrator coming to a finding that the conduct of Semate had destroyed the employment relationship.

[27] In summary therefore I find that, in respect of the condonation application no compelling explanation has been given for a significant delay. The attack on the award, far from being cogent is without merit, and no miscarriage of justice would result if the award were allowed to stand. Condonation is refused.

Costs:

[28] I would normally have had no hesitation in ordering that costs should follow the result in this matter. However Value Logistics were represented by an employee, Mr Van Niekerk. When I questioned him about whether in those circumstances I could order costs at all, Mr Van Niekerk indicated that the Value Logistics would not be seeking costs.

Order

I therefore make the following order:

1. The application for condonation for the late filing of the review application is dismissed;
2. There is no order as to costs.

Orr AJ
Acting Judge of the Labour Court of South Africa

APPEARANCES:

On behalf of the Applicant: Mr Baloyi of M M Baloyi Attorneys

On behalf of the Respondent: Mr Van Niekerk IR manager of the third respondent

LABOUR COURT