



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

CASE NO JR 560/08

In the matter between:

POPCRU obo MULAUDZI & 4 OTHERS

APPLICANT

And

ADV RONNIE BRACKS

1ST RESPONDENT

SAFETY AND SECURITY SECTORAL

BARGAINING COUNCIL

2ND RESPONDENT

SOUTH AFRICAN POLICE SERVICES

3RD RESPONDENT

Date heard: 27 October 2011

Judgment delivered: 27 October 2011

Date transcript requested and judgment edited: 27 February 2015

EX TEMPORE JUDGMENT

VAN NIEKERK J

[1] This is an application to review and set aside an arbitration award made

by the first respondent, Advocate R Bracks ('the commissioner'). In his award, the commissioner found that the dismissal of five employees on whose behalf the union acts in these proceedings was substantively and procedurally fair. The award is dated 19 October 2007.

- [2] The applicants state that the award was received only on 29 November 2007. These papers were filed only on the 28 March 2008. The applicant failed to comply with the six-week time limit imposed by section 145 of the Act and does thus apply for condonation for the late filing.
- [3] The test to be applied in an application for condonation is trite. The Labour Appeal Court in *National Union of Mineworkers v Council for Mineral Technology* [1999] 3 BLLR 209 (LAC) referred to and adopted the test or the approach established in *Melane v Santam Insurance Company Limited* 1962 (4) SA 531 (A). That test requires the court to exercise a discretion, a discretion that must be exercised judicially under consideration of all of the facts. The factors that are usually relevant and must be taken into account by the court are the degree of lateness, the explanation for the delay, the prospects of success and the importance of the case.
- [4] As the court observed in *NUM v Council for Mineral Technology* these facts are often interrelated. They are not individually decisive and what the court is required to do is to make an objective assessment of all of the relevant facts. As the Labour Appeal court indicated in that case, a slight delay and a good explanation might help compensate for prospects of success which are not strong. On the other hand, without a reasonable and acceptable explanation for the delay the prospects of success are immaterial. And without prospects of success, no matter how good the explanation for the delay might be, an application for condonation should be refused.

- [5] In *Republican Press (Pty) Ltd v CEPPWAWU and Gumede and Others* [2007] 11 BLLR 1001 (SCA) the Supreme Court of Appeal spelt out some of the important considerations applicable where an employee approaches the court in respect of an unfair dismissal. The court here emphasised the imperative of the speedy resolution of labour disputes, and noted that the procedures established by the Act, especially those concerning unfair dismissal disputes were designed to bring them to finality on an expeditious basis.
- [6] In the present matter, turning first to the explanation for the delay, a union official (one Campbell) apparently received the award and then decided to take his annual leave without further regard to the award. He prepared an opinion on the further prosecution of any litigation in respect of the award on 21 January 2008. This opinion was approved by his superiors on 26 January.
- [7] Attorneys were consulted only on 4 February 2008 and the further delay was occasioned apparently by the need to acquire certain documentation relevant to the application. Be that as it may, the founding affidavit was commissioned on 13 March 2008 and as I have already noted, the application filed only in this court on 28 March.
- [8] There is simply no explanation on the papers for many of these delays, especially the delay in consulting attorneys, the delay between that consultation which took place on 4 February and the commissioning of the affidavit on 13 March, more than a month later, in fact, almost six weeks later, the period within which the application was supposed to have been filed in the first place. And there is no explanation for the delay between the commissioning of the affidavit and the filing of the papers in this court.
- [9] This is not a matter in which one is dealing with unrepresented laypersons unaware of time limits in the Act. This is a registered trade union that is the applicant in this proceeding. It is fully aware of the time limit that applies and the purpose importantly that underlies the

incorporation of that limit into section 145 of the Labour Relations Act.

- [10] My colleague Le Grange J recently had occasioned a remark that it is not open for a trade union, (and the same applies frankly to an employers' association) to come to this court and to plead the need for internal processes to be complete prior to filing applications for review, and to seek condonation on the basis of any delay that might be occasioned by the need to exhaust those internal processes.
- [11] The LRA, as I have indicated, provides a time-limit which is specifically designed to meet the statutory purpose of the expeditious resolution of labour disputes. Trade unions and employer organisations in particular, ought to not only to be acutely aware of that purpose, but ought to conduct themselves in a manner that is conducive to that purpose being fulfilled.
- [12] In my view, the applicant has failed to provide a reasonable explanation for a delay that is not insignificant. In terms of the *Mintek* case, that in itself is a basis on which this application ought to be dismissed. However, in so far as they are relevant, the applicant's prospects of success, in my view, are minimal. The prospects of success in an application such as the present must necessarily be determined in relation to the test to be applied. In the case of *Sidumo and Another v Rustenburg Platinum Mines and Others* [2007] 12 BLLR 1097 (CC) the Constitutional Court held that this court is entitled to interfere or intervene and review and set aside an arbitration award if, and only if, the award is a decision that is so unreasonable that no reasonable decision-maker could come to that decision.
- [13] That is a high hurdle for an applicant in a review application to overcome and this is recognised by the Labour Appeal Court, for example, in the *Fidelity Cash Management Services v Commission, for Conciliation, Mediation and Arbitration and Others* [2008] 3 BLLR 197 (LAC) case where the court went so far as to note that it would be rare that a decision would fall into the category identified by the

Constitutional Court and in respect of which this court is entitled to review and set aside an award.

- [14] In the present case the only attack on the award is one based on the evidence of one S Hunga. As I understand, the attack it is that the commissioner failed to apply the cautionary rule that ought to be applied to someone who was a criminal and in the country illegally on his own admission.
- [15] It is clear to me from the face of the award that the commissioner did apply a cautionary approach. That much is apparent from paragraph 3 of the award which reads as follows:

“The respondent called four witnesses who testified regarding the charges. The evidence of Samuel Hunga seem to be pivotal, as according to him he had worked with the applicants to whom he referred as his colleagues. The applicants’ representative has cautioned that I should treat the evidence of S Hunga judiciously as he was a criminal and was in the country illegally.”

The commissioner goes on to say the following at paragraph 4 of the award:

“I have taken heed of this warning and despite this, found no reason why the evidence of S Hunga should be rejected since the documents were found in his possession by sheer coincidence because if he had not been involved in kidnapping the respondent would have been none the wiser.”

- [16] The commissioner goes on to analyse Hunga’s evidence and noted that that evidence disclosed a number of aspects about the operations of the applicants which could only be known by someone who had worked with them closely. From their own evidence it was clear to the commissioner that Hunga was known to them and the commissioner remarked that it was surprising that he can be remembered when it was considered that

they work with many people daily. The commissioner concluded as follows in paragraph 6:

“The only conclusion which can be drawn from this is that the applicants had indeed worked with S Hunga, selling affidavits to illegal immigrants. This is supported by the fact that these affidavits were found in S Hunga’s possession. How would he have obtained access to these affidavits unless they were provided by the applicants who did not specifically deny that it was their signatures on them, including the blank ones?”

- [17] If one is to apply the *Sidumo* test to the merits of the attack against the arbitration award, I fail to appreciate how it can be said that the commissioner’s conclusion in this case falls outside of the band of decisions to which reasonable people could come on the same evidence. For that reason, in my view, there are no prospects of success in this matter or even if there were, those prospects are so slight so as not to warrant the granting of condonation for the late filing of this application. It follows then that the application for review must fail.
- [18] In so far as costs are concerned, this is a matter in which the applicant union has been less than diligent in prosecuting the interests of its members. As I have indicated, this application for review was filed in March 2008, it is now October 2011. I accept that there was a postponement in this matter during December 2010. The reason for that is not apparent to me from the file, but even so, there is no reason from the papers before me to explain the inordinate delay in having this matter set down and argued.
- [19] The court is entitled in terms of s 162 of the Act to make orders for costs on the basis of the requirements of law and fairness. In this matter it seems to me that there is no reason why costs should not follow the result. I must add that I had seriously considered granting a

punitive order for costs. In circumstances where an application such as this is brought with, on the face of it, limited merit and prosecuted with less than due diligence. In those circumstances, as I have said, it seems to me that it is fair that costs ought to follow the result.

The order I make then is the following:

1. The application for condonation for the late filing of the application for review is dismissed with costs.

ANDRÉ VAN NIEKERK

JUDGE OF THE LABOUR COURT

Labour Court