



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR 1634/10

Case no: J 173/13

In the matter between:

OSCAR MABUNDA

Applicant

And

G4S CASH SERVICES

Respondent

Heard: 20 November 2014

Delivered: 4 March 2015

Summary: The applicant needs to show good cause for his or her application for condonation for late filing of a review application to succeed. He or she may not rely on self-created prejudice.

JUDGMENT

LALLIE J

Introduction

[1] Two applications were before court, namely, a review application and an application to make an arbitration award an order of court. The factual background of

this matter is that having been dismissed by G4S Services SA (Pty) Ltd (“the respondent”) Mr Mabunda (“the applicant”) referred an unfair dismissal dispute to the National Bargaining Council for the Road Freight Industry (“the bargaining council”). Commissioner Johnston of the bargaining council (“Commissioner”) issued an award on 16 March 2010, in which she found the applicant’s dismissal substantively unfair and ordered the respondent to reinstate him and pay him an amount of R68 400.00 within fourteen days of the receipt of the award. The respondent did not comply with the award. On 13 July 2010, the respondent filed a review application under case number JR 1634/10. On 6 February 2013, the applicant filed an application in terms of section 158 of the Labour Relations Act 66 of 1995 (“the LRA”) to make the arbitration award an order of court. It was opposed by the respondent. It was set down for 29 October 2014 on which day it was postponed to 20 November 2014 to be heard on the same day as the review application.

The review application

[2] The review application was filed on 13 November 2010 outside the six weeks period within which it had to be brought. The applicant did not file opposing papers because the respondent had not complied with Rule 7A (8). The respondent filed an application for condonation of the late filing of the review application, on 30 September 2013. The applicant did not file opposing papers but argued his opposition on the respondent’s papers.

[3] The arbitration award was issued on 16 March 2010 and the review application was filed on 13 July 2010 about two months late. The condonation application was however, filed on 30 September 2013. The reason given on behalf of the respondent in the founding affidavit for the delay is a misunderstanding between the respondent and its legal representatives. Upon receipt of the award, the respondent’s attorneys sent it to the respondent to obtain instructions as to who would file the review application as the respondent usually drafts and file its review applications. It is common practice that the respondent would file the review papers and there after hand the matter over to its attorneys. The attorneys were therefore of the view that the respondent had followed the usual practice while the respondent was of the view that the attorneys had filed the review application. The respondent submitted that it was not in wilful default in filing the review application on time. It

will suffer great prejudice should this application not be granted compared to prejudice the applicant will suffer should it be granted. It has at all material times prosecuted the review application diligently without seeking to delay finalisation of the dispute. It expressed as unfortunate the bargaining council's inability to provide portions of the record or its failure to maintain a record of the arbitration proceedings. It further submitted that it took all the necessary steps to determine whether a record exists which they would have reconstructed but they could not find it. Lastly, the respondent submitted that this matter be remitted to the bargaining council for arbitration.

[4] The respondent's submissions focused mainly on the review application and not much on the principles governing condonation. Opposing the application the applicant argued that no explanation was given for the late filing of the condonation application. Its founding affidavit consists of hearsay evidence in the absence of a confirmatory affidavit by a person with personal knowledge of the facts the deponent lacks personal knowledge of. It was further argued that the respondent failed to show good cause. The applicant continues to suffer prejudice as the award in his favour was issued 4 years ago. The respondent knew as early as October 2011 that the record was not available and failed to follow the necessary procedures which would have ensured that the review application was dealt with without unnecessary delay.

[5] The importance of complying with rules of court cannot be overemphasised. It was expressed as follows in *Grootboom v NPA and Another*:¹

'...One gets the impression that we have reached a stage where litigants and lawyers disregard the Rules and directions issued by the Court with monotonous regularity. In many instances very flimsy explanations are proffered. In others there is no explanation at all. The prejudice caused to the Court is self-evident. A message must be sent to litigants that the Rules and the Court's directions cannot be disregarded with impunity'.

[6] In determining whether the respondent has shown good cause for the condonation of the late filing of the review application, I have considered the

¹ [2014] 1 BLLR 1 (CC) at para 34.

principles laid down in *Melane v Santam Insurance Co Ltd*² on which the requirement that condonation should be granted in the interests of justice is based.

- [7] The reason proffered by the respondent for filing the review application late is that there was a misunderstanding between itself and its attorneys. No one both at the respondent business or the office of their attorneys took responsibility for the misunderstanding. The founding affidavit to the condonation application consists of inadmissible hearsay evidence which justifies the dismissal of the condonation application. While the review application was filed about two months late and the explanation proffered for its lateness covers the 2 months period only. The condonation application was filed years later and no explanation has been proffered for the delay from the date of the filing of the review application to the date of the filing of the condonation application. There was a duty on the respondent to explain the entire period of lateness and the respondent failed to do so. No explanation was given for the six months delay between the date on which the founding affidavit was attested to and the date on which the application was filed.ⁱ In *Superb Meat Supplies CC v Maritz*³ it was held that it has never been the law that a litigant will be excused if the blame lies with that litigant's the attorney.
- [8] The respondent also sought to rely on the bargaining council's failure to provide it with a copy of the arbitration record. While I acknowledge the difficulty the respondent found itself in as a result of the bargaining council's failure, the respondent was not without alternative relief which would have ensured that its matter was dealt with expeditiously. The respondent could have approached the Judge President in terms of the Practice Manual of the Labour Court of South Africa for assistance when the bargaining council made it impossible for it to file the arbitration record. The respondent has therefore failed to forward a reasonable explanation for the delay in filing the review application.

² 1962 (4) (SA) 531 at 532C-F]

³ (2004) 25 ILJ 96 (LAC)

- [8] The respondent's argument that it stands to suffer more prejudice than the applicant should this application be unsuccessful has no merit. The respondent is the author of its own inconvenience and can therefore not seek to rely on it. It is further responsible for its inability to rely on the record to prove its prospects of success in the review application. It is the applicant who continues to suffer prejudice as a result of the respondent's delay. He is unable to exercise his rights in terms of the arbitration award and bring this matter to finality.
- [9] I have considered the authority that the respondent sought to rely on. It is of no relevance as it is based on facts which are distinguishable from those of the present matter. A consideration of all the circumstances of this matter and the requirement of fairness to both parties, points to one direction, that it is in the interests of justice that condonation be refused. As the condonation application has been refused the review application is not properly before court and is dismissed.

Application in terms of section 158 (1) (c) of the LRA:

- [10] On 6 February 2013, almost 3 years after the award in favour of the applicant was issued, the applicant filed an application in terms of section 158 (1)(c) of the LRA to make the arbitration award an order of court. The application is opposed by the respondent on the grounds that the review application in which it sought an order setting aside the award, is a ripe for hearing. The file has been indexed and paginated since March 2012. The respondent submitted that this application is unnecessary and ill-advised as had the applicant perused the court file before filing it, he would have realised that the hearing of the review application was delayed because a set down date had not be allocated.
- [11] It is common cause that the respondent has not complied with the arbitration award which forms the subject matter of this application. The respondent's submission that this application is ill-advised because it was filed when the review application was ripe for hearing has no substance. The filing of a review application does not stay the execution of an arbitration award. This

application was filed just before the award prescribed at a time the applicant had no alternative but to file it in order to protect his rights in terms of the award. As the review application has been dismissed there is no fear that granting this application will make the review application superfluous. The circumstances of this matter require that I exercise my discretion in favour of the applicant as he has made out a case to have the arbitration award to be made an order of this court. It is common cause that the respondent has not complied with the award under case number gpr fbc 6487.

[12] I could find no reason both in law and fairness for not granting a costs order against the respondent. The applicant should not be out of pocket when asserting his rights in terms of an arbitration award which was granted in his favour in 2010.

[13] In the premises the following order is made:

13.1 The application for condonation of the late filing of the review application is dismissed.

13.2 The application for review is dismissed.

13.3 The arbitration award under case number Gprfbc6487 and dated 16 March 2010 is made an order of court.

13.4 The respondent is ordered to pay the applicant's costs.

Lallie J
Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant: Mr Faurie of Du Toit Gerber

For the Respondent: Mr Wheatley of De Wet and Jordan

LABOUR COURT