



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR 291/2011

In the matter between:

TSEPANG PASCALIS NOOSI

Applicant

and

EXXAROMATLA COAL

First Respondent

COMMISSION FOR CONCILIAITON

MEDIATION AND ARBITRATION

Second Respondent

JOSEPH NGOBENI

Third Respondent

Heard: 11 March 2015

Delivered: 25 June 2015

Summary: Review application. Condonation for the late filing of the review application. Insubordination-the test is not whether the instruction falls within the job description but whether, the instruction is it reasonable and lawful. Employee refusing to obey instruction on the basis that it does not fall within his job description. Employee refusing

to obey instruction because the manager of the unit not his immediate supervisor.

JUDGMENT

MOLAHLEHI J

Introduction

- [1] This is an application to review and set aside the arbitration award made by the third respondent ("the Commissioner") under case number MP 4769-10 in terms of which the dismissal of the applicant was found to have been for a fair reason and, accordingly, his unfair dismissal claim was dismissed.
- [2] The applicant has also applied for condonation for the late filing of the review application. The application is 8 weeks and 4 days late. The applicant blames the union for the delay. The application is opposed by the first respondent.

The background facts

- [3] The applicant who at the time of his dismissal was employed as an electrician was charged and dismissed for the following misconduct:

'Contravening code 11 (Gross Negligence) – occurred on 27th January 2010 when he failed to install an emergency stop wire between the last emergency stop and the feeder breaker on the section belt in section 22 and allow the conveyor belt to be operated in contravention of the Mine Health and Safety Act.

And

Contravening code 5 (Gross insubordination)- occurred on 27th January 2010 when he was instructed by the senior foreman (Head of Maintenance), to stop the section belt in section 22, where the specified

belt was operated without an emergency stop wire between the last emergency stop and the feeder breaker.'

- [4] In contending that the dismissal of the applicant was for fair reason, the first respondent presented the testimony of Mr Schoeman who testified that on the day in question, he together with shaft manager and the mine inspector visited section 22 of the mine. He further testified that as they approach the feeder break, they were informed by the applicant that the section wire was still not extended from the last stop switch and was still busy with that task. He then instructed him to lock it out and to continue with his other task.
- [5] According to Mr Schoeman, after giving the instructions, the applicant climbed on the bridge, walked few meters next to the belt and turned back towards them. When asked as to why he did not comply with the instructions, the applicant engaged in an argument according to Mr Schoeman. The mine inspector, who as indicated was with Mr Schoeman, then instructed that the section be immediately stopped and an investigation be conducted.
- [6] The case of the applicant during the arbitration hearing was that he did not refuse to obey the instructions given by Mr Schoeman. His case seems to also be that Mr Schoeman was not entitled to give him instructions because he was not his immediate supervisor. His other case was also that Mr Schoeman never gave him instructions.

The grounds of review

- [7] The applicant contends that the Commissioner committed misconduct and gross irregularity in the approach he adopted in dealing with the matter which was properly placed before him. He further contends that the Commissioner failed to:
- a. investigate and understand the fact that he was on leave.
 - b. determine whether or not it was his duty to stop the belt and lock it out.

- c. investigate why Mr Schoeman did not himself stop the belt as he was standing next to it.
- d. understand his defence.
- e. caution the applicant and his representative of the need to put their case to the respondent's witnesses.
- f. take into account that no one was injured in the damage was caused.

The finding that the applicant had given contradictory evidence is criticised for not being supported by the evidence on the record.

The arbitration award

- [8] The Commissioner found that despite the delay in instituting the disciplinary hearing, which was in contravention of the disciplinary code was procedurally fair. In terms of the disciplinary code, the first respondent was supposed to have instituted the disciplinary hearing within three days of becoming aware of the offence.
- [9] The Commissioner accepted the justification for the delay in instituting the disciplinary hearing on two grounds. The first being that the applicant was on leave when the need to institute disciplinary proceedings arose and also because his union had requested that the other charges against him be finalised first.
- [10] As concerning substantive fairness, the Commissioner accepted the version of the first respondent that the applicant was given instructions which he failed to carry out. The version was accepted on the basis that the evidence of Mr Schoeman was never challenged and that the evidence of the applicant was contradictory.

The condonation application

- [11] As stated above, the review application was 8 weeks and 4 days out of the time period prescribed by s 145 of the Labour Relations Act (“the LRA”).¹
- [12] The reason for the delay in filing the review application according to the applicant is because of the confusion that prevailed between the union officials who handled his matter. The other reason relates to the alleged “computer crush,” at the head office of the union which resulted in the head office of the union not receiving the arbitration award.
- [13] The two people who according to the applicant in the union dealt with his case was Mr Malahlela of the regional office and Mr Rakau of the head office. According to the applicant, he was informed by Mr Malahlela that after studying the arbitration award, he faxed it to the email address of Mr Rakau for an opinion as to whether there were prospects of reviewing it.
- [14] The applicant further says that he was advised by Mr Mahlangu that Mr Rakau informed him that his case was already referred to the Labour Court. However, when he enquired later on 7 February 2011 from Mr Mahlangu about progress, he was told that Mr Rakau had indicated that he had no knowledge of the applicant’s case. It was only when he was reminded about the discussion during December 2010 that he recalled the matter. In this respect, the applicant states the following in his founding affidavit:

¹ Act no 66 of 1995. Section 145 of the LRA reads as follows: (1) Any party to a *dispute* who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award -

- (a) within six weeks of the date that the award was served on the applicant, unless the alleged defect involves the commission of an offence referred to in Part 1 to 4 or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004; or
- (b) if the alleged defect involves an offence referred to in paragraph (a), within six weeks of the date that the applicant discovers the corruption such offence
- (1A) The Labour Court may on good cause shown condone the late filing of an application in terms of subsection (1).

'27. Mahlangu referred him (Rakau) to the December 2010 conversation and Rakau said that he was talking to a different Mahlangu, and that the report he gave Mahlangu, to the effect that the case had been lodged with the Labour Court, relates a different case, and not mine.

28. On investigation, it became clear that Mahlalela had indeed sent the Award for Rakau, had but Rakau had not received it, due what he called a computer crush in the NUM's offices.'

[15] The investigation conducted thereafter, according to the applicant, revealed that the arbitration award was indeed sent to Mr Rakau but did not receive it due to the reason stated above. Thereafter, with the engagement of the technicians, the faxed arbitration award was retrieved from Mr Rakau's computer.

[16] After the retrieval of the arbitration award, the applicant consulted with both Mr Rakau and Mr Mahlalela who advised him that there were no prospects of success in reviewing the arbitration award. It was as a result of this that the applicant instructed the attorneys to institute these proceedings.

[17] The applicant further states, in the founding affidavit, that both Mr Mahlalela and Mr Rakau initially refused to provide him with confirmatory affidavits about what they had told him. They, however, more than two years later provided the confirmatory affidavits.

The principles governing condonation

[18] The test to apply when considering an application for condonation is set out in *Grootboom v National Prosecuting Authority and Another*,² in the following terms:

'50 ... the test for determining whether condonation should be granted or refused is the interests of justice. If it is in the interests of justice that condonation be granted, it will be

² (2014) 35 ILJ 121 (CC) at paras 50-51.

granted. If it is not in the interests of justice to do so, it will not be granted....

- 51 The interests of justice must be determined with reference to all relevant factors. However, some of the factors may justifiably be left out of consideration in certain circumstances. For example, where the delay is unacceptably excessive and there is no explanation for the delay, there may be no need to consider the prospects of success. If the period of delay is short and there is an unsatisfactory explanation but there are reasonable prospects of success, condonation should be granted. However, despite the presence of reasonable prospects of success, condonation may be refused where the delay is excessive, the explanation is non-existent and granting condonation would prejudice the other party. As a general proposition the various factors are not individually decisive but should all be taken into account to arrive at a conclusion as to what is in the interests of justice.'

[19] The factors to take into account in weighing whether the interest of justice favours the granting of condonation are: (a) the degree of lateness or the extend of non-compliance with the prescribed time frame, (b) the explanation for the lateness or the failure to comply with time frames, (c) prospects of success or *bona fide* defence in the main case; (d) the importance of the case, (e) the respondent's interest in the finality of the judgement, (f) the convenience of the court; and (g) avoidance of unnecessary delay in the administration of justice.³

[20] In order to succeed in an application for condonation the applicant must convince the court that he or she deserves an indulgence that will allow for the extension of the time frame. In cases involving an individual dismissal, it is trite that a compelling case for condonation need to be made before the court can grant the indulgence. Put in another way, the Court will not readily grant condonation in individual

³ See *Foster v Stewart Scott Inc* (1997) 18 ILJ 367 (LAC) at 369C-D.

dismissal cases unless the case of the applicant is compelling.⁴ In dealing with the approach to an application for condonation for individual dismissals, Ndlovu AJ in *Shaik v South African Post Office Limited and Others*,⁵ had the following to say:

[25] On the basis of the aforementioned considerations, there needs, in my view, to be a differentiation in approach between condonation applications under labour law (the LRA), on the one hand, and under civil law, on the other, in that it should generally be more difficult to obtain the indulgence of condonation under the former, especially in disputes involving individual dismissals (not excluding mass dismissals in appropriate cases), than under the latter. In other words, condonation applications under the LRA need to be subjected to a strict judicial scrutiny test. Of course, every case will be determined on its own facts. As stated earlier, I reiterate, an application for condonation must not be a mere formality or something for the taking. In appropriate instances, such as the present, where there has been a considerably long and egregious delay in non-compliance with the rules, condonation should not be granted lightly. Therefore, whilst the Court has the discretionary power in relation to a condonation application, in such matters, the discretion should, in my view, be exercised less generously.'

[21] The approach to adopt when dealing with an application for condonation is well established in our jurisprudence. The approach to adopt is set out in *Melane v Santam Insurance Co Ltd*,⁶ in the following terms:

'In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the

⁴ See *Queenstown Fuel Distributors CC v Labuschgne NO and Others* [2000] 1 BLLR 45 (LAC) at para 25.

⁵ (DA 4/09) [2013] ZALAC 18 (19 July 2013).

⁶ 1962 (4) SA 531 (A) at 532C-E.

degree of lateness, the explanation therefore, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective *conspectus* of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked.'

Evaluation

- [22] In the context of a review application, the delay of 8 weeks and 4 days is excessive and thus required a detailed and full explanation as to how it came about.⁷ The applicant was in this regard required to indicate in his founding affidavit the reason given to him by the two union officials as to why they refused to provide the confirmatory affidavit and only to do so two and half years later. It was indicated during argument that the reason was because there was a disagreement between him and the two officials as to the prospects success of his case.
- [23] In the circumstances, it seems to me that the supporting affidavits were obtained as an afterthought after the first respondent had in its answering affidavit raised the issue of lack of support of the allegations made by the applicant in his founding affidavit. There is also no explanation as what made the two union officials change their stand of initially refusing to provide the confirmatory affidavit.
- [24] If the submission from the bar by the applicant's legal representative was to be accepted, that the two union officials refused to provide the

⁷ See *Uitenhage Transitional Local Council v South African Revenue Services* 1983 (4) SA 212 (SCA) at para 6 and *Shaik v South African Post Office Limited and Others (supra)* at para 20.

supporting affidavit, the question is why no complaint was raised with the union regarding the same. The applicant was represented by attorneys who if this was to be true, would undoubtedly have addressed a letter to the union indicating the alleged conduct of the two officials.

- [25] The alleged “crushing of the computers,” is a significant factor in the explanation of the delay in instituting the review proceedings. However, the applicant has not attached any affidavit from the technicians who had fixed the computers and assisted in retrieving the arbitration award. Of further significance is the fact that the applicant has not provided any date as to when the “crushing of the computers” occurred and how long it took the technicians to fix them.
- [26] It was further submitted in argument that the Courts do not shift the blame of failure to comply with the timeframes by the union on to the employees and, therefore, the employee in the present matter should not be blamed for the eight weeks delay in instituting the present proceedings.
- [27] The general principle of our law is that the Court will not readily shift the blame for failure to comply with the time frames by a union to an employee. There are, however, circumstances where the shifting of the blame to the union will not serve to absolve an employee who sit idle and hope to escape his or her responsibility by blaming the union. In a case of the delay in prosecuting a claim where the employee attributes the blame for the delay to the union, he or she has to make out a case that he or she is blameless. In the present case, the applicant has not taken the Court in his confidence in that the information he has provided regarding the delay is insufficient to weigh his role in the eight weeks delay.⁸

⁸ The principle that shifting of blame to a representative does not always absolve a litigant from the responsibility of non-compliance with the time frame is set out in *Saloojee and Another v Minister of Community Development* 1965 (2) SA 135 (A) at 140H-141H in the following terms:

‘This Court has on a number of occasions demonstrated its reluctance to penalise a litigant on account of the conduct of his attorney.... I should point out,

- [28] In my view, the facts and the circumstances of this case are such that the employee cannot be absolved from the negligence of the union. The proper analysis of the explanation proffered by the applicant raises the question of whether indeed the union is to blame for the delay, in light of the failure to indicate as to what date he was advised that he had no prospects of success.
- [29] The other problem with the applicant's explanation is that no date has been provided as to when the attorneys were instructed to take over the matter from the union. It may well be that the delay was occasioned by the attorneys also. It may also be as indicated above that the two union officials may have told applicant in time that he did not have a case but he delayed in instructing his attorneys to institute the review application.
- [30] In conclusion, I find that the delay of 8 weeks and 4 days by the applicant is in light of the poor explanation, excessive and therefore the condonation application stands to fail. In my view, the explanation is so poor that in its proper analysis it amounts to no explanation. It is

however, that it has not at any time been held that condonation will not in any circumstances be withheld if the blame lies with the attorney. There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court. Considerations *ad misericordiam* should not be allowed to become an invitation to laxity. In fact this Court has lately been burdened with an undue and increasing number of applications for condonation in which the failure to comply with the Rules of this Court was due to neglect on the part of the attorney. The attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a Rule of Court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are. (Cf. *Hepworths Ltd v Thornloe and Clarkson Ltd.*, 1922 T.P.D. 336; *Kingsborough Town Council v Thirlwell and Another*, 1957 (4) SA 533 (N)). A litigant, moreover, who knows, as the applicants did, that the prescribed period has elapsed and that an application for condonation is necessary, is not entitled to hand over the matter to his attorney and then wash his hands of it. If, as here, the stage is reached where it must become obvious also to a layman that there is a protracted delay, he cannot sit passively by, without so much as directing any reminder or enquiry to his attorney (cf. *Regal v African Superslate (Pty.) Ltd.*, *supra* at p. 23 *i.f.*) and expect to be exonerated of all blame; and if, as here, the explanation offered to this Court is patently insufficient, he cannot be heard to claim that the insufficiency should be overlooked merely because he has left the matter entirely in the hands of his attorney. If he relies upon the ineptitude or remissness of his own attorney, he should at least explain that none of it is to be imputed to himself.'

for this reason that I am of the view that the condonation application stands to fail without even having to consider the prospects of success and other related factors.

- [31] In the event I am incorrect in finding that the condonation application stands to fail, I am of the view that the application still stands to fail even when the merits of the application are considered.

The review test

- [32] It is trite that an arbitration award can be reviewed on the grounds envisaged in s 145 of the LRA which are suffused into the Constitutional standard of reasonableness. The test to apply in considering the review application is well known and needs no repeat in this judgment save to state that it requires an investigation into whether the conclusion reached by the Commissioner is one that could not be reached by a reasonable decision maker.⁹

- [33] I now turn to consider the merits of the review application.

- [34] In as far as procedural fairness is concerned, the applicant contended that the Commissioner failed to take into account the delay in instituting the disciplinary proceedings against him.

- [35] It is apparent from the reading of the arbitration award that the Commissioner did consider the issue of the delay in instituting disciplinary proceedings against the applicant. He accepted that the

⁹ The reasonable decision maker test in labour matters was first confirmed in *Sidumo and Another v Rustenburg Platinum Mines and Others* [2007] 12 BLLR 1097 (CC) and was later explained several other judgements of the courts including *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)*, (2013) 34 ILJ 2795 (SCA) at 2801 where the court held:

'That test involves the reviewing court examining the merits of the case 'in the round' by determining whether, in the light of the issue raised by the dispute under arbitration, the outcome reached by the arbitrator was not one that could reasonably be reached on the evidence and other material properly before the arbitrator. On this approach, the reasoning of the arbitrator assumes less importance than it does on the SCA test, where a flaw in the reasons results in the award being set aside. The reasons are still considered in order to see how the arbitrator reached the result. That assists the court to determine whether that result can reasonably be reached by that route. If not, however, the court must still consider whether, apart from those reasons, the result is one a reasonable decision maker could reach in the light of the issues and the evidence.'

reason for the delay was because, at the time when the disciplinary inquiry was to be conducted, the applicant was on leave and also that it was agreed between the first respondent and the union that the other pending cases against the applicant be finalised first before instituting the disciplinary hearing relevant to this proceedings.

- [36] It has not been disputed that before the institution of the disciplinary proceedings in this matter, the applicant was still faced with other disciplinary actions against him. The version of the first respondent that an agreement was reached with the union that the institution of the disciplinary proceedings against the applicant should be delayed pending the finalisation of other pending disciplinary action was not challenged by the applicant. For this reason alone, the criticism of the finding of the Commissioner cannot be sustained. Furthermore it cannot be sustained when regard is had to the relevant parts of the disciplinary code which amongst other things provides as follows:

‘4.24 Provision is made for a more flexible time period in order to protect the Company in any instances where the initiation process is slowed down or beyond the direct control of the Company. A complaint, which has been verified, should be initiated within a period of 3 working days after management have reasonably become aware of such an alleged offense or complaint. The Company reserves the right to initiate disciplinary proceedings outside of the period of 3 working days in circumstances which are out of its direct control and the Company hereby undertakes not to unreasonably delay the initiation of proceedings;

4.25 The purpose hereof is to ensure that the individual complaint then is considered by management and resolved as close as possible to the point of origin and as expeditiously as practically possible. The Company and the employees lodging the complaint made by mutual agreement extend or reduce the time limit of such procedure.’

- [37] I am also of the view that there is no basis to challenge the conclusion reached by the Commissioner in relation to the substantive fairness of the dismissal. The conclusion reached by the Commissioner that the dismissal of the applicant was for a fair reason cannot be criticised for unreasonableness when regard is had to the evidence and the material that served before arbitration proceedings.
- [38] Although, the applicant's defence is that he was never given instruction to stop the section belt and install an emergency stop wire between the last stop switch and the feeder breaker, he never challenged Mr Schoeman's version during his testimony that that instruction was given to him.
- [39] The applicant suggests that the reason for not putting a version to the first respondent's witness, concerning whether the instruction was given to him, is because of lack of knowledge and skills. It is for this reason that he contends that the Commissioner had the duty to caution him about the consequence of such a failure.
- [40] In my view, this ground of review has no merit when regard is had to the fact that the applicant was represented by a union official. There is no evidence on the record that the union representative was a lay person who did not understand the consequence of failure to put a version to a witness. The applicant failed to account during cross examination as to why his representative did not put the version to Mr Schoeman.
- [41] The contention that Mr Schoeman did not have the authority to give instructions to the applicant is also not sustainable. It is to be noted in this regard that the applicant did not dispute that Mr Schoeman was head of the department in which the applicant was employed in, and thus had the authority to give him instructions. The applicant did not produce any documentary evidence in the form of a policy or employment contract to support his version that Mr Schoeman did not have the authority to give the instructions.

[42] The contention of the applicant that he was an electrician and, therefore, it was not his duty to perform the instructions given to him is also unsustainable. This contention is not supported by the evidentiary material presented during the arbitration hearing. The documents presented by the first respondent during the arbitration proceedings support the testimony of Mr Schoeman that the instructions given fell within the responsibility of the applicant. The test is not whether the instructions fall within the job description of the employee but whether it was reasonable and lawful. In this regard, I align myself with what is stated in *Exxaro Coal Mpumalanga Ltd v CCMA and Others* – (unreported case number; JR 269/11 where the Court held that:

‘... Should it be shown that the instruction was unlawful, it would be the end of the inquiry. If it is found that the instruction was lawful, the expectation is that the employee to whom such instruction was issued should have complied. It will have little, if any, to do with whether the instruction related to the employee’s job description because it will never be a justification for an employee to refuse lawful instructions merely because the instructions are not his or his direct functions.’

[43] In any event, the documentary evidence presented by the first respondent during the arbitration hearing which was also not challenged indicate that the applicant, as an electrician, was also responsible for the task he was required to perform by Mr Schoeman.

[44] As concerning the allegation that the Commissioner failed to take into account the inconsistent application discipline, it is not clear whether the two electricians which the applicant refers to are alleged to have committed the same offence as that for which he was charged with. It is trite in our law that where the employee relies on inconsistent application of discipline in contending that the dismissal was unfair, he or she has the evidentiary duty to show that discipline in relation to which he or she was dismissed for had not been consistently applied by the employer. It has also been accepted that inconsistency is not a rule but rather a factor to take into account when considering the fairness of a dismissal.

- [45] In the present case, the Commissioner cannot be accused of having committed a reviewable conduct in this regard because, in my view, the applicant has failed to establish a *prima facie* case of inconsistency. In any case, the testimony of Mr Schoeman revealed that other electricians had previously been disciplined for similar misconduct and that was also not challenged by the applicant.
- [46] Turning to the issue of no loss or damage suffered by the first respondent as result of the conduct of the applicant that in my view does not automatically lead to the conclusion that the dismissal was unfair. It is of course a factor to take into account in the assessment of whether the sanction of dismissal is fair or otherwise. It has to be weighed against all other factors and the circumstances of the case including the seriousness of the misconduct. The misconduct in the present instance was very serious when regard is had to the circumstances in which it was committed.
- [47] As concerning the issue of the appropriateness of the sanction of dismissal, it is apparent from the reading of the record that the conclusion reached by the Commissioner is one, having regard to the seriousness of the offence, which any reasonable Commissioner could have reached. In the circumstances of this case, I am of the view that the misconduct committed by the applicant was serious enough to breakdown the trust relationship between the parties in particular when regard is had to the fact that the instruction related to safety.
- [48] In the circumstances, I find that the applicant has failed to make out a case justifying interference with Commissioner's award. I do not, however, believe that it would be fair to allow costs to follow the results.

Order

- [49] In the premises, the applicant's application to review the arbitration award made third respondent under case number MP 4769-10, is dismissed with no order as to costs.

Molahlehi

Judge of the Labour Court, Johannesburg

Appearances:

For the Applicant: Mr E.S. Makinta of Makinta Attorneys

For the First Respondent: S Lyden Shepstone and Wylie Attorneys