



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR 1697/14

In the matter between:

IMATU OBO GREYVENSTEIN

Applicant

And

EKURHULENI METROPOLITAN MUNICIPALITY

First Respondent

ADVOCATE L MOSALA-MATLATLE N.O.

Second Respondent

**SOUTH AFRICAN LOCAL GOVERNMENT.
BARGAINING COUNCIL**

Third Respondent

Heard: 06 January 2015

Delivered: 02 July 2015

Summary: Review of Bargaining Council Condonation Ruling

JUDGMENT

FOUCHE, AJ

Introduction

- [1] The applicant is applying, for the second respondent's condonation ruling, issued under the auspices of the third respondent, to be reviewed and set aside in terms of s 158(1)(g) read with s 145 of the Labour Relations Act, 1995 ("LRA").
- [2] The applicant also wants the second respondent's arbitration award to be replaced by an order dismissing the first respondent's condonation application.
- [3] The application is unopposed and there was no appearance on behalf of any of the Respondents at the hearing.

Facts

- [4] The interpretation of clause 6.3 of the Disciplinary Procedure and Code Collective Agreement concluded in the third respondent is central to this matter. Clause 6.3 of the collective agreement provides as follows:
"The Employer shall proceed forthwith or as soon as reasonably possibly with a Disciplinary Hearing but in any event not later than three (3) months from the date upon which the Employer became aware of the alleged misconduct. Should the employer fail to proceed within the period stipulated above and still wish to pursue the matter, it shall apply for condonation to the relevant Division of the SALGBC."
- [5] The applicant's member, Mr Greyvenstein, was accused of causing malicious damage to the first respondent's property on 18 December 2012.
- [6] On 5 June 2013, Greyvenstein was presented with a notice to attend a disciplinary hearing on 14 June 2013, in respect of the alleged misconduct. The disciplinary hearing proceeded on 20 June 2013, having being postponed on 14 June 2013. The chairperson of the hearing recused himself for reasons unrelated to this application.
- [7] After 20 June 2013, Greyvenstein next heard from the first respondent on 4 February 2014, when he received a charge sheet inviting him to attend a disciplinary hearing on 10 February 2014. The hearing did not take place on 10 February 2014.

[8] On 8 May 2014, the first respondent lodged an application for condonation with the third respondent in terms of clause 6.3 of the collective agreement. In the condonation application the first respondent alleged, *inter alia*, that:

- i. the chairperson of the hearing on 20 June 2013 issued a ruling that the first respondent needed to obtain condonation in terms of clause 6.3 of the collective agreement prior to the continuation of the disciplinary hearing;
- ii. the first respondent became aware of the alleged misconduct on 18 December 2012;
- iii. the disciplinary hearing took place on 14 June 2013;
- iv. the disciplinary hearing would take place as soon as the condonation has been granted;
- v. the disciplinary hearing would take place more than a year after the first respondent became aware of the alleged misconduct;
- vi. the disciplinary hearing was heard in time;
- vii. the first applicant had good prospects of success because the misconduct was malicious damage to the first respondent's property in that a vehicle was damaged and photos were presented as proof;
- viii. the first respondent would suffer prejudice if the matter remains unresolved;
- ix. Greyvenstein would not be prejudiced because he would receive an opportunity to answer any evidence against him and prove his innocence.

[9] No photographs were annexed to the first respondent's condonation affidavit.

[10] The applicant opposed the condonation application. The applicant alleged *inter alia*, that:

- i. when Greyvenstein received the charges on 5 June 2013, it was 6 months after the alleged incident and the applicant's delay in charging Greyvenstein at that stage amounted to approximately 3 months;
- ii. the first respondent provided no explanation for the delay;
- iii. the first respondent did not apply for condonation because the first respondent alleged that there was no lateness as the matter was heard in time;
- iv. the first respondent did not allege that it was Greyvenstein who damaged the vehicle;
- v. the first respondent failed to establish any wrong-doing against Greyvenstein;
- vi. the first respondent is the author of its own misfortune;
- vii. Greyvenstein would suffer prejudice should the condonation be granted due to the lapse of time and the possible unavailability of witnesses.

[11] The second respondent granted the first respondent's condonation application.

Grounds of review

[12] Mr Mkwibiso argued on behalf of the applicant that the second respondent misconstrued the nature of the matter that was before her, committed a gross irregularity by disregarding material evidence and that the second respondent's award is one that no reasonable arbitrator could make. The second respondent failed to consider the proper interpretation of the collective agreement and the relevant law in general.

Analysis

[13] A condonation ruling is not an award for the purpose of s. 145 of the LRA. Condonation rulings of Bargaining Councils are reviewable under s. 158(1)(g) of the LRA. A review in terms of s 158(1)(g) comprises a common law review.¹

¹ *Toyota South Africa Motors (Pty) Ltd v Radebe* [2000] 3 BLLR 243 (LAC) at para 31

- [14] The test to be applied in dealing with applications for review was formulated in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*.² This reasonableness test requires the review court to ask the question: “*Is the decision reached by the commissioner one that a reasonable decision maker could not reach?*” The reasonableness test applies to review proceedings under s 158(1)(g) of the LRA.³
- [15] The first respondent is bound by the collective agreement by virtue of being a member of the South African Local Government Association (“SALGA”).⁴ An arbitrator acting under the auspices of the third respondent has the power to determine whether the first respondent should be granted condonation in terms of clause 6.3 the collective agreement.⁵
- [16] The second respondent in considering the condonation application was tasked with exercising her discretion judiciously. This required considering the facts against the established factors to be considered in condonation applications, being the degree of lateness, the explanation for the delay, the prospects of success in the main case, the importance of the case, and ultimately the interests of justice.⁶ The second respondent also had to keep in mind that without a reasonable and acceptable explanation for the delay, the prospects of success are irrelevant and in the absence of prospects of success an application for condonation should be refused.⁷
- [17] The second respondent found that the first respondent complied with clause 6.3 of the collective agreement when it instituted the disciplinary hearing by issuing the charge sheet on 5 June 2013. The second respondent thus concluded that there was no delay on the part of the first respondent in instituting the disciplinary enquiry against Greyvenstein.

² (2007) 28 ILJ 2405 (CC) at para 110

³ *Trafford Trading (Pty) Ltd v National Bargaining Council for the Leather Industry of SA & others* [2010] 1 BLLR 95 (LC), at para 32; *Southern Life Association v CCMA* [2001] 3 BLLR 375 (LC), para 31

⁴ *Hendricks v Overstrand Municipality & Another* [2014] 12 BLLR 1170 (LAC), para 4; S. 23(1) of the LRA

⁵ S. 33A(1), (4)(a) and (8)(f) of the LRA read with s. 138(9) of the LRA; *SAMWU obo Jacobs v City of Cape Town & Others*, [2014] 10 BLLR 1011 (LC), paras 11-12

⁶ *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531, at 532C-E; *Seatlolo & Others v Entertainment Logistics Service (A Division of Gallo Africa Ltd)* (2011) 32 ILJ 2206 (LC), para 7

⁷ *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A), at 765; *NUM v Council for Mineral Technology* [1999] 3 BLLR 209 (LAC), para 10

- [18] The second respondent interpreted the three months referred to in clause 6.3 to commence only once the accusation of misconduct has been brought before the Municipal Manager or his authorised representative. Clause 6.1 of the collective agreement provides as follows:

“An accusation of misconduct against an Employee shall be brought in writing before the Municipal Manager or his authorised representative for investigation.”

- [19] The second respondent’s finding is not supported by the wording of clause 6.3 of the collective agreement. Considering both the context and the language⁸ of both clauses 6.1 and 6.3 there is no basis for link that the second responded tried to establish between the two clauses.
- [20] I agree with Steenkamp J in *Mahoko v Mangaung Metropolitan Municipality & Others*⁹ that clause 6.3 of the collective agreement is peremptory, which means strict compliance with its provisions is required.
- [21] The employer has to proceed with the “disciplinary hearing” within the three month period provided for in clause 6.3. Initiating the disciplinary process by presenting Greyvenstein with a notice to attend a disciplinary hearing on 5 June 2013, did not meet the requirements of clause 6.3. This approach is supported by the distinction between clause 6.3 referring to “*proceed... with a Disciplinary Hearing*” as opposed to clause 6.2 of the collective agreement referring to “*institute disciplinary proceedings*”.
- [22] On the first respondent’s version the disciplinary hearing commenced on 14 June 2013. The applicant alleged that the disciplinary hearing commenced on 20 June 2013 and not 14 June 2013. However, it is not necessary to decide that aspect for the purpose of this judgment.
- [23] The three month period provided for in clause 6.3 must be calculated from “*the date upon which the Employer became aware of the alleged misconduct*”. In the condonation application the first respondent conceded that it became aware of Greyvenstein’s misconduct on 18 December 2012. It means that in order to comply with the provisions of clause 6.3 the first respondent had to

⁸ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 2 All SA 262 (SCA); *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 1 All SA 517 (SCA);

⁹ (J878/13,unreported, 8 May 2013) para 26; *SAMWU obo Jacobs v City of Cape Town & Others*, supra, para 23

proceed with the disciplinary hearing by no later than 18 March 2013. The first respondent thus failed to proceed with the disciplinary hearing within the time limit provided for in clause 6.3.

- [24] The second respondent misconceived the nature of the enquiry or the process she had to conduct to establish whether the first respondent had complied with clause 6.3. The flawed interpretation of clause 6.3 resulted in the incorrect finding that the first respondent had complied with the provisions of clause 6.3. The consequences are that the applicant was denied a fair hearing and the second applicant committed a gross irregularity.¹⁰ She misconstrued the evidence before her when she linked the interpretation of clause 6.3 of the collective agreement with the provisions of clause 6.1 of the collective agreement.
- [25] The second respondent's finding that the first respondent complied with the time period in clause 6.3 is also one that a reasonable arbitrator would not have made. There are also no other reasons or facts upon which the second respondent did not rely to support her finding which would render the finding reasonable. On this aspect alone the second respondent's ruling on the condonation application stands to be reviewed and set aside.
- [26] It would serve no purpose to remit this dispute to the third respondent. This court is in as good a position as the third respondent to consider the condonation application. I thus proceed to consider the remainder of the condonation application for this purpose.
- [27] The second respondent's approach to the interpretation of clause 6.3 also resulted in her not considering the degree of lateness. Should an employer commence a disciplinary hearing more than three months after it became aware of the employee's alleged misconduct, the disciplinary hearing would be conducted in breach of clause 6.3. Where an employer has breached the provisions of clause 6.3 of the collective agreement, it renders the disciplinary hearing invalid and of no force or effect.¹¹ It also means that under clause 6.3 granting condonation retrospectively is not permitted.

¹⁰ *Toyota South Africa Motors (Pty) Ltd v Radebe*, supra, para 41

¹¹ *SAMWU obo Jacobs v City of Cape Town & Others*, supra, para 13; *SAMWU obo Nesengani v Mogale City Local Municipality & Others*, (J1784/14, unreported, 5 August 2014) para 10

- [28] It follows that the disciplinary hearing that took place on 14 June 2013 and 20 June 2013 was invalid and these dates could not be used to determine the degree of lateness.
- [29] The employer thus has to apply for condonation prior to conducting the disciplinary hearing. The conduct of the hearing prior to condonation being granted would be unlawful and of no force or effect.¹² It means that the degree of lateness should be determined with reference to both when the condonation application is launched and when the disciplinary hearing will take place subsequent to the condonation application.
- [30] The first respondent's condonation application is dated 8 May 2014. The first respondent admitted in its condonation application that the disciplinary hearing would have taken place more than a year after first respondent became aware of Greyvenstein's alleged misconduct. The degree of lateness is thus material, which requires a good explanation for the lateness.
- [31] The second respondent's consideration of the reasons for the delay focussed on the disciplinary chairperson's ruling that the first respondent had to obtain condonation in terms of clause 6.3 of the collective agreement prior to proceeding with the disciplinary hearing. The chairperson's ruling seems to be the only reason why the first applicant launched the condonation application. The first applicant denied that it failed to comply with clause 6.3 of the collective agreement, which is why the applicant's argument that condonation application was an application in name only and not in substance as the first respondent failed to acknowledge that it had proceeded with the disciplinary hearing out of time it not without merit.
- [32] In *Independent Municipal & Allied Trade Union obo Zungu v SA Local Government Bargaining Council & others*¹³ the following was said about the reasons for the lateness:

"In explaining the reason for the delay it is necessary for the party seeking condonation to fully explain the reason for the delay in order for the court to be in a proper position to assess whether or not the explanation is a good one"

¹² *SAMWU obo Nesengani v Mogale City*, supra, para 3

¹³ (2010) 31 ILJ 1413 (LC) para 13

- [33] The first respondent had to provide a detailed explanation of the steps it took from 18 March 2013 to when it filed the condonation application on 8 May 2014. It also had to explain why such steps constituted a good explanation for the lateness. The first respondent failed to provide any explanation for the lateness.
- [34] The second respondent did not consider the prospects of success. The second respondent's view was that for justice to prevail both parties must be given an opportunity to have their side of the story heard.
- [35] The second respondent referred to the photographs of the damaged vehicle, which indicates that the photographs were probably shown to the second respondent during the condonation hearing.
- [36] The difficulty with the first respondent's allegations regarding the prospects of success is that it failed to establish any causal link between the damage to the vehicle and Greyvenstein's conduct. The first respondent at least had to allege that it was Greyvenstein who caused the damage to the vehicle. As such Greyvenstein was not placed at the "scene" of the misconduct. The first respondent thus failed to demonstrate any prospects of success.
- [37] Even if I am wrong about the prospects of success the condonation application could not succeed given the lengthy delay and the absence of good reasons for the delay.
- [38] The above analysis also demonstrates that second respondent also acted unreasonably and committed gross irregularities when she misconstrued the nature of the enquiries involved in considering the reasons for the delay and the prospect of success. The second respondent failed to consider whether the first applicant had any prospects of success and did not realise that the first respondent had not submitted any explanation for the delay.
- [39] This case is, other than to the parties, not of particular importance. In the interest of justice, Greyvenstein should not be exposed to the prejudice of having to answer to the allegations more than two years after the alleged misconduct. In this regard Greyvenstein's interests outweigh the prejudice the first respondent may suffer as a result of the disciplinary process not being concluded.

[40] The applicant did not ask for an order as to costs save in the event that any of the respondents unsuccessfully oppose the review application. This is appropriate considering the ongoing relationship between the parties.

Order

[41] I therefore make the following order:

- 1 The condonation ruling of 1 July 2014 under case number GPD 051401 is reviewed and set aside.
- 2 The condonation ruling is replaced with the following ruling:
“The application for condonation is denied.”

FOUCHE AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr V G Mkwibiso
Union Official - Imatu

For the Respondents: No appearance

LABOUR COURT