



**REPUBLIC OF SOUTH AFRICA**

**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

**JUDGMENT**

Not reportable

Case no: JR 396/14

In the matter between:

**NATIONAL UNION OF MINEWORKERS**

**First Applicant**

**THABO PHAMOTSE**

**Second Applicant**

and

**COMMISSION FOR CONCILIATION**

**First Respondent**

**MEDIATION AND ARBITRATION**

**JSC NKOSI N.O.**

**Second Respondent**

**GFI MINING SOUTH AFRICA (PTY)**

**Third Respondent**

**Heard: 10 July 2015**

**Delivered: 16 October 2015**

**Summary: Review of a condonation ruling**

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## JUDGMENT

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COOK AJ,

### Introduction

- [1] This is a review instituted by the Applicant in terms of Section 158(1)(g) of the Labour Relations Act (“LRA”). The Applicant seeks to review the condonation ruling of the Second Respondent (“the commissioner”) under the auspices of the First Respondent (“the CCMA”) under case number GAJB310905-13 (“the ruling”).
- [2] The Applicants seek the following relief:
- 2.1 To review and set aside the ruling issued by the Second Respondent under case number GAJB310905-13;
  - 2.2 Substituting the Commissioner’s ruling with one that condonation application is granted; and
  - 2.3 Ordering the First Respondent to set the matter down for arbitration.
- [3] The Third Respondent (“the mine”) opposes the review and seeks that the application be dismissed with costs.

### Background

- [4] The employee resigned on 2 May 2012 and only referred the dispute to the CCMA on 20 December 2013. Accordingly, the delay is 18 months.

[5] The Commissioner, in his analysis, stated:

'The degree of lateness is excessive and is not mitigated by the reason for the delay and is not consistent with the reason for the delay. The Applicant resigned in 2013 but escalated the matter a year later yet at all material times he was represented by the union. The Applicant does not make out a prima facie case. He alleges a constructive dismissal. The Applicant was merely redeployed and his concerns were handled by the Respondent. The Applicant speculates he would have been dismissed. The Respondent stands to be irreparably prejudiced if condonation is granted. Having regard to all the circumstances and specifically the weight of prejudice, I come to the conclusion that condonation should be denied.'<sup>1</sup>

#### Case law

[6] In *Herholdt v Nedbank Limited, (Congress of South African Trade Unions as Amicus Curiae)*,<sup>2</sup> the SCA described the standard of review as follows:

'In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in section 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by section 145(2)(a)(ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.'

[7] The general principles applicable to condonation applications were set out in the case of *Melane v Santam Insurance Co Ltd*,<sup>3</sup> where it was said:

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<sup>1</sup> Page 16, index to pleadings.

<sup>2</sup> [2013] 11 BLLR 1074 (SCA) at para 25.

<sup>3</sup> 1962 (4) SA 531 (A) at 532C-E.

'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 degree of lateness, the explanation therefor, the prospects of success and the importance of the case. Ordinarily these facts are interrelated, they are not individually decisive, save of course that if there are no prospects of success there would be no point in granting condonation.'

- [8] The court must be appraised of all the facts and circumstances relating to the delay. The applicant for condonation must provide a satisfactory explanation for each period of delay.<sup>4</sup>

### Analysis

- [9] The reasons for the excessive delay are contained in the affidavit filed in the application for condoning the late referral.<sup>5</sup>
- [10] The Court is in agreement that the explanation provided is unacceptable. The explanation provided shows culpability on behalf of the employee and the union. The union acted with ineptitude in dealing with the employee's matter.
- [11] The Court cannot fault the Commissioner's finding in respect of the prospects of success in this matter. The employee did not establish that the employer had made the employment relationship intolerable. Rather telling in this matter is that the employer did not lodge any grievance in this matter and the employee also worked out his notice period. The employee also applied for voluntary retrenchment and only after that was not granted, did the employee decide to resign.
- [12] Even on the employee's own version, the working conditions had not become so unbearable that the employee could no longer reasonably be expected to endure them. The employee need not have resorted to the termination of the

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<sup>4</sup> See *NUMSA and Another v Hillside Aluminium* [2005] 6 BLLR 601 (LC) at para 12.

<sup>5</sup> Index to the bundle of documents at 21-23, paras 39 to 56 of.

employment relationship, which was the remedy of last resort.

- [13] The finding of the Commissioner that the mine would be prejudiced is also a reasonable finding in that the mine deserved and was entitled to the speedy and expeditious dispute resolution and this would have been frustrated by the lengthy delay in this matter as well as the fact that the mine would have had to defend a claim that was without merit.

### Conclusion

- [14] The finding of the Commissioner in this matter on a proper conspectus of all the evidence before him is a reasonable finding and, accordingly, the review application ought to be dismissed.
- [15] The Court finds no reason why, in law and fairness, costs should not follow the result.
- [16] Accordingly, the Court makes the following order:
1. The review application is dismissed with costs.

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Cook AJ,

Acting Judge of the Labour Court of South Africa

APPEARANCES.

For the Applicant: Advocate Z M Navsa.

Instructed by: Solomon Holmes Attorneys.

For the Respondent: Mr P Motaung

Instructed by: Nomali Tshabalala Attorneys

Labour Court