



REPUBLIC OF SOUTH AFRICA

Not reportable

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR 1646/14

In the matter between:

MAKOLOBE JOHANNES MOTHAPO

APPLICANT

And

METAL AND ENGINEERING INDUSTRIES

BARGAINING COUNCIL

FIRST RESPONDENT

JAN STEMMETT N.O

SECOND RESPONDENT

BEVCAN ROSSLYN (Division of NAMPAK)

THIRD RESPONDENT

Heard: 11 August 2015

Delivered: 12 August 2015

JUDGMENT

VAN NIEKERK J

Introduction

- [1] This is an application to review and set aside a ruling made by the second respondent, to whom I shall refer as the commissioner. In his ruling, the commissioner refused to condone the late referral of an unfair dismissal dispute by the applicant. The applicant had been dismissed on 25 May 2011. He referred his dispute to the second respondent only on 21 January 2014, 940 days late.

The ruling

- [2] The commissioner's ruling was clearly influenced by the period of the delay in this matter. In his award, he says the following:

- 3.1 I find that the degree of lateness (940 days, which is more than 31 months or 2 ½ years) is excessive in the extreme. The applicant would have to furnish a very good reason for the delay.
- 3.2 The applicant provided proof of his initiation as a traditional healer, but the exact dates of his initiation treatment are not clear because the commencement date he provides (6/6/2011), does not correspond with the date provided by Dr Chauke (3/6/2011). It is also not clear whether the applicant was confined to treatment at all times until 4/8/2013. This would appear not to be the case, since the applicant states that after his initiation, he went for cleansing and further rituals which took about four months.

- 3.3 The applicant fails to explain what prevented him from lodging a dispute or approaching the council for advice, from the time of his dismissal until the commencement of his initiation.
- 3.4 The applicant also fails to explain what prevented him from lodging a dispute after completion of his treatment in August 2013 until he eventually approached the council in January 2014.
- 3.5 Although there is no opposing affidavit from the respondent and even if the sanction of dismissal was too harsh, I am not persuaded that the applicant is furnished an acceptable reason for the delay of 940 days.
- 3.6 I take into account that the applicant will be prejudiced if condonation is not granted, but I also have to take into account the respondent's interest in having finality and that respondent will be prejudiced if condonation is granted on the poor explanation given by the applicant for the delay.

The grounds for review

- [3] The applicant asserts that the ruling was not the one to which a reasonable and objective decision-maker could have come to. In doing so, the applicant seeks in his founding affidavit to introduce new factual material which he contends he would have brought to the commissioner's attention by way of clarifying any uncertainty that may have existed in relation to the papers that served before the commissioner.

The applicable legal principles

- [4] The threshold for review is fairly well-established. Section 145 permits the review of an arbitration award, amongst other grounds, where the arbitrator commits a gross irregularity. This extends to latent gross irregularities or, put another way, instances where an arbitrator fails to apply him or herself to the available evidence, makes defect of factual findings and the like. In these instances, a party seeking to set aside an award or ruling must establish both the irregularity or defect relied on and that the *Sidumo* threshold is met. In *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA & others* [2014] 1 BLLR 20 (LAC), the

Labour Appeal Court noted that it is not sufficient for an award to be set aside simply to establish a gross irregularity in the conduct of the arbitration proceedings; in the event that a gross irregularity in the conduct of the proceedings is established, it is incumbent on an applicant to establish that the result was unreasonable or '*put another way, whether the decision that the arbitrator arrived at is one that falls outside the band of decisions to which a reasonable decision-maker could come to on the available material*'. In other words, the review court must consider whether despite the arbitrator's reasoning, the result is nevertheless capable of justification on the available material.

- [5] What this analysis requires where what is at issue is any assessment of whether a reviewable defect and/or irregularity has occurred or what its impact is to be upon an award, is a determination first of the nature of the error alleged to have been committed by the arbitrator and any distorting effect that the error may have had on the outcome of the arbitrator's award. If it is reasonably clear that but for the identified error relied upon the award would have been different or cannot stand on its own reasoning, then it is *prima facie* an unreasonable award. The court must then have regard to the issues and the evidence as a whole to determine whether or not the outcome is nevertheless capable of being sustained on the *Sidumo* test. This test reinforces the difference between a review on the one hand and an appeal on the other and makes clear that a reviewing court is not entitled to intervene simply because it would have come to a different conclusion on the same material.

Analysis

- [6] I am unable to find on the papers before me that the commissioner committed any reviewable defect or that any irregularity occurred in the proceedings under review. The commissioner had regard to all of the factors to which he was obliged to have regard to. The exercise of discretion which was based on relevant factors, having regard to facts that are not in dispute.

- [7] In so far as the applicant in the present proceedings suggests that the award is reviewable simply because the commissioner's decision was made in Chambers, there is no merit in that submission. The commissioner had before him an unopposed application and was entitled to deal with the merits of the application without convening a hearing. The applicant ought to have made out his case as comprehensively as possible in his founding affidavit. It is not open to an applicant in a review application to make out a case that ought to have been made before the commissioner. In short, there was no demonstrable prejudice to the applicant in the manner in which the ruling under review was made.
- [8] Given the above findings, it is not necessary for me to consider whether the outcome of the proceedings can nonetheless be sustained having regard to the record. Even if I were called upon to make this decision, I am unable to find on the papers that the commissioner's decision falls outside of a band of decisions to which reasonable people could come to on the available material. In this regard, the period of the delay is in itself a basis on which condonation ought to be refused.
- [9] An application for review is described in the Practice Manual as an application akin to an urgent application. To condone referrals as late as the referral in the present matter would be to undermine the statutory purpose of expeditious dispute resolution. Insofar as the applicant's explanation for his delay is concerned, it is trite that an applicant seeking condonation must explain each period of the delay and must provide an explanation that covers in full all the aspects relating to the reasons for the delay. A listing of significant events which took place during the period in question without any explanation for the time that elapsed between these events does not place the court in a position properly to assess the explanation for the delay. The failure to provide a proper explanation in the sense referred to above, will normally result in the failure of an application for condonation on that ground alone, regardless of any prospects of success on the merits. As I have indicated above, that the explanation is required to be made

out in full in the application made to the first respondent. Since the present application is unopposed, I do not intend to make any order as to costs.

For the above reasons, I make the following order:

1. The application is dismissed.

ANDRÉ VAN NIEKERK
JUDGE OF THE LABOUR COURT

APPEARANCES

For the Applicant: Union Official