



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: J432/12

MOHAU EDWIN MOTSOELE

Applicant

and

HIGHVELD STEEL AND VANADIUM

CORPORATION/EVRAZ GROUP SA

First Respondent

THE METAL AND ENGINEERING INDUSTRIES

BARGAINING COUNCIL

Second Respondent

JOSEPH MPHAPHULI NO

Third Respondent

Delivered: 14 August 2015

JUDGMENT

TLHOTLHALEMAJE, AJ

Introduction:

- [1] The Applicant (Motsoele) referred an alleged unfair dismissal dispute to the Second Respondent (MEIBC) under case number MEGA35901 out of time. His application for condonation was considered and dismissed by the Third

Respondent (Arbitrator) in a ruling issued on 23 April 2012. Motsoele brought this application to review and set aside that ruling. The application is opposed.

Background:

- [2] There is a dispute as to whether the parties' employment relationship was terminated by mutual agreement, or whether Motsoele was dismissed. The First Respondent contends a verbal agreement to mutually terminate the employment relationship was concluded on 23 November 2011. It was further contended that Motsoele had reneged on the verbal agreement by refusing to sign the written agreement. Motsoele however contends that there was no such an agreement concluded, and considers himself to have been dismissed.
- [3] The dispute was initially referred to the Commission for Conciliation, Mediation and Arbitration on 13 February 2012 under case number GAJB4776-12, together with an application for condonation. Motsoele failed to attend a con/arb hearing set down at the CCMA on 7 March 2012. The dispute was then referred to the MEIBC on 29 February 2012 with an application for condonation. The ruling in this regard is the subject matter of this review application.

The legal framework:

- [4] One of the only true jurisdictional questions that are likely to arise at the conciliation phase is whether the referring party referred the dispute within the time limit prescribed by Section 191(1) (b) of the Labour Relations Act¹. It therefore follows that once the prescribed time limits have not been complied with in referring a dispute, any subsequent consideration of an application for condonation would entail a jurisdictional fact that the legislature has decided must necessarily exist for a tribunal to have the power to act. For the purposes of a referral which is out of time, the provisions of section 191 (2) of the Labour Relations Act provide for good cause to be shown.

¹ *Bombardier Transportation (Pty) Ltd v Mtiya N.O* [2010] 8 BLLR 840 (LC) at para [13]

- [5] In *Phaaka and 19 others v Commissioner Bracks & others*², the Labour Appeal Court (per Murphy AJA) held that;

“.....The standard of review enunciated in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2008 (2) SA 24 (CC)) that in order to succeed in a review, the applicant must establish that the award was one that could not have been made by a reasonable decision-maker, applies only to the review of determinations of the fairness of a dismissal or labour practice. It has no application to the determination of jurisdiction.”

- [6] In line with the above LAC decision, where a ruling on condonation is sought to be reviewed, it follows that the proper approach of the court on review is determine whether the finding made by the arbitrator was correct or not. In establishing whether the finding was correct, it is also appreciated that when determining such applications, arbitrators are required to exercise a discretion, taking into account all relevant factors, and in particular, those identified in *Melane v Santam Insurance Co. Ltd*³, where it was held that;

“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. 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 prospects which are not strong. Or the importance of the issue and strong prospects may tend to compensate for a long delay. And the Respondent’s interests in finality must not be overlooked”

- [7] To enable the Arbitrator or the court for that matter to properly exercise a discretion, a party seeking condonation must set out all the facts and circumstances relating to the delay, and most importantly, must provide a

² Case no: JA 3/2014 at para [29]. See also *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others* (2008) 29 ILJ 964 (LAC) at para 101

³1962 (4) SA 531 (A) at 532B-E

satisfactory explanation and account for each period of the delay. Other factors which the courts have pointed out should be considered is whether it is in the interests of justice to grant condonation⁴.

The ruling and evaluation:

- [8] The Motsoele's main ground of review was that the Arbitrator did not apply his mind properly, reasonably, or as could be expected of him in the determination of the application for condonation before him. Even where this Court were to determine the issue *de novo* in order to decide whether the decision of the Arbitrator was correct or not, such a determination will be based on the evaluation of the material that was placed before the arbitrator at the time that he or she considered the application. It is trite that a party cannot raise new material in a review application.
- [9] The application was considered by the arbitrator on the papers and accordingly there is no record of proceedings. The application as can be gleaned from the ruling was treated as unopposed by the Arbitrator. This issue will further be dealt with elsewhere in this judgment. In his ruling, the Arbitrator correctly pointed out that in order to 'secure condonation', an applicant must show good cause why condonation should be granted by a consideration of the degree of the delay, the explanation for the delay, prospects of success and prejudice. The Arbitrator further stated that prejudice was axiomatic to every dismissal and therefore did not rank as highly as other factors to be considered. According to the Arbitrator, the degree of the delay, the explanation for the delay and prospects have a more direct bearing on the outcome of the application.

The degree of lateness:

⁴ See: *NEHAWU obo Mofokeng and Others v Charlotte Theron Children's Home* [2004] 10 BLLR 979 (LAC). See also *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others* 2000 (5) BCLR 465 (CC), where the Constitutional Court stated the following:

'It is appropriate that an application for condonation be considered on the same basis and that such an application should be granted if that is in the interests of justice and refused if it is not. The interests of justice must be determined by reference to all relevant factors including the nature of the relief sought, the extent and cause of the delay, the nature and cause of any other defect in respect of which condonation is sought, the effect on the administration of justice, prejudice and the reasonableness of the applicant's explanation for the delay or defect.'

[10] In the standard application for condonation, Motsoele had stated that he was dismissed on 'or about 10 December 2011', and that the referral was about 60 days late. In his substantial application attached to the standard application, his contention was that the exact date of his dismissal was unknown. He contended that the delay was in any event not excessive considering the festive period and commencement of the new year, and also in view of the fact that there was no clear indication as to when the dismissal occurred. The Arbitrator had nevertheless found that the delay was fifty one days, which in his view was 'quite remarkable'. I am in agreement with the Arbitrator that the delay was indeed excessive.

The explanation for the delay:

[11] In his ruling, the Arbitrator had summarised the reason for the delay in a cursory one liner to the effect that "*The applicant's representative's offices were closed for the year-end break*". In explaining the delay as per his founding affidavit, Motsoele averred that during the latter part of November 2011, he was presented with an option to resign and a proposed settlement agreement by the employer. He had advised the employer that he would take the option under consideration.

[12] Motsoele had however received information on or about 28 November 2011 that the employer had informed his colleagues that he had resigned. He had approached his attorneys of record in early December 2011 and communication was sent to the employer advising that he tendered his services as he had not resigned. He had received his salary for January 2012 which to him suggested that his services had not been terminated. He had also not received any payment in respect of the settlement package and according to him the matter had not been finalised. It was only on 10 December 2011 that the employer had confirmed a deemed verbal resignation to be in effect and informed him that he was not entitled to return to employment.

[13] A further reason attributing to the delay in referring the dispute according to Motsoele was that his attorneys of record had their offices closed for the

festive season between 15 December 2011 and 16 January 2012. Motsoele averred that he had repeatedly attempted to contact his attorneys once they had opened for the New Year, but had struggled to obtain an appointment. He had managed to sign the CCMA referral form and submitted it to his attorneys. However, through no fault of his, the referral form was only submitted to the CCMA on or about 13 February 2012. He had referred the matter to the CCMA as he was not aware that it ought to have been referred to the MEIBC. It was only after being so informed by the employer that he had referred the matter to the MEIBC, having forwarded his referral to his attorneys on 20 February 2012. At that point however, his attorney was in the Western Cape and he had only scheduled an appointment with him upon his return.

- [14] In the ruling, the Arbitrator makes reference to the fact that opposing papers were *'out of time and no condonation was applied for'*. He then stated that the *'opposing affidavit is therefore improperly before me'*. From the reading of the brief ruling, it does not appear that the First Respondent's opposing affidavit was taken into account by the Arbitrator, contrary to the submissions made on behalf of Motsoele in these proceedings⁵. There is therefore no basis for any conclusion to be reached that the Arbitrator committed a 'certain gross irregularity' in this regard as alleged on behalf on Motsoele's behalf.
- [15] It was submitted on behalf of the First Respondent in these proceedings that the opposing affidavit was timeously filed at the MEIBC and that this Court should take it into account. The difficulty with these submissions is that for the purposes of this review application, the Court can only consider the material that was placed before the Arbitrator for the purposes the condonation application. The Arbitrator stated in his ruling that he had not considered the First Respondent's opposing affidavit. Thus where there is nothing in the ruling itself to suggest that such evidence was indeed taken into account, in the absence of an application for a cross-review, it would be improper for the Court to take into account the opposing affidavit. The Arbitrator had found that

⁵ Paragraph 16 and 21 of the Applicant's heads of argument

it was not properly before him. In essence therefore, the Arbitrator treated the application as unopposed and nevertheless refused to grant condonation.

- [16] In considering the explanation proffered for the delay, the Arbitrator stated that the explanation was not satisfactory and 'failed to impress'. He further stated that even when note is taken of the unavailability of the legal representative between 16 December 2011 and 16 January 2012, there was no explanation as to why Motsoele did not consult with his attorneys anytime between 10 December 2011 and January 2012. The Arbitrator also found that it was inexplicable that Motsoele had failed to complete the referral form at any time before 13 February 2012. The Arbitrator concluded that Motsoele could not solely attribute blame to the unavailability of his legal representatives. He also took into account that the dispute was only filed on 29 February 2012, some two weeks after the referral forms were signed.
- [17] It is my view that the finding by the Arbitrator that the explanation for the delay was not satisfactory was correct. It is trite that an application for condonation should be filed without delay as soon as a party to litigation becomes aware of the need to file such an application⁶. Furthermore, the applicant must set out all the facts and circumstances relating to the delay, and most importantly, provide a satisfactory explanation and account for each period of the delay⁷. Any period of delay that is unaccounted for, will result in an indulgence being refused⁸.
- [18] As already pointed out, in the standard application for condonation form, Motsoele had stated that he was dismissed on or about 10 December 2011. He nevertheless in the substantive founding affidavit stated that he did not know the exact date of dismissal. This contradiction is indeed material. On Motsoele's own version as at 28 November 2011 he was aware that the employer considered him as having resigned. He does not state the exact

⁶ See *Meintjies v HD Combrinck (Edms) Bpk* 1961 (1) SA 262 (A) at 263 H-264B. See also *Saloojee & another N.N.O v Minister of Community Development* 1965 (2) SA 135 (A)

⁷ *Independent Municipal and Allied Trade Union on behalf of Zungu v SA Local Government Bargaining Council and Others* (2010) 31 ILJ 1413 (LC) at para 13.

⁸ See *NUMSA and another v Hillside Aluminium* [2005] 6 BLLR 601 (LC)

date but contends that he had approached his attorneys of record in 'early December 2011'.

- [19] Despite the contradictions in the two affidavits, and further on his Motsoele's own version, it should be taken that as at 10 December 2011, it had been confirmed with him that the employer deemed a verbal resignation to be in effect. He does not state the exact date but contends that he had approached his attorneys of record in 'early December 2011'. There is no explanation as to what steps he took between 10 December 2011 and 15 December 2011 in pursuing his matter before his attorneys' offices closed down for the festive season.
- [20] Motsoele does not give any further elaboration as to when he had made attempts to contact his attorneys once they had opened their offices in the New Year. No further details are provided in regards to when he had *'eventually managed to sign the referral to the CCMA and submitted all necessary documentation to my attorneys'*. No confirmatory affidavits by the attorneys were placed before the Arbitrator in this regard.
- [21] A further difficulty in Motsoele's case is that he sought to exonerate himself of any blame in the late referral of the dispute. As I understand it, he was legally assisted from when he initially referred the dispute to the CCMA. Having referred the matter erroneously to the CCMA, he had then completed the referral forms and forwarded them to his attorneys of record on 20 February 2012. These were however submitted to the MEIBC on 29 February 2012 and there is no account given for the delay during this period, other than that the attorney was in the Western Cape and he could not secure an appointment.
- [22] To the extent that Motsoele seeks to be absolved, or to blame the delay solely on his attorneys of record, it has always been held by courts that a litigant cannot absolve himself from the tardiness of his chosen legal representative. In dealing with the issue of tardiness on the part of legal representatives,

Steyn CJ in *Saloojee & another v Minister of Community Development*⁹, held that;

"In *Regal v African Superslate (Pty) Ltd* 1962 (3) SA 18 (AD) ... this court came to the conclusion that the delay was due entirely to neglect of the applicant's attorney, and held that the attorney's neglect should not, in the circumstances of the case, debar the applicant, who was himself in no way to blame, from relief. I should point out, 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 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.... 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... 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 attorney, he should at least explain that none of it is to be imputed to himself. That has not been done in this case. In these circumstances I would find it difficult to justify condonation unless there are strong prospects of success."

⁹ 1965 (2) SA 135 (A) 141B-H

[23] It follows therefore that an applicant cannot simply hand over a matter to his legal representatives, sit back and fold his arms without regularly following up on his litigation and/or enquiring on the progress therein¹⁰. This is even more pertinent where it is apparent to a litigant that the time limits of instituting any action may have prescribed. To the extent that the Arbitrator had rejected Motsoele's explanation that no blame was attributable to him, and further in the light of the failure to give a full account of the delays as highlighted above, it is my view that in the light of the submissions before him, the Arbitrator's finding in this regard was correct. In the words echoed in *Moila v Shai N.O. and Others*¹¹, where, in an application for condonation, the delay is excessive and no explanation has been given for that delay, or an "explanation" has been given but such "explanation" amounts to no explanation at all, it would not be necessary to consider the prospects of success.

Prospects of success:

[24] In view of the failure to proffer an acceptable and satisfactory explanation for the delay in referring the dispute to the MEIBC, ordinarily, and in line with *Moila* and other authorities, it would not have been necessary for the Arbitrator to consider Motsoele's prospects of success. This point was made by the Labour Appeal Court in *NUM v Council for Mineral Technology*¹² where it was held that;

".... without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused"

[25] The Arbitrator had nevertheless concluded that Motsoele had failed to address the critical aspects of prospects of success. Motsoele's submissions in his application in this regard were as follows;

¹⁰ *IMATU on behalf of Zungu v SA Local Government Bargaining Council and Others* (2010) 31 ILJ 1413 (LC);

¹¹ (2007) 28 ILJ 1028 (LAC) at para 34

¹² 1999 3 BLLR 209 (LAC) at p211 para G-H

He was employed as part of the Executive Committee. Compensation would therefore be paid out for the remainder of his intended tenure. There was no clear indication or proof that there was a verbal agreement to mutually terminate the employment relationship, and his dismissal was procedurally and substantively unfair.

- [26] If it was Motsoele's main contention that there was no verbal agreement to mutually terminate the relationship, it is inexplicable that he would contend that there was 'no clear indication' or proof that the agreement existed. It is either on his version the agreement existed or not. In the *pro forma* application for condonation, Motsoele in regard to the issue of prejudice stated that "*I stand to suffer immeasurable damages as a result of insufficient package offered*".
- [27] In these proceedings, it was argued on behalf of the first respondent that having regard to the above averments as made in Motsoele's affidavit before the Arbitrator, it was apparent that he had only referred the dispute because he was unhappy with the payment he got as opposed to what he had expected. It was further submitted that he was paid in accordance with the agreement, that he had not sought to set that agreement aside, nor had he made a tender to pay back what was paid to him in accordance with that agreement.
- [28] Having had regard to the submissions made by Motsoele in his application before the Arbitrator in regards to his prospects of success, the Arbitrator was correct in finding that Motsoele had not addressed this issue. In my view, it would not be in the interests of justice to grant condonation in circumstances where the basis of a claim upon which prospects of success are alleged is not clear. It is either Motsoele's claim was based on an alleged unfair dismissal, or on whether he was entitled to more compensation emanating from the alleged agreement to mutually terminate the employment relationship.

Conclusion:

- [29] Having had regard to the submissions as considered by the Arbitrator in respect of the degree of lateness in referring the dispute to the MEIBC, the

lack of a satisfactory or acceptable explanation for the delay, and failure to sufficiently address issues of prospects of success, I am satisfied that the Arbitrator arrived at a correct decision in dismissing the application for condonation. I am therefore satisfied that the Arbitrator's ruling, even if it can be said to be too brief, is in any event unassailable. The application for review should therefore be dismissed. I have further had regard to considerations of law and fairness and I am of the firm view that a cost order is not warranted in this case.

Order:

- i.* The application to review and set aside a ruling on condonation issued by the Third Respondent under case number MEGA35901 is dismissed.
- ii.* There is no order as to costs.



Tlhotlhemaje, AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv. A Greyling

Instructed by: Lautenberg Morris Attorneys

For the Respondent: Mr. M Van Niekerk of Van Niekerk Attorneys