



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR2227/11

In the matter between:

NATIONAL UNION OF MINEWORKERS

First Applicant

SIPHO MAGAGULA

Second Respondent

and

**COMMISSION FOR CONCILIATION, MEDIATION AND
ARBITRATION**

First Respondent

BORMAN LUCAS NO

Second Respondent

EXXARO REDUCTANTS (PTY) LTD

Third Respondent

Delivered: 9 September 2015

JUDGMENT

TLHOTLHALEMAJE, AJ

Introduction:

- [1] The Applicants seek condonation for the late service and filing of the review application. In the event that condonation is granted, they further seek to review and set aside the arbitration award issued by the Second Respondent

(The Commissioner) on 12 June 2011 under case number LP4891-10. In the award issued under the auspices of the First Respondent (CCMA), the Commissioner found that the dismissal of the Second Applicant (Magagula) by the Third Respondent ('Exxaro') was procedurally and substantively fair. Both applications are opposed by Exxaro.

The condonation application and evaluation:

- [2] Magagula was employed by Exxaro as a Senior Process Controller. He was dismissed pursuant to a disciplinary enquiry held on 16 July 2010 on account of allegations of misconduct. NUM had referred a dispute to the CCMA on Magagula's behalf, resulting in the award that is the subject matter of the review application.
- [3] In terms of the provisions of section 145 (1) (a) of the Labour Relations Act (the LRA), the review application ought to have been filed within six weeks of the date that the award was received. The review application was filed and served on 16 September 2011, which is some 49 days outside of the statutory time limits.
- [4] Section 145 (1A) of the LRA provides that the Court may on 'good cause' shown, condone the late filing of an application in terms of subsection 1. The Court has a discretion whether to grant condonation or not, and in exercising that discretion, the Court will take into account the principles and factors enunciated in *Melane v Santam Insurance Company Ltd*¹, being the degree of lateness; the explanation for non-compliance with the time frame; the prospects of success; and the importance of the case.
- [5] Other considerations which other Courts have alluded to include the convenience of the court and the avoidance of unnecessary delays in the administration of justice². It is also accepted that these factors are not individually decisive but are interrelated and must be weighed against each other. In *Brummer v Gorfil Brothers Investments (Pty) Ltd*³, Jacob J further

¹ 1962 (4) SA 531 (A).

² *Foster v Stewart Scott Inc* (1997) 18 ILJ 367(LAC)

³ [2000] (2) SA 837 (CC) at 839 F

stated that the interests of justice should be an overall consideration when dealing with such applications.

- [6] In weighing these factors against each other, and further in exercising its discretion, the Labour Appeal Court in *NUM v Council for Mineral Technology*⁴ held that the court must do so judicially upon a consideration of all the facts of the case. The Labour Appeal Court further added that;

“A slight delay and a good explanation may help to compensate for prospects of success which are not strong. The importance of the issue and strong prospects of success may tend to compensate for a long delay. There is a further principle which is applied and that is 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”

- [7] Where condonation is sought within the context of an application for a review, the Labour Appeal Court in *A Hardrodt (SA) (Pty) Ltd v Behardien and Others*⁵ in reference to *Queenstown Fuel Distributors CC v Labuschagne NO and Others*⁶ held that;

‘The principles laid down in that case included, firstly that there must be good cause for condonation in the sense that the reasons tendered for the delay had to be convincing. In other words the excuse for non-compliance with the six-week time period had to be compelling. Secondly, the court held that the prospects of success of the appellant in the proceedings would need to be strong. The court qualified this by stipulating that the exclusion of the appellant's case had to be very serious, ie of the kind that resulted in a miscarriage of justice.’

The extent of the delay and explanation:

- [8] The review application was filed some 49 days out of time. The delay is excessive *albeit* not in the extreme. Be that as it may, a compelling explanation is still required in order for an indulgence to be granted.

⁴ [1999] 3 BLLR 209 (LAC) at para 10.

⁵ (2002) 23 ILJ 1229 (LAC) at 1231C

⁶ (2000) 21 ILJ 166 (LAC).

- [9] In explaining the delay, Mr David Radibotseng, the Regional Organiser of NUM averred that having received a copy of the award, he had forwarded it to the union's head of the legal department. The head of the legal department only instructed the applicants' attorneys of record on 28 June 2011 to furnish an opinion on whether the award was reviewable or not.
- [10] The attorneys of record had on 29 June 2011 and on 4 July 2011 sent correspondence to the Union requesting a bundle of documents. Radibotseng had then made arrangements for the documents to be delivered to the union's head office for collection by the attorneys of record. On 6 July 2011 the attorneys of record had perused the documents. However due to the work schedule of both the attorneys of record and Radibotseng, the matter was only discussed on 20 July 2011. On 8 August 2011, the attorneys of record had reverted to the union on the matter, and on the issues which required Magagula's input.
- [11] Between 4 July 2011 and 12 August 2011 Radibotseng had made attempts to contact Magagula. Only on 13 August 2011 did Radibotseng manage to contact Magagula and inform him to attend to the Union's offices in Lephalale. Magagula, due to being unemployed was only able to raise money and attended to the office of the union on 30 August 2011. On 31 August 2011 consultations were then held with the attorneys of record. The review application was according to Radibotseng filed on 9 September 2011, and the delay was not due to any negligence on the union's part.
- [12] It is my view that the reasons proffered for the delay in filing the review application are neither compelling nor satisfactory. As it was correctly pointed out on behalf of Exxaro, the explanation is starved for details, and no full account was given for each and every period of the delay. The first difficulty with the applicants' application is that it is trite that an applicant must seek condonation as soon as it becomes apparent that the time frames have not been complied with. In this case, the review application was filed and served on 16 September 2011 (not 9 September 2011 as alleged by Radibotseng).

- [13] As can be gleaned from paragraph 64 of the founding affidavit to the review application, the applicants knew that there was indeed a need for an application for condonation. Notwithstanding that fact, the application was only filed on 13 September 2012, some one year after the review application was filed. There is no explanation as to the reason the condonation application was not filed simultaneously with the review application or soon thereafter.
- [14] A further difficulty with the application for condonation is that the confirmatory affidavit of Magagula is unsigned. If indeed there were consultations held with Magagula on 31 August 2011 as alleged, it remains inexplicable that the issue of condonation could not have been settled then in the light of the alleged difficulties in contacting him. To the extent that Magagula's confirmatory affidavit was unsigned when filed and served with the founding affidavit, it is concluded that it is not properly before the Court, and any averments made in regards to him by Radibotseng in the founding affidavit remains hearsay.
- [15] It is further trite that the work schedule of union officials and attorneys of record cannot be a justifiable excuse for not complying with the time limits. Furthermore, the excuse that Magagula was unemployed and thus not having the necessary finances to travel from his hometown to Lephalale for consultations with Radibotseng is even more inexcusable. There is no explanation as to what NUM did to assist Magagula as its member to ensure that he managed to travel to Lephalale for consultations. Radibotseng having represented Magagula in the arbitration proceedings was clearly familiar with the facts of the case. There was therefore no need for Magagula to be present for the purposes of filing the review application, as there was always an option of filing a supplementary affidavit once the requirements of Rule 7 had been complied with.
- [16] Furthermore, the averment to the effect that there were attempts to contact Magagula between 4 July 2011 and 13 August 2011 is hardly substantiated. It is not known how and when these attempts were made and what the difficulties were in successfully contacting him. Any attempts by the applicants

in filling up these gaps in the replying affidavit are indeed futile, as it is trite that a case cannot be made out in the replying affidavit.

- [17] Even if consultations were only held on 31 August 2011 with the attorneys of record, there is still no explanation for the delay between that date and 16 September 2011 when the review application was ultimately filed. On the whole, and having had regard to the attempt to explain the delay in the filing of the review application, I am satisfied that in the words of Zondo JP (as he then was) in *Moila v Shai N.O. and Others*⁷, the Applicants' purported explanation for the delay is no explanation at all. To the extent that no explanation has been proffered, ordinarily it would not be necessary to deal with other considerations relevant to such applications. However for the sake of completeness, I will address the applicants' prospects of success on the merits.

Prospects of success:

- [18] In regards to the approach in dealing with the aspect of prospects of success, this Court in *Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd*⁸ stated the following:

'The prospects of success or bona fide defence on the other hand mean that all what needs to be determined is the likelihood or chance of success when the main case is heard...'

- [19] The evidence presented at the arbitration proceedings can be summarised as follows;

19.1 Magagula was prior to his dismissal, also an elected shop steward. Exxaro had opened a new gas plant which was considered to be hazardous. The Mines, Health and Safety Act⁹ required Exxaro to ensure that all of its employees were trained and competent to operate the plant. In this regard, Exxaro did not operate night shifts, but employees worked according to a roster in terms of which they were on

⁷ (2007) 28 ILJ 1028 (LAC) at para 34

⁸ 2009 30 ILJ 347 (LC) at para 27.

⁹ Act 29 of 1996

duty for four days, and off duty for the other four days. Factored into the shift system as it then prevailed was a training schedule.

19.2 General meetings were held with the local branch of NUM, with Magagula also present, to discuss concerns regarding attendance at scheduled training. According to the evidence of Mtegha, Exxaro's Operations Manager, employees were initially reluctant to attend training sessions as scheduled. At some point after discussions were held with the Union, most employees undertook the training. On 21 June 2010, Magagula and two other employees however refused to attend the training sessions even after being instructed to do so. They were subsequently charged with absenteeism without permission; failing to inform management in good time; improper behaviour damaging to the interests of the company; insubordination and failure to obey instructions.

19.3 During the internal disciplinary enquiries, the other two employees, as part of their mitigating factors, undertook to attend the training and were issued with final written warnings. Magagula however did not make any such commitment. The chairperson of the enquiry took the failure to make a commitment as an aggravating factor and dismissed him.

[20] Magagula's testimony as summarised by the Commissioner was that he was indeed scheduled to attend training on 21 June 2010. He however failed to attend it as it was his day off and no prior arrangements had been made with him to be at work on his day off. The charges initially preferred against him were withdrawn as a meeting was arranged with management for 24 June 2010 to discuss issues surrounding work hours and training hours. The charges were nevertheless reinstated, and he was subjected to a disciplinary enquiry.

[21] The Commissioner's conclusions were as follows;

21.1 The dismissal was procedurally fair and there was no substance to the allegations that the presiding officer of the enquiry was junior to the

initiator and had been intimidated into dismissing Magagula. Magagula was afforded an opportunity to appeal but chose not to. There was no inconsistency in regard to the three employees being given an opportunity to review their position, and since Magagula had refused to commit to future training schedules, this was taken into account when mitigating factors were considered.

21.2 In regards to substantive fairness, the Commissioner found that employees used to attend training as scheduled until NUM shop stewards raised the issue with management. Following discussions with management, training had resumed. Magagula and others were placed on shift C, which was scheduled for training on 21 June 2010. They however did not attend as they alleged that the training was scheduled on their day off. However, the shift roster and hours of work had been explained by management, and they knew that the training shift fell within the total of 45 hours per week they were expected to work.

21.3 Magagula knew that his training was scheduled for 21 June 2010. He further testified that training was important and understood that it was required in terms of the provisions of the Mines Health and Safety Act. At the disciplinary enquiry, Magagula was afforded an opportunity to attend the training, but had refused to commit to it in future

[22] The applicants' grounds of review were that the Commissioner had committed numerous gross irregularities in law and fact, had failed to apply his mind to the evidence presented, and failed to properly analyse the evidence. It is now settled law that an award of a commissioner is susceptible to be reviewed and set aside if it can be shown that the decision arrived at is one which a reasonable commissioner could not have arrived at in the light of the material before him or her¹⁰. In *Herholdt v Nedbank Ltd*¹¹, the Supreme Court of Appeal, per Cachalia JA summarized the review test as follows:

¹⁰ *Sidumo and Another v Rustenburg Platinum Mines and Others Ltd* 2008 (2) SA 24 (CC)

¹¹ [2013] 11 BLLR 1074 (SCA) par 25 at 1084.

'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 enquiry 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 the effect is to render the outcome unreasonable.'

[23] In *Goldfields Mining South Africa (Pty) Ltd v CCMA and Others*¹² the Labour Appeal Court held that in the review court must ask the following pertinent questions;

'The questions to ask are these: (i) In terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process that the arbitrator employed give the parties a full opportunity to have their say in respect of the dispute? (ii) Did the arbitrator identify the dispute he was required to arbitrate (this may in certain cases only become clear after both parties have led their evidence)? (iii) Did the arbitrator understand the nature of the dispute he or she was required to arbitrate? (iv) Did he or she deal with the substantial merits of the dispute? and (v) Is the arbitrator's decision one that another decision-maker could reasonably have arrived at based on the evidence?'¹³

And

'Where the arbitrator fails to have regard to the material facts it is likely that he or she will fail to arrive at a reasonable decision. Where the arbitrator fails to follow proper process he or she may produce an unreasonable outcome (see *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* 2006 (2) SA 311 (CC)). But again, this is considered on the totality of the evidence not on a fragmented, piecemeal analysis. As soon as it is done in a piecemeal fashion, the evaluation of the decision arrived at by the arbitrator assumes the form of an appeal. A fragmented analysis rather than a broad-based evaluation of the totality of the evidence defeats review as a process. It follows that the argument that the failure to have regard to material

¹² 2014] 1 BLLR 20 (LAC)

¹³ At para 20

facts *may potentially* result in a wrong decision has no place in review applications. Failure to have regard to material facts must actually defeat the constitutional imperative that the award must be rational and reasonable - there is no room for conjecture and guesswork.¹⁴

- [24] In this case, the applicants' grounds of review are without substance. Insofar as the first four questions identified in *Goldfields* are concerned, I did not understand the applicants' case to be that the Commissioner's findings in that regard were found wanting. There are thus no prospects of success that the review court can find that the decision reached by the Commissioner was one that no other reasonable decision maker could come to in the light of the material placed before him. These conclusions are fortified by the following;

The main reason that led to Magagula's dismissal was that he had refused to attend a training scheduled for 21 June 2010. Under cross-examination, Magagula had conceded that training was important, and that the employer had a duty to keep a competent workforce¹⁵. He had accepted that the new plant was delicate and a dangerous area, and it was important for all employees to be competent to do their jobs. This invariably could only be made possible through proper training. He had further accepted that the employer had a right to discipline employees who refused to attend training. He had conceded that he did not attend the training scheduled for 21 June 2010. He had nevertheless testified that the training was scheduled on his off day, that he already had something planned for that day as he was not supposed to be at work. It was nevertheless put to him that Exxaro's witnesses' testimony to the effect that the 21st of June 2010 was not a day off was never disputed in the arbitration proceedings, and to this end, there was no substance to his contention that he was supposed to be off duty on that day.

- [25] Crucial in this case however was the lifeline given to Magagula during the disciplinary proceedings. The other employees similarly charged with him had shown contrition, and had committed to attending the training sessions in

¹⁴ At para 21

¹⁵ Line 4-5 of the record page 110

future. Magagula on the other had remained recalcitrant and refused to make any such undertaking. This can be gleaned from his examination-in-chief where he was asked questions by his representative Mr Radibotseng regarding future commitment to attend training¹⁶. Magagula had conceded that he was asked questions by the Chairperson as to whether he would commit to future training and his response was that he had not made such an undertaking as he could not answer the question then 'as he did not know what would happen to him in the future'. His testimony was further that the other employees received final written warnings whilst he was dismissed because he could not answer whether he was prepared to commit to future training.

[26] In circumstances where Magagula appreciated the importance of the training in the light of Exxaro's operations, and further in view of his own version that he had always propagated for other employees to be trained, it is therefore inexplicable that having failed to attend such training in circumstances where he was supposed to have done so, he would in the course of a disciplinary process, and where afforded a life-line, refuse to make any future commitment to such training. In these circumstances, I fail to appreciate how it can be argued that the Commissioner's conclusions that the dismissal was substantively fair are not reasonable.

[27] The applicants' further arguments surrounding the conclusions of the Commissioner in regards to procedural fairness are equally without merit. The Commissioner had appreciated that he was constrained by the failure of Exxaro to call upon the chairperson of the internal disciplinary enquiry to testify. Central to the dispute in this regard was whether the chairperson, who had reported to the initiator was intimidated into dismissing the applicant. Firstly, it was put to Magagula that he never disputed the evidence of Viljoen the initiator that that Darren Meyer, the chairperson did not report to him. In my view, it is not sufficient to simply make an allegation that a chairperson's findings were influenced in one way or the other, or that the chairperson came to his or her conclusions after being intimidated. It is crucial where such

¹⁶ Page 102 of the transcribed record line 8 - 30

allegations are made that they should be supported by evidence to indicate in what manner the chairperson was intimidated or how he or she was influenced into arriving at a particular decision. Having gone through the record, the only issue that was raised in this regard was that the chairperson reported to the initiator and was therefore influenced or intimidated. Nevertheless, there was no evidence to indicate in what material respects this was the case.

[28] The applicants' contentions in regards to the appeal procedures are equally without merit. It was common cause that Magagula was represented at the appeal hearing by a NUM regional organiser, who appeared to be only interested in a verdict rather than making submissions as requested by the appeal chairperson. No new information was presented at the appeal, and in the light of Magagula and his representative's approach to those proceedings not to present anything new, there is no basis for any conclusion to be reached that they were not afforded an opportunity of an appeal process.

[29] A further ground of review in this regard related to inconsistency in the application of the rule in that the other employees who were jointly and contemporaneously charged with Magagula were not dismissed. Clearly this ground has no merit in the light of the conclusions reached that Magagula and others were afforded an opportunity to commit to future training. Magagula had confirmed that he did not know what the other three employees said in the appeal hearing that led to them not being dismissed. Nevertheless, it was not in dispute that the other employees had committed to future training, whilst he had bluntly refused to do so. In those circumstances, there can be no substance in the contention that he was treated differently when he had rebuffed the opportunities given to him to show contrition and to commit to attend training in future.

[30] In the light of the above factors, and having taken into account the grounds of review as advanced by the applicants, there are no prospects that a finding can be made that the decision arrived at by the Commissioner was one that no other reasonable Commissioner could have arrived at in the light of the material before him.

[31] I have had regard to the excessive nature of the delay in filing and serving the review application, the failure to proffer any reasonable or acceptable explanation in that regard, the lack of prospects of success on the merits, and the prejudice that would be caused to Exxaro in the event that condonation was to be granted. In the light of the factors, it is my view that it would not be in interests of justice to grant the application for condonation. I have also had regard to considerations of law and fairness, and I am of the view that a cost order is not warranted in this case. Accordingly, the following order is made;

Order:

- i. The application for the late filing of the review application is dismissed.
- ii. The application to review and set aside the arbitration award issued by the Second Respondent under case number LP4891-10 dated 10 June 2010 is dismissed.
- iii. There is no order as to costs.



TLHOTLHALEMAJE, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: Mr. P Motaung of Nomali Tshabalala Attorneys

For the Third Respondent: Mr T Kubayi of AHI Employers Organisation

LABOUR COURT