



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR2962/12

In the matter between:

**SOUTH AFRICAN MUNICIPAL WORKERS UNION
obo J SEBOLAO**

Applicant

and

CITY OF MATLOSANA LOCAL MUNICIPALITY

First Respondent

SOLOMON MODIPA NO

Second Respondent

SOUTH AFRICAN LOCAL GOVERNMENT

Third Respondent

BARGAINING COUNCIL

Delivered: 29 September 2015

JUDGMENT

TLHOTLHALEMAJE, AJ

Introduction:

- [1] The Applicant approached the Court seeking an order reviewing and setting aside and/or correcting the arbitration award issued by the Second Respondent (Arbitrator) under case number NWD011208 dated 23

September 2012. In the award, the Arbitrator concluded that the dismissal of Sebolao was procedurally and substantively fair.

Preliminary issues:

- [2] The Applicant's Notice of Application together with a founding affidavit in respect of the review application was filed and served on 30 November 2012. The Applicants' contention is that the First Respondent had not proffered a reasonable explanation for the delay in filing its opposition as no condonation application was filed. An application was subsequently made on 15 May 2014 to set the matter down on an unopposed roll. The matter was then set down on 3 March 2015 in terms of a notice sent to the parties on 4 June 2014. Only on 12 February 2015 did the First Respondent file its Notice to Oppose. No answering affidavit was however filed until on 2 March 2015.
- [3] On 3 March 2015, the matter was postponed to 30 April 2015, with an order that the heads of argument had to be filed in accordance with the rules of this court and the Practice Manual. Costs occasioned by the postponement were reserved.
- [4] In the answering affidavit, in which condonation was also sought, Mabuda, the Acting Municipal Manager of the First Respondent averred that the application for review was not received, and that the First Respondent only became aware of it after receipt of the notice of set-down of the matter on the unopposed roll. This notice came to the attention of the First Respondent during January 2015. The First Respondent's attorneys of record were then instructed to attend to the matter.
- [5] After a perusal of the Court's file, it was established that the review application was sent to the First Respondent via facsimile on 30 November 2012. Mabuda nevertheless denied that the application was received and referred to a copy of a register of documents received at facsimile number 018 487 8594. Mabuda further averred that the facsimile machine with this number had been out of order for some time and was currently out of use.

- [6] In the replying affidavit, it was pointed out that the answering affidavit was delivered hopelessly out of time and the First Respondent had failed to properly apply for condonation for such delivery of the answering affidavit. The Applicants also denied that the First Respondent could not have received the application for review and reference was made to the service affidavit deposed to by the Applicants' attorney of record, Mr Xolisa Ngako.
- [7] Other than disputing that the application was not received, it was further pointed out that the First Respondent's Human Resources Manager, Diseko, had actively participated in the reconstruction of the record of the hearing that was held on 3 June 2013 under the auspices of the Third Respondent, and was clearly aware of the purpose of the reconstruction exercise. Furthermore, it was contended that the First Respondent was served with a notice in terms of Rule 7A on 13 November 2013. To this end, it was submitted that the allegation that the First Respondent was not aware of the application for review was a blatant lie.
- [8] It was also submitted that the First Respondent had also lied about the date it had received the notice of set-down from the office of the Registrar of this Court following a request to place the matter on an unopposed roll. In this regard, it was pointed out that the notice of set-down was received on 4 June 2014, and not in January 2015 as alleged.

Evaluation:

- [9] Rule 7 (9) of the Rules of this Court provides that any person wishing to oppose the granting of the order prayed in the notice of motion must, within 10 days after receipt of the notice of amendment or notice that the applicant stands by its notice of motion, deliver an affidavit in answer to the allegations made by the applicant. In circumstances where a party did not comply with the time frames set out in these provisions, it is expected of it to file a substantive application for condonation, and fully set out the circumstances that led to the time frames not being complied with. Accordingly, this court in line with the provisions of Rule 12 (3) may on good cause shown, condone non-compliance with its Rules.

- [10] Whether a party has shown good cause is dependent on a consideration of a variety of factors including those set out in *Melane v Santam Insurance Co. Ltd*¹ in the following terms:

“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”

- [11] Other factors to be considered is whether it was in the interests of justice to grant condonation²; whether the application for condonation was brought as soon as the party which applies for it became aware of the need to do so³. To enable this court to properly exercise its discretion, a party seeking condonation must set out all the facts and circumstances relating to the delay, and most importantly, must provide a satisfactory explanation and account for each period of the delay. Any period of delay that is unaccounted for, will result in an indulgence being refused⁴.

- [12] There are various difficulties with the First Respondent’s application for condonation. The first is that the application is intertwined with the application for review. Rule 11 (1) provides that all other interlocutory application must be brought on notice supported by an affidavit. It was submitted on behalf of the First Respondent during argument that a separate application could not be

¹1962 (4) SA 531 (A) at 532B-E

² See *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others* 2000 (5) BCLR 465 (CC) and also *NEHAWU obo Mafokeng and Others v Charlotte Theron Children’s Home* 2004] 10 BLLR 979 (LAC)

³ *Seatlolo and Others v Entertainment Logistics Service (A Division of Gallo Africa Ltd)* [2011] JOL 27264 (LC)

⁴ See *NUMSA and another v Hillside Aluminium* [2005] 6 BLLR 601 (LC)

filed due to the pressures of time. This is hardly an acceptable excuse in the light of the fact that at the very least, the First Respondent should have known in June 2014 that such an application would be necessary. The fact that the First Respondent was under administration following the suspension of its Municipal Manager does not imply that its operations came to a standstill, and no one was available to deal with matters before this court. From the facts of this case, it can hardly be said that the Municipal Manager was involved in this matter to the extent that it was required of him or her to personally attend to condonation application. Any other official within the HR of the Municipality could have attended to the matter.

- [13] The second difficulty is that the opposing affidavit was filed on 2 March 2015, whilst the review application was filed on 29 November 2012. The delay in filing the answering affidavit is over two years, which is excessive in the extreme.
- [14] The third difficulty with the application for condonation is that the explanation proffered for the delay is neither acceptable nor satisfactory. The review application was served by facsimile on the First Respondent on 30 November 2012. There is a service affidavit to confirm that indeed the application was properly served on the First Respondent. The First Respondent nevertheless denied having received the application and relied on a register of its facsimile in regards to documents received.
- [15] It is however not known who had compiled that register, and the information in that regard cannot be taken on face value, more particularly in the light of the further excuse by the First Respondent that its fax machine was either out of order or not in use. No confirmatory affidavits were filed in support of the register or to the effect that indeed the fax machine was out of order. The period surrounding when the machine was not working is unknown, nor was it established as to when it was serviced and became fully functional. There is a contradiction between stating that a document was not received on the basis of a register of documents received, and an allegation that the fax machine was out of use.

- [16] A further difficulty with the First Respondent's explanation for the delay and its averment that it was not aware of the application is that on the Applicant's contention, a process to reconstruct the record was embarked upon by both parties, with the First Respondent's Human Resources Manager being involved in that process. In my view, it is improbable that the Human Resources Manager could not have known what the purpose of that reconstruction of the record was. Had it been the First Respondent's case that it was not aware of the review application, it would have at the most, enquired from the Third Respondent on 8 May 2013 when a notice of set-down in respect of the reconstruction of the record was received, or at most, on 3 June 2013 when the parties met for the reconstruction of the record. It is therefore improbable that the First Respondent could not have known of the review application at any time before June 2014 when the notice of set down was sent to it.
- [17] Even more problematic is the First Respondent's submissions in regards to when it became aware of the review application. The notice setting the matter down on an unopposed roll was sent to the parties by the office of the Registrar of this Court on 5 June 2014. Surely the First Respondent must have known at the latest in June 2014 that there was a review application to attend to when it received the notice of set-down. The First Respondent acknowledged that this notice was received, and in my view, it could not have been received in December 2014 when it was sent on 4 June 2014. Mabuda did not state however when this notice was received. Nevertheless the First Respondent had allegedly instructed its attorneys of record to act on the matter. It is however not known when these instructions were issued to the attorneys, or when the attorneys had uplifted the file and what action was taken between 4 June 2014 when the notice of set-down was received and 12 February 2015 when a notice to oppose was filed, including up to 2 March 2015 when the answering affidavit was filed. No attempt was made whatsoever to give an account of the delay for this period.

- [18] In *Moila v Shai N.O. and Others*⁵, Zondo JP (as he then was) had the following to say in respect of an explanation for the delay in filing a review application a year after the expiry period of six weeks:

'I do not have the slightest hesitation in concluding that this is a case where the period of delay is excessive and the appellant's purported explanation for the delay is no explanation at all. I accept that the case is very important to the appellant. However, the weight to be attached to this factor is too limited to count for anything where the period of delay is as excessive as is the case in this matter and the explanation advanced is no explanation at all. If ever there was a case in which one can conclude that good cause has not been shown for condonation without even considering the prospects of success, then this is it. 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, I do not think that it is necessary to consider the prospects of success.'

- [19] The above remarks are even more apposite in this case. The delay in filing the answering affidavit is in excess of two years, which is excessive in the extreme. The explanation proffered by the First Respondent is riddled with inconsistencies, improbabilities and a clear lack of candour. In the words expressed in *Moila*, this 'explanation amount to no explanation at all'. In the circumstances, there is no basis to even consider whether the First Respondent has any prospects of success on the merits of the review application, and accordingly, the interests of justice would dictate that condonation should not be granted.

The review application:

- [20] Sebolao was employed by the First Respondent as a driver with effect from 1 March 2005. He was dismissed on 3 January 2012 following a disciplinary enquiry into allegations of misconduct pertaining to failure to obey reasonable instructions given by a person having the authority to do so, and dishonesty in using Municipality property in an 'unrelated manner'.

⁵ (2007) 28 ILJ 1028 (LAC) at para 34

[21] Having referred an alleged unfair dismissal dispute to the Third Respondent (SALGBC), attempts at conciliation failed and the matter came before the Second Respondent for arbitration. At the arbitration proceedings, evidence was led on behalf of the First Respondent by the Foreman, Amos Nobadula. His testimony was to the effect that on 6 May 2012, he went to an area called Alabama to do inspections. As he drove through Jouberton towards Alabama, he had noticed a big area that had been tarred on the side walk. He had called Sebolao and instructed him to remove the tar from the area. Despite Sebolao's undertaking to do as instructed, he had nevertheless failed to do so. The charge of dishonesty against Sebola pertained to his act of putting tar in an area that he was not assigned to.

[22] Sebolao's testimony was that during the week of 2 to 5 May 2012, he and his team were expected to fill potholes in the Meiringspark area. On 6 May 2012, having filled up potholes, and since they were left with tar that was unsuitable, they had decided to use it on a pavement in Jabulane Street, Jouberton as the area was recently flooded. Sebolao had further testified that he had done nothing wrong in using the tar in the manner he did. Amongst his team he was the only one to be charged. He had accepted that the Foreman had given them an instruction to remove the tar after it was used on the pavement. He nevertheless viewed the instruction as unreasonable in that the removal of the tar would have resulted in further damage to the pavement, and furthermore, once removed, the tar could no longer be used for any other purpose.

Grounds of review and evaluation:

[23] In seeking a review of the award, the Applicants' contention was that the Arbitrator committed gross misconduct in that he came to a conclusion that no reasonable arbitrator could reach in that:

- a) He failed to apply his mind to the fact that none of the First Respondent's witnesses had testified that the tar that was used on the pavement could still be used on the road to fill in the potholes.
- b) He failed to apply his mind to the fact that the instruction issued by the Foreman to remove the tar from Jabulane Street was unreasonable as

this would have caused damage to the pavement, and since further the tar could not be used for any other purpose.

- c) He failed to apply his mind to the fact that even if found guilty, the dismissal was too harsh as Sebolao was a first offender and did not benefit from the alleged misconduct.
- d) He had failed to appreciate the circumstances under which the alleged misconduct took place.
- e) He arrived at the conclusion that a dismissal was fair when there was no evidence of gross insubordination by Sebolao, and only assumed that any alleged insubordination had to be gross. This finding was made in circumstances where Sebolao was not charged and dismissed for gross insubordination.

[24] The review test is that as set out in *Sidumo and another v Rustenburg Platinum Mines Ltd and others*⁶, and in this regard, the question to be posed is whether the decision reached by the Arbitrator is one that a reasonable decision-maker could not reach on the material placed before him or her⁷. In *Herholdt*, the SCA further re-emphasized that the reviewing court should intervene in circumstances where the decision of the Arbitrator is “*entirely disconnected with the evidence*” or is “*unsupported by any evidence*” and “*involves speculation*”⁸. In *Goldfields Mining South Africa (Pty) Ltd v CCMA*⁹ the LAC further summarised the review test as follows;

‘In short: A review court must ascertain whether the arbitrator considered the principal issue before him/her; evaluated the facts presented at the hearing and came to a conclusion which was reasonable to justify the decisions he or she arrived at.’

⁶ [2007] 12 BLLR 1097 (CC), held that [at par 110]:

⁷ See also *Herholdt v Nedbank Ltd* (2013) 34 ILJ 2779 (SCA) at para [12] where the SCA held that the test

“... involves the reviewing court examining the merits of the case ‘in the round’ by determining whether, in the light of the issues raised by the dispute under arbitration, the outcome reached by the Commissioner was not one that could reasonably be reached on the evidence and other material properly before the Commissioner. ... The reasons are still considered in order to see how the Commissioner reached the result. That assists the court to determine whether that result can reasonably be reached by that route. If not, however, the court must still consider whether apart from those reasons, the result is one that a reasonable decision-maker could reach in the light of the issues and the evidence.”

⁸ At par [13]

⁹ (2014) 35 ILJ 943 (LAC) at para [16]

[25] Having had regard to the grounds of review, and further having considered the award and the reasoning of the Arbitrator in the light of the material placed before him, it is my view that the decision arrived at failed the standard of reasonableness envisaged in *Sidumo*. In this regard, it is taken into account that:

- a) The Arbitrator failed to properly evaluate the evidence placed before him that Sebolao and his team had throughout the week in question, been tasked with the filling of potholes. In the course of their duties the condition of the tar had deteriorated, requiring them to use it in an area where they deemed suitable;
- b) Sebolao and his team had then used the tar on a pavement which was within the Municipality's area, and with the sole purpose of alleviating future problems with flooding in the area in question;
- c) Selebalo had testified, which testimony was corroborated by his witness, that they had done nothing wrong as they had a discretion in the course of their duties;
- d) There was evidence placed before the Arbitrator that the instruction issued by the Foreman to remove the tar where it was fitted was an unreasonable one, as this would have resulted in further damage to the pavement, and once removed, the tar would have had no further use;
- e) The Arbitrator also failed to take into account all relevant factors in deciding whether the sanction of dismissal was appropriate in circumstances where Sebolao was a first offender, had not been charged with gross insubordination and where there was no evidence of dishonesty.

[26] In *Head of the Department of Education v Mofokeng and Others*¹⁰ it was held that:

"The failure by an arbitrator to apply his or her mind to issues which are material to the determination of a case will usually be an irregularity. However, the Supreme Court of Appeal ("the SCA") in *Herholdt v Nedbank Ltd* and this court in *Goldfields Mining South Africa (Pty) Ltd (Kloof Gold*

¹⁰ [2015] 1 BLLR 50 (LAC) At para [30]

Mine) v CCMA and others have held that before such an irregularity will result in the setting aside of the award, it must in addition reveal a misconception of the true enquiry or result in an unreasonable outcome.”

- [27] In the light of the omissions pointed out as above and as further ventilated on behalf of the Applicants, it is concluded that the Arbitrator essentially failed to apply his mind to the issues that were before him and thus committed a reviewable irregularity. The issues that the Arbitrator failed to take into account were material to a proper determination of the dispute. The flaws in the reasoning of the arbitrator as evidenced in the failure to apply his mind to the material issues placed before him implies that the arbitrator had undertaken the enquiry in the wrong manner and thus arrived at an unreasonable result. In the end, the failure to properly consider the material placed before him had the distorting effect of rendering the result of the award unreasonable. To this end, the award should be set aside.
- [28] The record of arbitration proceedings is incomplete despite attempts at reconstructing it. Little was achieved in this regard in that the handwritten notes of the Arbitrator are either illegible or difficult to follow. In the circumstances, a fair determination of this dispute requires it to be remitted back to the Third Respondent to be heard *de novo*.
- [29] Having had regard to considerations of law and fairness, and given the First Respondent's conduct in attempting to belatedly oppose this application, and the fact that its application for condonation was declined, it is deemed appropriate that it should be burdened with the costs of this application. Furthermore, costs on 3 March 2015 were reserved after the hearing of the matter was postponed in order to enable the parties to file heads of argument. A perusal of the file indicates that the Applicants filed their heads of argument on 24 February 2015 before the hearing. There is however no indication that the First Respondent filed its heads of argument before 3 March 2015. To the extent that the postponement was occasioned by the failure of the First Respondent to file its heads of argument before 3 March 2015, considerations of law and fairness dictate that it should also be burdened with those costs.

Order:

- a) The application for condonation for the late filing of the answering affidavit is dismissed.
- b) The arbitration award issued by the Second Respondent under case number NWD 011208 dated 23 September 2012 is reviewed and set aside.
- c) The matter is remitted back to the Third Respondent to be heard *de novo* by an Arbitrator other than the Second Respondent.
- d) The First Respondent is ordered to pay the costs of this application, including wasted costs occasioned by the postponement on 3 March 2015.



Tlhotlhamaje, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

On behalf of the Applicants: Mr X Ngako of Ruth Edmonds Attorneys

On behalf of the First Respondent: L Pentz of Waks Silent INC Attorneys

LABOUR COURT