



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not Reportable

CASE NO: P 499/12

In the matter between:

VEVILE SOLOMON JAMA

Applicant

~~and~~ And

TRANSNET BARGAINING COUNCIL

First Respondent

COMMISSIONER DANIE OOSTHUIZEN

Second Respondent

TRANSNET RAIL ENGINEERING

Third Respondent

Heard: 28 January 2014

Delivered: 18 February 2015

Summary: The applicant cannot in an application for condonation of the late filing of his review application seek to rely on the delay he caused by not co-operating with the Justice Centre which offered to assist him.

JUDGMENT

LALLIE J

Introduction

- [1] This is an application to review and set aside or correct an arbitration award of the second respondent (the arbitrator) in which he found the applicant's dismissal both substantively and procedurally fair. It is opposed by the third respondent.

Factual background

- [2] The applicant was employed by the third respondent until his dismissal on 27 July 2011. On dismissal, he was a senior technical worker. On 21 February 2011, the applicant submitted a medical certificate in which his doctor ordered that he be removed from working in a noise zone immediately and permanently owing to hearing loss. The third respondent complied and moved the applicant temporarily to a different position while looking for a permanent one. The applicant was not pleased with his new position. He was on sick leave from 6 to 20 June 2011 and from 20 to 27 June 2011 and presented medical certificates for both periods. He did not return to work after 27 June 2011. The third respondent asked the applicant to submit medical certificates justifying his absence from work. He submitted none. He did not heed the Respondent's warning that should he not report for duty on 23 July 2011, his contract of employment would be terminated for misconduct. The applicant was eventually dismissed. He challenged the fairness of his dismissal at the first respondent where the second respondent (the arbitrator) issued the award which is the subject matter of this application.
- [3] In terms of section 145 (1) (a) of the Labour Relations Act 66 of 1995 (the LRA), the applicant should have filed this application within six weeks from the date on which the award was served on him. He submitted that he became aware of the award on or about 3 January 2012 and his application was filed on 25 October 2012. His version is, therefore, that his application is about eight and a half months late. The award is dated 15 December 2011 and the third respondent submitted that the application was in fact filed 10 months late. The applicant filed a condonation application simultaneously with his application for review. The condonation application is also opposed by the third respondent.

- [4] For the condonation application to be successful the applicant had to show good cause and in so doing he had to prove, *inter alia*, that he had a reasonable explanation for the delay, good prospects of success, the importance of his case, and prejudice on the respondents. The extent of the delay is also relevant. In this regard see *Melane v Santam insurance Co Ltd*.¹ In *F v Minister of Safety and Security and another (Institute for Security Studies, Institute for Accountability in Southern Africa Trust and Trustees of the Woman's Legal Centre as amici curiae)*,² the court added the interests of justice as a factor to be considered as follows:

'It is now trite that condonation will be granted if it is in the interests of justice to do so, and if there appear to be reasonable prospects of success on appeal. Factors to be considered with regard to the interests of justice include the reason for the delay, and the extent of the prejudice, if any, that was suffered by the other party.'

- [5] The applicant himself conceded that eight month's delay is excessive. The explanation forwarded by the applicant for the lateness of his review application is lack of financial means to enlist the services of an attorney. He applied for legal aid at the Uitenhage Justice Centre which informed him in a letter dated 28 May 2012 that he qualified for legal aid. He was, however, assisted by a non-governmental organisation, Ilida, which referred his dispute to the CCMA instead of referring it to the Labour Court. He attended the Uitenhage Justice Centre offices on 8 June 2012 where he consulted with an attorney who asked him to bring all the relevant documents which were at that stage under the control of Mr Randall, an attorney he had consulted shortly after receiving the arbitration award. He was informed by the CCMA in a letter dated 27 June 2012 that it lacked jurisdiction to entertain his dispute. Sometime in July 2012, the applicant visited the Uitenhage Justice Centre to arrange a consultation with the relevant attorney. The attorney was too busy to consult with him and he never contacted him for a further consultation. In August 2012, Mrs Banda of Ilida promised the applicant that he would approach Ilida's attorneys to assist him but he waited in vain for such help. In

¹ 1962 (4) 5318 (A).

² (2012) 23 ILJ 93 (CC) at para 28.

October 2012, the applicant visited the offices of the Labour Court where he was directed to the Port Elizabeth Justice Centre for assistance. He received the assistance and his first consultation was held on 22 October 2012. The applicant submitted that he never intended abandoning this matter.

- [6] Opposing the application, the third respondent submitted that the applicant waited for four months after receiving the award before seeking assistance from the Justice Centre on 28 May 2012. This allegation is factually incorrect. Having been told that he qualified for legal aid, the applicant took too long to furnish the Justice Centre with the relevant documents. He only returned in July 2012 for consultation and provided no explanation for the delay. He also failed to file the relevant confirmatory affidavits. The third respondent submitted that the applicant's impecuniosity should be disregarded as he was aware that he could seek help from an NGO, the CCMA and the Justice Centre. It further submitted that the applicant should not be allowed to hide behind the conduct of both Ilida and the Uitenhage Justice Centre and that the applicant's conduct is inconsistent with his allegation of his intention not to abandon this matter.
- [7] The reason for the delay is a relevant factor in determining whether it is in the interests of justice that condonation be granted. It is not apparent from the reasons provided by the applicant that he, at all times, intended to pursue this matter. I have considered that the applicant was unable to pay the attorney he approached shortly after receiving the award. Our courts do not deny a litigant audience only on the grounds of indigence. I find the explanation of his inability to pay his attorney reasonable from the period 3 January 2012, when he was made aware of the award to the date when he took the decision that he needed to look for alternative assistance owing to financial reasons. That date has, however, not been disclosed. He also did not disclose the date on which he approached Ilida for assistance. He only states that he got assistance and was informed in the letter dated 27 June 2012 that the CCMA had no jurisdiction to arbitrate the dispute Ilida had assisted him refer. He further does not disclose when he applied for assistance from the Uitenhage Justice Centre, he merely states that he was advised on 28 May 2012 that he qualified for assistance. A further material omission from the applicant's

explanation is what the attorney at the Uitenhage Justice Centre told him in July 2012 after he had been too busy to consult on with him. There was a duty on the applicant to arrange a further consultation but he did not, he set on his rights until in August 2012 Mrs Banda (Banda) promised to arrange further assistance for him. He only took an active step in October 2012, when he made enquiries from the Labour Court. There was a duty on the applicant to take active steps to ensure that his review application was filed within the statutory period alternative to provide a reasonable explanation for filing it late. He was required to explain the entire period of lateness but he only managed to explain a portion thereof. There is a substantial portion of the delay which he failed to explain. A proper reading of his explanation reflects that even after he had been informed by the Uitenhage Justice Centre that his application for legal aid had been successful, he failed to play his part. He even conceded that he had no explanation for a substantial part of the delay. The applicant forwarded no explanation for not filing Banda's confirmatory affidavit. His evidence pertaining to her participation in his efforts to get assistance remains hearsay. The absence of the confirmatory affidavit of the attorney who assisted the applicant at the Uitenhage Justice Centre is also not explained. Of significance is that the applicant's papers were drafted at the Port Elizabeth Justice Centre which could approach the attorneys at the Uitenhage office. The evidence relating to that attorney will therefore suffer the same fate as Banda's. The applicant sat on his rights and has himself to blame for the excessive and explained delay. His explanation is unreasonable.

- [8] The applicant submitted that he has good prospects of success in the review application in that the arbitrator committed gross irregularities which included his failure to play an inquisitorial role to assist him. He failed to apply his mind to the true nature of the dispute before him. He also failed to determine whether the applicant had breached the third respondent's policy and failed to consider the appropriateness of the sanction of dismissal. The third respondent denied and submitted that the arbitration award is reasonable and the grounds the applicant sought to rely on are untrue and unfounded. The applicant has good prospects of success because if the allegations he has

made pertaining to prospects of success are proved, his review application could be successful.

- [9] Lastly, the applicant submitted that the prejudice that he is currently suffering and stands to suffer in the event of the refusal of this application out-weighs by far any actual and potential prejudice to the third respondent. He remains unemployed and finds it difficult to find alternative employment as a result of the hearing loss caused by unfavourable working conditions and resulted in his dismissal. The third respondent submitted that granting this application would be unfair to it owing to the inordinate delay in the filing the review application as well as the absence of prospects of success. It will suffer the prejudice of having to bring witnesses to the Labour Court and defend an opportunistic, frivolous and vexatious case. It further submitted that the applicant did not deal with the issue of the importance of his case which is important to it as it considers allegations of unfair dismissal in a serious light.
- [10] A consideration of all the circumstances of the applicant's case reflects that the applicant has failed to establish good cause. He failed to provide reasonable explanation for the delay. He left substantial and material parts of the delay unexplained. As the party who seeks an indulgence, he should have been more candid. In the absence of a good explanation for the delay, his good prospects of success do not help him.³ The applicant did not disclose the importance of this case. While I accept that he will suffer more prejudice than the third respondent because he will lose his right to be heard should this application be refused, he is the author of his own inconvenience and therefore cannot seek to rely on it. He failed to play his part after being offered assistance by the Justice Centre which he denied the opportunity to assist him file his review application earlier. The prejudice that the third respondent will suffer as a result of the delay cannot be underestimated. This Court has a duty to do justice to both parties. The application can in these circumstances not succeed. As the condonation application has been denied, the review application is not properly before court and stands to be dismissed.

- [11] In the circumstances, the following order is made:

³ See *Moila v Shai NO and others* [2007] 5 BLLR 432 (LAC).

11.1 The application for condonation is dismissed.

11.2 The application for review is dismissed.

Lallie J

Judge of the Labour Court of South Africa

Appearance

For the Applicant: Mrs Van Staden of Justice Centre

For the Third Respondent: Ms Kazee of Bowman Gilfillian

LABOUR COURT