



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not Reportable

Case no: PR 02/13

In the matter between

EDITH KHOLEKA NGQONDI

Applicant

and

MARION FOUCHE

First Respondent

NELSON MANDELA METROPOLITAN

MUNICIPALITY

Second Respondent

SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL

Third Respondent

Heard: 06 May 2015

Delivered: 8 March 2016

Summary: A condonation application cannot succeed when the applicant has failed to prove prospects of success in the main cause and to provide reasonable explanation for a length delay.

JUDGMENT

LALLIE, J

Introduction

- [1] The applicant approached this court for an order reviewing and setting aside the arbitration award of the first respondent ('the arbitrator') in which she dismissed the applicant's unfair dismissal matter and ordered her to pay the second and third respondents' costs. The review application was filed late and the applicant applied for condonation of the delay. Both applications are opposed by the second respondent.

Factual background

- [2] The second respondent employed the applicant as a senior accountant. Pursuant to allegations of misconduct against the applicant, the second respondent subjected her to a disciplinary enquiry which found that she had made herself guilty of misconduct and dismissed her on 29 December 2010. The applicant appealed against the decision of the chairperson of the disciplinary enquiry but her appeal was dismissed. Aggrieved by her dismissal, the applicant referred an unfair dismissal dispute to the third respondent. The dispute was scheduled for arbitration by the arbitrator on 5 October 2011. The arbitration was held in the applicant's absence and the arbitrator issued the award which the applicant seeks this court to review and set aside.

The award

- [3] Giving reasons for her decision, the arbitrator recorded that the arbitration was scheduled for 5 October 2011, by agreement between the applicant and the second respondent who communicated their agreement to the third respondent. On 3 August 2011, the third respondent informed the applicant

and the second respondent that the arbitration of their dispute would be held on 5 October 2011 at the offices of the third respondent at 33 Heugh Road, Walmer in Port Elizabeth.

[4] At about 08h45 on 5 October 2011, the office of the third respondent informed the applicant, first and second respondent that the arbitration would no longer be held at the scheduled venue but at the second respondent's Labour Relations Division at Fidelity Building. The arbitrator proceeded to the offices of the third respondent to collect the file and observed that the floor of the boardroom which was used for arbitration hearings was under construction and the furniture was all over the place. After the applicant and her attorney, as well as the second respondent had arrived, the applicant's attorney objected to the venue because it was held "in the employer's back yard" and that he had not been consulted about the change of venue. The arbitrator's efforts to persuade the applicant's attorney to accept the new venue were unsuccessful. She then requested the Regional Secretary of the third respondent to change the venue. The boardroom of the Cacadu District Municipality ('the third venue') was then made available. The applicant's attorney intimated that he was satisfied that the arbitration could be transferred to the third venue. When the arbitrator arrived at the third venue, she found the applicant and her attorney standing outside the building. The attorney told the arbitrator that the third venue was not suitable as the power was out. The arbitrator suggested that they go inside the building to have a look but the applicant's attorney told her that he and the applicant had had discussions and had decided to leave. He communicated the decision of the second respondent's counsel. The applicant's attorney insisted that the arbitration be held at the offices of the third respondent and reiterated the decision he had taken with the applicant to leave. The arbitrator pointed out that the attorney was living at the applicant's risk. He responded that he realised it and promised to fight the matter whenever necessary. He said the arbitration could continue in their absence and left with the applicant.

[5] On arrival at the board room of the third venue, the arbitrator found it suitable and unaffected by the unavailability of electricity. The arbitration was held in

the absence of the applicant is in terms of Rule 2.24(2) of the third respondent's Rules. In terms of the same Rules, it is the third respondent which has the power to determine arbitration venues. The second respondent's counsel sought an order for the dismissal of the applicant's matter with costs owing to the applicant's absence from the arbitration. The arbitrator dismissed the matter and ordered the applicant to pay the third respondent's costs in respect of 5 October 2011 in the amount of R3 300.00. She further ordered the applicant to pay the wasted costs of the second respondent in respect of 5 October 2011, on scale C of the Magistrates' Court tariff and on the attorney and client scale.

Condonation

- [6] The review application should have, in terms of section 145 of the Labour Relations Act 66 of 1995 ('the LRA'), been filed within 6 weeks of the date that the award was served on the applicant. The arbitration award was served on the applicant's attorneys via fax on 13 October 2011. It is out of time by 505 days. The reason proffered by the applicant for the delay is that after receiving the award, she filed her review application at the High Court. Her application was opposed by the second respondent who, in the answering affidavit the second respondent filed on 29 November 2012, objected to the jurisdiction of the High Court. The High Court application was set down for hearing 25 April 2013. While the applicant's attorney was preparing for the hearing, he researched the law and came to the conclusion that the second respondent's objection to the jurisdiction of the High Court was well-founded. The applicant then withdrew her review application at the High Court and filed it at the Labour Court on 12 April 2013.
- [7] In the answering affidavit, the second respondent alleged that the applicant had failed to file a substantive condonation application for the substantial delay. Her reasons for the delay were both insufficient and impermissible. The second respondent submitted that it will suffer great prejudice should the condonation application be granted as some witnesses may not be available and the memories of others may have faded. The delay offends the objective of the LRA which requires disputes to be resolved expeditiously. The second

respondent submitted that it has continued to arrange its affairs according to the outcome of the disciplinary enquiry. It pointed out that the applicant failed to deal pertinently with her prospects of success in the review application, which, in the second respondent's view, do not exist.

- [8] In her replying affidavit, the applicant dealt with the issues raised by the second respondent in the answering affidavit. The second respondent responded by filing an application to strike out paragraphs 9, 10, 11, 12, 13, 26 and 27 of the applicant's replying affidavit and her attorney's confirmatory affidavit. The basis of the application is that the allegations in the impugned paragraphs constituted new matter which should have been included in the founding affidavit. The confirmatory affidavit by the applicant's attorney confirms the impugned paragraphs. Although all the submissions that the applicant sought to rely on in her condonation application should have been contained in her founding affidavit, nothing prevented her from replying to the allegations made by the second respondent in the answering affidavit. The impugned paragraphs are responses to allegations made in the answering affidavit and there is, therefore, no basis to have them struck out. The application to strike out can, therefore, not succeed.
- [9] The applicant sought to rely on a number of cases including *Melane v Santam Insurance Co Ltd*¹ where it was held that in exercising the discretion whether condonation should be granted the court needs to consider a number of interrelated factors which include the degree of lateness, explanation thereof, prospects of success and the importance of the case. The court further found that if there are no prospects of success there would be no point in granting condonation. Reliance was further made on the minority judgment of Zondo J in *Grootboom v NPA and Another*² where he was the only Judge who found that condonation should be granted. The decision of the court on failure by litigants and their lawyers to comply with rules of court was expressed in paragraph 34 of the same judgment as follows:

¹ 1962 (4) SA 531 (A) at 532C-E.

² [2014] 1 BLLR 1 (CC).

‘... One gets the impression that we have reached a stage where litigants and lawyers disregard the Rules and directions issued by the Court with monotonous regularity. In many instances very flimsy explanations are proffered. In others there is no explanation at all. The prejudice caused to the Court is self-evident. A message must be sent to litigants that the Rules and the Court’s directions cannot be disregarded with impunity.’³

[10] The extent of the delay is 505 days. It is excessive and requires reasonable explanation. The applicant’s explanation is that her attorney made an error in interpreting the law. Even if the delay from the date that the applicant filed the review application at the High Court can be overlooked. When the applicant’s attorney received the second respondent’s objection to the jurisdiction of the High Court, he should have acted diligently and established its validity within reasonable time. He took five months to do the verification exercise. He was dilatory in executing the applicant’s review application and his lack of diligence is inexcusable. In *Waverley Blankets v Ndimma and Others*,⁴ a decision which was referred to with approval in *SA Post Office Ltd v Commissioner for Conciliation Mediation and Arbitration and Others*,⁵ it was held that even where an attorney’s neglect of his client’s affairs may be inexcusable and despite the blamelessness of the client, condonation would still be refused.

[11] The applicant submitted that her prospects of success are very strong and that the court would not non-suit or penalise her on account of a *bona fide* error her legal representative may have made in interpreting the law on the complicated legal question of the High Court’s jurisdiction on reviews. In order to establish prospect of success, the applicant must make allegations, which if proved, will make her review application successful. The applicant submitted that the arbitrator erred in holding the arbitration in her absence. She sought to rely on Rule 2.11 of the third respondent’s Rules which reads as follows:

‘The Council must give the parties at least twenty (20) days’ notice, in writing, of an arbitration hearing, unless the parties agree to a shorter period.’

³ *Ibid* at para 34.

⁴ (1999) 20 *ILJ* 2564 (LAC) at 1145 I-J.

⁵ (2011) 32 *ILJ* 2442 (LAC) at para 22.

The applicant further argued that implicit in Rule 2.11 is that the third respondent was required to give the applicant at least 20 days' notice in writing of the date, time and venue of the arbitration hearing.

- [12] The applicant also relied on Rule 2.30 of the third respondent's Rules which reads as follows:

'2.30 Failure to attend proceedings before the Council

- (1) If a party to the dispute fails to attend or be represented at any proceedings before the Council, and that party –
 - (a) had referred the dispute to the Council, an arbitrator may dismiss the matter by issuing a written ruling...
- (2) An arbitrator must be satisfied that the party had been properly notified of the date, time and venue of the proceedings, before making a decision in terms of subrule (1).'

- [13] The applicant submitted that a necessary jurisdictional fact was absent when the arbitrator issued the dismissal ruling as she lacked the power to issue it. The third respondent failed to give her 20 days' notice of the change in venue. She was only given 15 minutes oral notice of the change of the venue of the arbitration proceedings. The first respondent, in the applicant's view, could not have been satisfied that she had been properly notified of the date, time and venue of the proceedings as required in Rule 2.30 (2) before she issued the ruling dismissing her matter. The second respondent correctly argued that the applicant has no prospects of success in the review application because she initially agreed that the arbitration could be held at the third venue. Her later objection to the third venue was therefore unfounded.

- [14] The applicant was given 20 days' notice of the arbitration in terms of the third respondent's Rules. She agreed that the arbitration could be held at the third venue. She refused to get into the venue to assess its suitability and took a unilateral decision to leave. She was warned by the arbitrator that she was leaving at her own peril. The third respondent's Rules do not provide that parties be given 20 days' notice of the change of venue. When the venue was

changed, the parties had been given their 20 days' notice in terms of Rule 2.11 and it had served its purpose as all the parties were ready to proceed with the arbitration. The Applicant failed to disclose the basis of her entitlement to 20 days' notice of the change of venue of the arbitration proceedings. She, therefore, failed to make allegations which if proved would make her review application succeed. The extent of the applicant's lateness in filing the review application is excessive and she failed to provide reasonable explanation for the delay. She also has no prospects of success in the review application. Her condonation application cannot be granted. In the circumstances, the review application is not properly before court and stands to be dismissed.

[15] In the premises, the following order is made:

- 15.1 The application to strike out paragraphs 9, 10, 11, 12, 13, 26 and 27 of the replying affidavit is dismissed.
- 15.2 The application for condonation of the late filing of the review application is dismissed.
- 15.3 The application for review is dismissed.

Lallie, J

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr Daubermann of Peter Daubermann Attorneys

For the Second Respondent: Advocate Boswell

Instructed by Gray Moodliar Attorneys

LABOUR COURT