



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR 1095/15

Not Reportable

In the matter between:

SAMWU OBO 157 MEMBERS

Applicant

and

PIOTRANS (PTY) LTD

First Respondent

C BRUMMER N.O.

Second Respondent

**SOUTH AFRICAN ROAD PASSENGER
BARGAINING COUNCIL**

Third Respondent

Heard: 08 December 2015

Delivered: 06 January 2016

Summary: Review of a condonation ruling. Application considered on papers in terms of rule 33.10 of the Rules of the Bargaining Council. Found that failure in the circumstances of the case was irregular.

JUDGMENT

MOLAHLEHI, J

Introduction

- [1] This is an application in terms of which the applicants seek to review and set aside the ruling of the second respondent (the Commissioner) made under case number RPNT 2716, 2684 and 2685 dated 26 May 2015, in terms of which their condonation application for the late referral of their alleged unfair dismissal dispute was dismissed.

Background facts

- [2] The individual applicants are all drivers who prior to their dismissal were employed to drive the Rea Vaya buses in the City of Johannesburg.
- [3] It is common cause that the 157 individual applicants embarked on an unprotected strike action at the beginning of 2015. The strike action took the form of the applicants abandoning their buses on 2 February 2015 resulting in a traffic gridlock.
- [4] In an effort to have the applicants abandon their action the first respondent sought the intervention of their union, SAMWU to assist in having the applicants to resume rendering their services. The individual applicants were also according to the first respondent sent short text messages (sms) notifying them of the need to resume their duties with the warnings that failure to do so could lead to disciplinary action being taken against them.
- [5] The applicants were subsequently charged with misconduct relating to the incident of 2 February 2015. The charge included;
- (a) Failure and refusal to drive their respective buses,
 - (b) Refusal to park the buses in the prescribed areas,
 - (c) Sabotage of the services of the third respondent,
 - (d) Leaving the buses unattended and in an unauthorised area,
 - (e) Disruption of the first respondent's operations
 - (f) And failure to act in the interest of the first respondent.

- [6] It is apparent that few of the employees attended the disciplinary hearing and the hearing of the rest of over 150 of them proceeded in their absence.
- [7] The recommendation from the independent chairperson who conducted the disciplinary hearing was that the applicants should be dismissed, which recommendation the first respondent implemented. The applicants were informed on 14 February 2015 that they were dismissed.
- [8] The applicants being aggrieved by their dismissal referred a dispute concerning the alleged unfair dismissal dispute to the CCMA.
- [9] It is common cause that the applicants' referral was defective on several grounds but more importantly because the person who signed the referral did not have the authority to do so. The applicants conceded that the referral was defective and accordingly withdrew it on 29 April 2015.
- [10] It is also common cause that immediately thereafter and on the same day of the withdrawal of the dispute the applicants referred the dispute again accompanied by a condonation application.
- [11] The first respondent opposed the application by filing its answering affidavit on 15 May 2015. It is common cause that the applicants filed their replying affidavit to the first respondent's answer late.
- [12] The Commissioner considered the condonation applicant on the basis of the founding and answering affidavits. The Commissioner issued his ruling dismissing the condonation application on 26 May 2015 which was about 3 days before the applicant filed their replying affidavits; namely 29 May 2015.

The grounds of review

- [13] As indicated earlier the Commissioner considered the condonation application on the papers without inviting the parties to make oral submissions. The applicants contend that this constitutes an irregularity on the part of the Commissioner. According to them the Commissioner should have offered the parties the opportunity to make oral submissions. The applicants further argues that the Commissioner considered the

application only on papers before him when such procedure is not provided for in the bargaining council's Dispute Resolution Procedures.

- [14] The other ground upon which the applicants rely on is that the Commissioner did not consider its replying affidavit in determining the condonation application. In this respect the applicants contend that the Commissioner did not consider the point made that the applicants did not receive the notices of the disciplinary hearing.
- [15] It is further argued by the applicants that had the Commissioner considered the replying affidavit, he would have noted that prospects of success were good.
- [16] Mr Maimane, for the applicants, in his submission regarding the prospects of success emphasised the fact that the applicants were not given proper notice regarding the disciplinary hearing. His emphasis was on the alleged procedural unfairness of the dismissal. He further argued that in not setting the matter down for oral argument the arbitrator committed an irregularity.

The ruling

- [17] The arbitrator indicates firstly in his ruling that the matter was decided on the papers submitted by the parties. This is both the founding and answering affidavit, because at the time the bargaining council had not yet received the applicants' replying affidavit.
- [18] As concerning the degree of lateness the arbitrator found that the delay was excessive for two reasons: firstly that the applicants did not state the degree of lateness correctly and secondly the lack of proper service by the applicants.
- [19] In relation to the issue of prejudice the arbitrator found that the party that would be prejudiced more than the other was the first respondent if the matter was to proceed to arbitration. It appears that his finding is based on the following; the reasoning that the applicants did not avail themselves to the internal remedies, the negative impact that their conduct had on the commuters, the financial and reputational loss that the third respondent has suffered as a result.
- [20] In dealing with the prospects of success the arbitrator found the versions of the parties to be mutually destructive. He then proceeded to resolve the conflicting

versions on the basis of what was said in *First National Bank v Leeuw*,¹ where the Court quoted with approval what was said by the Appellate Division in *National Employers Mutual General Insurance Association v Gany*² where it was held that:

‘Where there are two stories mutually destructive, before the onus is discharged, the Court must be satisfied that the story of the litigant upon whom the onus rests is true and the other false. It is not enough to say that the story told by Clark is not satisfactory in every respect, It must be clear to the Court of first instance that the version of the litigant upon which the onus rests is the true version, and that case absolute reliance can be placed upon the story as told by A Gany’.

[21] In applying the principles in Gany’s above the Commissioner made the following finding:

‘5.3 It is not denied that the applicants’ received notification to attend the respective hearings; the Applicants averred that they received one days’ notice whereas the Respondent submitted that 48 hours’ was given. Nothing prevented the Applicants from appearing at the hearings and requesting a postponement due to their perceived belief that the time period was too short to prepare a proper response.

4.5 I find the Respondent’s submissions in relation to the attempted processes to secure presence of the Applicants at the respecting hearings more probable and that the absence of the majority of the Applicants at the hearings was of their own making and at their peril’.

Legal Principles

[22] It is trite that the test to apply in determining whether to grant or refuse condonation for non-compliance with the time frames is the interest of justice which is determined by having regard to the following factors: (a) the degree of lateness or the extend of non-compliance with the prescribed time frame, (b) the explanation for the lateness or the failure to comply with time frames, (c) prospects of success or *bona fide* defence in the main case; (d) the importance of the case, (e) the respondent’s

¹ (2007) ZAFSHC 31 (29 March 2007).

² 1931 AD 1999 at 199.

interest in the finality of the judgment, (f) the convenience of the court; and (g) avoidance of unnecessary delay in the administration of justice.

- [23] It has been repeatedly stated that as a general rule these factors are not to be determined in isolation of each other but collectively. The exception to this rule is stated by Zondo J in *Grootboom*³ in the following terms:

“However, some of the factors may justifiably be left out of consideration in certain circumstances. For example, where the delay is unacceptably excessive and there is no explanation for the delay, there may be no need to consider the prospects of success. If the period of delay is short and there is an unsatisfactory explanation but there are reasonable prospects of success, condonation should be granted. However, despite the presence of reasonable prospects of success, condonation may be refused where the delay is excessive, the explanation is non-existent and granting condonation would prejudice the other party. As a general proposition the various factors are not individually decisive but should all be taken into account to arrive at a conclusion as to what is in the interests of justice.”

Evaluation

- [24] The test to apply in applications of this nature is that of a reasonable decision maker as set out by the Constitutional Court in *Sidumo*.⁴ The test entails, the review court having to enquire into whether the conclusion reached by the Commissioner is one which a reasonable decision maker could not reach. It has also been accepted that the provisions of s 145 of the Labour Relations Act are suffused in this test.
- [25] The key complaint of the applicants in this matter is that they were not afforded a hearing in as far as their application for condonation is concerned. It is common cause, as indicated earlier, that the matter was considered on papers without scheduling for oral hearing.

³ *Grootboom v National Prosecuting Authority and Another* (CCT 08/13) [2013] ZACC 37; 2014 (2) SA 68 (CC); 2014 (1) BCLR 65 (CC); [2014] 1 BLLR 1 (CC)

⁴ *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 28 ILJ 2405 (CC).

[26] In defending the ruling the first respondent contends that the Commissioner had the power to do that in terms of the rules of the bargaining council.

[27] The scheduling of hearing in an application in the bargaining council is governed by rule 33.9 of the Rules of the bargaining council which reads as follows:

- 33.9 (a) The Council must allocate a date for the hearing of the application once a replying affidavit is delivered, or once the time limit for delivering a replying affidavit has lapsed, whichever occurs first.
- (b) The Council must notify the parties of the date, time and place of the hearing of the application.
- (c) Applications must be heard on a motion roll.

[28] The exception to the above rule is in rule 33.10 of the Rules of the bargaining council which reads as follows:

- 33.10 Despite this rule, the Commissioner may determine an application in any manner it deems fit and, in particular, may have applications determined on the papers as delivered with hearing and agreement.

[29] The wording of the above rule is exactly the same as that of CCMA rule 31(9). The same applies in relation to rule 33.10 of the bargaining council except that in that exception the rule emphasises the power to determine the hearing on the basis of the papers filed with bargaining council. The first respondent's case as I understand it is that the Commissioner in terms of the rule has unfettered discretion to determine an application on papers without having it set down for an oral hearing.

[30] I do not agree with what seems to be the suggested interpretation of clause 33.10 of the rules of the bargaining council by the first respondent. In fact the proper interpretation of the rule is that the Commissioner was supposed to have obtained the agreement of the parties if the matter was to be decided on paper. This was not done and therefore the Commissioner adopted an irregular approach in considering the condonation application only on papers submitted.

[31] In my view taking into account the proper interpretation of clause 33.10 and what was said in *Kungwini Residential Estate & Adventure Sports Centre Ltd v Mhlong NO &*

Others,⁵ the approach adopted by the Commissioner in this matter was irregular. In that case in dealing with failure to give notice of set down, McCall AJA had the following to say:

“However, I do not think that this provision can possibly be relied upon to dispense with the giving of notice to the parties, or at least to the applicant if the respondent is in default, of the commissioner’s intention to hear a matter. For a commissioner to hear and determine an application for condonation without notice to the parties would be to ignore the *audi alterem partem* rule. There is no indication in the papers that any such notice was given to either the third respondent, who had applied for condonation, or the appellant. Although it may be argued that it was not necessary to give notice to the appellant, since, although it was a party as contemplated by Rule 31, it had not given notice of intention to oppose the application (leaving aside Annexure “A”), the same cannot be said about notice to the third respondent. Had notice of the intention to hear the condonation application been given to the third respondent’s legal representative, Hawyes, he would surely have had an obligation to call Annexure “A” to the attention of the CCMA or at least to advise the appellant’s attorneys of the set down of the application. Had that occurred it is unlikely that the CONDONATION RULING would have been made in the absence of both parties and the huge wastage of time and effort which has occurred in this matter would have been avoided.’

- [32] In my view had the third respondent set the matter down for a hearing the possibility exist that the applicants may have come forward and indicated that they were preparing the replying affidavit. This is so when regard is had to the fact that the applicants submitted the replying affidavit three days late. In this circumstances the Commissioner may possibility have directed the applicants to file condonation for the late filing of their replying affidavit.
- [33] It is also possible that had the bargaining council sought the agreement of the parties to have the matter considered on papers to be placed before the Commissioner, the applicants may have indicated that they were in a process of preparing their replying affidavit or request an opportunity to do so in which case they may have been

⁵ [2006] 5 BLLR 423 (LAC).

advised, as a matter practice, to ensure that the replying affidavit is accompanied by a condonation application.

[34] The same applies once the matter was placed before the Commissioner for consideration. In the circumstances of this matter the Commissioner faced with the absence of a replying affidavit and a dispute of facts on the papers before him ought to have directed that the matter be set down for oral submission.

[35] It is apparent from the papers that the parties had representatives who assisted them in the condonation application. It therefore means that the other approach that the Commissioner could have adopted was to direct that the parties should make written submissions which in my view would have satisfied the *audi* rule. Again in all probabilities, had the Commissioner adopted this approach, the applicants may have indicated their wish to file a replying affidavit.

[36] In light of the above I find the ruling of the Commissioner, in refusing the applicants condonation for the late referral of their dispute, to be reviewable. However, whilst noting the need for speedy resolution of the dispute between the parties, I find that in the circumstances of this case the appropriate approach to adopt is to remit the matter to third respondent for consideration afresh.

[37] In as far as costs are concerned I do not believe that it would be appropriate to allow costs to follow the results.

Order

[38] In the circumstances I make the following order:

1. The ruling made by the second respondent case number RPNT 2716, 2684 and 2685 dated 26 May 2015, is reviewed and set aside.
2. The matter remitted to the third respondent for consideration by a Commissioner other than the second respondent.
3. There is no order as to costs.

E, Molahlehi

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv. F R Memani

Instructed by: Nemavhula

For the Respondent: F Malan of Edward Nathan Sonnenberg Inc.