



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR 1173/13

Not Reportable

In the matter between:

SAMWU obo T P GORATI

Applicant

and

SALGBC

First Respondent

AS NTAJOB N.O

Second Respondent

FEZILE DABI DISTRICT MUNICIPALITY

Third Respondent

Heard: 18 November 2015

Delivered: 03 February 2016

Summary: Application for condonation for late filing of a review application.

JUDGMENT

MOLAHLEHI, J

Introduction

- [1] This is an application to review and set aside the arbitration award of the second respondent (the arbitrator) under case number FSD 091212 dated 20 December 2012, in terms of which the dismissal of the individual applicant, Mr Gorati (the applicant) was found to have been both procedurally and substantively fair.
- [2] The applicant has also applied for condonation for both the late filing of the review application and the replying affidavit. Both the review and the condonation applications are opposed by third respondent.

Background facts

- [3] The applicant who was prior to his dismissal by the third respondent employed as the LED officer was charged and dismissed because of the email he had sent to his manager, Ms Moloi. The charges against him reads as follows:

'First Count

- 3.3.1 It is alleged that the employee committed misconduct by sending an e-mail correspondence to his Director Me V Moloi on Tuesday the 05 June 2012 using insolent, provocative, intimidatory and aggressive contents against her and distributed the e-mail to the rest of the personnel.

Second Count

- 3.3.2 The employee committed misconduct by being aggressive intimidatory by intimidating the Secretary of the Director, Me L Mehlape in person in her office in the Municipal Building on Friday the 29 June 2012.'

- [4] The email in question as quoted in the transcript of the arbitration proceedings reads as follows:

"Victoria, your resent attitude towards me is so annoying to say the least. The manner that you have been treating me over the last month is uncalled for and must stop with immediate effect. The way you have treated me at the LED & Tourism Summit in Kroonstad and at yesterday's departmental meeting in front of my colleagues was the first and the last. You don't have to hug and kiss me whenever you see me but your attitude and behaviour towards me leaves much to be desired. It is well known fact in this organisation about the impasse between us and unfortunately I cannot help you

because I do not know where it comes from. You were at one point discussing my private and personal life with my ex-wife and I just want to say to you enough is enough! I am so fed up with this Victoria/Thami issue and something must be done before something drastic happens. I am a human being with feelings and emotions like everybody else in this department and I will never allow you to harass me emotionally like you have done in recent weeks. You either tell you what you want from me or recommend that I be transferred to another department. So that you continue running this department like it is your private company with majority shareholding. You, are the worst manager I have ever worked under, a person who does not know how to differentiate between work and personal issues. Please attend as many leadership and Management courses as possible. Victoria I am so fed up with your attitude."

The arbitration award

- [5] The arbitrator noted that the employee did not deny having written the email and thus the issue he had to determine was whether the language used therein constituted insolence or insubordination. He also noted that the factors which would aggravate the misconduct of this nature would depend on the 'extend of the abuse, its degree and whether the words had been uttered in malice.'
- [6] On the facts concerning the first charge the arbitrator found the language used by the employee in the email to have been 'abusive and directed to a female and that constituted insolence.' It was for this reason that the employee was found to have contravened a rule of the workplace which was 'valid as it restores order and respect for superiors in the workplace.'
- [7] The employee was not found guilty of the second offence because there was no evidence to support the allegation regarding the same.

The grounds for review

- [8] The employee in this matter challenges the arbitration award on the grounds that the arbitrator:
 - a. Failed to appreciate and or give effect to his powers and duties set out in s138 of the Labour Relations Act (the LRA).

- b. Committed gross irregularity and exceeded his powers in the manner he conducted the arbitration proceedings.
- c. Failed to reach a justifiable decision and that the decision is one which no reasonable decision maker could have reached.
- d. Failed to take into consideration in arriving at his decision that the employee had filed a grievance which was ignored by the third respondent.
- e. Failed to take into account that the third respondent had failed to comply with its grievance procedure.
- f. Failed to take into account the conspiracy to have him dismissed.
- g. Misdirected himself in the assessment of the evidence

The condonation application.

[9] The condonation application is set out in the founding affidavit in the following terms:

“8.1 Mr Gorati was represented in the arbitration by Mr Mahlati of SAMWU in Sasolburg

8.2 After the Second Respondent made the award, the first Respondent forwarded it to Regional Office of SAMWU Local Office in Fezile Dabi Municipality apparently during January 2013.

8.3 There was a strike in relation to demarcation in Metsimaholo Local Municipality towards the end of January and the beginning of February 2013. All municipal offices were closed during that period. Another strike for the removal of the mayor took place in February 2013 which affected the receipt of the Arbitration Award.

8.4 The Applicant received the award on 20 March 2013, after the Applicant contacted the First Respondent to enquire about the award. On 22 March 2013, the first award was forwarded to Malatji Attorneys to prepare a review application. Mr Malatji advised the Applicant that he will prepare the application in 10 April 2013, Mr Malatji advised Mr Gorati that he will only file the Application once his fees have been fully paid. He wanted R10 000.00. Mr Gorati could not secure the funds as he is not employed, at the same time the union could not assist him because there was a problem with his membership. On 22 May 2013 the membership was

resolved and Maenetja Attorneys prepared the application and it was launched on 4 June 2013.

8.5 If one has regard to an assumption that the award was provided to Mr Gorati in March 2013, this application is in that event approximately 2 months late. I submit that 2 months is pardonable given the reasons of the delay.”

- [10] In relation to prospects of success the employee states that he has good prospects of success because; ‘... the Commissioner failed to consider grievance lodged by the Employee and the evidence of 1st witness of the employee about conspiracy to dismiss him.’
- [11] As concerning prejudice the employee contends that no party would suffer any prejudice if condonation was to be granted. According to him he would suffer prejudice if condonation was to be refused because he would not have the opportunity to be heard and would lose the opportunity for either being reinstated or re-employed.

Evaluation/Analysis

- [12] It is trite that in an application for condonation the applicant seeks an indulgence from the court to extend the time frame provided for in the rules or legislation. In considering such an application the court has a discretion to exercise which it does by weighing whether it is the interest of justice to grant or refuse the condonation.¹
- [13] In weighing whether it is in the interest of justice to grant or refuse condonation the factors which the court will take into consideration are; the degree of the delay, the explanation, the prospects success and prejudice. These factors, as has been repeatedly stated in case law, are not individually decisive.
- [14] The two factors that however carries considerable weight are, the reasonableness of the explanation and prospects of success.² In order to succeed the applicant is required to give a full explanation as to how the delay occurred and that must cover

¹ See *Grootboom v National Prosecuting Authority & another* (2014) 35 ILJ 212 (CC).

² See *eThekwin Municipality and Ingonyama Trust* (2013) 5 BLLR 497 (CC).

the full period of the delay.³ This requirement is based on the principle that condonation is not there for the mere asking.⁴

[15] In *NUM v Council for Mineral Technology*,⁵ held that:

“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.”

[16] In *Moilola v Shai*,⁶ the court in line with the above principle held that:

“... in case such as this one, it is not necessary to consider the prospects of success and that condonation could be refused no matter how strong the prospects of success are ...”

[17] The explanation proffered by the applicant in the present matter is in my view unsatisfactory for a number of reasons. The first relates to the alleged financial affordability. In this regard the applicant states in his founding affidavit that the delay was due to the fact that he did not have funds to pay his attorney.

[18] The issue of whether financial affordability can serve as an acceptable explanation for the delay received attention in *Gaoshubelwe and Others v Pie Man's Pantry (Pty) Limited*,⁷ where the court in dealing with the issue had the following to say:

“In my view there is no rule that the explanation that the delay was occasioned by lack of funds should automatically lead to the dismissal of the application for condonation. If this was to be the case then in my view the Court would be ignorant of the economic reality that in most instances faces unrepresented dismissed employees. I do however agree that as a general approach that lack of funds should not on its own constitute reasonable explanation. In this particular instance it seems to me that it cannot be disputed that the applicant had based their hopes of access to justice on the union which apparently deserted them without any notice. Faced with this and in the context

³ See *Van Wyk v Unitas Hospital and another (Open Democratic Advice Centre as Amicus Curiae)* 2008 (4) BCLR 442 (CC).

⁴ See *NUMSA and Another v Hillside Aluminium* (2005) 6 BLLR 601 (LC) and *High Tech Transformers v (Pty) Ltd v Lombard* (2012) 33 ILJ 919 (LC).

⁵ (1998) 3 BLLR 209 (LAC) at 211 G-H.

⁶ (2007) 28 ILJ 1028 (LAC).

⁷ (2009) 30 ILJ 347 (LC) (22 July 2008)

where free legal assistance is not readily accessible, it cannot be said that the period of three months is unreasonable regard being had to the fact that the applicant had to contact the affected employees to seek the mandate to include them in the claim, including having to ask them to put forward a contribution for the legal fees."

[19] In *Antoinette Du Plessis v Wits Health Consortium (Pty) Ltd* unreported case JS 122/2011, the court held:

'It is clear from the above and other judgments that a claim of lack of funds on its own cannot constitute reasonable explanation for the delay. In other words, when pleading lack of funds as the cause of the delay, the applicant needs to provide more than a mere claim that the reason for the delay is lack of funds. In this respect, the applicant has to take the court into his or her confidence in seeking its indulgence by explaining "when" not only that he or she finally raised funds to conduct the case but also how and when did he or she raise those funds. The "when" aspects of the explanation is important as it provided the courts with the information as to whether there was any further delay after raising the funds and whether an explanation has been provided for such a delay.'

[20] The above was quoted with approval by Tlhotlhemaje AJ, as he then was, in *Anver Cassem v BASF South Africa (Pty) Ltd* unreported case JS 1176/13. In that case the Learned Judge had the following to say:

[13] It cannot be doubted that this Court is not insensitive to the harsh realities of indigence that ordinarily follow upon a loss of a job. Most hard hit by the consequences of a loss of a job are low income earning former employees. However, when a lack of funds is given as a reason for a failure to comply with time frames, the Court as correctly pointed out by Molahlehi J in *Antoinette Du Plessis* requires more than mere averments that indeed the state of one's destitution prevented him or her from approaching the Court timeously with a claim. In view of the discretion it enjoys, the Court, in the light of these realities would not be averse to granting an indulgence on those grounds, depending obviously on the circumstances of each case.

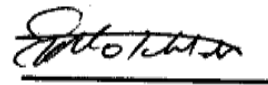
- [14] On the whole however, it is my view that on its own, the excuse surrounding a lack of funds for a failure to timeously institute a claim is not sufficient for an indulgence to be granted.”
- [21] In the present case the counsel for the applicant conceded that there is no indication as to what steps the applicant took to secure financial assistance. He also conceded that the applicant’s papers do not provide the details as to what the nature of the problem related to his membership of the union was and what relationship that had with the filing of the review application on time. It is also not clear in what way the strikes at the municipality contributed to the delay in the filing of the review application. There is also a period of twenty days which the applicant has failed to explain.
- [22] Turning to the prospects of success, I find that they also do not assist the case of the applicant. The applicant did not dispute that the email was disrespectful and that it was not sent at the spur of a moment due to provocation. The email was sent two years after the provocation which he alleges was the cause of him sending it which means he had all the time to consider his cause of action in dealing with his complaint.
- [23] The complaint that he had filed two grievances which never received attention by the third respondent also does not assist him particularly when regard is had to the fact that he was a person employed in managerial position. He provided no explanation as to why he did not check with management as to when his grievances would be considered. It should be noted that the previous time the grievance hearing was postponed due to the fact that he was sick.
- [24] Having regard to the totality of the material that served before the arbitrator it is apparent that the clean disciplinary record which the applicant had was outweighed by seriousness of his conduct. He also showed no remorse after the commission of the offence. His claim that he did approach Ms Moloi to apologise does not assist his case because that evidence was introduced during cross examination. It was not denied that that version was never put to Ms Moloi at the time she testified to afford her the opportunity to respond thereto.
- [25] In addition to the above I am of the view that granting condonation would not be in the interest of justice and that the third respondent would suffer prejudice due to the delay in bringing finality to this matter.

[26] In my view the period of three and half months' delay is excessive particularly when regard is had to the explanation proffered by the applicant which on proper evaluation is not plausible. It follows therefore that the applicant has failed to put before this court a convincing case for the condonation for the late filing of his review application. Accordingly the application stands to fail.

[27] Turning to the issue of costs, I do not believe that it would be appropriate to allow costs to follow the results.

Order

[28] In the premises the applicants' application to review and set aside the arbitration award made by the second respondent under case number FSD 091212 dated 20 December 2012, is dismissed with no order as to costs.



E.M Molahlehi

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv. JL Basson

Instructed by: Maenetja Attorneys.

For the Respondent: Adv. MC Louw

Instructed: Peyer Attorneys

LABOUR COURT