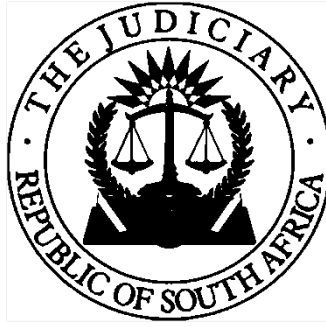




REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR 1279/09b

In the matter between:

**NATIONAL COMMISSIONER OF THE
SOUTH AFRICAN POLICE SERVICE**

Applicant

And.

**SIPHO RADEBE
PUBLIC SERVICE CO-ORDINATING
BARGAINING COUNCIL**

First Respondent

Second Respondent

E. BRITZ

Third Respondent

Delivered: 9 February 2016

Summary: Review proceedings and application for condonation for the late filing of the review application. Condonation application granted. A reviewable irregularity was committed by the first respondent in adjudicating the dispute. The first respondent did not make his own

decision in arbitrating the dispute, he, however cut and pasted the previous arbitration award as if it was his own. Matter is remitted back to the second respondent for arbitration hearing afresh before an arbitrator other than the first respondent. No order as to costs.

JUDGEMENT

NGAKO, AJ

Introduction:

- [1] In this application, the applicant seeks an order in the following terms:
- 1.1. Condoning the late filing of the review application.
 - 1.2. Setting aside on review the arbitration award dated 15 June 2009.
 - 1.3. That the third respondent is not entitled to the reinstatement of her salary contrary to the determination in the arbitration award.
 - 1.4. In the alternative, referring the dispute which is the subject matter of the arbitration award to the second respondent for arbitration afresh by an arbitrator other than the first respondent.
 - 1.5. Directing that the costs of the review application be paid by any of the respondents who oppose the review application.
 - 1.6. Granting such further and/or alternative relief that the court deems appropriate.
- [2] The review application is opposed by the third respondent.

The Condonation application

[3] On 15 June 2009, the first respondent issued an award as follows:

'6. AWARD:

Having found the respondent to be in breach of the collective agreement in question the applicant is entitled to full pay in terms of occupational injury and disease leave from the date that their pay was suspended until such time as an inquiry determines otherwise.'

[4] The applicant alleges that it received the award on 1 July 2009. The award was served by fax.

[5] This allegation is not disputed by the third respondent. The third respondent only notes the contents thereof.

[6] The review application should have been brought on or before 12 August 2009.

[7] The review application was, instead, brought on or about 11 September 2009. This is a delay of almost a month, which is excessive.

[8] The third respondent had, however, indicated that it does not oppose the application for condonation.

[9] The main reason for the applicant's late filing of its review application was that there was some delay in the State Attorney's office in briefing counsel.

The legal principles governing condonation applications

[10] The legal principles governing granting or refusal of a condonation application are well-known and had been enunciated in *Melane v Santam Insurance Co Limited*¹ where the following is stated:

“In deciding whether sufficient cause has been shown, the basic principle is that the Court has discretion, to be exercised judicially upon 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 thereof, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, 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 facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked. I would add that discursiveness should be discouraged in canvassing the prospects of success in the affidavits. I think that all the foregoing clearly emerges from the decisions of this Court, and therefore I need not add to the evergrowing burden of annotations by citing cases.’

Analysis on condonation application

[11] The explanation for the delay given by the applicant cannot be said to be a reasonable explanation; however, the prospects of success, which will be dealt with later in this judgment, compensate for the unreasonable explanation.

[12] It is for this reason that the application for condonation should be granted.

Background facts

¹ 1962 (4) SA 531(A) at 532C-F

- [13] At the time of dispute between the parties, the third respondent was employed by South African Police Service ("SAPS") as an inspector.
- [14] The third respondent was absent from duty for a considerable time as a result of an occupational injury and disease.
- [15] She was instructed by her employer to resume her duties as her sick leave cycle was exhausted but did not do so.
- [16] Her salary was suspended by her employer.
- [17] She was not satisfied with her employer's decision and she referred a dispute to the second respondent.

The arbitration award

- [18] I now turn to deal with the arbitration award which is the subject matter of the applicant's review application.
- [19] The third respondent attached, as annexure to her replying affidavit, an arbitration award dated 14 April 2009 by Mr Pat Stone ("Stone").
- [20] It is clear when comparing Stone's arbitration award and the first respondent's arbitration award that the first respondent did not at all apply his mind to the dispute before him and in making the arbitration award. This is illustrated hereunder.
- [21] The first respondent merely cut and pasted the arbitration award by Stone.
- [22] Paragraphs 3.1; 3.2; and 3.5 of the first respondent's arbitration award, under the heading 'Background to the issue', are exactly the same as paragraphs 3.1; 3.2 and 3.3 of Stone's arbitration award.
- [23] Paragraphs 4.1 -4.9 of the respondent's arbitration award, under the first heading 'Analysis of evidence and argument', are exactly the same as paragraphs 4.1 – 4.9 of Stone's arbitration award.
- [24] Once more paragraphs 5.1 – 5.4 of the first respondent's arbitration award, under the second heading 'Analysis of evidence and

argument', are exactly the same as paragraphs 5.1 – 4 of Stone's arbitration award.

[25] No argument whatsoever was raised by any of the parties before the first respondent regarding his or the second respondent's jurisdiction to hear the matter.

[26] The first respondent clearly never applied his mind to the dispute before the parties and he came to an unreasonable award.

The test for review

[27] The test to be applied in a review application under section 145 of the LRA was enunciated in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*,² as follows:

'The better approach is that Section 145 is now suffused by the constitutional standards of reasonableness. That standard is explained in *Bato Star*: is the decision reached by the Commissioner one that a reasonable decision maker could not reach? Applying it will give effect not only to the Constitutional right to fair labour practices but also the right to administrative action which is lawful, reasonable and procedurally fair.'

[28] The *Sidumo* test was further explained by the Supreme Court of Appeal in *Herholdt vs Nedbank Ltd*³ as follows:

'That 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 arbitrator was not one that could reasonably be reached on the evidence and other material properly before the arbitrator... The reasons are still considered in order to see how the arbitrator 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.'

² 2007 (12) BLLR 1097 (CC).

³ (2013) 11 BLLR 1074 (SCA) at para 12 per Cachalia JA

And

'In summary, the position regarding the review of CCMA award is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in Section 145 (2)(a) of the LRA. For a defect in the conduct of proceedings to amount to a gross irregularity as contemplated by s 145(2)(a)(ii), the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached on particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.'⁴

- [29] The Labour Appeal Court in the matter of *Goldfields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others*⁵ stated the following:

'*Sidumo* does not postulate a test that requires a simple evaluation of the evidence presented to the arbitrator and based on that evaluation, a determination of the reasonableness of the decision arrived at by the arbitrator. The Court in *Sidumo* was at pains to state that arbitration awards made under the Labour Relations Act (LRA) continue to be determined in terms of s145 of the LRA but that the constitutional standard of reasonableness is 'suffused' in the application of s145 of the LRA. This implies that an application for review sort on the grounds of misconduct, gross irregularity in the conduct of arbitration proceedings, and/or excess of powers will not lead automatically to a setting aside of the award if any of the above grounds are found to be present. In other words, in a case such as the present, where gross irregularity in the proceedings is alleged, the enquiry is not confined to whether the applicant misconstrued the nature of the proceedings, but extends to whether the result was unreasonable, or put another way, whether the decision that the arbitrator arrived at is one that falls in a band of decisions to which a reasonable decision maker could come on the available material.'

⁴ *Ibid* at para 25.

⁵ (2014) 35 ILJ 943 (LAC)

And;

'In short, A reviewing court must ascertain whether the arbitrator considered the principal issue before him/her, evaluated the fact presented at the hearing and came to a conclusion that is reasonable.'

Final evaluation and analysis

[30] In my analysis, the first respondent has dismally failed in his duties as an arbitrator and had, in fact, not make any decision.

[31] He was biased in his approach and did not afford parties, especially, the applicant a fair hearing.

[32] In the matter of *Rustenburg Platinum Mines Ltd (Bafokeng Rasimore Platinum Mine) v CCMA and Others*,⁶ the following was stated (per Ngcamu, AJ (as he then was)):

[38] I am satisfied that the applicant apprehended that it was not given a fair hearing as a result of the bias of the arbitrator. In fairness to both parties, this is a matter to be remitted to the CCMA to be arbitrated by a commissioner other than the second respondent. A new commissioner would be able to come with a fresh mind, uninfluenced by the previous hearings.'

[39] In the light of what I have indicated, I find that the commissioner was bias and did not apply her mind to the matter. The award stands to be reviewed and remitted to the CCMA. It is not necessary for me to deal with other grounds for review.

[40] I am of the view that it would be in the interest of justice and fairness that I make no order for costs.

[41] The order I make is the following:

⁶ (2007) 28 ILJ 408 (LC) at paras 38-41.

- (a) The arbitration award issued by the second respondent dated 15 December 2004 is hereby reviewed.
- (b) The matter is remitted to the first respondent for arbitration de novo by another commissioner.
- (c) There is no order for costs.'

[33] I agree with the sentiment expressed by the Learned Acting Judge (as he then was) in the above mentioned judgment.

[34] I am also of the view that there is no need to deal with each and every ground raised by the applicant as the first respondent had committed a patently gross misconduct in relation to his duties as an arbitrator.

Order

[35] In the circumstances, the following order is made:

- 35.1 The condonation application is granted.
- 35.2 The arbitration award issued by the first respondent dated 15 June 2009 is reviewed and set aside.
- 35.3 The matter is remitted back to the second respondent to be heard afresh by an arbitrator other than the first respondent.
- 35.4 There is no order as to costs.

Ngako, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: Advocate M. Botma,

Instructed: by the State Attorney.

For the Third Respondent: Advocate L. van Rooyen –Steenkamp

Instructed by: Schoeman and Associates Attorneys

LABOUR COURT