



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Case no JS 820/06

In the matter between

Applicant

GOODWIN NGCONGO

and

**THE LOCAL GOVERNMENT BARGAINING
COUNCIL**

First Respondent

Second Respondent

MS C WEBB

Third Respondent

CITY OF JOHANNESBURG

Heard: 13 August 2015

Delivered: 14 August 2015

Edited: 24 February 2016

EX-TEMPORE JUDGMENT

VAN NIEKERK J

- [1] This is an application to review and set aside an arbitration award. The application is brought in terms of section 145 of the Labour Relations Act. The applicant was employed as a police officer by the third respondent until his dismissal in July 2005. He disputed the fairness of his dismissal and referred that dispute to the first respondent, the Bargaining Council, for arbitration. The arbitration was conducted by the second respondent. She found in an award dated 20 April 2006 that the applicant's dismissal was both substantively and procedurally fair.
- [2] The applicant says that he received the award on 23 October 2006. On 23 November 2006, he filed an application for review in the form of a statement of claim filed under Rule 6. The matter came before Francis, J, on the 23 September 2008 and was removed from the roll on the basis that the incorrect procedure had been followed. The application, of course, ought to have been brought under Rule 7A.
- [3] On 14 October 2008, the present application was filed. The applicant also filed an application for condonation, the review application being, on his own version, some one year and nine months late. That period of delay, which is inordinate, must necessarily be seen in context, and it is a context in which the applicant has taken some seven years from the date of the filing of this application to have the matter set down for hearing.
- [4] The test for condonation is well-established, the court is required to exercise a discretion, taking into account all the relevant facts, the extent of the delay, the explanation for the delay, the prospects of success and the importance of the case and any relevant prejudice. See *Melane v Santam Insurance Company*

Ltd 1962(4) SA 531(A). The present delay, as I have indicated, is an inordinate one. The statute requires review applications to be filed within six weeks of the award coming to the knowledge of the applicant.

[5] As regards the explanation for the delay, the following principles have been found over the years to be critical for an explanation as to what is regarded as satisfactory. The court must be apprised of all the relevant facts and circumstances relating to the delay. There must be, in addition, an explanation for each period of the delay. The applicant must give a full explanation for the entire period of the delay and it is not sufficient simply to list or record significant events which took place without an explanation for the time that lapsed between these events. In short, the court must be placed in a position where it is properly able to assess the explanation. The explanation in the present instance is one that relates to a mistake and assumption by the applicant's attorney that the provisions of Rule 6 applied and that it was incumbent on him to file a statement of case in terms of Rule 6 in a review application. There is a limit, as the courts have observed, to the extent to which an applicant can rely on the negligence of his attorney in order to escape the consequences of the late filing of process.

[6] In the present instance, even if I were to grant the applicant the benefit of the doubt and to find that the explanation proffered by his attorney, which is nothing short of negligence on his part, is acceptable or somehow should exculpate the applicant, What becomes critical are the prospects of success. In this regard, in my view, the prospects of success are minimal, if they exist at all. The arbitration award is well reasoned, it is one in which the Commissioner rationally assesses the evidence and comes to a conclusion which, in my view, manifestly meets the threshold of reasonableness which is to be applied.

[7] The grounds for review in the present instance are critical because it is on this basis that the prospects of success must necessarily be assessed. The grounds for review are simply that the arbitrator erred in making particular findings. The case that is made out appears to be that the arbitrator ignored certain evidence or gave undue weight to particular evidence. In short, the case is that the

arbitrator erred in overlooking the testimony of Inspectors Bosch and Burger and that the arbitrator erred in rejecting the evidence of the applicant. The arbitrator made a credibility finding against the applicant. She found that his version was not credible and that it ought to be rejected. Given the test that applies, that enunciated by the Supreme Court of Appeal in *Herholdt v Nedbank* and prior to that *Sidumo v Rustenburg Platinum Mines*, a decision of the Constitutional Court, Commissioners are allowed to err, Commissioners are allowed to be wrong Commissioners are not permitted, however, to reach decisions that fall outside of a band of decisions to which reasonable decision makers could come on the available material. There is nothing in the present application that serves to assert that the outcome of the proceedings under review fell outside of that band and in that, or that being so, the applicant has simply failed to make out a case for review on the basis of the applicable principles.

[8] So in the face of an inordinate delay in filing the present application, an explanation for a delay, in respect of which, which as I have indicated, I am prepared to grant the applicant the benefit of the doubt and regard as a neutral factor, the fact that the applicant's prospects of success are non-existent, has the consequence that the present application stands to be dismissed. In this regard, I must point out that one of the applicant's co-employees, who was dismissed at the same time and who was also a party to the arbitration proceedings, separately sought a review and set aside the award that is the subject of these proceedings, and on the 12 October 2009, Freund AJ dismissed that application with costs. Since the award withstood scrutiny by this court on that occasion, I fail to see why the result would be any different in the present instance.

[9] I need to say something about review applications. The statute is designed to ensure the expeditious resolution of labour disputes. This court is often reproached by the Supreme Court of Appeal and the Constitutional Court for what have been termed "systemic delays" in the resolution of labour matters. In some instances, this court as an institution, must take some responsibility for those delays. But the present instance is one in which the applicant, as I have

indicated, was dismissed some ten years ago, these papers were filed some seven years ago and he now seeks the intervention of this court. The practice manual applicable in this court records that applications for review are not unlike urgent applications and it is incumbent on an applicant in a review application to act with due diligence. The applicant in the present instance has failed to do so, and given the degree of the delay and his failure to offer any explanation for his failure to prosecute this application with due diligence, is in my view, in itself a basis on which the application should be dismissed, however, I make no decision in that regard.

[10] I now come to the issue of costs, I was advised from the bar that the applicant has been unemployed since his dismissal, and it would seem to be in those circumstances that an order for costs would be meaningless. In any event, insofar as the blame for the delay is concerned, this seems to be only or partially the fault of his attorney. So in those circumstances, and given the broad discretion that this court has in terms of section 162 of the Act, I do not intend to make any order for costs.

The order then is as follows:

1. The application is dismissed.
2. There is no order as to costs.

ANDRÉ VAN NIEKERK

JUDGE OF THE LABOUR COURT