



THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not reportable

Case no.: PR 106/14

In the matter between

MINISTER OF POLICE

Applicant

and

**SECURITY SECTORAL BARGAINING
COUNCIL**

First Respondent

JOHN ROBERTSON N.O

Second Respondent

**SAPU OBO CAPTAIN T VAN GRAAN
AND 26 OTHERS**

Third Respondent

Heard: 1 June 2015

Delivered: 1 June 2015

Edited: 24 February 2016

EX-TEMPORE JUDGEMENT

VAN NIEKERK, J

- [1] This is an application to review and set aside an arbitration award dated 20 January 2014, under case number PSSS737-12/13. At issue before the Arbitrator was a dispute concerning the application and interpretation of the SSSBC Agreement 1 of 2010, with regard particularly to a special overtime allowance of R700.00 per day. The dispute concerned the Applicant's obligation, if any, to pay the allowance to the Third Respondent, for 18 and 19 May 2011.
- [2] The Applicants in the arbitration submitted that they performed special overtime duties from 04h45 on 18 May 2011, to 03h00 on 19 May 2011 and that they had accordingly performed overtime over two consecutive days and were thus entitled to payment of the overtime allowance of seven hundred Rand for each day.
- [3] The Respondent in the arbitration proceedings, the Applicant in the present proceedings, submitted that in effect, that the Third Respondent had worked one continuous shift and that there was no overtime worked for effectively three hours of work performed on 19 May 2011. The submission, as I understand it, was that the Third and Further Respondents had completed their shift which commenced on 18 May 2011 and that they were accordingly not entitled to payment of the overtime allowance for the additional day.

- [4] The Arbitrator made reference to the wording of the agreement and in effect, decided in paragraph 10.5 of his award that the word 'day' is not defined but that it was generally accepted that the meaning of 'day' is a period of twenty-four hours that commences on the expiry of the previous day at 00h00. He concluded the following at 10.6:

“Although the employees worked one continuous shift, this shift extended from one day into another day. In other words, the employees performed special overtime duties on two days, i.e. 18 May 2010 and 19 May 2010 and are accordingly entitled to the special duty overtime allowance for two days”.

- [5] The application for review was filed late. The Applicant has applied for condonation. The Applicant states that the award was received on 13 February 2014, despite the fact that the award was dated 20 January 2014. The date on which the award was received is not in dispute and I accept for present purposes, that it was indeed received on 13 February 2014.
- [6] The deponent to the Founding Affidavit, who provides the explanation for the delay, is one Colonel Lunga Mkalipe, who describes himself as being, “in charge of arbitration matters within the entire Eastern Cape Province”. Thus described, one might expect that Colonel Mkalipe has an intimate knowledge of the procedures regarding the filing of Review applications and that he is aware of the six-week time limit established by Section 145 of the Labour Relations Act. What he says is that after receipt of the award on 13 February 2014, he perused it and discussed same with the Head Provincial

Legal Services, one General Billet. It is not apparent from the Founding Affidavit precisely when this discussion took place.

[7] The next intimation of any activity in this matter is the averment to the effect that on 24 March 2014, almost six weeks later, Colonel Mkalipe forwarded a letter to the SAPS Head Office, seeking authority to instruct the State Attorney to review the award. That authority was obtained two days later, on 26 March 2014. He then says that he instructed the State attorney to act on behalf of the applicant and to prepare the review application.

[8] The deponent says that on 27 March 2014, the very next day, he received a letter from the State Attorney, seeking a mandate to brief Counsel. He responded to that letter on 2 April 2014 and advised the State Attorney to go ahead and appoint Counsel. There is then an averment to the effect that before the brief was forwarded to Counsel, the parties attempted to resolve the matter without resorting to litigation. The averment is as follows:

“The Third Respondent’s members undertook to provide necessary proof that they had worked the two-day shift and therefore they were entitled to payments for two days in terms of the collective agreement. No positive results were achieved.

The brief was then forwarded to Counsel on 22 April 2014”.

[9] In the Answering Affidavit filed by the Third Respondent, the contents of this paragraph are specifically denied. The Respondents go on to say that the Applicant in his Founding affidavit, did not dispute the fact that members of the Third Respondent performed duties on 18 and 19 May 2011, therefore

this reason cited as a reason for lateness of the Applicant's review application does not make sense". In the face of the denial that there was an attempt to resolve the matter without resort to litigation and that this somehow contributed to the delay in filing the review application, the Replying Affidavit is completely silent. It makes absolutely no reference to paragraph 7.4.1 at all.

[10] In accordance with the applicable legal principles, this Court must therefore accept the terms of the Answering Affidavit as correct, they being undisputed in the Replying Affidavit. On that basis, I cannot accept the content of paragraph 16, in other words, that this matter was delayed by some attempt to resolve the matter between the parties without resort to litigation.

[11] What follows after that is an averment to the effect that the deponent to the Founding Affidavit, was out of the office and involved in National and Provincial elections. The period during which the deponent was out of the office, and why he was unavailable to consult with Counsel, full knowing, it would seem to me that this matter was already out of time, is not explained. What he does say is that he returned to the office on the 12th of May and that he noted that there was correspondence from the State Attorney, requesting a consultation and that this consultation was held in Port Elizabeth on 15 May 2014. He goes on to say that this was the first suitable and available date on his return from the election period. But what is not clear and what is not explained is what appears to be an absence from the office from sometime after 22 April 2014, through to 12 May 2014.

[12] The application was thereafter prepared; the papers were signed and

ultimately this application, as I have indicated, was filed only on 30 May 2014.

[13] In regard to the prospects of success, the deponent does not elaborate on these except to say that the Applicant has “great prospects of success”, and that these are set out in the review application, which is the subject, of course, of the bulk of the Founding Affidavit. What he submits is that the Arbitrator’s award is unreasonable and stands to be reviewed and set aside for that reason. It is worth observing that in the affidavit where the deponent deals with the grounds for review, the case made out is one to the effect that the Arbitrator’s award is one that is so unreasonable that no reasonable decision-maker could have arrived at the decision. In other words, the Applicant has treated the application as one in which the standard of reasonableness applies and in particular the threshold established by *Sidumo & Others v Rustenburg Platinum Mines & Another* 2012 BLLR 109 (7) C.C.

[14] The test that the Court must apply in regard to the application for condonation is well-established. It is one that has its roots in *Melane v Santam Insurance Company* 1964(4) SA 531 AD, where the Court indicated that the Court in exercising a discretion in regard to any application for condonation, must take into account, the degree of lateness, the explanation for the delay, the prospects of success and the relative prejudice that would be suffered by either party. What the Court did indicate is that none of these factors are individually decisive, the Court must take a conspectus of all of them and come to a decision which is just in the circumstances.

- [15] The *Melane v Santam Insurance Company* test has been refined by the Labour Appeal Court, in *National Union of Mine Workers v Mintech*. The Labour Appeal Court stated that in the absence of a reasonable explanation for an unacceptable delay, the prospects of success are irrelevant. In other words, the Court is not required to have regard to an applicant's prospects of success, where it fails to meet the hurdle of proffering an acceptable explanation for or a reasonable explanation for an unacceptable period of delay.
- [16] In the present matter, the delay is some sixty-two days. That is not insignificant and here I must have specific regard to the provisions of the Act, which stipulate a six-week time period within which an application for review is to be filed. I must also have regard to the Practice Manual which applies in this Court, in which the view is expressed that an application for review is not unlike an urgent application and that the parties are required to pursue a review application with due diligence.
- [17] The Courts have also required, that a party seeking condonation must set out a full explanation for the whole period of the delay; that condonation is not there for the taking; that an applicant must take the Court into his or her confidence and set out the fullest possible explanation, as I have indicated, for every period of the delay.
- [18] In the present instance, as I have indicated, the deponent who must necessarily have been aware of the statutory time limit. The applicant received the award on 13 February 2014 but did nothing until 24 March, almost six weeks later, except for a discussion with the Head, Provincial Services, General Billet, on some undisclosed date. It was only after the

24th that authority was sought to instruct the State Attorney. I must indicate that when that authority was obtained and once the State Attorney was instructed, this matter appeared to be dealt with, with the required degree of diligence. My views on any unacceptable delay in this matter cannot be ascribed to the office of the State Attorney. It seems to me that the delays here were occasioned entirely by Colonel Mkalipe. The State Attorney has obviously responded with the required degree of diligence in regard to every stage at which it was instructed.

[19] The two periods that concern me are the ones to which I have already alluded, this almost six week period between 13 February 2014 and 24 March 2014, where there is simply no explanation for a delay that equates to the period of six weeks prescribed by Section 145. There is a further delay, which is after the State Attorney was authorised to brief Counsel, on 2 April 2014, and the return to office on the part of the deponent on 12 May 2014, when he then noticed correspondence from the State Attorney. That is a period of some five weeks and as I have indicated and given the view I have taken of the content of paragraph 16 of the Founding Affidavit, is a period that in effect is unexplained. What is also unexplained is the period between the consultation held with Counsel on 15 May 2014 and the filing of the present application only on 30 May 2014, some two weeks later.

[20] Given that there is a failure properly, in my view, to explain a delay of almost six weeks between 13 February 2014 and 24 March 2014; a period of some five weeks between 2 April 2014 and 12 May 2014; and then two weeks following the 15 May 2014, when Counsel was consulted, in my view the deponent to the Founding Affidavit has failed to provide an acceptable

explanation for a period of delay that is significant.

[21] Given the test that the Labour Appeal Court has established in *National Union of Mine Workers v Mintech*, the prospects of success then become irrelevant and it is not necessary for the Court to canvass those. I would only mention in that regard however, that the case made out in the Founding Affidavit, stands completely at odds with the case made out in the Heads of Argument. The Constitutional Court has indicated that a party to a review application must set out its grounds for review in a founding affidavit and a supplementary affidavit provided for in terms of Rule 7A(8) and that an applicant is bound by the grounds for review so articulated.

[22] I have said, the case in the founding papers is one which relies on the threshold of reasonableness. The case made out in the Heads of Argument is entirely different. It is one which relies on correctness and submits that the award made by the Arbitrator for the reasons proffered there was incorrect.

[23] As I have said, it is not necessary for me to make any decision in regard to the prospects of success. I would simply observe that the two cases made out by the Applicants are mutually exclusive.

[24] That leaves the question of costs. This Court has a broad discretion in terms of Section 162, to make orders for costs according to the requirements of the law and fairness. The Court is reluctant, ordinarily, to make orders for costs in circumstances where the parties are party themselves to a collective bargaining relationship, which appears to be the case in the present instance, where an order for costs might serve to prejudice that relationship. I must necessarily take that factor into account.

I must also take into account, the fact that Mr Gerber, who appeared on behalf of the Third Respondent, is an official of the South African Police Union, the Third Respondent, acting on behalf of Captain van Graan and twenty-six others, in this matter. This is not therefore a matter in which the Third Respondent has incurred the costs of briefing outside attorneys or Counsel. I appreciate obviously, that there is a cost involved in securing the services of in-house Counsel, but where that Counsel is provided on that basis, it seems to me that that is a factor that ought, appropriately, to be taken into account. So for that reason, I intend to make no order as to costs.

The order I make then is the following:-

1. The application for the condonation of the late filing of the review application is dismissed;
2. There is no order as to costs.

ANDRÉ VAN NIEKERK

JUDGE OF THE LABOUR COURT

APPEARANCES

For the applicant: Adv. Mark Thys instructed by the State Attorney

For the third respondent: Andre Gerber, Union Official