



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not Reportable

Case no: PR 73/14

In the matter between:

AZOLA NGCANA

Applicant

and

COMMISSION FOR CONCILIATION MEDIATION

AND ARBITRATION

First Respondent

COMMISSIONER BOTHA DU PLESSIS

Second Respondent

NATIONWIDE SECURITY (PTY) LTD

Third Respondent

Heard: 29 May 2015

Delivered: 29 February 2016

Summary: The Labour Court does not review and set aside an arbitration award when the applicant has not established that the arbitration award falls outside the bounds of reasonableness.

JUDGMENT

LALLIE, J

Introduction

- [1] This is an application to review and set aside an arbitration award of the second respondent ('the commissioner') in which he found the applicant's dismissal fair. As the application was filed outside the six weeks period envisaged in section 145 (1) of the Labour Relations Act 66 of 1995 ('the LRA'), the applicant applied for condonation for the delay. Both applications are opposed by the third respondent.

Condonation

- [2] The review application was filed five months late. The determination of a condonation application involves the consideration of a number of factors which include the extent of the delay, the explanation thereof, prejudice to the parties if condonation is granted or refused, reasonable prospects of success and the interests of justice.¹
- [3] The extent of the delay is five months. It is excessive and requires reasonable explanation. The applicant was employed by the third respondent as a grade D security guard. He performed his duties at the offices of the South African Revenue Service ('SARS'), in Port Elizabeth. After his dismissal, he went to his home in Mthatha as his unemployment made it impossible for him to continue renting accommodation in Port Elizabeth. While in Mthatha, he was advised that he could get free legal representation from the Port Elizabeth office of the Justice Centre. He travelled to Port Elizabeth and made the necessary application. Internal processes of the Justice Centre to determine whether assistance should be granted added to the delay. When the decision to assist the applicant was taken, the review and condonation applications

¹ *SA Post Office Ltd v CCMA and Others* [2012] 1 BLLR 30 (LAC) at para 17.

were drafted and filed. Opposing the application, the third respondent criticised the applicant for not making his application to the Justice Centre while he was still in Mthatha as that would have limited the delay. The approach suggested by the third respondent is ideal but not practicable in the circumstances. While the necessity to comply with the Rules of the Labour Court cannot be overemphasised, this Court does not turn a blind eye to the inability of unemployed applicants for condonation to afford legal representation. Although the delay is excessive the applicant has provided reasonable explanation. He will suffer more prejudice than the third respondent should this application be refused as he will lose the right to have his review application heard. This court does not take the decision to non-suit a litigant's lightly. For these reasons, the application for condonation should succeed.

Factual background

- [4] The applicant was employed by the third respondent as a grade D security guard in October 2012 until his dismissal on 24 April 2013 for site desertion on 11 and 12 April 2013. He challenged the fairness of his dismissal at the first respondent ('the CCMA') where the commissioner issued the arbitration award that the applicant seeks this Court to review and set aside.

The award

- [5] The applicant performed guard duties at SARS in April 2013. On the last two days of employment with the third respondent, the applicant worked night shift which started at 18h00 and ended at 06h00 the following morning. Evidence led on behalf of the third respondent was that on the morning of 11 April 2013, the applicant was seen by the site manager, Mr September ('September') leaving his site 15 minutes early and without being relieved by the security guard that was supposed to work the day shift which was scheduled to start at 06h00. September reprimanded the applicant for his conduct and gave him a verbal warning. As the applicant had deserted his post, September had to perform guard duties at it until the arrival of the day shift security guard. The following morning the applicant repeated the misconduct. He was charged

with deserting his post for the two mornings and dismissed. The applicant denied having deserted his post and testified that on the first morning he left his post after the arrival of Mr Kallis ('Kallis'), a fellow security guard but gave no details of the security guard who relieved him on his last day on duty. He testified that he had evidence of entries in the occurrence book ('OB') to prove that he did not desert his post.

[6] The commissioner considered both versions before him and attached no weight to the applicant's evidence because his testimony did not always make sense and he contradicted himself during cross examination. He further noted that the applicant initially denied that he was on duty on the two days in question but later claimed that he was on duty but denied having deserted his post. He alleged that the respondent had no evidence to prove that he had deserted his post. He, however, gave the wrong name of the guard that relieved him and gave a name of a security guard who was not even on the SARS team. The occurrence book was not signed in the manner that supported the applicant's version. The commissioner accepted September's evidence as he was the site manager and on the spot. He was not shaken under cross-examination. He considered the misconduct which led to the applicant's dismissal a serious offence especially in the security industry where the conduct goes to the heart of the employment relationship. The commissioner then dealt with procedural fairness which I decided not to consider in determining the review application because the applicant's attorney intimated that the commissioner's finding on procedural fairness was not challenged.

[7] The commissioner found the sanction of dismissal appropriate because the relationship between the applicant and the third respondent was destroyed. He considered that in the security industry, post desertion goes to the root of the employment relationship. He took into account that the applicant showed no remorse as it would be difficult for any employer to re-employ an employee who has shown no remorse.² He relied on the provisions of Schedule 8 to the LRA in concluding that it was appropriate to dismiss an employee when the

² *De Beers Consolidated Mines Ltd v CCMA and Another* (2000) 21 ILJ 1051 (LAC) at para 25.

misconduct is serious and of such gravity that it makes the employment relationship intolerable. He finally concluded that the applicant's dismissal was fair.

Test for review

- [8] Section 145 of the LRA enables the Labour Court to set aside an arbitration award on application by a party to a dispute who alleges a defect in arbitration proceedings under the auspices of the CCMA. The test for review is whether the decision reached by the commissioner is one that a reasonable decision-maker could not reach.³

Grounds for review

- [9] The applicant submitted that the answering affidavit should be disregarded as it was filed prematurely before the filing of the Rule 7A(8) notice. The premature filing of the answering affidavit is of no moment. The third respondent filed it early at its own peril. The purpose of the requirement that it be filed after the Rule 7A(8) notice is to afford the respondents an opportunity to answer to allegations made in the supplementary affidavit. The decision to non-suit a party is not taken easily. The applicant did not suffer any prejudice as a result of the third respondent's conduct. A decision not to take the answering into account is not justified in the circumstances. The applicant submitted that the commissioner reached conclusions which are entirely disconnected from the evidence which served before him. He committed a gross error and/or gross irregularity and arrived at an unreasonable conclusion in that he failed to take into account relevant and material aspects of the evidence which was favourable to the applicant's version. He completely and unreasonably ignored to deal with material aspects of the evidence. Substantiating the allegation, the applicant submitted that the commissioner ignored the time sheet which indicated that he was off duty on 11 and 12 April 2013 which corroborated his version. He was charged for committing misconduct on 11 and 12 April 2013. The applicant expressed the

³ *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] 12 BLLR 1097 (CC) at para 110.

view that had the commissioner allowed the evidence and attached due weight to it, he would have found his version probably. The applicant is being opportunistic and bordering on being disingenuous by raising this ground as the record clearly reflects that the error in dates was corrected at the arbitration before evidence was led and the third respondent made it abundantly clear that the two days the applicant was alleged to have committed the misconduct were his last two days on duty.

- [10] The applicant further submitted that the commissioner failed to consider what the precise nature of the rule/practice was by failing to attach weight to the fact that the third respondent failed to prove what the rule was and whether it was indeed communicated to him. When September was giving evidence on behalf of the third respondent, he made it clear that the rule was communicated to the applicant and the applicant did not challenge his evidence. The commissioner's finding that, in the security industry, post desertion constitutes serious misconduct cannot be faulted. There are also unwritten rules of conduct which employees in different industries are expected to be reasonably aware of. Guarding premises is the core of a security guard's duties. The applicant further submitted that the commissioner interrupted proceedings on many occasions making it impossible for him to present his version at times. The third respondent correctly pointed out that the record reflects that when the commissioner interjected, he was guiding the process and even assisting the applicant. By so doing, he was fulfilling his duties in terms of section 138 of the LRA. The third respondent correctly argued that the applicant's allegation that the commissioner failed to play an inquisitorial role is invalid and contradicts his submission that the commissioner interrupted. It is further not supported by the record. The attack on the commissioner's reasoning process is unjustified and discordant with the test for review which is whether the decision and not the reasoning process of the commissioner was reasonable.
- [11] The applicant submitted that the reasons given by the commissioner in respect of the appropriateness of the sanction were unreasonable and flawed as he failed to focus on the entire evidence which served before him. He

expressed the view that the evidence does not support the conclusion that the charge contained an element of gross (serious) misconduct. A security guard employed to guard premises who refuses to acknowledge the gravity of the misconduct of leaving those premises unguarded makes mockery of the need to enlist the services of a security company. The applicant's allegation that the commissioner failed to apply his mind to the fact that no progressive discipline was followed overlooks September's evidence that when the applicant deserted his post for the first time, he reprimanded him and gave him a verbal warning. September's evidence, in that regard was not refuted. The applicant submitted that no evidence was led which objectively leads to a logical conclusion that the contract was in fact jeopardised because September testified that he stood in for the applicant. This ground loses sight of the fact that September was a site manager. He was not employed to relieve the applicant but forced to do so by the applicant's misconduct.

- [12] The applicant submitted that no evidence was led from which it could objectively be determined that the trust relationship had been damaged beyond repair. The commissioner gave reasons why he was of the view that the trust relationship had been destroyed. He relied on Schedule 8 of the LRA which required him to determine the appropriateness of the sanction. He also relied on a Labour Appeal Court decision in making his finding that the sanction of dismissal was appropriate. He, therefore, applied his mind to the issue and reached a reasonable decision on it. The applicant's allegation that the commissioner misconstrued the nature of the enquiry before him and that his award is entirely disconnected from the evidence is not supported by the record.
- [13] The applicant raised some aspects of the arbitration proceedings that he was not happy with which include the weight the commissioner attached to evidence. He further submitted that had he committed the misconduct which led to his dismissal, further and different charges would have been preferred against him. Not every gripe that an applicant for review has constitutes valid grounds for review. Mistakes made by commissioners in the conduct of arbitrations which do not render their decisions, based on the evidence before

them, unreasonable, do not render their awards unreasonable. An assessment of the evidence which served at the arbitration in its totality proves that the applicant failed to prove a defect in the arbitration proceedings and his application cannot succeed

[14] In the premises, the following order is made:

14.1 The late filing of the review application is condoned.

14.2 The application for review is dismissed.

Lallie, J

Judge of the Labour Court of South Africa

Appearances

For the Applicant: Miss Van Staden of the Justice Centre

For the Third Respondent: Advocate Grobler

Instructed by Bakker Attorneys

LABOUR COURT