



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not Reportable

Case no: P55812

In the matter between:

SIMPHIWE NGCAKU

Applicant

and

RUTENDO MANDIMUTSIRA N.O.

First Respondent

THE GENERAL PUBLIC SERVICE SECTORAL

BARGAINING COUNCIL

Second Respondent

THE DEPARTMENT OF CORRECTIONAL SERVICES

Third Respondent

Heard: 14 May 2015

Delivered: 1 March 2016

Summary: An application for the late filing of a review application cannot succeed in the absence of a reasonable explanation for the delay and prospects of success.

JUDGMENT

LALLIE, J

Introduction

- [1] In this application, the applicant seeks an order reviewing and setting aside an arbitration award of the first respondent ('the arbitrator') in which she dismissed the applicant's claim of unfair constructive dismissal against the third respondent. The applicant also filed an application for condonation of the late filing of his application for review. The applications are opposed by the third respondent. Shortly before this matter was argued, the third respondent filed an interlocutory application which is opposed by the applicant. The condonation application will be considered first as its outcome will determine whether the review application is properly before court.

Condonation

- [2] The applicant was employed by the third respondent as a correctional officer. Subsequent to disciplinary action being taken against the applicant over a number of years, the applicant tendered his resignation on 24 June 2011, giving notice that his last day on duty would be 31 August 2011. He, thereafter, referred an unfair constructive dismissal dispute to the second respondent ('the bargaining council'). The dispute was arbitrated by the arbitrator who issued an arbitration award in which she found that the applicant was not constructively dismissed but resigned. The Bargaining Council forwarded the arbitration award dated 14 August 2012, to the applicant's erstwhile attorneys who gave the applicant a copy on 14 September 2012. After receiving the award, the applicant took time to consider his position and his prospects of success. He then approached his current attorneys on 10 October 2012 with instructions to launch the review application. Owing to the workload of his attorneys, they only filed his

application on 25 November 2012, a month after the expiry of the six weeks from which the applicant received the arbitration award.

- [3] A number of factors have to be considered in the determination of a condonation application. They include the degree of the delay, the reasons thereof, the applicant's prospects of success in the main claim, prejudice that the parties will suffer if condonation is granted to refuse and whether it is in the interests of justice to grant condonation.¹ It is trite that when the applicant has no prospects of success in the principal claim there would be no point in granting condonation and condonation should, therefore, be refused.
- [4] In the answering affidavit, the third respondent submitted that the applicant has no prospects of success in the review application as he conceded having resigned at the arbitration. They relied on the following part of the evidence tendered by the applicant at the arbitration:
- 'That is why I decided to resign because I cannot wait for the Department to [indistinct]. Then to me I was safe to resign so that I cannot be able to apply to other departments, which I was also avoiding to be dismissed.'
- [5] The third respondent also relied on the evidence of its witness, Mr Simons, who testified that the applicant cited personal reasons for his resignation which was voluntary. The respondent further submitted that the workload of the applicant's attorney is not a justifiable excuse for condonation.
- [6] In the replying affidavit, the applicant submitted that he would only reply to those paragraphs to which a reply was necessary. In selecting the paragraphs that he considered necessary, he did not deal with the third respondent's averments that he had no prospects of success because he resigned voluntarily and that his attorney's workload was no justifiable excuse for condonation. Both allegations were left unrefuted and I could find no grounds for rejecting them.

¹ *SA Post Office Ltd v CCMA and Others* [2012] 1 BLLR 30 (LAC) at para 18.

- [7] The court expressed its displeasure to litigants and their lawyers' failure to comply with Rules of Court in the following words in *Grootboom v NPA and Another*:²

'The language used in both *Van Wyk* and *eThekweni* is unequivocal. The warning is expressed in very stern terms. The picture depicted in the two judgements is disconcerting. One gets the impression that we have reached a stage where litigants and lawyers disregard the Rules and directions issued by the Court with monotonous regularity. In many instances very flimsy explanations are proffered. In others there is no explanation at all. The prejudice caused to the Court is self-evident. A message must be sent to litigants that the Rules and the Court's directions cannot be disregarded with impunity.'

- [8] The applicant sat on his rights for almost a month after receiving the award before instructing his attorneys to file the review application. When he approached his attorneys, the six weeks period within which the review application should have been filed had already expired. Service of the award on the applicant's erstwhile attorneys who represented him at the arbitration constituted proper service on him. His present attorneys should have acted diligently and treated the review application with the urgency that it deserved. When the six weeks period is calculated from the date the applicant received the award, a month's delay is not substantial in the circumstances. The explanation for the delay is not reasonable. The applicant failed to provide a reasonable explanation for the delay and to show reasonable prospects of success in the review application. His condonation application can, therefore, not succeed. As the condonation application has not succeeded, the review application is not properly before court and stands to be dismissed.

- [7] In the premises, the following order is made:

7.1 The application for condonation is dismissed.

² [2014] BLLR 1 (CC) at para 34.

7.2 The review application is dismissed

Lallie, J

Judge of the Labour Court of South Africa

LABOUR COURT

Appearances:

For the Applicant: Mr Van der Veen of Messrs Wheeldon Rushmere & cole

For the Third Respondent: Advocate Laher

Instructed by State Attorney

LABOUR COURT