



THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Case Number: PR 70/15

5 In the matter between:

ZAMUXOLO MTONGANA

Applicant

And

STANDARD BANK SA (PTY) LTD

Respondent

10 **Heard: 26 April 2016**

Delivered: 26 April 2016

JUDGMENT

Moshoana, AJ

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Introduction

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[1] This is an application for condonation of the late filing of the review application. In terms of Section 145, a review of a ruling or an award ought to be brought within 6 weeks of receipt of the ruling and/or the award. It is common cause in this matter that a review application is out of time. Reference was made to being 26 months out of time.

Background

- 5 [2] The facts of matter are briefly as follows. The applicant was employed as a branch manager of the Third Respondent from the year 2004 until around 30th October 2008 when he was dismissed on account of poor performance.
- 10 [3] Aggrieved by his dismissal the applicant referred a dispute to the CCMA for consideration. On 14 June 2009 an award was issued in the Applicant's favour. The Third Respondent was aggrieved thereby and launched an application for review.
- 15 [4] Owing to an incomplete record the matter was remitted back to the CCMA. On 16 August 2010 another award in the Applicant's favour was issued. Yet again a review application was launched. By agreement the matter was referred back to the CCMA.
- 20 [5] On 12 February 2013 a ruling was issued dismissing the Applicant's referral due to the Applicant's absence, who at the time had indicated through his legal representative that he was indisposed. The arbitrator had refused an application for postponement prior to the ruling to dismiss the referral.
- 25 [6] The Commissioner who was issuing the ruling at the time, that is 12 February, somehow, incorrectly so in my view, advised the Applicant to apply for rescission. Indeed the rescission application was launched and was dismissed on the 4th of June 2013.
- 30 [7] On or about 31st August 2015, the Applicant launched this application for condonation together with an application for review. The present application is opposed by way of a notice that was served on the 21st of September 2015 and an opposing affidavit that was filed on the 5th of October 2015.

Evaluation

- 5 [8] In terms of the issues that the court ought to deal with the principles relating to application of this nature has been crystallised in the *Melane* judgment. I do not wish to repeat them. However, before I deal with the merits of the application, I pause to deal with the issue that was raised by Mr Woodhouse in the course of argument. And that issue is that even if condonation is granted the review application seeks only to attack the ruling of 4 June 2013 such that even if that is granted, the February 2013 ruling would stand on the Applicant's way.
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- 15 [9] Upon enquiry by the court, reference was made to the application for review, and indeed the first prayer makes reference to review of the ruling of the 4th of June 2010. In traversing that issue, Ms Mqobi for the Applicant suggested that there was an agreement that the review to be brought is attacking the two rulings. Mr Woodhouse retorted by disputing the aforesaid agreement and submitted that the review application only relates to the ruling of the 4th of June 2013. In reply the representative of the Applicant made reference to certain paragraphs in the papers suggesting that although the notion of motion made reference to the 4th of June 2013 the intention is to attack both the rulings.
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- 25 [10] After I had heard the submissions and adjourned the matter for the purposes of this judgment, in the course of the lunch break, there were further references that were emailed to court for the purposes of demonstrating that intention.
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- [11] In my view the Applicant can only be granted leave or permission as it were to apply review outside the 6 weeks period. Once that permission is granted the Applicant is

good, as it were, to bring the application outside the 6 weeks period prescribed by the Act.

[12] It is apparent that in order to reduce the period of the delay the Applicant sought to file the review application itself on the 31 August 2015 together with the application under consideration. If condonation is not granted the process filed in August 2015 becomes an irrelevant step. Put it differently only when condonation is granted would there be a proper application for review. In terms of the rules of this court once a record has been filed a party is entitled to amend the notice of motion and also supplement its case.

[13] Therefore in terms of the rules the Applicant can still and still has an opportunity to amend the notice of motion. As it stands, it refers to the 4th of June ruling. However, it is clearly apparent to the court regard being had to the papers before me that the ruling of February 2013 is intended to be attacked.

[14] Such is apparent from the founding affidavit in support of this application (see page 21 paginated papers). Reference is made to the arbitration award dated 12 February 2013. And the Applicant quotes provisions of the ruling and specifically states the following:

14.1 *"The Second Respondent committed misconduct and gross irregularity in the approach he adopted in dealing with the matter which was properly placed before him by Mr Toni. The Second Respondent seriously misdirected himself and failed to apply the correct test where he found that the onus of proof was on the Applicant rather than the Third Respondent to satisfy him that there was indeed a wilful default. The Second Respondent lacked appreciation of the correct test to be applied considering application for postponement. His finding in this regard is not only wrong it is also arbitrary. The Second*

Respondent committed gross irregularity and misconduct and further misdirected himself when he misled the Applicant by ordering him to pursue rescission route when the circumstances of the case did not warrant rescission. In the circumstances, the Second Respondent misdirected himself in directing that the rescission application be made effectively prevented me from having my case fully and fairly determined thereby committing gross irregularity in the conduct of the arbitration proceeding.”

[15] All what the court is empowered to do at this stage is to condone the late filing of the review. The court in my view cannot do more. It is upon the indulged party what he or she, if so advised, seek to attack once the permission to review is granted.

[16] Therefore on proper reflection of this matter, I am of the firm view that the issue of the unamended notice of motion that refers to the award of June 2013 is of no consequence at this point in time. It may well be so that if advised the Applicant may choose to attack the February 2013 award only to the exclusion of the June 2013 ruling or vice versa.

[17] The court once permitting an application to be brought outside the prescribed period a court cannot, in my view, prescribe at the same or dictate to a party what he or she ought to attack or not.

[18] Therefore in the interests of justice the issue of the notice of motion as it stands is irrelevant to the consideration whether condonation ought to be granted or not. Strictly speaking the application that has been launched, defective as it may be, was only to reduce the time period. If, as I have indicated earlier, the court does not grant condonation, whether he was seeking to attack in the notion of motion both the rulings, it will be of no

consequence. Accordingly the point raised by Mr Woodhouse cannot be upheld.

Merits

- 5 [19] Turning to the merits of the application. I am satisfied that the Applicant gave an adequate and reasonable explanation, which in my mind is what is required. The fact that the Respondent finds it lacking does not necessarily suggest that it is not adequate and reasonable.
- 10 [20] This is not a matter where a litigant sat back for months without lifting a finger. There was action to demonstrate an intention to ventilate his rights. A *prima facie* view already exists that his dismissal was unfair in the form of two favourable awards. How can a party such as the
- 15 Applicant with two favourable awards sit back and do nothing. To my mind I do not see that happening.
- [21] In any event, I am satisfied that the Applicant possess excellent prospects of success on the review application. In my view there exists prospects to the effect that refusal
- 20 of the postponement was not justified and not in the interests of justice. Accordingly a review court might find that the dismissal of the referral was unreasonable
- [22] Regarding the rescission application I am of the *prima facie* view that it was inappropriate for the application for
- 25 rescission to be brought. Should a review court find that the refusal of a postponement and the dismissal of the referral, is reviewable, that maybe the end of the matter in so far as the second award is concerned.
- [23] In that regard the review court may order that the matter
- 30 should continue to arbitration where parties would again have an opportunity to ventilate all the issues relevant to the fairness or otherwise of the dismissal.

Costs

[24] I turn to the issue of costs. Having had regard to the papers much as they were not properly ventilating the case as it were, in certain respects lacking in providing the basis upon which the review application is brought, I do not believe that this is matter which the Third Respondent should have opposed.

[25] Nonetheless in terms of Section 162 of the LRA, I have discretion to grant costs taking into account the law and fairness. I do not believe that the principle of costs following the result should be ignored.

Order

[26] Accordingly I make the following order.

- (a) **Condonation for the late filing** of the review application is hereby **GRANTED**.
- (b) The Applicant is hereby **granted leave to launch a review application** outside the prescribed 6 weeks period.
- (c) The **Third Respondent to pay the costs** of this application.

A J MOSHOANA

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant:

MS MQOBI

Instructed by:

5 For the Respondent:

MR WOODHOUSE

Instructed by:

LABOUR COURT

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