



**IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

Not Reportable

Case no: JR967/14

In the matter between:

**CASHBUILD THOHOYANDOU**

**Applicant**

and

**CHRISTOPHER MANNDE N.O.**

**First Respondent**

**COMMISSION FOR CONCILIATION,  
MEDIATION AND ARBITRATION**

**Second Respondent**

**DOUGLAS MANAKA**

**Third Respondent**

**Heard: 19 May 2016**

**Delivered: 8 August 2017**

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**JUDGMENT**

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**TLHOTLHALEMAJE, J**

*Introduction:*

- [1] This is an opposed application in terms of which the applicant seeks an order reviewing and setting aside the arbitration award dated 23 April 2014, issued by the first respondent (the Commissioner) under case number LP7255-13.

- [2] In the award, the Commissioner found that the dismissal of the third respondent (Manaka), was substantively unfair, and had awarded him retrospective reinstatement. Manaka's answering affidavit to the review application was filed out of time and he seeks condonation in that regard. The applicant opposed the application for condonation.

*Condonation:*

- [3] The principles surrounding applications for condonations are trite. They involve a consideration of a variety of factors including the degree of the delay, the explanation for the delay, the applicant's prospects of success in respect of the main case, and any prejudice to the parties. These factors are interrelated *albeit* a lengthy delay without a reasonable explanation might dispense with the other factors, whilst greater prospects of success might compensate for a substantive delay. In the end however, considerations of the interests of justice will determine whether condonation ought to be granted or not<sup>1</sup>.
- [4] The answering affidavit to the review application is about six months late as Manaka alleged that he received the notice in terms of Rule 7A (8)<sup>2</sup> of the Rules of this Court in December 2014. He had only filed his answer on 19 May 2015. Manaka attributed the delay to the fact that after his dismissal, he had moved to Brakpan from Thohoyandou. It was only when he went back to Thohoyandou to visit his relatives in December 2014 that he had received some of his mail and a copy of the review application.
- [5] Manaka had confirmed having received the Rule 7A (8) notice in December 2014 but contended that he did not understand what it meant as he was a layperson. He had also received 'an electronic mail' and 'sms' message from the applicant's

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<sup>1</sup> See *Melane v Santam Insurance Co. Ltd* 1962 (4) SA 531 (A) at 532B-E; *Brummer v Gorfil Brothers Investments (Pty) Ltd* [2000] (2) SA 837 (CC) at 839 F

<sup>2</sup> **Rule 7A Reviews**

(1) A party desiring to review a decision or proceedings of a body or person performing a reviewable function justiciable by the court must deliver a notice of motion to the person or body and to all other affected parties.

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(8) The applicant must within 10 days after the registrar has made the record available either-

- (a) by delivery of a notice and accompanying affidavit, amend, add to or vary the terms of the notice of motion and supplement the supporting affidavit;
- or
- (b) deliver a notice that the applicant stands by its notice of motion.

attorneys of record to come to court on 12 December 2014. It was only thereafter that he had made copies of the application from the Court's file and then approached Legal Aid South Africa for assistance.

- [6] The essence of Manaka's application for condonation is that he did not receive the review application because of moving from his original residence after his dismissal. He contended that he would be severely prejudiced if not allowed to oppose the review application as his prospects of success were good in that regard.
- [7] The applicant opposed the application for condonation on a variety of grounds including that the review application was sent to the same address where the Rule 7A (8) Notice was sent and which Manaka had received. It was also contended that the answering affidavit was six months late and that there was no proper explanation for the delay.
- [8] In determining whether condonation should be granted, I have considered that a delay of six months is excessive, and that the explanation proffered by Manaka in that regard is lacking in particularity. No specific account is given for the duration of the delay, and even if Manaka was not aware of what the documents in his possession meant as of December 2014, no detailed account is given as to the reason it took him a further five months or so to approach Legal Aid South Africa.
- [9] Ordinarily, one would take a dim view of Manaka's application in view of the shortcomings pointed out. The interests of justice however persuade me to adopt a lenient approach towards Manaka's application in view of the following considerations;
- [10] It would be foolhardy for the Court not to acknowledge that employees upon the loss of their jobs normally move places and change residence in search of alternative employment. A second factor is that it should not be taken for granted that ordinary employees would understand the meaning of Court documents even if they had received them without the benefit of legal assistance. Manaka had contended that he was a lay person who did not understand what the documents he had received meant, and I have no reason to doubt that contention.

- [11] It would further be iniquitous to deny Manaka an opportunity to defend the review application in the light of his favourable arbitration award which the applicant seeks to set aside. Furthermore, even if there is prejudice to the applicant in the light of the delay, such prejudice cannot by all accounts be said to outweigh that to be suffered by Manaka if condonation was to be refused. In the circumstances, it is my view that the late filing of the answering affidavit ought to be condoned.

*Background to the dispute:*

- [12] Manaka was employed as a Sales Assistant with effect from February 2009. He was dismissed from the applicant's employ on 3 October 2013 because of alleged misconduct related to;

*"Gross Insubordination alternatively Gross Insolence in that on the 12 September 2013 you failed to carry out an instruction from a Manager, you treated him with disrespect and directly challenged his authority in the presence of other staff members."*<sup>3</sup>

- [13] The circumstances which led to the charge were that Manaka was instructed by a manager to retrieve and remove cans of paint that were 'de-ranged' and to place them on the shelves. This was stock of paint that was meant to be removed from the shelves as the applicant would not be selling it any longer, or that would be sold at lower prices. The instruction was given as part of a larger re-arrangement of stock in the store.
- [14] It is alleged that Manaka repeatedly refused to comply with the instruction. There was a difference in versions between the parties about the incident, with the applicant's case being that Manaka was not busy with anything at the time that the instruction was issued. Manaka in turn contended that he was busy moving door frames when he was given the instruction and that he told the manager who had issued the instruction that he would remove the paint off the shelves at a later stage once he was done with his other tasks.
- [15] Following the convening of a disciplinary enquiry, Manaka was dismissed. He challenged the substantive fairness of his dismissal at the Commission for

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<sup>3</sup> Page 3 of the Arbitration Award

Conciliation Mediation and Arbitration (CCMA), and the matter came before the Commissioner for determination.

*The arbitration proceedings and the award;*

- [16] The applicant's evidence was presented by three witnesses and was summarised by the Commissioner as follows;

Lucas Mashambo (Mashambo), the line manager had testified that he had received a memo from the area manager that certain stock (paint) had to be removed from the shelves and be placed at the end of the isle for the purposes of stock-taking. Mashambo had issued the instruction to Manaka to do likewise. Manaka had refused to carry out the instruction despite not doing anything at the time. Mashambo had then issued Manaka with a final written warning and had also suspended him. These disciplinary measures also led to a disciplinary hearing being convened.

- [17] Hector Nkwinika (Nkwinika), of the applicant was informed of the incident and had reported it to the divisional manager, who had in turn advised him that Manaka was to be suspended. Nkwinika had also testified that Manaka did not have a 'good attitude' at work and he had issued him with a written warning for gross insolence on 14 August 2013. Before that warning expired, he was issued with another one for insolence according to Nkwinika. Lucas Nemadzivhana had also confirmed that indeed Manaka was in the past issued with a written warning for gross insolence.

- [18] Manaka's case was to confirm that he was indeed issued with an instruction to re-arrange stock. At the time that he received the instruction, he was busy with other tasks (packing door frames), and had informed his manager that he would attend to the paints once he was done with his other tasks. He had denied that the instruction was issued three times as alleged, and that the only time that Mashambo came back to him after he had issued the instruction was when he issued him with a final written warning whilst he was still busy with his other tasks, and when he again came to him at a later stage with a letter of suspension. His other contention was that he was punished twice for the same offence.

[19] In the award, the Commissioner found that the applicant in this case had failed to prove the full charge against Manaka, and that the latter had been punished twice for the same incident. The Commissioner concluded that the dismissal of Manaka was unfair on the following grounds;

- a) The charge levelled against Manaka was exaggerated in that there was no evidence led by Mashambo that he was disrespected or that Manaka had refused to obey the instruction in the presence of other staff members;
- b) It was not in dispute that the instruction was issued, and further that it was not carried out;
- c) Manaka was punished twice and the applicant had not submitted evidence to justify doing so;
- d) The only aspect of the misconduct proven was regarding a refusal to obey an instruction, and a dismissal in that regard was however unwarranted and unfair;

*Grounds for review:*

[20] The Applicant sets out its grounds for review in its founding affidavit but elected not to file a supplementary affidavit. The grounds of review are essentially that:

- i. The decision was one that a reasonable decision maker could not reach in the light of the evidence before him;
- ii. The finding by the Commissioner that the applicant did not prove that the incident occurred in the presence of other employees was unreasonable and irregular as the evidence was not challenged;
- iii. The Commissioner failed to elaborate as to why he found the dismissal to be unfair in circumstances where he accepted Manaka had committed the offence;
- iv. The Commissioner's finding in respect of double jeopardy constitutes a gross irregularity, as the evidence in that regard did not support a finding that Manaka was issued with a written final warning for a refusal to adhere to the instruction and thereafter subjected to a disciplinary hearing for the same offence;

- v. The relief of reinstatement, in the face of previous warnings, was grossly irregular and unreasonable.

- [21] Manaka opposed the application and reiterated his stance that the applicant failed to make out a case for review. He contended that the applicant was not entitled to the relief it seeks, as the award was one that a reasonable decision maker could have come to based on the evidence led at arbitration. It was submitted on his behalf that the Commissioner had correctly found that an instruction was issued and not complied with due to a reasonable explanation. In this regard, it was contended that Mashambo had conceded that Manaka told him when the instruction was issued that he was busy with other tasks, but that Mashambo had at a later stage changed his evidence.
- [22] Further submissions made on behalf of Manaka were that the Commissioner's findings in regard to double jeopardy could not be faulted in the light of the evidence given and the fact that the applicant could not explain or justify its actions in that regard. To this end, it was submitted that once the final written warning was issued, which warning the applicant had sought to conceal by not presenting evidence in that regard or even making a discovery of a copy of that warning, there was no justification for the applicant to convene a disciplinary hearing in regard to the same charge.

*Evaluation:*

- [23] The test that this Court applies in determining whether the arbitrator's decision is reviewable is that as enunciated in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*<sup>4</sup>. The question to be posed and answered is 'whether the conclusion reached by the arbitrator was so unreasonable that no other arbitrator could have come to the same conclusion.' The arbitrator's decision must therefore fall within a range of decisions that a reasonable decision maker could make.

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<sup>4</sup> (2007) 28 ILJ 2405 (CC) at para 110.

[24] In a further explication of the review test, the Supreme Court of Appeal in *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae*<sup>5</sup>, held that:

‘A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)(a)(ii), the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.’

[25] Central to this application in view of the Commissioner’s findings that indeed Manaka had refused to obey an instruction is whether a further finding regarding double jeopardy and the appropriateness of the sanction of dismissal was one that a reasonable decision maker could have made in the light of the material that was before him.

[26] In accordance with the provisions of section 188 (2)<sup>6</sup> of the Labour Relations Act<sup>7</sup>, any person considering whether or not the reason for *dismissal* is a fair reason or whether or not the *dismissal* was effected in accordance with a fair procedure must take into account any relevant *code of good practice* issued in terms of *this Act*. The reason that led to Manaka’s dismissal was that on 12 September 2013, he had failed to carry out an instruction from his line manager, treated him with disrespect and directly challenged his authority in the presence of other staff members.

<sup>5</sup> (2013) 34 ILJ 2795 (SCA) at 2806 para 25

<sup>6</sup> Section 188 provides: **Other unfair dismissals**

- (1) A dismissal that is not automatically unfair, is unfair if the employer fails to prove -
  - (a) that the reason for dismissal is a fair reason -
    - (i) related to the employee’s conduct or capacity; or
    - (ii) based on the employer’s operational requirements; and
  - (b) that the dismissal was effected in accordance with a fair procedure.
- (2) Any person considering whether or not the reason for dismissal is a fair reason or whether or not the dismissal was effected in accordance with a fair procedure must take into account any relevant code of good practice issued in terms of this Act

<sup>7</sup> Act 66 of 1995



- [27] The Commissioner had however found no basis for a conclusion that Manaka was disrespectful towards or had directly challenged the authority of his manager. The applicant takes issue with this conclusion, and contended that Manaka did not dispute the version that he had refused to follow the instruction in front of other employees.
- [28] The record of proceedings is of bad quality as verified by the transcribers. Be that as it may, on the evidence of Mashambo<sup>8</sup>, I accept that indeed the latter had testified that on the second time he approached Manaka with the instruction, he had called Nemadzivhana as a witness, and had issued the instruction, and that Manaka had refused to obey the instruction. This evidence does not appear to have been challenged by Manaka, and to this end, I accept that the Commissioner's conclusions in this regard are not supported by the evidence presented.
- [29] Central to the applicant's arguments was that the Commissioner committed a reviewable irregularity more specifically in regards to whether Manaka was subjected to double jeopardy. In this regard, the argument was that the Commissioner had misunderstood the evidence of Nkwinika as to whether a final written warning for the same incident was issued or not. In this regard, it was contended that it was Nkwinika who had issued Manaka with a final written warning<sup>9</sup> on 13 August 2013 for gross insolence. This had been followed by a further verbal warning issued to Manaka on 14 August 2013 for a similar offence, and that there was nothing to support the conclusion that Manaka was issued with a further final written warning at the same time that he was issued with a letter of suspension on 12 September 2013.
- [30] As to whether Manaka was issued with a final written warning for the misconduct which he was subsequently dismissed for can be gleaned from record (flawed as it is), and the cross-examination of Mashamba by Manaka (with the intervention by the Commissioner) which went as follows<sup>10</sup>;

*Applicant (Manaka): So what is the reason for final written warning*

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<sup>8</sup> At page 11 line 10

<sup>9</sup> Page 62 of the Record

<sup>10</sup> Page 13 - 16

Siza (Mashamba): Can I respond

Commissioner: Ja

Siza: Uhm the one was for, obviously they were all part of a misconduct that has been brought against you and uh obviously the there were witnesses to the case, who would be the crush of the matter, uhm I think we were talking about over a hundred thousand rand if I am not mistaken so we (inaudible) that if the cost the company over a hundred thousand rand and (inaudible) could affect your salary

Commissioner: But the reason for the warning uh that is what

Siza: (Inaudible)

Commissioner: Okay so it was not refusal to take an instruction

Siza: Actually it was it was a refusal to take an instruction to (inaudible)

Commissioner: Come again

Siza: It was

Commissioner: It was refusal?

Siza: To take instruction

Commissioner: To take instruction

Siza: Which led to the

Commissioner: The instruction that he refused is that the instruction, I mean is that an instruction to, to off load the paint

Siza: He was requested to pack of from the

Commissioner: Oh but the final written warning was linked to the paint issue

Siza: Yes correct

Commissioner: Okay

- [31] In line with the above exchanges, the applicant still contended that it was objectively determinable that Mashambo was trying to explain that the reason for suspending Manaka and the final written warning was for similar misconduct, but that Mashambo was not informing the Commissioner that the final written warning was issued to Manaka and that he was thereafter disciplined for the same misconduct.
- [32] My reading and understanding of the exchanges above, coupled with the direct evidence of Manaka and his cross-examination clearly indicates that at some point after the instruction was issued, he was subsequently issued with a final written warning, which copy no one appears to have kept, and he was thereafter issued with a letter of suspension. Manaka's version in that regard had been consistent, and he had maintained that those were the three instances when Mashamba came to him. Mashamba's evidence on the other hand vacillated between conceding that indeed Manaka was issued with a final written warning for a refusal to obey an instruction in respect of the paints, and a denial that this was the case.
- [33] Further clarity on the issue can be gleaned from the minutes of the internal disciplinary hearing, which forms part of the record. It is accepted that arbitration proceedings before the CCMA are *de novo*. This however does not imply that the testimony led at internal disciplinary proceedings should be ignored.
- [34] The chairperson of the disciplinary enquiry had recorded in the summary of the evidence that the complainant (presumably, Mashamba, had '*received authorisation to issue a written warning for the incidence but stated that the Accused took it from the Complainant and crumpled it up.*<sup>11</sup>' Makana's cross-examination in the arbitration proceedings did not at all indicate that his version that he was issued with a final written warning and was thereafter suspended was challenged. In the circumstances, even if what was recorded by the chairperson of the internal enquiry as illustrated above was not placed before the Commissioner, on the evidence of Mashamba as gleaned from the record, it cannot be said that the Commissioner misunderstood the evidence in regards to the final written warning or some form of warning in respect of the events of 12

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<sup>11</sup> At page 38 of the Record

September 2013, and accordingly, his conclusions that Manaka was indeed subjected to double jeopardy cannot be faulted.

[35] It is accepted that in determining whether an employer is precluded from convening a second disciplinary enquiry in respect of the same form of misconduct, a further consideration is whether it would be fair to do so, or whether it would be unfair to compel an employer to retain an employee in whom it had justifiably lost all confidence<sup>12</sup>. In this case, I am further prepared to accept that prior to the incident on 12 September 2013, Manaka had already been issued with a final written warning valid for six months on 13 August 2013 for gross insolence, which warning was still valid at the time of the latest refusal to obey an instruction. Manaka had also been issued with a verbal warning on 14 August 2013 valid for three months for insubordination. The arguments advanced on behalf of Manaka in this regard were that there is a difference between insubordination and insolence, and it could therefore not be concluded that Manaka had a final written warning for the same offence of gross insubordination. It was however correctly pointed out on behalf of the applicant that it is a fundamental principle of our law that Courts should have regard to the substance of a dispute and not its form, and further that the content of the final written warning issued on 13 August 2013 and the charge that led to the dismissal related to a refusal to adhere to an instruction by Manaka. Even so, it is however trite that acts of insolence and insubordination do not automatically justify dismissal unless they are serious and wilful<sup>13</sup>

[36] It has already been established that the Commissioner's conclusions in regards to whether Manaka had refused to obey instructions in the presence of another employer is not supported by the evidence before him. Nowhere in his award did the Commissioner deal with the issue of the effect of the previous warnings issued to Manaka in regard to what amounts to essentially a refusal to obey instructions, whether framed as insubordination or insolence. These factors in my view, and moreso in the light of a finding in regard to double jeopardy were material in determining the appropriateness of a sanction of dismissal. The Commissioner by failing to make a finding in regard to these factors in my view

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<sup>12</sup> *BMW (South Africa) Pty Ltd v Van der Walt* [2000] 2 BLLR 121 (LAC) at para 12 and 13

<sup>13</sup> *Palluci Home Depot (Pty) Ltd v Herchowitz and Others* [2015] 36 ILJ 1511 (LAC) at para 22

committed a reviewable irregularity, and thus arrived at an overall decision which a reasonable decision maker could not have arrived at.

[37] The applicant had sought that the award be reviewed, set aside and be substituted with an order that Manaka's dismissal was substantively fair. In the alternative, the applicant sought an order that the matter be remitted back to the CCMA for a proper determination before another Commissioner. I am not in agreement with the approach that the award should be substituted with a finding that Manaka's dismissal was substantively fair for a variety of reasons including that pertaining to my findings in regards to the issue of double jeopardy. Ordinarily, and more specifically in the light of the protracted nature of this dispute, the court would readily substitute the findings of the Commissioner as it is empowered to do so. I am however disinclined to do so in the light of the poor quality and nature of the record of proceedings, and I am thus not satisfied that the Court has all the available material before it to make any such substitution.

[38] I have further had regard to the requirements of law and fairness and hold the view that a cost order is not warranted in this matter.

*Order:*

[39] Accordingly, the following order is made;

1. The late filing of Third Respondent's answering affidavit to the review application is condoned.
  2. The arbitration award issued by the First Respondent under case number LP7255-13 dated 23 October 2015 is reviewed and set aside.
  3. The dispute between the Third Respondent and the Applicant is remitted back to the Second Respondent for a determination *de novo* before a Commissioner other than the First Respondent.
  4. There is no order as to costs
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E. Tlhotlhemaje

Judge of the Labour Court of South Africa

LABOUR COURT

**APPEARANCES:**

On behalf of the Applicant: Mr A Posthuma of Snyman Attorneys

On behalf of the Respondent: Ms N Maharaj of N Maharaj Attorney

LABOUR COURT