



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR1090/2015

In the matter between:

NUM obo VINCENT LIPSON NAMANE

Applicant

and

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

First Respondent

COMMISSIONER DONALD KGALAKE

NKADIMENG N.O

Second Respondent

ANGLO GOLD ASHANTI TAU TONA MINE

Third Respondent

Heard: 26 October 2017

Delivered: 6 December 2017

Summary: Rule 11 application - Explanation for the delay in prosecuting a review application occasioned by non-availability of records reasonable and acceptable thus granted. Condonation application – Explanation for late filing of the records reasonable and accepted occasioned by non-availability of records reasonable and acceptable thus granted. Review Application arbitration award reviewed and set aside.

JUDGEMENT

NTSOANE, AJ

Introduction:

- [1] There are a number of applications that came before me, which applications gave rise to this judgment. The first application pertains to the review application itself which I will determine after having dealt with the second application brought in terms of Rule 11¹ seeking to dismiss the very review application. The applicant then brought a condonation application to explain the delay in filing the records in terms of Rule 7A(6)². The third respondent following its filing of the Rule 11 application did not see it fit to oppose the review application.
- [2] The only application that was ripe for hearing was the opposed Rule 11 application thus it was the application before me on 20 July 2017, perhaps the review application on unopposed basis however the latter was not set down for hearing before me as indicated. Only after I had indicated that in view of the reasons and submissions made by the applicant in support of its lateness to filing the records, I was inclined to dismiss the Rule 11 application, only then did the third respondent seek an opportunity to oppose the review application and file its answering affidavit. The parties only came to agree on a future date of 9 October 2017 for review arguments after I had indicated that the Rule 11 application will not be granted. The review application also came before me as agreed between the parties and purely in an attempt to evade another long wait for the set down of the matter.

Background:

¹ Rule 11 of the Labour Court Rules.

² Rule 7A(6) of the Labour Court Rules.

- [3] It is imperative to mention that the submissions for the condonation for the late filing of the records cannot be separated from the Rule 11 application itself as the submissions are exactly the same. I will therefore determine these two applications simultaneously.
- [4] It is further important to mention that the applicant's attorneys attached all these referred documents to the records, condonation application as well as the Rule 11 answering affidavit. The arbitration award which forms the basis for the applicant's review application is dated 2 June 2015. The applicant through its attorneys brought a review application on 18 June 2015, which is within the prescribed time limit in terms of section 145(1) of the Labour Relations Act³ (LRA). The review application became opposed on 22 June 2015. On the same day, 22 June 2015, the applicant received notice in terms of Rule 7A(3) from the first respondent discovering the record of the proceedings. On closer perusal of the content of such notice, all that the first respondent had discovered was the documentary records and not the electronic recording of the arbitration proceedings.
- [5] The applicant's attorneys addressed a letter to the first respondent on 8 July 2015 to the effect that their Rule 7A(3) notice did not contain the electronic records. The first respondent responded the very following day on 9 July 2015 saying that it could not locate the electronic records of the arbitration. What the applicant's attorneys did on 13 July 2015 was to dispatch a letter to the first respondent requesting the hand written notes of the second respondent. The third respondent's attorneys were informed on the same day, 13 July 2015 about the dire situation pertaining to the electronic records.
- [6] On 22 July 2015, the third respondent then took it upon itself to avail its own arbitration electronic records as it had been recording the entire arbitration. The applicant immediately instructed its transcribers to transcribe the electronic recordings furnished by the third respondent. The applicant filed the transcript on 30 September 2015 however, the said transcript was incomplete as the evidence of the applicant's witnesses was not part of the recordings. The applicant's attorneys received the remainder of the recording from the

³ Act 66 of 1995 as amended.

third respondent on 9 October 2015 and the transcriber was instructed on 19 October 2015. At this point, only a period of just 4 months had elapsed but with so much having been done by the applicant's attorneys and the third respondent's attorneys being a participant to all these steps.

- [7] The attorney (Ms Sethosa) who was at all times handling the matter resigned from the applicant's attorneys and a newly admitted attorney of the firm had to take over the matter. The transcribers were called on 11 December 2015 in order to check progress of the transcript but the transcribers stated that they had already closed their business for the December shut down holidays. The applicant's attorneys also closed for December holidays on 15 December 2015 and re-opened on 13 January 2016. Following their re-opening of the firm, the applicant's attorneys called the transcribers on 18 January 2016 in order to enquire on the progress of the transcript and left a voice message for the transcriber.
- [8] The applicant's attorneys addressed an email to the transcribers on 22 January 2016 enquiring on the progress of the transcript. The transcriber was reminded again on 12 February 2016 and on 4 March 2016 an email was again sent to the transcribers placing them on terms and requiring them to state if they are not in a position to do the work. Only then did the transcriber, on 7 March 2016, request another copy of the recording stating that the one in his possession was not properly copied. The transcriber was furnished with another copy of the electronic recording on 8 March 2016 and on 29 April 2016 a transcript was ready for filing.
- [9] What is then interesting is that at all times, the third respondent had not filed the Rule 11 application but only sought to do so on 20 May 2016 after they had received the Rule 7A(8) notice on 10 May 2016. It is further not clear why the Rule 11 application was filed on 10 May 2016 but was in fact served on the applicant's attorneys on 20 May 2016 after it was filed. Be that as it may, in my opinion, it was unnecessary to even commence filing the Rule 11 application despite having received the applicant's Rule 7A(8) notice. The filing of the Rule 7A(8) notice should have spurred the third respondent to also file its answering affidavit to the review application but instead the third

respondent believed in the Rule 11 application so much that it did not see it fit to do so. The applicant in the same token brought a condonation application to explain its delay in filing the records.

[10] The submissions made in the applicant's condonation application for the late filing of the records, are repeated in the Rule 11's answering affidavit or vice versa, I simultaneously find these submissions reasonable and acceptable when considering the sequence of events. As indicated above, all these documents were attached and I am thus satisfied that there is absolutely nothing untoward that the applicant has done to warrant dismissal of its review application. The applicant has extensively explained the unfortunate circumstances it found itself in commencing hardly five days after having filed the review application when the first respondent filed a discovery notice without the electronic records and have in fact acted diligently at all times to ensure progression of the review application. It would thus be grossly unfair to find otherwise.

[11] Mr Wissing in fact conceded that there is nothing amiss in the chronology of events to warrant the granting of the Rule 11 application. I am also agreeable to this concession.

[12] The general principles applicable to condonation applications were set out in the case of *Melane v Santam Insurance Co Ltd*⁴ where it was said:

'In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success and the importance of the case. Ordinarily these facts are interrelated, they are not individually decisive, save of course that if there are no prospects of success there would be no point in granting condonation.'

⁴ 1962 (4) SA 531 (A) at 532C-E.

- [13] When considering a condonation application for the failure to timeously and properly prosecute a review application, even if the review application was initially timeously brought, these factors play an important role. The condonation and the Rule 11 applications are interrelated, they are not individually decisive, save of course that if there are good prospects of success in the Rule 11 application, there would be no point in granting condonation.
- [14] Having considered the submissions made by the applicant I am thus inclined to dismiss the Rule 11 application. The explanation was provided and I consider the explanation evidently reasonable and acceptable. It is on these bases that the Rule 11 application must fail.

Review Application

Background

- [15] The applicant was employed by the third respondent in the design department until he was dismissed for allegations of fraudulent conducts relating to leave applications during the period July 2013 to September 2014.
- [16] Displeased by the dismissal, the applicant referred an unfair dismissal dispute, alleging that he was unfairly dismissed. Consequently, the matter was set down for arbitration which was held and finalised on 28 May 2015. The determination of the unfair dismissal dispute then gave rise to the arbitration award which now forms the basis for the review application that came before me for determination. The procedural aspect of the dismissal was not in dispute therefore the second respondent was called upon to determine only the substantive fairness of the dismissal.
- [17] Dismissal was common cause therefore the applicant had the onus of proving the fairness of the dismissal.

The Commissioner's award

- [18] The second respondent's arbitration award was very brief, in fact did not deal with the issues in my opinion. The second respondent held that the third

respondent relied on a change of the procedures whereby employees were instructed to submit leave forms directly to payroll. He then held that the said evidence appears to be supported by the third respondent's witnesses. The second respondent was then concerned that not even a single original leave form could be found after the investigation commenced. In the event that the applicant had submitted the leave forms as alleged then they should have been located and the fact that they could not be found raised a question mark to the applicant's version.

- [19] The second respondent further held that since the original leave forms could not be located then this leads to a reasonable conclusion that the applicant failed to submit the original leave forms after they had been approved by the HOD. It was then on these bases that the second respondent found charge 1 to be correctly levelled and proved against the applicant. The charge thus warranted a dismissal sanction on the basis of the applicant's senior and responsible position.
- [20] The second respondent seems to be absolving the applicant as far as the charge of gross negligence is concerned because the applicant's explanation was reasonable when he had consulted the year planner and Project Wise in order to calculate his leave entitlement. This cannot be construed as gross negligence, the second respondent held. The second respondent found the dismissal to be substantively fair.

Grounds for Review:

- [21] The applicant submitted the grounds of review as that the second respondent committed a gross irregularity and/or misconduct in the following:
- 21.1 By finding that the third respondent relied on its change of procedure and that such appears to be supported by evidence of its witness is grossly irregular as none of the witnesses produced such proof;
 - 21.2 Having accepted the evidence that Namane (the applicant) relied and complied with the procedure he knew to be in place, it was within his

duties to require proof that indeed such procedure was subsequently changed;

21.3 The procedure relied upon by Namane was supported by an email that was presented before the second respondent. Therefore, in the absence of a similar documentary proof to the change of procedure, Namane cannot be said to have ignored and/or breached any applicable procedure;

21.4 It is extremely disturbing that the second respondent, with the issues before him, found that the sole issue of concern was the fact that the original leave forms could not be found;

21.5 Having noted that it was a mystery as to what had happened to the original leave forms in question since such were approved by the HOD, the second respondent committed misconduct by putting the entire blame for the missing original leave forms entirely on Namane thereby disregarding his evidence that he submitted the forms as per the applicable procedure;

21.6 It was common cause that when the scanned copies of the leave forms were sought by Ms Madalyn van der Suy such were forwarded to her by Namane;

21.7 The second respondent failed to provide any reasonable explanation for concluding that because the original leave forms could not be located then that meant Namane had not submitted same;

21.8 By finding Namane not guilty on the second charge, the second respondent ultimately exonerated Namane from the first charge;

21.9 By accepting an explanation on the second charge as reasonable, the motive for defrauding the third respondent fell away.

Test for review:

[22] The grounds for review for arbitration awards are stipulated in Section 145 of the Labour Relations Act⁵. In the case of *Sidumo and Another v Rustenburg Platinum Mines*⁶ the Constitutional Court held that section 145 of the LRA is suffused by the constitutional standard of “reasonableness”. The Constitutional Court in *Sidumo* subsequently confirmed that the standard of review is whether the decision reached by the commissioner is one that a reasonable decision maker could not reach. The Court in the case of *Shoprite Checkers vs Ramdaw NO*⁷ held that public power must be exercised rationally and therefore a decision made by a public agency must be rationally related to the purpose the decision making power was given. In addition thereof, and in *CUSA v Tao Ying Metal Industries and Others*,⁸ O'Regan J held:

‘It is clear.... that a commissioner is obliged to apply his or her mind to the issues in a case. Commissioners who do not do so are not acting lawfully and/or reasonably and their decisions will constitute a breach of the right to administrative justice.’

[23] What the Constitutional Court meant in *Sidumo* and *Tao Ying Metal Industries*⁹ was a review test based on a comparison by a review court of the totality of the evidence that was before the arbitrator as well as the issues that the arbitrator was required to determine, to the outcome the arbitrator arrived at, in order to ascertain if the outcome the arbitrator came to was reasonable. This review test was considered and applied in *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others*,¹⁰ where the Court said the following:

⁵ No 66 of 1995.

⁶ [2007] 12 BLLR 1097 (CC).

⁷ [2001] BLLR 1011 (LAC).

⁸ (2008) 29 ILJ 2461 (CC) at para 134.

⁹ *Supra*.

¹⁰ (2008) 29 ILJ 964 (LAC) at para 96.

'The Constitutional Court has decided in *Sidumo* that the grounds of review set out in s 145 of the Act are suffused by reasonableness because a CCMA arbitration award, as an administrative action, is required by the Constitution to be lawful, reasonable and procedurally fair. The court further held that such an award must be reasonable and if it is not reasonable, it can be reviewed and set aside.'

[24] As to what would be considered to be unreasonable, the Court in *Fidelity Cash Management Service* held as follows:¹¹

'The Constitutional Court further held that to determine whether a CCMA commissioner's arbitration award is reasonable or unreasonable, the question that must be asked is whether or not the decision or finding reached by the commissioner 'is one that a reasonable decision maker could not reach' (para 110 of the *Sidumo* case). If it is an award or decision that a reasonable decision maker could not reach, then the decision or award of the CCMA is unreasonable, and, therefore, reviewable and could be set aside. If it is a decision that a reasonable decision maker could reach, the decision or award is reasonable and must stand. It is important to bear in mind that the question is not whether the arbitration award or decision of the commissioner is one that a reasonable decision maker *would* not reach but one that a reasonable decision maker *could* not reach....

[25] The Court in *Fidelity Cash Management Service* then went further and formulated this outcome based review test which the Court considered the *Sidumo* review test envisaged, where the Court said:¹²

'It seems to me that there can be no doubt now under *Sidumo* that the reasonableness or otherwise of a commissioner's decision does not depend - at least not solely - upon the reasons that the commissioner gives for the decision. In many cases the reasons which the commissioner gives for his decision, finding or award will play a role in the subsequent assessment of whether or not such decision or finding is one that a reasonable decision maker could or could not reach. However, other reasons upon which the

¹¹ Id at para 97.

¹² Id at para 102.

commissioner did not rely to support his or her decision or finding but which can render the decision reasonable or unreasonable can be taken into account. This would clearly be the case where the commissioner gives reasons A, B and C in his or her award but, when one looks at the evidence and other material that was legitimately before him or her, one finds that there were reasons D, E and F upon which he did not rely but could have relied which are enough to sustain the decision.'

[26] The Court in *Fidelity Cash Management Service* then concluded:¹³

'.... Whether or not an arbitration award or decision or finding of a CCMA commissioner is reasonable must be determined objectively with due regard to all the evidence that was before the commissioner and what the issues were that were before him or her. There is no reason why an arbitration award or a finding or decision that, viewed objectively, is reasonable should be held to be unreasonable and set aside simply because the commissioner failed to identify good reasons that existed which could demonstrate the reasonableness of the decision or finding or arbitration award.'

[27] What the judgment of *Herholdt v Nedbank Ltd and Another*¹⁴ means is simply that if the commissioner ignored material evidence, and the review court in considering this material evidence so ignored together with the case as a whole, believes that the arbitration award outcome cannot still be reasonably sustained on any basis, then the award would be reviewable. The Court again in this case specifically considered the *Sidumo* test, and concluded as follows:¹⁵

'In summary the position regarding the review of CCMA award is this: A review of a CCMA award is permissible if the defect in the proceedings fall 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 inquiry 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

¹³ Id at para 103.

¹⁴ 2013 (6) SA 224 (SCA); [2013] 11 BLLR 1074 (SCA) per Cachalia and Wallis JJA.

¹⁵ Id at para 25.

relevance to be attached to the particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of consequence if their effect is to render the outcome unreasonable.'

[28] I am now, in view of all these cases laying the test for review, inclined to intensively conduct a review enquiry in order for me to be in a better position to determine if irregularity, which warrants the award to be set aside, occurred. I will then interrogate the evidence holistically presented before the second respondent in order to establish if there is an irregularity. If, in conducting this enquiry, I find that there is no irregularity in the first place, the matter is at an end, no further determinations need to be made, and the review must fail. However, should I find that a material irregularity indeed exists, then the second step in the review test follows, which is a determination as to whether if this irregularity did not exist, this could reasonably lead to a different outcome in the arbitration proceedings. If I were to put it differently, could another reasonable decision-maker, in conducting the arbitration and arriving at a determination, in the absence of the irregularity and considering the evidence and issues as a whole, still reasonably arrive at the same outcome? In conducting this second step of the review enquiry, the review court needs not concern itself with the reasons the arbitrator has given for the outcome he or she has arrived at, because the issue of the arbitrator's own reasoning was already considered in deciding whether an irregularity existed in the first part of the test.

Analysis of the evidence

[29] I have already indicated my concerns about the brevity of the second respondent's award which does not properly deal with the issues, if at all. The second respondent determined the substantive fairness of the dismissal and found that the dismissal was fair especially on charge 1. In considering the award of the second respondent, it is clear that when determining the evidence, all he does is to spit every other testimony by the applicant and mainly concentrated on the originality of the forms. There is simply no consideration or any kind of analysis as to what testimony must be accepted, what must be rejected, and why. The conduct of the second respondent in

this respect is comparable to the following *dictum* from the judgment in *Sasol Mining (Pty) Ltd v Ngqeleni NO and Others*¹⁶, where the Court said:

'Regrettably, the commissioner's logic (or, more accurately, the lack of it) permeates many of the awards that are the subject of review proceedings in this court. Some commissioners appear wholly incapable of dealing with disputes of fact - their awards comprise an often detailed summary of the evidence, followed by an 'analysis' that is little more than a truncated regurgitation of that summary accompanied by a few gratuitous remarks on the evidence, followed by a conclusion that bears no logical or legal relationship to what precedes it. What is missing from these awards (the award under review in these proceedings is one of them) are the essential ingredients of an assessment of the credibility of the witnesses, a consideration of the inherent probability or improbability of the version that is proffered by the witnesses, and an assessment of the probabilities of the irreconcilable versions before the commissioner...

[30] The second respondent's reasoning is simply that because the original leave forms could not be found then the applicant was guilty as charged and the dismissal was fair and upheld. I fail to comprehend this reasoning for simple reasoning that will follow herein under. I hereby wish to emphasise that the determination of the second respondent was purely whether the leave forms were not the originals. He confined his determination of the fairness of the dismissal on the original leave forms in that because they could not be located therefore the applicant was guilty, misconstruing facts and misplacing his reasoning in the process.

[31] I am not going to deal with each and every ground of review raised by the applicant but only those that will lead to a reasonable conclusion to set aside the award or dismiss the review application. I should admit that the determination of the second respondent is very strange indeed. This is also one of the grounds for review raised by the applicant in its founding papers and I find this ground of review to be reasonable thus should be upheld. The second respondent in his award found that "*what concerns me about the applicant's version is that not a single original leave form could be found, after*

¹⁶ (2011) 32 ILJ 723 (LC).

the investigation commenced. If applicant had submitted these leave forms, then surely they should be located. The fact that they cannot be found, with respect, raise a question mark over applicant's version". Mr Molotsi representing the applicant argued that and referred me to pages 58 and 59 of the disciplinary hearing transcript and it is apposite to quote Cindy Somers who testified at the disciplinary hearing as follows:

'Comp: Please explain to the panel what prompted you to request leave forms for Vincent.

Wit1: It was actually not for Vincent only, when I came back from leave I had no leave forms, sick and any form of leave or documents. Nothing from the West Wits office. It is impossible that no one took off for seven months. Everyone takes off at some point, whether sick or whatever. So I went to the pay point administrator Yvonne and asked for leave history and asked how to pull data. Then I looked into that then I saw there was a problem. I then asked each person for their copies.

....

Comp: If I am correct they send you copies

Wit1: Yes after I requested

Comp: so you can confirm that is all the copies you received through email

Wit1: yes'

[32] If this piece of evidence is anything to go by then I am agreeable to the argument made by Mr Molotsi that it is illogical for the second respondent to confine his reasoning only to original leave forms when their originality was never an issue in the first place. It is therefore my finding that the second respondent has not considered the evidence presented before him concerning the actual issues. It is further my determination that the originality of the forms should not have been a determining factor whether the applicant has indeed committed misconduct or not. In fact, in terms of the evidence led, it is clear

that the leave forms were requested from a number of employees after it became apparent that the system did not balance as far as leaves are concerned. It is therefore unfair to limit his determination to the applicant when the applicant was not the only employee who had submitted copies of the leave forms. The second respondent thus drew an unreasonable inference and probability that any reasonable decision maker could have made and failed to properly apply the law. The second respondent made an unreasonable finding that the dismissal of the applicant was fair and dismissed his application. I am inclined to interfere with this determination.

- [33] One question that comes to mind is whether it is even necessary to entertain other grounds for review when I have already found that the only reason that the second respondent relied upon for finding against the applicant was unreasonable. In my opinion it is not necessary to deal with every other ground for review as the one determined settles the entire issue.
- [34] In applying the reasonable decision maker test there seem to be no doubt that there is a need to interfere with the second respondent's arbitration award in this matter. The second respondent has failed to execute the judicial duties he conformed to and failed to reach a decision which could have been reached by a reasonable decision maker, which decision is reasonable. The analysis of the reasoning and the conclusion reached in this matter indicates that the second respondent did misconceive the task that was before him and has committed fundamental mistakes of law. Based on the considerations I have set out above, I am inclined to interfere with the second respondent's decision. Such award is certainly inconsistent with the evidence and exercise of his judicial discretion.
- [36] The applicant submitted that he does not wish to be reinstated to his position and that the Labour Court has powers to make an appropriate remuneration order in the event that the award is reviewed and set aside. I am agreeable to this notion. It has been a long period that has passed since the dismissal of the applicant therefore remitting the matter back to the first respondent would not be an ideal situation under the circumstances.

[37] In the premises, I make the following order:

Order

1. The arbitration award issued by the second respondent is hereby reviewed and set aside.
2. The second respondent's award is replaced with an order that the dismissal of the applicant was substantively unfair.
3. The third respondent is ordered to pay the applicant compensation equivalent to six (6) months' salary.
4. There is no order as to costs.

MM Ntsoane

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant: Mr Molotsi
Instructed by: M. S. Molebaloa Attorneys

For the Respondent: Mr H. Wissing of Henk Wissing Inc.