

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT PORT ELIZABETH

Case Number: PR58/16

In the matter between:

NUMSA + Others

Applicants

and

Transnet SOC Ltd

Respondent

JUDGMENT

Steenkamp J

- [1] This is an application to have a condonation ruling by Ebrahim Patelia, a panellist of the Transnet Bargaining Council, reviewed and set aside.
- [2] NUMSA, the trade union appearing on behalf of eleven of its members, referred an unfair dismissal dispute to the bargaining council. It is common cause that it was some 70 days late, in other words more than twice the time period of 30 days provided for in s 191(1) of the Labour Relations Act 66 of 1995.
- [3] The arbitrator considered the condonation application at the hand of the well known principles set out in MELANE v SANTAM INSURANCE CO. LTD 1962(4) SA 531 (A).
- [4] Firstly, as far as the degree of lateness is concerned, it is obviously an inordinate delay -- as I have said, more than twice the period provided for -- and the arbitrator then considered the reasons for the delay.

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- [5] The main reason is that the union attempted to fax the referral to the bargaining council on 2 November 2016, but the transmission did not go through. The union then sent it to TOKISO, which is not the proper forum, but said that it thought that there was a relationship between TOKISO and the bargaining council.
- [6] The commissioner considered that there was no effective and proper referral to the bargaining council on 2 November 2016 and concluded that it was caused by the fault of the union representative. Ultimately, he said, the employees bear the consequences of the actions of their union representative. He then considered the prospects of success and said that he was unable to make a clear determination; however, the Transnet supplementary affidavit, he said, places doubt on the credibility of the union representative's affidavit. In this regard, although he does not say so in so many words, he took into account the principle set out in PLASCON EVANS PAINTS v VAN RIEBEECK PAINTS 1984 (3) SA 623 (A) that, in case of a conflict and a decision on the probabilities, he needed to consider the evidence of the respondent insofar as it contradicts that set out by the applicant and it is not clearly untenable. He also found that Transnet would suffer greater prejudice should the condonation application be granted; that there were no

public policy issues at stake; and that it would not be in the interests of justice to grant the condonation application.

[7] The union essentially argues that that conclusion is so unreasonable that no other arbitrator could have come to the same conclusion.

[8] Before I deal with the merits of that contention, I must deal with an issue raised by Ms Gagiano, and that is that the arbitrator should not have taken into account the answering affidavit filed by Transnet in the condonation application, as that affidavit was itself filed five days late. The arbitrator did deal with that preliminary point raised by the union and he noted that according to Transnet a Ms Winnie Mataung from the bargaining council confirmed that, “as the respondent, we do not respond to applications until such time that they are sent to us by the Transnet Bargaining Council with a date for response.” Transnet alleged that it was notified of the application on 7 February 2016 and therefore the answering papers were due on 14 February. It is in that context that the arbitrator accepted the answering affidavit. That explanation is indeed the one proffered by Transnet and, although it does not appear to correspond with the rules of the bargaining council, what is stated under oath by Ms Lee-Anne Neveling, the company’s

employee relations officer, is not gainsaid by the union. She says under oath: “Ms Motaung confirmed that as the respondent we did not respond to applications until such time that they are sent to us by the TBC with a date for response. This is how the TBC has worked since I have been dealing with them and as such I followed the same process in this matter. The TBC notified me on 7 February 2017 that they had received the application. It was therefore only then that answering papers were due on 14 February 2017. The answering affidavit was duly served and filed on 13 February 2017.” Confronted with that evidence it was not unreasonable for the arbitrator to accept it and consequently to accept the answering affidavit into evidence. The question then remains whether his overall conclusion was a reasonable one.

- [9] Ms Gagiano argued that the arbitrator should have taken into account that at least part of the delay could have been, and was explained, due to the festive season. This court has held on numerous occasions that the so-called collective slumber that the country enters customarily in December and January is not something to be taken into account in condonation applications. The union was well aware of the time periods involved and it was indeed, as the arbitrator found, negligent of the union and its officials not to cater for that and to make sure that it

acted in the interests of its members before embarking on holiday.

[10] As far as the prospects of success go, the arbitrator did note that he could not on the papers before him, and without any evidence, make a clear determination on the prospects of success. However, as I have pointed out, he took into account the evidence on affidavit, as he must in terms of the rule in PLASCON EVANS, and he found that it cast doubt on the version of the union. He also took into account that the employees were dismissed for gross insubordination after a disciplinary hearing; and he was alert to the evidence of Transnet that the employees blatantly refused two instructions from their supervisor and were insubordinate and insolent.

[11] The other issue raised by Ms Gagiano and also raised before the arbitrator was an allegation that the chairperson of the disciplinary hearing had colluded with the company in an off the record discussion. At best, that discussion refers to the hearing dedicating at least an hour to “process only”. The arbitrator found that the transcript does not establish that there was collusion between the chairperson and the company representative. That finding is not, in my view, so unreasonable that no other arbitrator could have come to the same conclusion, given the inconclusive nature of the

words uttered.

[12] In a nutshell, the arbitrator exercised his discretion in deciding whether or not to grant condonation. This court sitting on review is loath to interfere with the exercise of a discretion, provided it is properly exercised and not capriciously or in arbitrary fashion. The ruling made by the arbitrator comfortably crosses that threshold, and what is more, it is not so unreasonable that no other arbitrator could have come to the same conclusion on the evidence before him. The ruling is not open to review.

[13] Both parties asked for costs to follow the result. I see no reason to differ.

The application for review is dismissed with costs.

Steenkamp J

Date of Hearing: 25 October 2017

Date of Judgment: 25 October 2017

For the Applicants: Ms Lodene Gagiano

Instructed by Minnaar Niehaus.

For the Third Respondent: Mr Siya Cokile (attorney).

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