



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR730/16

In the matter between:

**THE ASSOCIATION OF MINEWORKERS
AND CONSTRUCTION UNION**

First Applicant

**THE MEMBERS OF AMCU REFLECTED ON
ANNEXURE 'A'
Applicants**

Second to Further

and

**THE COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION MEDIATION**

First Respondent

COMMISSIONER KGOMOTSO LEKWAKWE N.O

Second Respondent

GLOBAL CLEANING SERVICES (PTY) LTD

Third Respondent

EKM TRADING (PTY) LTD

Fourth Respondent

TMMS TRADING CC

Fifth Respondent

ELUTSANE ENTERPRISE (PTY) LTD
MAHUBE A GAUTA 78 HOLDINGS (PTY) LTD

Sixth Respondent
Seventh Respondent

KWEZI INVESTMENTS (PTY) LTD

Eighth Respondent

SIZISA UKHANYO TRADINGS 498 CC

Ninth Respondent

Heard: 15 November 2017

Delivered: 25 January 2018

Summary: Application in terms of section 158(1)(g) of the LRA – review of a condonation ruling – given the unreasonable explanation, prospects of success are immaterial – the condonation ruling is rational and beyond reproach.

JUDGMENT

NKUTHA-NKONTWANA. J

Introduction

[1] This is a review application in terms of section 158(1)(g) of the Labour Relations Act¹ (the LRA). The first applicant, the Association of Mineworkers and Construction Union (AMCU), and second to further applicants (individual applicants), seek to review, set aside and substitute the condonation ruling issued by the second respondent (the commissioner) dated 3 March 2016 under case number GAJB165-16. The commissioner dismissed the applicants' application for condonation for the late filing of an unfair dismissal dispute.

[2] The application is opposed only by the third respondent (Global Cleaning).

Background facts

¹Act 66 of 1995 as amended.

- [3] The facts in this case are mostly common cause. In 2003, AngloGold Ashanti (AngloGold) engaged Global Cleaning to provide cleaning services on its mines in the Carltonville area (the cleaning service agreement). The individual applicants were employed by Global Cleaning as cleaners and were placed at various AngloGold premises.
- [4] The cleaning service agreement was terminable, *inter alia*, by AngloGold giving 30 days' notice to Global Cleaning. Global Cleaning argued that the individual applicants had agreed, in terms of their employment contracts, to an automatic termination clause in terms of which their employment would automatically terminate upon AngloGold terminating the cleaning service agreement. This is disputed by the applicants.
- [5] On 8 June 2015, AngloGold terminated the cleaning service agreement on 30 days' notice to Global Cleaning. The reason that had been proffered for the termination is that AngloGold intended to divide the cleaning service agreement and put out to tender each part. On 9 June 2015, Global Cleaning informed the individual applicants that their services would terminate automatically on 21 July 2015, and in so doing invoked the automatic clause, so Global Cleaning argued. In view of that, the dismissal of the individual applicants was not preceded by a consultation in terms of section 189 of the LRA.
- [6] It is common cause that the actual date of dismissal of the individual applicants is 21 July 2015. On 4 January 2016 the applicants referred a dispute based on unfair dismissal for operational requirements to the Commission for Conciliation Mediation and Arbitration (the CCMA) together with the condonation application. The degree of lateness was almost 5 months or 142 days.
- [7] The applicants' explanation for the delay is that they were of the *bona fide* but mistaken view that despite the termination of the individual applicants' employment contracts with Global Cleaning, the individual applicants would be employed by the new service providers. In other words, they were of the mistaken belief that the individual applicants would 'not lose their jobs' and

therefore it was unnecessary to refer an unfair dismissal dispute to the CCMA. It was only when their belief for employment with the new service providers did not yield the desired result and having taken legal advice, that the applicants referred an unfair dismissal dispute to the CCMA.

[8] The applicants argued that their belief was informed by the historical fact that the individual applicants' employment was never affected by the change of cleaning contractors at different AngloGold premises since 2003.

[9] On 9 July 2015, whilst waiting for the new service providers to employ the individual applicants, the applicants referred a severance pay dispute to the CCMA consequent to being served with the notice of termination of the individual applicants' contracts of employment by Global Cleaning. In the LRA 7.11 form the facts in dispute and the required result are summarised as follows:

'The company is refusing to discuss the issue of severance payment since some workers are to be retrenched & also refusing to discuss s189.

We request the company to pay severance package if needs be.'

[10] Despite being clearly well-versed of their rights in terms of section 189 of the LRA, the applicants failed to refer an unfair dismissal dispute to the CCMA at that stage. Coverley, assisted by AMCU, the individual applicants registered a close corporation and used it as a vehicle to tender for the cleaning services to replace Global Cleaning.

[11] The awarding of tenders to the successful companies happened before the end of October 2015 and the new service providers, the fourth to the ninth respondents, commenced their services on 1 November 2015. The individual applicants' corporation was unsuccessful and regrettably the new service providers only employed 54 individual applicants contrary to the applicants' belief. Even the 54 individual applicants who were employed by the new service providers lost their years of service as they were employed on new employment contracts.

- [12] The individual applicants embarked on a protest action at the premises of AngloGold in response to their non-appointment by the new service providers. On 3 November Mr Mathunjwa, the AMCU president, intervened and as a result, 60 additional individual applicants were employed by AngloGold and without the assistance of Global Cleaning.
- [13] It was clear, at least by 1 November 2015, that the individual applicants were not going to be employed by the new service providers. The applicants still did not refer the dispute soon thereafter as would have been expected. They waited up until 4 January 2016 to approach the CCMA. The explanation proffered for the 2 months' delay is that the applicants sought legal advice on 6 December 2015 and AMCU officials went on leave during the December holidays before providing the details of the new service providers and that made it impossible to settle the affidavit in support of the condonation application.

Grounds of review

- [14] The first ground of review is that the commissioner failed to consider, alternatively, properly consider the relevant evidence regarding the explanation for the delay.
- [15] The second ground of review is that the commissioner undertook the wrong enquiry and/or undertook an enquiry in a wrong manner when he had to consider all the rudiments applicable in an application for condonation, particularly the prospects of success, prejudice and the importance of the matter.

Legal principles and evaluation

- [16] It is trite that the failure by a commissioner to apply his or her mind to issues which are material to the determination of a case constitutes an irregularity. However, before such an irregularity can result in the setting aside of the

award, or ruling in this instance, it must, in addition, reveal a misconception of the true enquiry or result in an unreasonable outcome.²

- [17] In *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others*,³ it was stated that:

‘Nothing said in *Sidumo* means that the CCMA's arbitration award can no longer be reviewed on the grounds, for example, that the CCMA had no jurisdiction in a matter or any of the other grounds specified in s 145 of the Act. If the CCMA had no jurisdiction in a matter, the question of the reasonableness of its decision would not arise. Also if the CCMA made a decision that exceeds its powers in the sense that it is ultra vires its powers, the reasonableness or otherwise of its decision cannot arise.’

- [18] Even though the above matter was decided in terms of section 145(2) of the LRA, it was held in *Southern Life Association v Commission for Conciliation, Mediation and Arbitration (CCMA)*⁴ that the extended grounds of review identified therein are equally applicable to review proceedings brought under section 158(1)(g) to the extent that it involves a decision by a CCMA commissioner exercising public power. This construction accords with the constitutional imperatives.

- [19] It is also trite that condonation is not a formality, merely there for the asking. The Labour Appeal Court (LAC) in *Queenstown Fuel Distributors CC v Labuschagne NO and Others*,⁵ pointed out that the principles of condonation should be much stricter than those which were applied ‘in normal circumstances’. The Court stated that:

² See: *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 28 ILJ 2405 (CC); *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curia)* [2013] 11 BLLR 1074 (SCA); *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others*[2013] ZALAC 28; [2014] 1 BLLR 20 (LAC); (2014) 35 ILJ 943 (LAC) at paras 14 to 16 and *Department of Education v Mofokeng Head of the Department of Education v Mofokeng* [2015] 1 BLLR 50 (LAC).

³ (2008) 29 ILJ 964 (LAC) at para 101; see also *Premier Foods (Pty) Ltd (Nelspruit) v Commission for Conciliation, Mediation and Arbitration and Others* [2016] ZALCJHB 426; (2017) 38 ILJ 658 (LC) at paras 15 -16.

⁴ [2001] 3 BLLR 375 (LC) at 380.

⁵ [2000] 1 BLLR 45 (LAC) at para 24.

‘...In principle, therefore, it is possible to condone non-compliance with the time-limit. It follows, however, from what I have said above, that condonation in the case of disputes over individual dismissals will not readily be granted. The excuse for non-compliance would have to be compelling, the case for attacking a defect in the proceedings would have to be cogent and the defect would have to be of a kind which would result in a miscarriage of justice if it were allowed to stand. The principles set down in *Melane v Santam Insurance Co Ltd*⁶ remain a yardstick. In *National Union of Mineworkers v Council for Mineral Technology*,⁷ the LAC reaffirmed the position *Melane* and stated that:

“The approach 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 therefore, the prospects of success and the importance of the case. These facts are interrelated: they are not individually decisive. What is needed is an objective conspectus of all the facts. A slight delay and a good explanation may help to compensate for prospects of success which are not strong. The importance of the issue and strong prospects of success may tend to compensate for a long delay. There is a further principle which is applied and that is that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused ...’ (emphasis added)

- [20] A full and acceptable explanation has to be given for ‘*whatever delays non-compliance has occasioned; an inadequate explanation could well bar the grant of condonation*’.⁸ In *Moila v Shai NO and Others*,⁹ the LAC stated that it is not necessary to consider the prospects of success as condonation could be refused no matter how strong the prospects of success where there were periods of delay for which there was either no acceptable explanation or no explanation at all.

⁶1962 (4) SA 531 (A).

⁷ [1999] 3 BLLR 209 at 211-213

⁸ *Toyota South Africa Motors (Pty) Ltd v Commissioner, South African Revenue Service* 2002 (4) SA 281 (SCA) at para 15.

⁹ (2007) 28 ILJ 1028 (LAC) at 1038, para 36.

- [21] In the present case, the applicants' argument that the delay in referring the dismissal dispute to the CCMA by almost 4½ months was because of a mistaken belief that the individual applicants would be employed by the new service providers is untenable. The applicants promptly referred a severance dispute upon receipt of the notice of termination in line with section 191(2A) of the LRA. They did that despite their belief and hope for employment with the new service providers. It is apparent, also, from the referral form that Global Services' refusal to follow a section 189 of the LRA procedure was the only other issue that was questioned by the applicants at that stage even though it was not included as an issue in dispute.
- [22] It is mind boggling, therefore, that AMCU, a seasoned trade union with access to renowned law firms, would fail to take a conventional step of referring a dispute in order to preserve the rights of the individual applicants pending the appointment of new services providers.¹⁰ One can only infer from the applicants' conduct that they had accepted the rationale for the dismissal of the individual applicants hence they even formed a company that tendered to replace Global Cleaning, their employer. The fact that they are now challenging the substantive fairness of the individual applicant's dismissal is disingenuous. They can't have their cake and eat it too or as the German saying goes "You can't dance at two weddings."
- [23] In any event, even if condonation was not a hurdle, the applicants would still be faced with another jurisdictional hurdle in relation to a procedural dispute given the number of the individual employees affected, which is 159 in total. Section 189A of the LRA deals with dismissals based on operational requirements by employers with more than 50 employees and in terms of section 189A(1):

¹⁰ See *NEHAWU and Others v Vanderbijlpark Society for the Aged* [2011] 7 BLLR 690 (LC) at para 9. In this case the Court dismissed the condonation application where the union referred a retrenchment dispute out of time by three months and relied principally on its internal procedures to explain delay. The Court pertinently stated that 'The LRA has been in existence for more than 15 years, and the time limits governing referrals have not changed in that time. It is reasonable to expect that trade unions ought to be well aware of the need to act timeously in the interest of their members...'; see also *Independent Municipal Allied Trade Union (IMATU) obo Zungu v South African Local Government Bargaining Council and Others* [2009] ZALC 137; (2010) 31 ILJ 1413 (LC) at para 25.

'This section applies to employers employing more than 50 employees if –

- (a) the employer contemplates dismissing by reason of the employer's operational requirements, at least –
 - (i) 10 employees, if the employer employs up to 200 employees;
 - (ii) 20 employees, if the employer employs more than 200, but not more than 300, employees;
 - (iii) 30 employees, if the employer employs more than 300, but not more than 400, employees;
 - (iv) 40 employees, if the employer employs more than 400, but not more than 500, employees; or
 - (v) 50 employees, if the employer employs more than 500 employees...

[24] Clearly, section 189A is applicable. To the extent that the applicants are also challenging the procedural fairness of the individual applicants' dismissal, in terms of section 189A(18), the 'Labour Court may not adjudicate a *dispute* about the procedural fairness of a *dismissal* based on the employer's *operational requirements* in any *dispute* referred to it in terms of section 191(5)(b)(ii)'. By the same token, the CCMA lacks jurisdiction to conciliate a procedural dispute that ought to have been referred to the Court in terms of section 189A(13).

[25] Accordingly, I agree with the commissioner that the explanation for the delay proffered by the applicants is unreasonable and unacceptable and as such the prospects of success are immaterial. Still, I have had regard to the prospects of success and I find them to be poor. As stated above, the applicants' conduct is indicative of persons who had accepted the rationale for the individual applicants' dismissal.

[26] I am alive to the fact that the real reason for the dismissal of the individual applicants is in dispute. I, however, deem it unnecessary to pronounce on this issue given the findings I have made above.

Conclusion

[27] In a nutshell, the commissioner's ruling is beyond reproach.

Costs

[28] There is no reason why costs should not follow the result. The applicants ought to have been better advised of the consequences of reviewing the condonation ruling given the circumstances of this case.

[29] In the result, I make the following order.

Order

1. The application to review the commissioner's condonation ruling dated 3 March 2016 under case number GAJB165-16 is dismissed.
2. The applicants are ordered pay the costs.

P Nkutha-Nkontwana

Judge of the Labour Court of South Africa

Appearances:

For the applicants:

Advocate S Collet

Instructed by

Larry Dave Incorporated Attorneys

For the third respondent:

Advocate A Landman

Instructed by

Ronelda Van Staden Attorneys