



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: JR 2386/15; J 323/16

In the matter between

**MEC DEPT OF ECONOMIC
DEVELOPMENT, ENVIRONMENT AND
TOURISM, MPUMALANGA**

Applicant

and

First Respondent

NEHAWU obo WINNIE RAMBAU

**GENERAL PUBLIC SERVICE SECTORAL
BARGAINING COUNCIL**

Second Respondent

COMMISSIONER M SAMBO N.O.

Third respondent

Heard: 1 February 2018

Judgment: 2 February 2018

JUDGMENT

VAN NIEKERK J

- [1] There are two applications before the court. The first, filed under case number JR 2386/15, is an application to review and set aside an arbitration award issued by the third respondent. In his award, the third respondent, to whom I shall refer as 'the arbitrator', held that the dismissal of the first respondent (the employee) was unfair, in the sense that the penalty of dismissal was too harsh a sanction for the misconduct that the arbitrator found the employee to have committed. The arbitrator substituted the sanction of dismissal with an order of reinstatement, subject to a penalty of suspension without pay for a period of three months.
- [2] The second application (J 323/16) was filed by the first respondent in the review application, and seeks to have the award under review made an order of court in terms of s 158 (1) (c) of the Labour Relations Act (LRA). The parties are agreed that the fate of this application is dependent on the outcome of the review application.
- [3] The review application has a sorry history. The award under review was issued on 12 October 2015. The applicant states that the award was received on 21 October 2015. The application to review and set aside the award was filed on 2 December 2015, just inside the statutory limit for the filing of reviews. The review application (and the award under review) were not placed in the court file, and had to be located in the s 158 (1) (c) file. There is no explanation from the applicant's representatives as to why the court file was not prepared as required by the Rules and Practice Directive.
- [4] The review application cites as respondents the employee and the bargaining council. During March 2016, the applicant filed a founding affidavit (with no notice of motion attached) in which it seeks the substitution of NEHAWU as the first

respondent and the joinder of the arbitrator. The substitution of the employee by NEHAWU appears to be motivated by the fact that the applicant was unable to serve the review on the employee at her last known address, and that she was a member of NEHAWU. (It is apparent from the award but not mentioned by the applicant in its founding affidavit that a NEHAWU official had represented the employee during the arbitration hearing.) In the application to join the arbitrator, there is an explanation to the effect that it is 'common practice' to cite the arbitrator in review applications, and that the applicant had inadvertently omitted to do so. I should mention that neither the application to substitute nor the application to join is a proper and competent application, there being no notice of motion filed. Given the conclusion to which I have come and which is reflected below, it is not necessary for me to consider these applications.

- [5] Be that as it may, the record of the proceedings under review was filed only on 2 February 2017, a year and two months after the review application was filed.
- [6] Some three weeks later, on 21 February 2017, the applicant filed (again without a notice of motion) what appears to be an application to condone the late filing of the record and a supplementary affidavit as contemplated by Rule 7A (8). The explanation for the applicant's non-compliance with the courts rules and practice directive amounts to the following. On 2 December 2015, the review application was served on the bargaining council but not on the employee, whose whereabouts could not be established. At some undisclosed later date, NEHAWU advised the applicant that it would accept service of the application.
- [7] In the latter half of February 2016, the applicant was informed by the bargaining council that the record of the proceedings under review was available for collection. The record was collected on 4 March 2016. The record was despatched (on a date that is not disclosed) to Digital Recording Transcriptions for typing. It was subsequently discovered (on a date that is not disclosed) that the disc provided contained no data. The applicant's representatives telephoned

the bargaining council and were requested to send an email. This was sent on 18 March 2016. The bargaining council was unable to find the record and supplied it to the applicant's representatives only on 22 August 2016. The applicant states that the transcription was completed and provided to the applicant's representatives on 18 August 2016 (This cannot be correct – on the applicant's own version, the record was provided to it on 22 August 2016.) On a perusal of the transcription, it became apparent that the record was incomplete. This was raised with the bargaining council during September 2016. On 30 November 2016, a new (and presumably) complete transcription was collected.

- [8] The standard to which parties are expected to comply in the prosecution of review applications is set out clearly in the Practice Manual. Clause 11.2.2 requires that the record of proceedings must be filed within 60 days of the date on which the applicant was advised by the registrar that the record has been received. Clause 11.2.3 provides that if the applicant fails to find a record within the prescribed period, the application will be deemed to have been withdrawn unless the applicant during that period requested the respondent's consent for an extension of time and consent has been given. If consent is refused, the applicant may on notice of motion supported by affidavit, applied to the Judge President for an extension of time. Further, clause 11.2.7 provides that review application is by its nature an urgent application. An applicant in review application is required to ensure that all the necessary papers in the application are filed within 12 months of the date of the launch of the application, failing which the application will be archived and regarded as lapsed, in the absence of good cause shown as to why the application should not be uplifted from the archive. The urgency with which review applications are required to be prosecuted is further highlighted by the statutory amendment introduced in 2014 which requires an applicant to apply for a date for a review application to be heard within six months of delivery of the application.

- [9] Although the application for condonation in the present instance does not

specifically address the shortcomings in respect of which condonation is sought, the most obvious of these is the failure to deliver the record timeously. I will accept for present purposes that the application extends to a failure by the applicant to comply with the practice manual and the consequences of deemed withdrawal and automatic collapsing established by clause 11 of the manual. I intend therefore to consider whether the applicant has shown good cause for its failure to prosecute the review application timeously and in particular, to file the record within the prescribed time limit. This requires the court to consider the length of the delay, the explanation for that delay and the applicant's prospects of success in the main application.

- [10] The delay in filing the record is inordinate. As I have recorded above, the record was filed some one year and two months after the review application was filed. Further, it is not in dispute that the applicant failed to either seek the consent of the respondent for the late filing of the record, or that the applicant applied to the Judge President for an extension of the prescribed period. Further, the applicant has failed to ensure that all of the necessary papers were filed within a period of 12 months from the date on which the application was filed.
- [11] The explanation for the delay is incomplete and woefully inadequate. There is no explanation for the applicant's failure to comply with clause 11 of the Practice Manual, or any explanation for the failure to request the Judge President for an extension of time. Even if I were to accept the explanation that is proffered in the founding affidavit, on the applicant's version, it collected a complete transcription on 30 November 2016. Yet the record was filed on 2 February 2017, some two months later, in circumstances where the applicant was already hopelessly out of time.
- [12] The applicant does not address its prospects of success in the main application. That in itself is a basis to refuse condonation for the late filing of the record. Be that as it may, the applicant's prospects of success in the review application are

minimal, if they exist at all. Distraught that this court may intervene by way of review if and only the decision reached by a commissioner or arbitrator is so unreasonable that it falls outside of a band of decisions to which a reasonable decision-maker could come on the available material. In the present instance, what is at issue are the questions of sanction and remedy. Specifically, the applicant contends that the arbitrator's decision to set aside the employee's dismissal and substitute it with a lesser penalty (that of a period of unpaid suspension) is a decision that fails to meet the reasonableness threshold. Further, the applicant contends that the arbitrator's decision to reinstate the employee (rather than to make an award of compensation) is a decision that fails to meet the reasonableness threshold.

- [13] The arbitrator's reasoning can be found in the award itself. As I have indicated, the arbitrator accepts that the employee breached the rules concerned, i.e. that she was insubordinate and insolent. However, his is the following:

When looking at the matter in totality I find the applicant to be a person that is not in a habit of obeying instructions and does not respect authority. On the other hand I find the respondent also have a habit of condoning such behaviour as it did in the first charge by selectively disciplining officials. The other factor took into consideration is that the respondent took long to charge and discipline the applicant. The applicant was charged in 19 months later in the first charge, five months later in the second charge and eight months later in the third charge. The only explanation given by the HUD was that the applicant was not cooperative with the investigation officer who was not even called to testify (this is hearsay). The 19 month timeframe to charge the applicant negates the claim of irretrievable breakdown of relationship by the respondent. As a result of the above I find of the dismissal not to be an appropriate sanction.

- [14] As I have indicated, the test is not whether the arbitrator came to the right decision or whether this court would have come to a different decision. It is sufficient that the arbitrator appreciated the nature of the enquiry, applied his

mind to the evidence and came to a decision that is reasonable having regard to that evidence. In the present instance, the arbitrator clearly understood what was required of him and the nature of the value judgement that he was required to make. Section 193 (2) provides that reinstatement is the primary remedy for unfair dismissal. To the extent that the applicant now contends it was unreasonable for the arbitrator to have reinstated the employee, the arbitrator clearly had regard to the evidence before him and in particular, the evidence of the applicant's dilatoriness in pursuing the charges of misconduct against the employee. The periods of delay referred to are inordinate and obviously self-destructive of any contention that a continued employment relationship was intolerable on account of the applicant's behaviour. In my view, it cannot be said in the circumstances that the applicant has any reasonable prospect of success on review.

- [15] In view of the applicant's failure to provide a full and acceptable explanation for any inordinate delay in the prosecution of the review application, and having regard to the applicant's billable prospects of success in the review application, the application to condone the applicant's non-compliance with the rules of this court stands to be dismissed.
- [16] In relation to costs, this court has a broad discretion in terms of s 162 to make orders for costs according to the requirements of the law and fairness. The court does not ordinarily make orders for costs in disputes that involve collective-bargaining partners, particularly where that order may prejudice a bargaining relationship. In the present instance, the court must necessarily take into account of the following factors. First, the shoddy manner in which the review application has been prosecuted and presented. What is recorded above in relation to the application for condonation speaks for itself. The applicants dilatory conduct and its failure to prosecute the review with the required degree of diligence has had the consequence that the employee, who was dismissed more than four years ago, on 15 January 2014, is to wait that long for justice to prevail. The failure by

the applicant's representatives to prosecute the application with diligence and in accordance with the professional standards that are expected by this court is the primary cause of the delay. While it is correct that the bargaining council failed to provide the record expeditiously, it was incumbent on the applicant's representatives to place pressure on the bargaining council to comply with its obligation to furnish the record and to ensure that the record was made available as a matter of urgency. Instead, it took some nine months for the complete record to be secured in circumstances where it is apparent that the applicant's representatives pursued the matter with no sense of urgency and indeed, with some degree of leisure. Further, there is the better of the failure by the applicant's representatives to have recourse to the remedy available to them in terms of the practice manual. The present application was prosecuted as if the practice manual did not exist. In all the circumstances, it seems to me that the interests of the law and fairness are best satisfied by the respondent paying the costs of both of the application for review and the application to have the arbitration award made an order of court. The respondent's representatives sought an order for costs on a punitive scale. I am satisfied however that the conduct of the applicant and its representatives was not *mala fide* and that they were negligent at most in the prosecution of this litigation.

[17] Finally, as I have indicated above, the parties agree that the s 158 (1) (c) application stands to be determined by the outcome of the review. I intend therefore to order that the award be made an order of court.

I make the following order:

1. Condonation for the late filing of the record of the proceedings under review is refused.
2. The application for review is dismissed.
3. The arbitration award issued by the third respondent on 12 October 2015 is made an order of Court in terms of s 158 (1) (c) of the Labour

Relations Act.

4. The applicant in the review application is to pay the costs of both the review application and the s 158 (1) (c) application.

André van Niekerk
Judge

REPRESENTATION

For the applicant: Adv. PP Ferreira, instructed by Ledwaba Sam Inc.

For the first respondent: Adv. S van Vuuren, instructed by Majang Inc.