



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

CASE NO: JR1283/17

In the matter between:

MEC FOR CO-OPERATIVE GOVERNANCE

HUMAN SETTLEMENT AND TRADITIONAL AFFAIRS

Applicant

and

GENERAL PUBLIC SERVICES SECTORAL

BARGAINING COUNCIL

First Respondent

COMMISSIONER M.E. PHOOKO N.O.

Second Respondent

MAHLATSE MATLALA & OTHERS

Third Respondent

Application heard: 19 June 2018

Judgment delivered: 20 June 2018

JUDGMENT

VAN NIEKERK J

- [1] This is an unopposed application to review and set aside an arbitration award issued by the second respondent, to whom I shall refer to as 'the arbitrator'. In his award, the arbitrator found that the applicant had committed an unfair labour practice relating to the provision of benefits by failing to accept certain performance instruments. The applicant was ordered to assess the instruments within 30 days of receipt of the award.
- [2] The material facts are recorded in the arbitration award under review, and I do not intend to burden this judgement with their repetition. It is sufficient to record for present purposes that in terms of a policy document regulating performance, employees are required to submit performance instruments in accordance with a stipulated time table, failing which employees are disqualified from receiving performance bonuses and pay progression in spite of any good performance. In his award, the arbitrator, in his analysis of the evidence, held that the third and further respondent's had made out a *prima facie* case for the deprivation of the benefits by the applicant and that the evidential burden then shifted to the applicant to justify its conduct. That justification amounted to no more than that the relevant performance instruments had been submitted late. The arbitrator held that it was not disputed that in terms of the policy, the performance instruments were required to be submitted within the prescribed time frame and that the policy made no provision for condonation for the late submission of the instruments. However, he went on to note that the policy 'is not cast in stone, in other words, it cannot be said that its provisions are peremptory'. The arbitrator went on to found that each case must necessarily be determined on its own merits and that in this particular instance, there was no deliberate failure to submit the performance instruments timeously and that given the inexcusable

degree of lateness, the decision not to assess the third and further respondents was arbitrary and thus constituted an unfair labour practice.

- [3] The application for review was filed late. The applicant acknowledges receiving the award under review on 30 March 2016. On this basis, the award ought to have been filed by no later than 11 May 2016. The review application was filed only on 13 July 2016. Contrary to what the applicant submits, the degree of lateness is not 'plus/minus 31 days (6 weeks) late'; the application was filed nine weeks late. That is a considerable delay.
- [4] The explanation for the delay is centred on internal authorisation procedures. The appointment of the applicant attorneys of record was approved only on or about 9 June 2016, well after the expiry of the six-week time limit established by s145. A consultation was held only on 23 June 2016, and preparation with the application commenced then.
- [5] Insofar as the prospects of success are concerned, the applicant says no more than that 'it is clear' from the grounds of review that the applicant has prospects of success on review, and cross-refers to the substance of the review application.
- [6] The court has a discretion, to be exercised judicially, to grant condonation. Among the factors usually relevant for consideration are the degree of lateness, the explanation therefor, the prospects of success, the prejudice that parties will suffer if condonation is granted or refused, and the importance of the case. None of these factors are individually decisive and the court must consider all the facts. In the final analysis, it is a matter of fairness to the parties. Condonation applications require a court to balance various interests and factors, having regard to all of them with none of them being decisive. (See *Melane v Santam Insurance Co. Ltd* 1962 (4) SA 531 (A) at page 532; *NEHAWU obo Mafokeng and Others v Charlotte Theron Children's Home* [2004] 10 BLLR 979 (LAC).
- [7] The principles were also summarised in *South Africa Post Office Ltd v CCMA & Others* [2012] JOL 28463 (LAC). In this case, the court recognised that ultimately the test is whether it is in the interests of justice to grant condonation. The court

accepted that in matters where importance is placed upon the speedy and expeditious resolution of a dispute, even a short delay may not be excusable, unless an explanation is proffered that sets out the reasons for the delay which the Court should find acceptable. The court further held that:

Where it is evident that the party seeking condonation has no prospects of succeeding in his principal claim or opposition, no purpose is served in granting condonation and the Court must in such circumstances refuse to grant condonation irrespective of the degree of delay or the explanation provided.

- [8] In *National Union of Mineworkers v Council for Mineral Technology* [1998] (2) ZALAC 22, the LAC established the principle that given the extent of the delay and the poor explanation for the delay, it was not necessary to consider the applicant's prospects of success in the main application. This was affirmed more recently in *Collett v Commission for Conciliation, Mediation & Arbitration* [2014] 6 BLLR 523 (LAC) where the court stated as follows:

There are overwhelming precedents in this court, the Supreme Court of Appeal and the Constitutional Court for the proposition that where there is a flagrant or gross failure to comply with the rules of court, condonation may be refused without considering the prospects of success. In *NUM v Council for Mineral Technology* (1999) 3 BLLR 209 (LAC) at para 10, it was pointed out that in considering whether good cause has been shown the well-known approach adopted in *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532 C-D... should be followed but:

'There is a further principle which is applied and that is without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without good prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused.'

The submission that the court a quo had to consider the prospects of success irrespective of the unsatisfactory and unacceptable explanation for the gross and flagrant disregard of the rules is without merit.”

- [9] In *Independent Municipal and Allied Trade Union on behalf of Zungu v SA Local Government Bargaining Council and Others* (2010) 31 ILJ 1413 (LC) at para 13, the Court held:

In explaining the reason for the delay it is necessary for the party seeking condonation to fully explain the reason for the delay in order for the court to be in a proper position to assess whether or not the explanation is a good one. This in my view requires an explanation which covers the full length of the delay. ...”

- [10] In *eThekweni Municipality v Ingonyama Trust* 2013 (5) BCLR 497 (CC) at para 28, the Court said the following where the explanation furnished did not cover the entire period and part of the delay was unexplained:

As stated earlier, two factors assume importance in determining whether condonation should be granted in this case. They are the explanation furnished for the delay and prospects of success. In a proper case these factors may tip the scale against the granting of condonation. In a case where the delay is not a short one, the explanation given must not only be satisfactory but must also cover the entire period of the delay. Thus in *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)*, this Court said in this regard:

“An applicant for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of delay. And, what is more, the explanation given must be reasonable. The explanation given by the applicant falls far short of these requirements. Her explanation for the inordinate delay is superficial and unconvincing.”

- [11] In *Gold Fields Mining SA (Pty) Ltd v CCMA* [2014] 1 BLLR 20 (LAC)), The Labour Appeal Court noted that a review court is not required to take into account every

factor individually, consider how the arbitrator treated and dealt with each factor and then determine whether a failure by the arbitrator to deal with one or more factors amounted to a process-related irregularity sufficient to set aside the award. The court cautioned against adopting a piecemeal approach since a review court must necessarily consider the totality of the available evidence (at paragraph 18 of the judgment). Specifically, the questions for a review court to ask or whether the arbitrator gave the parties a full opportunity to have their say in respect of the dispute, whether the arbitrator identified the issue in dispute that he or she was required to arbitrate, whether the arbitrator understood the nature of the dispute, whether he or she dealt with a substantial merits of the dispute and whether the decision is one that another decision-maker could reasonably have arrived at based on the evidence (see paragraph 20). So, when arbitrator fails to have regard to the material facts it is likely that he or she will arrive at a decision that is unreasonable. Similarly, where an arbitrator fails to follow proper process he or she will arrive at an unreasonable outcome. But, as the court emphasised, this is to be considered on a totality of the evidence and not on a fragmented, piecemeal analysis (at paragraph 21).

- [12] As I have recorded above, the delay in the present instance is substantial. Further, the explanation for the delay is incomplete. Even if I were to accept that approval was granted only on 9 June 2016 to proceed with the application, there is no explanation why the application was filed only on 13 July 2016, some 5 weeks later. At the time the applicant attorneys were instructed on 23 June 2016, they must have appreciated that the application was already substantially out of time. Even if I were to grant the applicant a degree of latitude in relation to the explanation for the delay, in my view, the minimal prospects of success in the main application dictate that condonation ought to be refused. In this regard, as I have noted above, the applicant deals with prospects of success by way of no more than a cross-reference to the substance of the review application. That in itself is insufficient – it is incumbent on an applicant seeking condonation to file a substantive affidavit dealing with all of the relevant factors, including the

prospects of success. It is not for the court to trawl through the main application to form its own assessment of what those prospects might be. In the review application, the applicant simply records that in its view, the arbitrator committed a gross irregularity, committed misconduct in relation to his duties as an arbitrator and exceeded his powers. A fourth ground for review alludes to the submission to the effect that the award is reviewable on the ground that it is not rationally connected to the facts of material evidence before the arbitrator and that the award is consequently irrational and unfair. There is no supplementary affidavit in which the applicant has sought to amplify its grounds for review. In effect, the grounds for review are no more than a statement of those grounds referred to in s 145 and the additional averment of the absence of a rational connection between the award and the facts. There is not a single averment to the effect that the award falls outside of a band of decisions to which reasonable decision-makers could come on the available material. That is what distinguishes a review from an appeal and it is accordingly incumbent on an applicant in a review application at least to plead the two-stage test referred to above, and its application to the facts of the case. It is not for the applicant simply to parrot the three grounds for review referred to in s 145 and regard those as sufficient and definitive.

- [13] The applicant's attorney was obviously alive to the shortcomings in the papers as he submitted heads of argument which more adequately addressed the test for review. Regrettably, it is not open to the applicant to make out its case for review in heads of argument. To the extent that the applicant's contended at the hearing of the application that the arbitrator had exceeded his powers given the terms of the policy and the fact that the third and further respondents had been afforded a two-week extension to comply with the requirement to submit performance instruments, this does not amount to the arbitrator exceeding his powers. His powers were to determine the existence or otherwise of an unfair labour practice. That he did. The fact that he chose to interpret and apply the policy in a manner more flexible than that contended for by the applicant does not necessarily mean

that the arbitrator exceeded his powers, nor does it mean that he committed any other reviewable irregularity in coming to the decision that he did.

[14] For all of the above reasons, in my view, condonation for the late filing of the review application stands to be refused.

I make the following order:

1. Condonation for the late filing of the review application is refused.
2. The review application is dismissed.

André van Niekerk
Judge

REPRESENTATION

For the applicant: Mr MC Chauke, Bopela Maake Attorneys