



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case no: JR 1113/14

In the matter between:

VAUGHN MORGAN BOLTON

Applicant

and

**COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION**

First Respondent

ZAKHELE MHLAMBO N.O

Second Respondent

SHOPRITE CHECKERS (PTY) LTD

Third Respondent

Heard: 19 July 2018

Delivered: 24 August 2018

Summary: This is a review application brought by the applicant for an order reviewing and setting aside the award issued by the second respondent under the auspices of the first respondent under case number: GATW3698-14 and granting the applicant condonation for the late referral of his unfair dismissal dispute.

JUDGMENT

SEDILE. AJBackground

- [1] The applicant was previously employed as the Divisional Meat Markets Manager: Hyper Checkers, Gauteng Division for a period of 30 years with the third respondent. During September 2012 the third respondent received a number of complaints from a supplier, East Rand Meat Mecca regarding alleged irregularities by the applicant.
- [2] The third respondent started investigating these allegations. In June 2013 it discovered a large number of irregularities. On 12 July 2013 the applicant was issued with a notice to attend a disciplinary hearing. The notice listed a litany of irregularities on the part of the applicant. The third respondent appointed an independent chairperson, Mr Matheta Swafo of the Sebata Dispute Settlement Agency to hear the enquiry.
- [3] The enquiry was heard on 5, 6 and 7 August 2013. On 14 August 2013 Mr Swafo issued a disciplinary hearing report, finding the applicant guilty of nine of the eleven allegations against him. Importantly he found that the evidence led at the disciplinary enquiry pointed to possible criminal activities on the part of the applicant that would require further investigation and for possible referral to law enforcement agencies.
- [4] After considering mitigating and aggravating circumstances the chairperson recommended a sanction of dismissal. On 20 August 2013 the third respondent, accepting the recommendation and informed the applicant of the termination of his services.
- [5] In terms of Section 191(1)(a)(i) of the Labour relations Act¹ (the LRA), the applicant was obliged to refer a dispute to the Commission for Conciliation

¹ 66 of 1995, as amended.

Mediation and Arbitration (CCMA) within 30 days of his dismissal, which meant by no later than 19 September 2013.

- [6] The applicant referred his dispute to the CCMA on 20 March 2014 and also filed an Application for Condonation of the late filing of the application. On 3 April 2014 the third respondent filed an Answering Affidavit in opposition to the Application for Condonation.
- [7] The matter was set down for argument on 9 April 2014 before Zakhele Mhlambo, the second respondent. On the morning of 9 April 2014, the applicant's Replying Affidavit was served on the third respondent's attorneys at the CCMA Pretoria, prior to the hearing of the matter. The legal representatives of both parties argued the matter before the second respondent.
- [8] On or about 23 April 2014, the second respondent issued a ruling refusing the applicant's Condonation Application.

Grounds for review

- [9] The applicant contended that any other commissioner reasonably applying his/her mind to the application in its entirety, would have concluded:
 - 9.1 That a reasonable and cogent explanation for the lengthy delay in lodging the unfair dismissal dispute was given by the applicant;
 - 9.2 That the factual averments made by the applicant pertaining to the charges preferred against him at the disciplinary hearing demonstrates strong prospects of success in defending the charges; and
 - 9.3 That the prejudice the applicant stood to suffer should the condonation not be granted, outweighed any prejudice that the third respondent stood to suffer;

- 9.4 That the second respondent had no regard to the circumstances as to why the applicant initially did not declare the dispute and was wrong in law and in fact in holding that the reasons for the delay fell “*outside the jurisdiction of the CCMA*”.

Submissions by the parties

- [10] The applicant submits that the second respondent holds, without substantiating same, that the applicant did not place any “*credible considerations*” before him to which he could apply his mind in considering the cause for the delay. Further, that the second respondent properly applied his mind to the facts before him, he found that a cogent explanation was given by the applicant thereto.
- [11] The third respondent is opposing the application in its entirety.

Analysis and conclusion

- [12] The applicant’s referral of the dispute to the CCMA was made after a period of six months, after he was dismissed on 20 August 2013. The said dispute was only referred on 20 March 2014 and the applicant was duly assisted by his attorney.
- [13] During the six months’ period, the applicant had no desire to pursue this case as he had no further interest in prosecuting his innocence against the allegations made against him.
- [14] What triggered the applicant’s mind and change of heart some five months later, to refer the matter to the CCMA, was the third respondent’s decision to bring a civil claim in the High Court against the applicant for the recovery of his losses.
- [15] The third respondent simultaneously made a request to the Retail Provident Fund to withhold payment to him of his withdrawal benefits, pending the

finalisation of the civil claim and as well as the criminal case brought against him by the third respondent as per the initial recommendations made by the chairperson during his disciplinary hearing.

- [16] The CCMA clearly is not a court law, it is a tribunal established in terms of the LRA and the decision made by the CCMA must be within the confines of the LRA and therefore a decision made by the Pension Funds Adjudicator will have no bearing in the decision making by the CCMA as the latter has no jurisdiction thereto.
- [17] Clearly the decision to initiate the proceedings at the CCMA was an afterthought, triggered by the non-payment of pension fund benefits to the applicant as the latter was disinterested in challenging the fairness of his dismissal for close to five months. The applicant was required to have declared the unfair dismissal dispute within thirty days after his dismissal from his employment.
- [18] The degree of six months is inordinate in that the applicant was a manager and fully conversant with the time limits available for him to challenge his dismissal at the CCMA.
- [19] Insofar as the applicant's prospects of success are concerned, it is clear that from a number of judgments by the Labour Appeal Court, that it is not sufficient simply to plead one or more irregularities or misdirection on the part of an arbitrator.
- [20] First, not all irregularities in the conduct of the arbitration proceedings contribute gross irregularities or misconduct for the purposes of section 145 of the LRA. The irregularity or misdirection relied upon must render the outcome of the proceedings unreasonable, in the sense that a reasonable decision maker could not reach the decision to which the arbitrator came in light of all the evidence before him/her.

[21] The applicant in the present instance have not pleaded any proper factual basis on which he submits that the second respondent committed any gross irregularity in the conduct of the proceedings under review. Further there is no averment in the founding affidavit to the effect that the outcome of the proceedings failed to meet the reasonableness threshold as described above.

[22] In the circumstances, the applicant patently failed to make out a proper case for review on the papers and in his arguments during the hearing of the matter and their prospects of success, if they exist at all.

[23] For the above reasons, I make the following order:

Order

1. Condonation is refused;
2. The review application is dismissed;
3. The applicant is ordered to pay costs.

P. Sedile

Acting Judge of the Labour Court of South Africa

APPEARANCES:

For the applicant: M. Henning of Martin Henning Attorneys

For the respondent: J. Jorge of Cliffe Dekker Hofmeyr Attorneys

LABOUR COURT