



THE LABOUR COURT OF SOUTH AFRICA, POLOKWANE

Not Reportable

Case no: JR 704/15

In the matter between:

MATOME McDONALD MARA

Applicant

and

DEPARTMENT OF EDUCATION LIMPOPO

First Respondent

EDUCATION LABOUR RELATIONS COUNCIL

Second Respondent

COMMISSIONER RAYNOLD BRACKS N. O

Third Respondents

Heard: 27 November 2018

Delivered: 29 November 2018

Summary: An opposed review application – The distinction between review and appeal ought to be maintained. Section 138 enjoins an arbitrator to determine a dispute by dealing with the substantial aspects and with minimum of legal formalities. An arbitrator must deal with the principal issue and afford each party to present its case. An outcome that is consistent with the evidence so presented is one that a reasonable decision maker may arrive at. A review application filed outside the prescribed period without an acceptable explanation for the delay is

defective and ought to be dismissed for want of jurisdiction. Held (1): The application is dismissed. Held (2): No order as to costs.

JUDGMENT

MOSHOANA, J

Introduction

[1] This is a review an opposed review application. The applicant contends that having failed to observe the cautionary rules of evidence, the third respondent denied the applicant a fair hearing. Further, the third respondent found the applicant guilty of charges not charged or dismissed for, which conduct amounts to an irregularity. There was no evidence to sustain the charge of sexual assault. Above all, the findings are not those of a reasonable decision maker.

[2] The application is opposed by the first respondent only.

Background facts

[3] Since 7 January 1986, the first respondent employed the applicant as a CS 1 educator at Motseketla Primary School. In February 1988, he was moved to another school. Ultimately in January 1996, he was appointed a Principal of Ramogabe Primary School.

[4] Around 2012, allegations of misconduct arose against the applicant. Ultimately, on 12 November 2012, he was charged with various acts of misconduct. Following a disciplinary hearing, the applicant was found guilty of various charges and was dismissed. Aggrieved by his dismissal, he referred a dispute to the second respondent alleging unfair dismissal. The third respondent was appointed to resolve the dispute through arbitration. After what appears to be a protracted hearing, the third respondent published his award wherein he found the dismissal to be fair on both legs. Aggrieved by the outcome, the applicant launched the present application seeking to review and set aside the award. e

Grounds of Review

- [5] The applicant alleges that the third respondent committed gross irregularity in that he failed to have regard to material facts and rejected material witnesses' testimony without justification. The applicant catalogued various charges and contended that there was no evidence to prove them. Largely, he criticized the manner in which the third respondent dealt with the evidence and lamented unfairness and irregularity. In his supplementary affidavit, the applicant again criticized the manner in which certain specific evidence was dealt with. He alleged that the third respondent favoured the evidence of the first respondent's witnesses at the detriment of his own evidence.

Evaluation

- [6] The difference between a review and an appeal ought to be maintained at all times. In a review, what is crucial is the question whether the outcome moves in tandem with the material properly placed before an arbitrator. The test remains that of whether the decision is one that a reasonable commissioner faced with the same material may arrive at. It is whether the decision falls within the bounds of reasonableness.
- [7] When one carefully considers the grounds of review by the applicant, one observes grounds for an appeal. I do not possess appeal powers. In casu, the third respondent was faced with conflicting versions. As he was behooved to do, he followed the approach set out in *Mabona and another v Minister of Law and Order and others*¹. Applying the applicable standard of proof, he found that the allegations against the applicant were proven. He found that the applicant's bare denial did not begot a real dispute of fact. He was far from being impressed with the applicant's blaming approach. The applicant laid the blame on the door of Ramohlale.

¹ 1988 (2) SA 654 (SE)

[8] Commissioner, when they arbitrate, they do not function like a court of law, particularly a criminal court. Although the proceedings are akin to civil proceedings in a court of law, an arbitrator does not function like a court of law. Section 138 of the LRA enjoins an arbitrator to deal with the substantial merits quickly and fairly. Most importantly with a minimum of legal formalities. Certain of the cautionary rules developed by the criminal courts do not find application in arbitration proceedings. To my mind, the issue of the age of the witnesses is a legal formality that does not have a place in arbitration proceedings. What matters is whether the evidence weighed with other evidence brings about probable results. Accordingly, the third respondent was not compelled to apply the cautionary rule contended for by the applicant.

[9] Nonetheless, the court in *Woji v Santam Insurance Co Ltd*² had the following to say:

Nor, for that matter, have the Courts “acted upon a rigid rule that corroboration should always be present” before a child’s evidence is accepted... That was a criminal matter as were all other cases cited by counsel in argument. Where the action is not criminal but civil one in which the burden of proof is not so onerous, there is even less cause to insist that the child’s evidence should be corroborated. The question...is whether the young witness’ evidence is trustworthy. Trustworthiness... depends on factors such as the child’s power of observation, his power of recollection, and his power of narration on the specific matter to be testified...

[10] I do not agree with Mr Kela appearing for the applicant that there is a constitutional duty to apply cautionary rules in arbitration proceedings. The third respondent did not commit an irregularity. As held in *Goldfieds*, the third respondent identified the principal issue, dealt with it and afforded each party an opportunity to deal with the principal issue. The outcome when compared with the evidence presented it comes out as a hand and a glove. The outcome does not obliquely lie besides the

² 1981 (1) SA 1020 (A)

evidence. Therefore, the outcome is one that a reasonable commissioner may arrive at.

[11] The applicant's application is launched outside the prescribed time period. This court lacks jurisdiction to entertain reviews launched outside the prescribed time period unless good cause is shown to exist. When the applicant launched the review application, he did so outside the prescribed time period. He failed to show good cause at that time. The first respondent took a point in its answering affidavit filed and served around 2 December 2015. The applicant properly reacted to the point two and half years later. On 13 August 2018, he brought an application seeking condonations of various non-compliance including the late filing of the application. The applicant offered no plausible explanation for the delay. He alleged that the delay of 24 days was minimal. It is important to state that the applicant offered no plausible explanation. This court and the apex court has consistently held that where there is no proper explanation of the delay, prospects of success are immaterial and condonation ought to be refused. I agree with the first respondent, there is no proper explanation for the delay, thus condonation ought to be refused. The explanation given is so shallow and amounts to no explanation at all. No explanation was offered why the application was properly launched two years later. The attempted and withdrawn applications for condonation are of no moment. In motion proceedings, a party stands and falls by its founding papers. In the founding affidavit there is a deafening silence as to why the application was launched two years later. It is unnecessary to deal with the other condonation applications for the replying affidavit and the heads of argument.

[12] For all the above reasons, I come to the conclusion that the application for review ought to be dismissed.

[13] In the results I make the following order:

Order

1. The application for condonation of the late filling of the review application is dismissed.
2. The application for review is dismissed.
3. No order as to costs.

GN Moshwana

Judge of the Labour Court of South Africa.

Appearances:

For the Applicant: Adv D Kela.

Instructed by: Ndumiso Voyi Incorporated, Midrand

For the 1st Respondents: Adv V P Ngutshana.

Instructed by: State Attorney, Johannesburg.