



IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

Not Reportable

Case No: PR 249/14

In the matter between:

PSA obo VUMILE BAKUBAKU

Applicant

and

THE GENERAL PUBLIC SERVICE

SECTOR BARGAINING COUNCIL

First Respondent

WILLIAM FRIEDRICH BENTZ

Second Respondent

MINISTER OF PUBLIC WORKS

Third Respondent

Heard: 30 November 2016

Delivered: 19 January 2018

Summary: The late filing of an application may not be condoned when the applicant has failed to make averments placing the court in a position to decide the application.

JUDGMENT

LALLIE, J

- [1] The applicant launched this application seeking an order declaring the arbitration award issued by the second respondent who will be referred to as the arbitrator in this judgment, null and void. The application is opposed by the third respondent.
- [2] The factual background to this matter is that the individual applicant, Mr Bakubaku (Bakubaku), was employed by the Department of Public Works (the Department) as a Deputy Director: Human Resources Management in July 2005. He performed his duties at the Mthatha office of the Department. Arising from allegations of misconduct against him, he reached an agreement with the Department that a pre-dismissal arbitration be conducted into the allegations. The pre-dismissal arbitration was conducted by the arbitrator on 30 July and 13 August 2009 under the auspices of the first respondent which will be referred to as the bargaining council in this judgment. On 23 September 2009 the arbitrator issued an award in which he found Bakubaku guilty of the charges which had been preferred against him and dismissed him. On 13 November 2009, the PSA launched an application on behalf of Bakubaku in this court to have the award reviewed and set aside. After substantial delay in the prosecution of the review application the PSA launched the application at hand on 15 November 2014 and subsequently withdrew the review application.
- [3] In the answering affidavit the third respondent raised a number of preliminary points. In the first, the third respondent submitted that this court lacks jurisdiction to entertain the application as the applicant filed it out of time but failed to apply for condonation. The third respondent further submitted that lack of jurisdiction constituted sufficient grounds for the dismissal of the application. When this matter was argued, counsel for the applicant relied on the issue of legality only. It was the applicant's case that the award should be declared null and void because the arbitrator had no jurisdiction to conduct the pre-dismissal arbitration as he lacked the necessary accreditation. The third respondent persisted with the preliminary point of lack of jurisdiction resulting from the applicant's failure to apply for condonation. The issue of

condonation has to be determined first as without the necessary jurisdiction, this court may not hear a matter.

- [4] In the founding affidavit the applicant made the following averments in respect of condonation:

“Insofar as the delay in launching this application is concerned:

- 37.1 I am a layman at the mercy of my union and my legal representatives;
- 37.2 I have, at all times, been led and guided (sic) by their advice;
- 37.3 There is no prejudice to the Respondents. This is particularly in light of the fact that the other review is still pending”.

- [5] Answering to these averments, the third respondent submitted that the applicant failed to provide a proper explanation for the delay and to place this court in a position to assess its conduct and motives. The third respondent denied that it will not suffer prejudice. It submitted that it will suffer prejudice should the Department be required to reinstate Bakubaku and hold a disciplinary enquiry afresh six years after his dismissal. Memories have faded and it will be more difficult to locate documentation. A number of employees who were involved in the pre-dismissal arbitration have left the Department. Mr Malebye has resigned from the public service and Mr Rathatha has left the Department.

- [6] In the replying affidavit the applicant did not deal with the averments raised by the third respondent on condonation. The third respondent's version therefore remains undisputed. The applicant submitted that it has been granted by this court an opportunity to file an affidavit which sets out the basis of its attack on the pre-dismissal arbitration award. It added that the opportunity applied to both applications. The applicant further submitted that this court ordered that it may be permitted to file the replying affidavit. The applicant's interpretation of the order of 4 September 2015 is opportunist and unsustainable. When the order was granted, two applications were pending. In the first the applicant sought to have the arbitrator's award reviewed and set aside. In the second it sought an order declaring the same award null and void. In the order the

applicant was required to file an affidavit and explain the manner in which it intended to pursue the matter in view of the pending applications. The applicant did not construe the order as condonation of the late filing of the application at hand because in the founding affidavit it sought condonation. Had the applicant been of the view that condonation had been granted, it would not have sought condonation of the late filing of the application in the founding affidavit. The third respondent's averment that the applicant has not brought the application within reasonable time is not denied.

- [7] The need to seek condonation for the late filing of this application was not lost to the applicant. The applicant, however, failed to make proper averments for condonation and elected not to deal, in the replying affidavit, with the respondent's vehement opposition to condonation. The Constitutional Court in *Grootboom v National Prosecuting Authority and Another*¹ expressed its disapproval for non-compliance with court rules and the failure to give proper reasons for condonation in the following words:

'The language used in both *Van Wyk* and *Ethekwini* is unequivocal. The warning is expressed in very stern terms. The picture depicted in the two judgements is disconcerting. One gets the impression that we have reached a state where litigants and lawyers disregard the Rules and directions issued by the Court with monotonous regularity. In many instances very flimsy explanations are proffered. In others there is no explanation at all. The prejudice caused to the Court is self-evident. A message must be sent to litigants that the Rules and the Court's directions cannot be disregarded with impunity.'

The court expressed the need for a proper condonation application thus:

'[23] It is trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or court's directions. Of great significance, the explanation must be reasonable enough to excuse the default.'

¹ [2014] 1 BLLR 1 (CC) at para 34.

[8] The applicant elected not to make averments which would have placed me in a position to determine whether filing this application more than five years after the award the applicant sought to have declared null and void, was issued. Absent the necessary averments, condonation may not be granted. As the excessive delay has not been condoned, this court lacks jurisdiction to hear this application.

[9] The third respondent sought a costs order against the applicant. I have considered the arguments on the issue of costs. Notwithstanding the manner in which the applicant conducted this matter, I am not convinced that both the law and fairness justify a costs order.

[10] In the premises, the following order is made:

Order:

1. The application is dismissed.
2. No order is made as to costs.

Z Lallie

Judge of the Labour Court of South Africa

Appearances

For the Applicant: Advocate Dyke SC

Instructed by: Nosindwa Attorneys

For the Third Respondent: Advocate Kroon SC

Instructed by: The State Attorney

LABOUR COURT