THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR2215/16

In the matter between:

SATAWU OBO M.R. HLALETHWA **Applicant**

and

TRANSNET BARGAINING COUNCIL **First Respondent**

ARBITRATOR EBRAHIM PATELIA *N.O.* **Second Respondent**

TRANSNET FREIGHT RAIL **Third Respondent**

Heard: **19 JULY 2018**

Delivered: **26 MARCH 2019**

JUDGMENT

PIENAAR, AJ

Introduction

[1] This is an opposed Application for review in terms of section 145 and section 158 of the Labour Relations Act[1] (LRA) brought by SATAWU on behalf of one of its members Ms Hlalethwa.

[2] The Applicant wishes to review and set aside the ruling granted by the Second Respondent on 09 September 2016 whereby the Second Respondent dismissed the Applicant's Condonation Application for the late filing of the Rescission Application and, in turn, dismissed the Applicant's Rescission Application.

Background

[3] The Applicant commenced employment as a Manager with the Third Respondent on 01 June 2011. It was alleged that the Applicant was fraudulently submitting travel claims on trips not taken. Consequently, the Applicant was charged with fraud and dishonesty and was requested to attend a pre-dismissal arbitration.

[4] There were 10 attempts to hold the pre-dismissal arbitration over the course of almost a year. Of the 10 postponements, the Applicant was the cause of 6 postponements and, in particular, the cause of the final 4 consecutive postponements. Accordingly, the Applicant was notified by a registered letter, that the arbitration would proceed in her absence if she failed to attend the next date that the arbitration was set down for which was 11 March 2015.

[5] Consequently, when the Applicant did not appear at the proceedings on 11 March 2015 because of an alleged illness, the Arbitrator proceeded with the pre-dismissal Arbitration in the Applicant's absence.

[1] 66 of 1995, as amended.

[6] The Arbitrator found the Applicant guilty of fraud and dishonesty and ruled that dismissal was an appropriate order. Consequently, the Arbitrator dismissed the Applicant whom was handed a letter of dismissal on 11 April 2015.

[7] According to the Applicant, she contacted SATAWU and notified them of the default award against her. On or around 26 June 2015, an intern at SATAWU erroneously referred a Review Application to the Labour Court instead of applying for the rescission of the default award.

[8] This mistake only came to the attention of SATAWU almost a year later who then launched the Rescission Application and Condonation Application with the First Respondent. At this point the Applicant was approximately 15 months late in filing her Application for Rescission.

[9] On 09 September 2016, the Second Respondent dismissed both the Condonation Application and, by implication, the Rescission Application. This is the subject of the review.

[10] The Applicant's main grounds of review put forward were that the Second Respondent committed a gross irregularity, the Second Respondent arrived at a ruling that no reasonable Arbitrator would have arrived at, the Second Respondent failed to consider all the material facts presented to him by the parties and the Second Respondent's ruling is flawed in relation to both process and outcome.

Analysis and findings

[11] It is trite that the onus sits on the Applicant to prove that the Condonation Application must be granted. In the case of *NUMSA and Another v Aluminium Hillside*[2], the court stated:

[2] [2005] 6 BLLR 601 (LC).

[12] It is trite that the onus sits on the Applicant to prove that the Condonation Application must be granted. In the case of *NUMSA and Another v Aluminium Hillside*[3], the court stated:

> 'Condonation is not there merely for the asking. Applications for condonation are not a mere formality. The onus rest on the applicant to satisfy the court of the existence of good cause and this requires a full, acceptable and ultimately reasonable explanation.'[4]

[13] The court in *Melane v Santam Insurance Co Ltd*[5], set out the following factors that must be taken into account when deciding whether condonation should be granted:

12.1 extent of the delay in filing the rescission application;

12.2 the explanation for the delay in filing the rescission application;

12.3 the prospects of success of the rescission application;

12.4 the importance of the issue.

[14] In addition the court considers the potential prejudice to be suffered by the parties if condonation is or is not granted.

Extent of the delay.

[15] As stated in Rule 31 of the Bargaining Council rules, an application for the rescission of an arbitration award or ruling must be made within fourteen (14) days of the date on which the applicant became aware of the

[3] [2005] 6 BLLR 601 (LC).
[4] Id fn 2 at para 12.
[5] 1962 (4) SA 531 (A) at 532C-D.

arbitration award or ruling which was erroneously made in the absence of any party affected by the award or ruling.

[16] It appears to be common cause that the Applicant became aware of the default award when she was handed the dismissal letter by the Third Respondent on 11 April 2015.

[17] This would mean that the Applicant had to apply for rescission of the award by 25 April 2015. The Applicant only referred the matter to Transnet Bargaining Council for rescission on 28 July 2016. Accordingly, the rescission application was approximately 15 months late. It cannot be debatable that the delay is indeed excessive in the extreme.

[18] The Second Respondent incorrectly stated that the Applicant became aware of the award when it was issued on 24 March 2014. Accordingly, the Second Respondent identified the due date for the Rescission Application to be on 07 April 2015. However, the incorrect dates has no baring on this case as the delay in the Application for Review, regardless of whether it was due on 07 April 2015 or 25 April 2015, is excessive.

Explanation for the delay

[19] The Applicant argued that the reason for the late referral of the rescission judgment was due her legal representative and the negligent and substandard performance of SATAWU in that they erroneously launched a review application instead of a rescission application. Accordingly, the Applicant argued that her representative misunderstood the correct procedure and legal principles that should be applied.

[20] In *Honey and Blankenberg v Law*,[6] the Court held as follows with regard to negligence on the part of an attorney:

> 'The test for establishing negligence [on the part of the attorney in performing his or her duties] is whether he [such attorney] has been proved to be guilty of such failure as no attorney of ordinary skill would be guilty of if acting with reasonable care. He will not be guilty of negligence merely because he committed an error of judgement whether on matters of discretion or law.'[7]

[21] This finding was referred to with approval by the Appellate Division in *Mouton v Die Mynwerkersunie*.[8]

[22] The Appellate Division in *Saloojee and Another, NNO v Minister of Community Development*[9] ("*Saloojee*"), held that it cannot be assumed that non-compliance with Rules of Court, which is entirely attributable to the attorney of the non-complying party, should automatically result in an Application for condonation being granted.[10]

[23] The courts have held that the same principle would apply in situations where a Union has been the cause of the delay to the proceedings. In the case of *AMCU and Others v Oil Separation Services Northern Province*[11], the court held:

> 'The starting point is that to the extent that a Union and its officials are mandated to act on behalf of its members, especially in regards to all matters pertaining to employees' rights in the LRA, there is in my view, no reason to distinguish them from the ordinary attorney/client relationship. It is trite that litigants cannot be absolved from tardiness of their own chosen representatives.'[12]

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[6] 1966 (2) SA 43 (R).
[7] Ibid at 46H-47A.
[8] 1977 (1) SA 119 (A) at 142H-143A.
[9] 1965 (2) SA 135 (A)
[10] Ibid at 141B-H.
[11] Unreported case. (JS815/16) [2017] ZALCJHB 3 (11 January 2017)
[12] Ibid at para 10 and 11.

[24] In light of the above principles, it is not sufficient for the Applicants simply to lay the blame for the delay in filing their rescission application on the SATAWU. The fact that the Applicant's Union took the matter on review is regrettable but the Applicant ultimately bears the consequence of the Union's actions.

[25] Furthermore, it was correctly pointed out by the Third Respondent that in light of the extent of the delay, the explanation proffered by the Applicant was equally inadequate and not reasonable. The Applicant took 9 months to enquire about the progress of her case with SATAWU. This falls short of what a reasonable litigant would have done.

Prospects of success: rescission application

[26] In the case of *National Union of Mineworkers v Council for Mineral Technology*[13], the court stated that:

> '…without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial…' [14]

[27] In this case, in light of the conclusions reached, the Applicants' attempt to lay blame squarely on SATAWU cannot be accepted as an excuse, and further in the delay being excessive in the extreme, it follows that the explanation, if any, does not amount to an explanation at all. Thus, little purpose would be served by considering the Applicants' prospects of success in the matter.

[13] 1999(3) BLLR 209 (LAC),
[14] Id fn 13 at para 10. Quoted with approval in *Mofokeng and 4 Others v Rotek and Roschon Soc Ltd* (JR264/16) [2018] ZALCJHB 421 (13 December 2018).

[28] However, for the sake of completeness, the basis of the Applicant's claim will be briefly discussed. The Applicant submitted that she was never afforded an opportunity to make representations, thus contravening the requirements of natural justice based on fairness and the right to be heard. She stated that she has more evidence to prove that she can defend herself successfully on all allegations against her.

[29] However, in no way does she substantiate this claim by providing any proof of her innocence. Thus, the Applicant wishes this Court to take a blind leap of faith and mindlessly believe that she possesses evidence which will exonerate her from the offence.

[30] In contrast, the Third Respondent presented a host of evidence in the form of phone records and map analysis that implicated the Applicant in the impugned offence. Furthermore, the Third Respondent exhibited proof that 6 other Managers in its employ were charged with similar offences and were subsequently dismissed.

[31] I agree with the Second Respondent in finding that, from the information available, the Third Respondent's version is more probable that that of the Applicant. In the absence of any evidence to the contrary I therefore find that the Applicant has little to no prospects of success in the rescission application.

Prejudice

[32] It is my view that the granting of the condonation application would cause undue prejudice to the Third Respondent.

[33] Given the already lengthy delay, the Third Respondent has lost key resources, such as crucial witnesses, that are integral in successfully

prosecuting this offence. Thus, there would be an undue burden on the Third Respondent to condone this application.

[34] Furthermore, it appears apparent to me that the Applicant was the architect of her own misfortune.

Conclusion

[35] I am of the view that the Second Respondent in his ruling correctly dismissed the Condonation Application for the late filing of the Rescission Application.

[36] Therefore, I concur with the decision of the Second Respondent and can find no reason to interfere with his ruling.

[37] For these reasons, I order as follows:

Order

1. The review application is dismissed with costs.

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Pienaar, AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Dawn Malope of Masondo Malope Attorneys

For the Third Respondent: Zanele Chauke of Poswa Inc