THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR590/17

In the matter between:

CHRISTINE C DE WET **Applicant**

and

BIGEN AFRICA (PTY) LTD **First Respondent**

NC MACHAKA N.O **Second Respondent**

COMMISSION FOR CONCILIATION, MEDIATION & ARBITRATION **Third Respondent**

Heard: **17 January 2019**

Delivered: 10 May 2019

JUDGMENT

SCHENSEMA, AJ

<u>Introduction</u>

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[1] The applicant seeks to review and set aside the arbitration award issued on 10 February 2017, wherein the second respondent found that the applicant had failed to prove that she was constructively dismissed. The applicant further seeks that Rules 39 (3) and (4) of the Commission for Conciliation, Mediation and Arbitration (CCMA) Rules be declared to be inconsistent with sections 9, 23 (1) and 34 of the Constitution of the Republic of South Africa[1] (the Constitution) and also that section 4 (1)(b) of the Competition Act[2] be set aside. However, at the commencement of the Court proceedings, counsel for the applicant confirmed that the applicant would be abandoning the relief sought in respect of the Competition Act.

[2] The application for review is brought in terms of s145 of the Labour Relations Act[3] (the LRA). The review application was filed with this Court on 10 April 2017. The application is opposed by the first respondent. The applicant further seeks condonation for the late filing of the review application, which condonation is contained at paragraphs 133 to 134.4 of the applicant's founding affidavit.

<u>Condonation application</u>

[3] The only submission made by the applicant in respect of condonation is that the review is one week late and that the delay is insignificant. Furthermore, that the cause of the delay was as a result of arrangements having to be made for the financing of these proceedings and that the applicant has excellent prospects of success in the review application based on the evidence and legal submissions deposed to in the founding affidavit.

[4] The condonation has been opposed on the basis that no proper condonation application has been brought by the applicant in that the applicant has failed to provide a full explanation for the delay, has further failed to deal with the prospects of success and to address the issue of prejudice. In conclusion the first respondent has submitted in its opposing papers that the applicant has failed to show good cause and that for this reason the application for condonation should fail.

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[1] 108 of 1996.
[2] 89 of 1998.
[3] 66 of 1995

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[5] In terms of Rule 12 (3) of the Labour Court Rules, the Court may, on good cause shown condone the non-compliance with any period prescribed by these Rules. Where it comes to deciding condonation applications, the law in this regard is now well settled on the basis of the following principles as set out in the case of *Melane v Santam Insurance Co Ltd*[4]:

> "In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefore, the prospects of success and the importance of the case. Ordinarily these facts are interrelated, they are not individually decisive, save of course that if there are no prospects of success there would be no point in granting condonation."

[6] In the case of condonation applications brought in the Labour Court, and by applying the *ratio* in *Melane supra*, the Court in *Academic and Professional Staff Association v Pretorius NO and Others*[5] summarised the principles for consideration as follows:

> "The factors which the court takes into consideration in assessing whether or not to grant condonation are: (a) the degree of lateness or non-compliance with the prescribed time frame; (b) the explanation for the lateness or the failure to comply with the time frame; (c) prospects of success or bona fide defence in the main case; (d) the importance of the case; (e) the respondent's interest in the finality of the judgment; (f) the convenience of the court; and (g) avoidance of unnecessary delay in the administration of justice… It is trite law that these factors are not individually decisive but are interrelated and must be weighed against each other. In weighing these factors for instance, a good explanation for the lateness may assist the applicant in compensating for weak prospects of success. Similarly, strong prospects of success may compensate the inadequate explanation and long delay."

[7] What is clear from the *ratio* in *Academic and Professional Staff Association* is that the providing of a proper explanation for any default or delay is a critical component to any condonation application. As to how this explanation must be

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[4] 1962 (4) SA 531 (A) 532C-E.
[5] (2008) 29 ILJ 318 (LC) paras 17-18.

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provided was further set out in *Independent Municipal and Allied Trade Union on behalf of Zungu v SA Local Government Bargaining Council and Others*[6] where 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…"

[8] The Labour Appeal Court (LAC) in *NUM v Council for Mineral Technology*[7] emphasised that the two crucial elements for deciding on the issue of condonation are prospects of success and a good explanation for the delay. The LAC stated that:

> "… Without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused. "

[9] There are a number of worrying factors in this case insofar as condonation being sought. The applicant has failed to properly address the requirements for condonation and merely states that the delay is insignificant and that due to financial reasons it was not possible to launch the review application within the applicable time frame and furthermore that there are excellent prospects of success. This is the totality of the applicant's condonation.

[10] It has repeatedly been stated in this Court that condonation cannot be had for the mere asking[8] and that there is an obligation on the defaulting party to proffer a reasonable, adequate and satisfactory explanation for the delay. In this case the applicant merely seeks an indulgence on the basis that the delay is insignificant and that due to financial reasons it was not possible to timeously launch the review application.

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[6] (2010) 31 ILJ 1413 (LC) para 13.
[7] [1999] 3 *BLLR* 209 (LAC) at para 10.
[8] See: *Uitenhage Transitional Local Council V South African Revenue Service* 2004 (1) SA 292 (SCA).

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[11] Despite the weak reasons given and notwithstanding the aforementioned, it is my view that upon a consideration of the interests of justice, condonation should be granted.

Grounds for review

[12] The applicant had been in the employ of the first respondent for a period of 19 years. The applicant has submitted that her employment with the first respondent became intolerable and she was left with no alternative but to resign with effect from 30 April 2016. The applicant subsequently referred a constructive dismissal dispute to the CCMA, at the conclusion of which the Commissioner dismissed the applicant's case.

[13] The applicant seeks to review and set aside the arbitration award for the reasons set out in the founding affidavit, which *inter alia* include that the Commissioner committed a material error of law, ignored relevant evidence and arrived at a conclusion which no reasonable decision-maker would have reached on the evidence presented to the Commissioner.

[14] The applicant submits that the Commissioner committed a material error of law by admitting the "without prejudice" letter written by her attorneys. The Commissioner further committed a gross irregularity in the proceedings by ignoring relevant evidence which explained the intolerability of the applicant's employment and that the Commissioner had materially misdirected himself as to the nature of the questions he had to answer and only considered the form of the applicant's complaints instead of the contents and merits thereof.

[15] In opposition, the first respondent raised several points *in limine* which *inter alia* related to the applicant's failure to adhere to the time lines contemplated in s145 of the LRA, the applicant's failure to launch a proper condonation application, the relief sought by the applicant is not competent and the applicant's reliance on the evidence is tantamount to an appeal.

The test on review

[16] It is trite that the question in constructive dismissal cases is whether there was a dismissal or not. This has to be determined before an enquiry into the

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fairness thereof could happen. The question whether a dismissal had taken place, goes to jurisdiction and this Court as well as the LAC has confirmed on numerous occasions that the review test as laid down in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[9] does not find application.

[17] The present application is premised on the review test as laid down in *Sidumo supra*. In its opposing affidavit the first respondent did not take issue with the fact that the applicant seeks to review the arbitration award on the basis of unreasonableness and has further defended the arbitration award. In the matter of *Johnson v Rajah NO and Others*[10] the Court held that reasonableness finds no application in cases such as these and further referred the parties to the matter of *NUMSA obo Zahela and 3 Others v Volkswagen SA (Pty) Ltd and Others*[11]. In this matter the Court dismissed an application for review where an applicant had incorrectly relied on 'reasonableness' instead of 'correctness' and held that:

> "In other words, reasonableness ordinarily has no place in a review where the enquiry is whether or not the CCMA had jurisdiction. This is an assessment that must be made objectively, having regard to the facts placed before the commissioner. It amounts to a determination of whether the commissioner's decision was correct.
>
> It follows that in a matter such as the present, where the proper right of review is one based on correctness that is the case that must necessarily be pleaded. The applicant mistakenly, has pleaded on the basis of an attack on the reasonableness of the arbitrator's decision. Mr Niehaus, who appeared for the applicant, did not dispute that the applicant had sought intervention on a basis that was incorrect. He requested the court to postpone the matter and to grant the applicant leave to file amended papers in order to address the error.
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> There are a number of considerations that compelled me to conclude that a postponement and the concomitant further delay in the resolution of these proceedings was not appropriate in the circumstances. First, as I have indicated, the fact of the matter is that the applicant has approached this court on the basis of pleadings that posit the incorrect test. All of the submissions in

[9] (2007) 28 ILJ 2405 (CC) paras 78 to 79.
[10] Case number JR33/15. Unreported (26 January 2017).
[11] Case number PR137/13. Unreported (16 November 2016).

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> the founding papers, to the extent that they suggest that the arbitrator failed to appreciate the nature of the enquiry that she was to conduct that her decision fell outside of the band of decisions to which reasonable people could come on the available material, are irrelevant. The applicant would be obliged to make out an entirely new case for review. The present situation is not dissimilar to that where a plaintiff elects the wrong cause of action to pursue his or her claim. It is not open to a plaintiff, generally speaking, in those circumstances simply to seek to remove the matter from the trial roll and introduce a new cause of action."

[18] I am guided by both these cases and having considered the applicant's founding affidavit, the basis of the applicant's review clearly relates to reasonableness. In this regard I refer particularly to paragraphs 127 to 132 of the founding affidavit which clearly sets out the basis of the review. Furthermore, the heads of argument refer to various cases relating to the reasonableness test and the requirements to set aside an arbitration award on the basis that the decision is one that a reasonable decision maker could not have reached when considering the evidence. For the aforementioned reasons, reasonableness finds no application *in casu* and the grounds for review relating to reasonableness can therefore not be considered.

[19] Accordingly a decision has to be made as to whether the arbitrator was right or wrong and not whether the conclusion reached by the arbitrator was one that a reasonable decision maker could not reach. The question this Court therefore has to decide in view of the applicable test is whether the arbitrator correctly found that the applicant had indeed resigned and she had not been dismissed.

[20] Accordingly I will only consider this application on the basis whether the arbitrator was correct to find that the applicant was not constructively dismissed in line with the submissions made by both counsel.

[21] My analysis in this regard commences with a review of the record and the evidence that was submitted during the arbitration proceedings. The applicant firstly submitted extensive evidence in relation to her employment history with the first respondent. Secondly the applicant made reference to the

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Bushbuckridge project where she commenced working with effect from 1 March 2015.

Background Facts

[22] On 23 June 2015 a meeting was arranged during which the applicant raised the challenges she had been experiencing at the Bushbuckridge project. A week after this meeting, the applicant was informed that someone else will be taking over from her at the Bushbuckridge project. On 13 July 2015 another meeting was held, where the applicant again raised her concerns, which resulted in the applicant being transferred to the South Hills project in Gauteng. The applicant contended that she was being transferred as the "scapegoat" and that the real reason for her transfer was as a result of her complaints and consequently there was a concerted effort by the first respondent to get rid of her.

[23] The applicant on 15 July 2015 addressed a letter to advance reasons as to why she could not be transferred. In response the first respondent insisted that the applicant had to transfer and that no assistance would be provided to her in this regard, thereafter which the applicant escalated her grievance to the head of human resources. In August 2015, the applicant's travel claims were declined unless she was able to submit an explanation for the travel. Upon the applicant's transfer, the first respondent refused to make payments (which payments had been previously made) for accommodation, a site allowance and payment of travel to home once a month. The first respondent in response to these complaints advised that in light of the fact that there had been a change in the applicant's base pay that the aforementioned payments were no longer possible.

[24] During November 2015 a performance appraisal process was conducted. The applicant raised her concerns that the performance rating was never discussed with her and further criticised that the score of 3 was inappropriate as she had previously always received a score between 4 and 5. On 21 November 2015, the applicant submitted a grievance in which she stated that the objectives and performance was never discussed with her. During this period the applicant's health was also suffering.

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[25] During March 2016 further issues were raised in relation to the handing over of the Lufhereng project which ultimately, according to the applicant, was "*the final straw*" which resulted in her resignation. In response to the resignation the first respondent invited the applicant to lodge a formal grievance, which was done. Of significance, during these proceedings is that the applicant proposed that she be afforded the same financial opportunities that were extended to other employees when the Nelspruit office was closed and if this was not possible, to be permitted to return to the Bushbuckridge project.

[26] In response counsel for the first respondent dealt with the various points raised by the applicant's counsel and referred me to various portions in the record in support of the first respondent's opposition to the review application. With reference to the email that the applicant addressed to the first respondent, it is noteworthy that the applicant makes no reference to her dissatisfaction in moving or that she felt that as result of the meeting that she had "*stepped on toes*". Nowhere throughout the email correspondence is a dispute raised by the applicant in respect of the transfer or that it was unfair. At this stage of the discussions, a "*without prejudice*" letter is submitted and due to the fact that it is clear from the previous correspondence that no dispute existed, there was no basis to challenge the acceptance of this letter by the commissioner.

[27] At this stage in August, the applicant's concerns now relate to the fact that she holds the position of an assistant and raises no further concerns in relation to the transfer. Between August to November 2015, no further complaints and/or discussions are held between the parties. On 21 November 2015, a letter is then sent by the applicant in which she raises her complaints relating to the performance appraisal process, the subsistence allowance and that she feels that she is being victimised. There is no mention of relocation, the sick note or the unfair treatment in relation to the time sheets and her transfer.

[28] The first respondent responds to the letter, which does not result in the applicant lodging a formal grievance. A further three months pass, and in January a letter is addressed to the first respondent in which the issues relating to Mr Moodley's allowance, which had previously been dealt with, however was now being referred to again. Furthermore, reference was made

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to the demotion and that it is this that had pre-empted the resignation. In respect of the performance appraisal the first respondent had proposed a remedy, which remedy was declined by the applicant.

[29] The applicant in respect of her demotion complaint had been invited by the first respondent to attend a grievance hearing on 14 April 2015, during which meeting the applicant recorded her demand either to be paid a severance package or to be transferred back to the Bushbuckridge project. The first respondent criticises the applicant's allegation of intolerability primarily on this basis, in that had the employment relationship become so intolerable, why would the applicant agree to be transferred back to the Bushbuckridge project.

Arbitration Award

[30] The Commissioner found that the applicant had been unable to prove that the first respondent had constructively dismissed her and accordingly did not award compensation as sought by the applicant. The Commissioner further made no order as to costs.

[31] The Commissioner in his analysis of the evidence and argument made specific references to various cases in order to substantiate his reasoning in determining whether or not the applicant had been constructively dismissed. The Commissioner further *inter alia* considered the fact that the applicant had worked her notice period and had further participated in the grievance process which in the view of the Commissioner did not support an allegation of intolerability.

The test for constructive dismissal

[32] In the case of alleged constructive dismissal the enquiry is centred on whether or not there was a dismissal. As aforementioned the question of whether a dismissal has taken place goes to jurisdiction. In *Asara Wine Estate and Hotel (Pty) Ltd v Van Rooyen & others* [12] Steenkamp J explained the test as follows:

> "In most unfair dismissal cases, the existence of the dismissal is common cause and the enquiry at arbitration- or on review by the Labour Court – is

[12] (2012) 33 ILJ 363 (LC) at paras 20-21.

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whether the dismissal was fair, and whether the finding of the arbitrator in this regard was reasonable.

In the case of an alleged constructive dismissal in terms of s186(1)(e), though, the prior question is whether there was a dismissal. The onus is on the employee to prove that his resignation amounted to a dismissal. In order to decide whether there was a dismissal, the commissioner has to investigate the full merits of the case. Only then can the commissioner decide if there was a dismissal as defined. If so, the commissioner must still decide whether it was fair. If not, though, the CCMA did not have jurisdiction in the first place, even though the commissioner can only make that finding ex post facto."

[33] Section 186(1)(e) of the LRA defines a constructive dismissal to mean:

"an employee terminated employment with or without notice because the employer made continued employment intolerable for the employee."[13]

[34] It is trite in our law that where an employee claims constructive dismissal, the onus is on the employee to prove that the resignation was not voluntary and it was not the intention to terminate the employment relationship. Once the employee discharges this onus, the conduct of the employer must be assessed and the question is then whether the employee could reasonably have been expected to put up with the conduct of the employer.[14] Accordingly the mere fact that an employee resigns because work became intolerable does not, in and by itself, make for a constructive dismissal.[15]

[35] Having regard to the conspectus of the facts, it is clear that the employee did resign however I am of the view that the resignation was for a voluntary reason in that the applicant had made it clear that she would accept a

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[13] See: *Eagleton and Others v You Asked Services (Pty) Ltd* [2008] BLLR 1040 (LC).

[14] *Murray v Minister of Defence* (2008) 29 ILJ 1369 (SCA) at para12. The Supreme Court of Appeal reasoned that:

"These cases have established that the onus rests on the employee to prove that the resignation constituted a constructive dismissal: in other words, the employee must prove that the resignation was not voluntary, and that it was not intended to terminate the employment relationship. Once this is established, the inquiry is whether the employer (irrespective of the intention to repudiate the contract of employment) had without reasonable and proper cause conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust with the employee. Look at the employer's conduct as a whole in its cumulative impact, the courts have asked in such cases whether its effect, judged reasonably and sensibly, was such that the employee could not be expected to put up with it. " (Footnotes omitted)

[15] Ibid para 13.

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severance package were she not transferred back to the Bushbuckridge project, thereby providing an alternative to her resignation.

[36] In the matter of *Pretoria Society for the Care of the Retarded v Loots*[16] the LAC held that when an employee resigns as a result of constructive dismissal, the employee is in fact indicating that the situation has become so unbearable that the employee cannot work. Effectively the employee is saying that he or she would have carried on working indefinitely had the unbearable situation not been created. The employee resigns because he or she does not believe that the employer will ever reform or abandon the pattern of creating an unbearable working environment.

[37] In this regard, the applicant had provided the first respondent with an option of being transferred back to the Bushbuckridge project, therefore the working environment could in my view have not been so intolerable. This was clearly an alternative that had been proposed by the applicant thereby demonstrating that continued employment with the first respondent was therefore possible.

[38] The applicant has therefore failed to demonstrate that the first respondent had behaved in a manner that rendered the relationship intolerable and would continue to do so. I am further not convinced that the first respondent conducted itself in a manner calculated or likely to destroy or seriously damage the relationship with the applicant.

Conclusion

[39] Therefore in conclusion I am not persuaded on the objective facts that the applicant in fact discharged the onus of proving a constructive dismissal and her claim therefore has to fail.

[40] The Commissioner in my view correctly found that the applicant had failed to establish a constructive dismissal by taking into account the totality of the evidence before him. The Commissioner further considered the cumulative impact of the conduct complained of and adjudged whether such conduct viewed reasonably and sensibly was such that the applicant could not be expected to put up with it.

[16] (1997) 18 ILJ 981 (LAC) at p. 984.

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[41] Having regard to my findings it is therefore not necessary to deal with the various challenges raised by the applicant in respect of the constitutionality of Rules of the CCMA.

Costs

[42] In regards to costs, I have a wide discretion in respect of the awarding of costs, having regard to the provisions of s 162 (1) of the LRA. In this instance, I believe a costs order is indeed appropriate. It must have been clear to the applicant that firstly in respect of condonation that the awarding of condonation must come at a price. Secondly the first respondent was compelled to engage in litigation and oppose an application that had no merit from the onset. In my view the applicant came to Court without merit and with no proper consideration of the prospects of success, causing the first respondent to incur legal costs.

[43] It is trite that a cost order is method of ensuring that decisions to litigate in this Court are taken with due consideration of the law and the prospects of success. I am of the view that this review application was ill considered and therefore taking into account the law and fairness a costs order should follow.

[44] In the premises, I make the following order:

Order

1. The applicant's review application is dismissed with costs.

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H. Schensema

Acting Judge of the Labour Court of South Africa

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Appearances:

For the Applicant:	Advocate J. L. Basson
Instructed by:	Du Toit Smuts & Partners
For the First Respondent:	Advocate Bernard
Instructed by:	Yusuf Nagdee Attorneys

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