

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

CASE NO: JR2428/2015

In the matter between:

NATIONAL UNION OF METAL WORKERS

OF SOUTH AFRICA

First Applicant

TANUSHA, DEBORAH GEORGE

Second Applicant

and

SASOL SYNFUELS (PTY) LTD

First Respondent

NATIONAL BARGAINING COUNCIL FOR THE

CHEMICAL INDUSTRIES (NBCCI)

Second Respondent

THABISO SEKHABISA, N.O

Third Respondent

Heard: 7 March 2019

Delivered: 5 June 2019

JUDGMENT

LALLIE J

- [1] This is an application to review and set aside an arbitration award of the third respondent in which he found the applicant's dismissal by the first respondent both substantively and procedurally fair. It is opposed by the first respondent.

- [2] The applicant filed the record of the arbitration proceedings (the record) late and brought an application seeking condonation for the delay. The condonation application is also opposed by the first respondent. Rule 7A (6) of the Labour Court Rules (the Rules) requires an applicant for review to furnish other parties with a copy of the record or the portion of the record the applicant seeks to rely on in the review application. Clause 11.2.2 of the Practice Manual of the Labour Court (the Practice Manual) requires the applicant to file the record within 60 days of the date on which the applicant is advised by the registrar of its availability. Failure to file the record within the 60 day period results in the applicant being deemed to have withdrawn the review application. Clause 11.2.3 of the Practice Manual provides for a procedure which the applicant has to follow to prevent a review application being deemed withdrawn. It is common cause that the applicant did not follow the procedure.
- [3] The major cause of the applicant's delay in filing the record is that the second respondent neglected its obligation of dispatching the mechanically recorded record of the arbitration proceedings to the registrar. The applicant had to put pressure on the second respondent to make the record available. The applicant's problems did not end with the failure to file the record. Some parts of the record that was eventually filed turned out to be either incorrect or faulty resulting in further delays. The applicant communicated the reasons for the delay to the first respondent. At all material times therefore the first respondent was aware of the reasons for the delay. The first respondent's decision of not executing its threat of bringing an application for the dismissal of the review application owing to the delay supports the applicant's view that she did not sit on her hands but took active steps to ensure that the record was available.
- [4] I have considered the applicant's submissions that condonation be refused because the applicant has no prospects of success. A reading of the applicant's papers reflected that should some averments she made be proved, her application for review will be granted. The approach adopted by the applicant in arguing that the applicant has no prospects of success is

incorrect. It raises the standard of proof of prospects of success. The allegations made by the applicant suffice.

- [5] The applicant furnished a reasonable explanation for the delay. She has prospects of success on review and she will suffer more prejudice should condonation be refused as she will lose the right to have her review application heard. The interests of justice therefore justify condonation. The application for condonation, should, in the circumstances succeed.
- [6] The factual background to this dispute is that the applicant was employed by the first respondent until her dismissal on 13 December 2013 at a time she held the position of a Process Engineer at the first respondent's Technical Cluster. Subsequent to her dismissal she referred an unfair dismissal dispute to the second respondent where the third respondent issued the arbitration award under review.
- [7] In the award, the third respondent noted that Ms Correia became the applicant's line manager in 2012. In 2013 Correia asked her to assist in other projects but she refused on the grounds that they fell outside the scope of her responsibilities. Ms Correia sought the assistance of the manager of the Product and Technical Department in persuading the applicant to do heater efficiency calculations. The applicant persisted with her refusal. The calculations were vital in ensuring the quality of the petrol the first respondent produced. Ms Correia held discussions with employees who reported to her about their work. The applicant, however, refused to attend the meeting scheduled to discuss her work. Her reason for not attending the first work discussion was that she was busy. She cited their unhealthy working relationship for refusing to attend the second one. The applicant wanted to discuss her work with Mr Du Toit whose position was three levels above Ms Correia's. Ms Correia told the applicant to discuss her work with her line manager whose position was two levels above hers. The applicant refused. Ms Correia recommended that the applicant worked under Mr Schoeman because of her refusal to carry out her instructions. The applicant refused and continued doing but a portion of her duties. As the applicant elected not to testify at arbitration, the third respondent found that the first respondent had

discharged the onus of proving the fairness of the applicant's dismissal. He therefore concluded that her dismissal was substantively and procedurally fair.

- [8] The applicant's grounds for review are mainly based on gross irregularities in the form of errors committed by the third respondent in the conduct of the arbitration as envisaged in section 145 (2) of the Labour Relations Act¹ (the Act).
- [9] In her founding affidavit the applicant stated the grounds for review which are provided in section 145 (2)(a) of the LRA. She added other generic grounds for review without adding factual averments on which the grounds were based. I accept the first respondent's argument that the applicant's approach is incorrect and does not comply with provisions of Rule 7A (2)(c). In her supplementary affidavit, the applicant added a long list of the errors which in her view, the third respondent committed and rendered his award unreasonable. The approach was also attacked by the first applicant as the impermissible piece-meal approach which was rejected in *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration*².
- [10] The submissions on behalf of the applicant constitute, in the main, the case she should have presented at arbitration which would have assisted the third respondent in determining the fairness of her dismissal. She elected not to give evidence. One of her grounds for review is that the third respondent committed a gross irregularity in not apprizing her of the consequences of closing her case without tendering evidence. I am not convinced that the ground she seeks to rely on is valid because she was represented by NUMSA representatives for the duration of the arbitration. She cannot put the blame at the arbitrator's door when the advice she was given by representatives of her choice did not yield the result she desired.

¹ 66 of 1995 as amended

² [2014] 1 BLLR 20 (LAC)

- [11] I have considered all the grounds for review the applicant sought to rely on and their opposition by the first respondent. The power to determine the fairness of a dismissal is bestowed on arbitrators by the LRA. The court of review has to ensure that the power is exercised reasonably. In *Gold Fields* it was held that the review court has to consider the totality of the evidentiary material which was properly placed before the arbitrator in assessing the reasonableness of an arbitration award. In *Herholdt v Nedbank*³ the SCA required the review court to consider the evidence 'in the round'. The review court, in determining the reasonableness an arbitration award, has to determine whether the arbitrator fulfilled his or her obligations in terms of section 138 (1) of the LRA by conducting the arbitration fairly, dealing with the issue, analysing evidence and reaching a reasonable decision⁴.
- [12] The third respondent did not misconceive the dispute before him. He stated that he had to determine whether the applicant's dismissal was substantively and procedurally fair and to grant relief if he found it unfair. He recorded the gist of the evidence of each witness who testified at the arbitration. The third respondent analysed the evidence at length against the acts of misconduct which led to the applicant's dismissal. He found the evidence on behalf of the first respondent credible, clear, coherent and without contradictions. He expressed the view that during the cross examination of the first respondent's witnesses the applicant presented a bare denial of the accusations against her. He accepted the only version before him and found that the applicant had made herself guilty of the charges which had been preferred against her.
- [13] The third respondent considered the procedural fairness of the applicant's dismissal and found that the first respondent's decision not to allow the applicant to be represented by a NUMSA official because NUMSA was not amongst the trade unions that were recognised by the first respondent was not unfair. He noted that it was common cause that the applicant left her disciplinary enquiry after her request to be represented by a NUMSA official was declined. She returned shortly thereafter and sought to be given an observer status at the disciplinary enquiry. Her request was not acceded to.

³ (2013) 34 ILJ 2795 (SCA) at para 12.

⁴ Goldfield supra

The third respondent accepted the first respondent's evidence that it acted in terms of its disciplinary code which requires all the parties to consent to the presence of an observer in a disciplinary enquiry. As it withheld its consent an observer could not be present at the disciplinary enquiry. The third respondent found that version fair. He found that the cumulative effect of the acts of misconduct the applicant had made herself guilty of and the evidence that the relationship between the parties had broken down irretrievably rendered the sanction of dismissal fair.

[14] The applicant argued that the evidence does not prove that she committed all the acts of misconduct she was dismissed for. The third respondent's decision is connected to the evidence before him and falls within bounds of reasonableness. The applicant presented no errors which vitiated the award and therefore no grounds to have the award reviewed and set aside.

[15] In the premises the following order is made:

Order:

1. The late filing of the record is condoned.
2. The application for review is dismissed.

Z. Lallie

Judge of the Labour Court of South Africa

Appearances

For the Applicant:

Advocate S.L Shangisa

Instructed by: KNT Attorneys

For the First Respondent: Mr. D.O Pretorius of Fluxmans Attorneys

LABOUR COURT