

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: JR1051/16

In the matter between:

FREE STATE GAMBLING AND LIQUOR AUTHORITY**Applicant**

and

NEHAWU OBO BANZI TOLLIE**First Respondent****COMMISSION FOR CONCILATION MEDIATION
AND ARBITRATION (FREE STATE PROVINCE)****Second Respondent****COMMISSIONER CHARLES DELL****Third Respondent****Heard: 08 August 2019****Delivered: 07 November 2019****Summary: Condonation for the late delivery of replying affidavit is denied-
Review application is dismissed.**

JUDGMENT

MABASO, AJIntroduction

- [1] Two applications served before this court. The first is an application to review and set aside an arbitration award under the Commission for Conciliation, Mediation and Arbitration (CCMA) case number FSBF 4006-15 issued by the third respondent, and the second is a condonation application for the late delivery of the applicant's replying affidavit. Only the first respondent opposes these applications. Immediately after hearing oral arguments, this court made an order that the condonation application for late delivery of the replying affidavit was not granted, reasons for this order are contained in this judgment.
- [2] The applicant is Free State Gambling and Liquor Authority (the applicant), the first respondent is the NEHAWU obo Banzil Tollie (the Employee), the second respondent is the CCMA, and the third respondent is Commissioner Charles Dell (the arbitrator).

Brief background

- [3] The Employee was employed by the applicant as its Communications and Marketing Manager. He was summoned before a disciplinary hearing to answer to 6 counts of misconduct. The chairperson of the disciplinary hearing found him guilty of all the charges and recommended dismissal as a sanction. Thereafter, the applicant proceeded to dismiss the Employee. As a result, the Employee referred an unfair dismissal dispute to the CCMA against the applicant.
- [4] The arbitrator after allowing both parties to give their respective evidence, issued an arbitration award wherein he confirmed the guilty verdict on counts 1 and 5. However, he ruled that the Employee was not guilty in respect of charges 2, 3, 4 and 6. I propose to deal only with these charges, namely:

- 4.1 Gross dereliction of duties in that the Employee failed to submit his alignment as required by the Treasury for Communication and Marketing, a service provider (Morar Inc) for strategic planning (charge 2);
- 4.2 Gross dereliction of duties and dishonesty as it was alleged that he conducted an interview with the newspaper called 'The Weekly', without prior authorisation by the CEO and he misrepresented them false information (charge 3);
- 4.3 Failure to attend the Free State Provincial Premier's Breakfast meeting as instructed by the CEO, alternatively that he committed gross insubordination in that he failed to obey the instruction (charge 4); and
- 4.4 Gross negligence in that he lost his data card and failed to timeously report such to both the applicant and SAPS (charge 6).
- [5] He then concluded that the dismissal was procedurally fair but substantively unfair. Consequently, the applicant was ordered to reinstate the employee and be issued with a final written warning, and be paid arrear salary.

Condonation application

- [6] Usually there is no prejudice suffered by respondents if a condonation application for the delivery of a replying affidavit is granted in a review application where the grounds of review are properly pleaded in the founding affidavit and are based on what is contained in the arbitration records as the latter will guide this Court. However, if through the replying affidavit an applicant attempts to introduce a new ground of review or material which was not contained in the founding papers and the records delivered in terms of Rule 7A (6) there is a possibility of prejudice on the part of the respondent(s).
- [7] The review application was delivered in June 2016. In September 2016, the applicant proceeded to deliver both parts of the arbitration records and the Rule 7A (8) (b) notice indicating that it stands by its founding papers. Any of

the respondents intending to oppose the application had to deliver an answering affidavit within 10 days thereafter, and within this period the Employee delivered his opposing affidavit wherein he alerted the applicant that the arbitration records were not complete as some of the evidence of the witnesses was not contained therein. There are correspondences which were exchanged between the parties regarding the need for the remainder of the records to be delivered.

- [8] It was important for this part of the missing records to be filed for the court to decide whether the arbitrator committed reviewable irregularity as pleaded by the applicant.
- [9] On 3 October 2016, the Employee's attorneys reminded their counterparts herein about the need to deliver a replying affidavit and further said they take it that there was none to be produced.
- [10] A year later, on 1 November 2017, the Judge President through the office of the Registrar of this Court directed the applicant to file heads of argument within 15 days and thereafter the respondent was to deliver theirs within ten days subsequently. The applicant's attorneys did not comply with this directive. Instead, the Employee's attorneys delivered theirs in March 2018. By the time that the set down notice was issued, the applicant had not delivered its heads of argument.
- [11] The replying affidavit was due on or about 30 September 2016. In July 2019 the applicant delivered a replying affidavit incorporated the transcribed records which the Employee called for since 2016. It is delivered more than two years later. The respondent objected to the late delivery of the replying affidavit.
- [12] The practice manual of this Court provides that there is no need for a condonation application to be delivered if a replying affidavit is filed out of time, condonation application is only necessary if there is an objection, which is the case in this matter. In a condonation application, the Court has to use its discretion taking into account the interests of justice which requires among

other things the degree of lateness, prospects of success in the main application, reasons for the delay, and prejudice. The question of whether it is in the interests of justice to grant a condonation application depends on the facts and circumstances of each case. Sometimes, a long delay may result in the court not considering the prospects of success and may refuse the condonation application based on the long delay factor.

- [13] Considering that the replying affidavit incorporates part of the records that the applicant should have delivered in 2016, and perusal of the entire contents of the replying affidavit clearly show the applicant's intention is to introduce the records, and the period of delay, and that the explanation for the delay is inadequate. No doubt the delay is inordinate; the Employee will be prejudiced because he delivered his answering affidavit without having the entire record which the applicant now intends to use. This will mean that the Employee had to deliver another affidavit to address a certain part of the evidence that has been introduced at this late stage. Based on the above, I conclude that the condonation application for the late delivery of the replying affidavit should be refused. Meaning, this Court had to proceed with the limited arbitration records.

Grounds for the review and the law

- [14] The applicant in its founding affidavit asserted that the arbitrator, in respect of charge 3, has not considered the applicant's testimony that the Employee was aware of his duties, but failed to execute them, and that the arbitrator used a beyond reasonable doubt test instead of the balance of probabilities test.
- [15] In respect of charge 3, the arbitrator is again accused that he failed to take into account that the Employee gave an interview without approval, and he used the beyond a reasonable doubt test instead of the balance of probabilities test, and did this again in respect of charge 4. In respect of charge 6, he failed to consider the applicant's evidence and the responsibilities of the Employee.

[16] The applicant avers that the arbitrator after finding the employee guilty of two acts of misconduct found that dismissal was not an appropriate sanction committed reviewable irregularity.

[17] In respect of the review test, the Labour Appeal Court in *Fidelity Cash Management Service v CCMA and others*¹ held that:

“It will often happen that, in assessing the reasonableness or otherwise of an arbitration award or other decision of a CCMA commissioner, the court feels that it would have arrived at a different decision or finding to that reached by the commissioner. When that happens, the court will need to remind itself that the task of determining the fairness or otherwise of such a dismissal is in terms of the Act primarily given to the commissioner and that the system would never work if the court would interfere with every decision or arbitration award of the CCMA simply because it, that is the court, would have dealt with the matter differently. Obviously, this does not, in any way, mean that decisions or arbitration awards of the CCMA are shielded from the legitimate scrutiny of the Labour Court on review.”²

I opine that the same applies to the parties in *casu*, in that you do not merely bring an application for review because you hold a view that the arbitrator tasked to assess the fairness of the dismissal has concluded in a way that you do not like. What is required is that an applicant has to show that the outcome is unreasonable, taking into account the material that was before an arbitrator.

[18] Regarding charge 2, it was not in dispute that the employee knew his responsibilities and the only issue which is apparent from the arbitration award is whether or not the employee failed to do such duties. The arbitrator concluded that the Employee did execute his duties. I have perused the arbitration award and could not agree with the applicant that the arbitrator used the test applicable in criminal law which is one of beyond a reasonable doubt. Further, in respect of this ground of review, the applicant has not substantiated as to why it submits that the arbitrator used an incorrect test. Same goes with

¹ [2008] 3 BLLR 197 (LAC)

² Own underlining and emphasis.

charges 3 and 4. In respect of all the charges herein, this Court takes into account the well reasons detailed arbitration award which clearly indicates that the arbitrator was faced with two diametrical versions and being aware of the onus of proof he accepted the evidence of the Employee.

[19] In respect of charge 6, the applicant avers thus:

"Upon reading of the award, it is clear that the [arbitrator] again failed to consider the applicant's evidence and also take into account the responsibility of the [Employee] regarding his job and to safeguard the applicants' items placed under his care and supervision."

[20] The LAC in explaining what is expected of a litigant, an applicant, in a review application, in *Netherburn Engineering CC t/a Netherburn Ceramics v Mudau NO and Another*³ held that,

"When you are a party to a dispute or when you were the arbitrator or presiding officer in some proceedings and one of the parties brings a review application, you, of course, read the papers to understand what the applicant's case is and to decide whether to oppose or to consent to the order sought or to abide the decision of the Court. What you do will depend partly upon the view you take of the applicant's case as disclosed in the papers. If, after reading the applicant's papers, you conclude that there is absolutely no case for you to answer in the light of the contentions or the grounds of the application as disclosed in the founding affidavit and you decide to abide the decision of the Court, you would feel legitimately aggrieved if you subsequently learn't that the award was set aside by the Court not on the grounds contained in the founding affidavit but on grounds that were advanced in oral argument which were not foreshadowed in the founding affidavit and without you being afforded an opportunity to oppose the new case. On my understanding the rule that in motion proceedings the applicant

³ [2009] 4 BLLR 299 (LAC), at para 29.

must make his case in his founding affidavit and that you stand or fall by your papers has not been abolished and still applies. It serves a very useful purpose in terms of fairness.”

- [21] The applicant has failed to indicate as to which evidence was not considered by the arbitrator. Looking at the arbitration award, clearly, the arbitrator did deal with the essential part of the charges before him. Nowhere in the affidavits (taking into account that the records are not complete) is it asserted that the arbitrator under the summary of evidence as contained in the award is not in line with what was presented during the arbitration hearing. I conclude that the applicant failed to present grounds which support the review application.
- [22] The applicant contends that the arbitrator after finding the Employee guilty of the two charges should have confirmed the dismissal as an appropriate sanction, as it alleges that the Employee did not consider the weight of each misconduct in relation to the trust relationship between it and the Employee. The arbitrator in determining a dismissal based on misconduct had to take into account the appropriateness of sanction and in doing that he has to look at both aggravating and mitigating factors. He had to take into account the security of employment in this country.⁴ In paragraph 5.48 of the award the arbitrator among other things says that the Employee's track record is taken into account in that he has a clean disciplinary record. Further, that at the time of the dismissal the Employee had been with the applicant for 10 years and further he takes into account the seriousness of the charges and concludes that the dismissal is not an appropriate sanction.
- [23] Therefore, in conclusion, should the Court interfere with the award it would be saying to the parties that the Court **“would have arrived at a different decision or finding to that reached by the [arbitrator]”**, which is not the yardstick in a review application. I then conclude that the arbitrator did apply his mind to the facts before him and his conclusion is one that a reasonable

⁴ *Sidumo and Another v Rustenburg Platinum Mines Ltd and others* [2007] 12 BLLR 1097 (CC).

decision-maker could have made, and he committed no reviewable irregularities.

[24] Wherefore, the following order is made:

Order:

1. The condonation for the late delivery of the replying affidavit is not granted.
2. The review application is dismissed.
3. There is no order as to costs.

S. Mabaso

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr D S Qwelane

Instructed by: Qwelane Theron & Van Niekerk Inc

For the Respondent: Adv M C Louw

Instructed by: Honey Attorneys