THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

CASE NO: JR2350/17

In the matter between:

MABOKO ROSEY SEKESE **Applicant**

And

MINISTER OF TELECOMMUNICATIONS

& POSTAL SERVICES **First Respondent**

DEPARTMENT OF TELECOMMUNICATIONS

& POSTAL SERVICES **Second Respondent**

GENERAL PUBLIC SERVICE SECTOR

BARGAINING COUNCIL **Third Respondent**

COMMISSIONER ADVOCATE D P VAN TONDER **Fourth Respondent**

Heard: 4 December 2019

Judgment delivered: 6 December 2019

JUDGMENT

VAN NIEKERK J

[1] This is an application to review and set aside a ruling issued by the fourth respondent, to whom I shall refer as 'the arbitrator'. In his ruling, the arbitrator refused to condone the late referral by the applicant of a dispute that she alleged concerned her unfair dismissal.

[2] The material facts are contained in the ruling. In brief, the applicant was employed by the second respondent on a fixed term contract. That contract expired on 31 May 2016.

[3] The dispute was referred to the bargaining council on 7 June 2016. The applicant contended that the dispute arose on 31 May 2016, the date on which she alleged that she had been dismissed.

[4] The application that served before the commissioner records that on 31 May 2016, at 17h 30, the applicant received a letter of dismissal from the applicant. The applicant contended that her dismissal was both substantively and procedurally unfair. She recalls that on 7 June 2016 she referred a dispute to conciliation, referring the dispute to the second respondent's Cape Town office and to the bargaining council. When she did not receive feedback from the bargaining council, the applicant says that on 19 July 2016, she went to the

bargaining council's offices to enquire why the matter had not been set down. She was informed that the council had not received the referral form. The matter was ultimately settled for conciliation on 28 September 2016, and on the same date, the certificate of non-resolution was issued. The matters referred to arbitration on 11 October 2016 and after a hearing on the point in limine, the matter was set down for hearing on 17 January 2017. The presiding arbitrator recused himself, and the matter was set down before another commissioner on 29 June 2017. The second respondent raised the point in the manner that the referral to arbitration was late. It ought to have been referred by 8 October 2016; and was referred on 11 October 2016. The applicant accordingly had to file an application for condonation. The reasons proffered in the application for condonation are that the bargaining council failed to set the matter down and that the applicant was advised that she should resubmit conciliation form. The applicant submitted that the degree of lateness was not excessive, and that she was not in wilful default, the default being that of the bargaining council. In regard to the prospects of success, the applicant averred that 'when the respondent dismissed me my contract had already elapsed'. She averred further that the dismissal was procedurally and substantively unfair in that the chair of the disciplinary hearing refused to postpone the matter when he ought to have, and that the hearing was rushed to finality at the applicant's expense. In regard to prejudice, the applicant recorded that if condonation was refused, she would be prejudiced on account of the fact that she would not be employable in the public service, and that the case was important to her as it would determine her future and her reputation.

[5] On 21 August 2017, the second respondent filed an answering affidavit in which it took the point that the applicant's averment that the dismissal was unfair because the contract of employment expired before the date of dismissal, disposed of her referral in its entirety. In particular, the second respondent averred that the bargaining council would have no jurisdiction for the obvious reason that there would be no dismissal in circumstances where a fixed term contract had expired by the effluxion of time prior to any purported date of

dismissal. In other words, disciplinary proceedings conducted after the termination of the contract of employment or nullity since an employer cannot dismiss a person's contract has terminated and in circumstances where that person is no longer an employee. Given that the existence of a dismissal is a self-evident jurisdictional fact, and if there has been no dismissal, there can be no dispute capable of being arbitrated. The second respondent submitted for this (and other) grounds, the application for condonation should be refused.

[6] In his ruling, issued on 9 September 2017, the arbitrator recalled the principles applicable to applications for condonation, relying on the various authorities in this and other courts on the approach to be adopted. In regard to the degree of lateness, the arbitrator recorded that the referral was approximately six days late and considered this not to be a lengthy delay. Turning to the prospects of success, the arbitrator noted that there was no suggestion by the applicant that she was dismissed as contemplated by section 186 (1) (b) to (f) of the LRA. The commissioner observed that there could be no dismissal where an employment relationship is terminated by operation of law, or expires naturally after the passage of a specified time or on the happening of a specified event. The arbitrator noted further that on the applicant's own version, the employer had dismissed her after her contract had already elapsed. That being so, there was no longer any employment relationship for the employer to terminate as contemplated by the LRA when the employer allegedly purported to dismiss the applicant after the expiry of the contract. Any attempt to dismiss the applicant after the expiry of the contract was nullity and could not constitute a dismissal for the purposes of the LRA. On this basis, the arbitrator held that the applicant had no prospects of success in any arbitration hearing. In any event, the arbitrator held that the applicant had failed to provide a reasonable explanation for the full period of delay. The explanation proffered by her was limited and did not extend to any explanation as to why the applicant was prevented from referring a dispute to arbitration with hundred and 20 days from the date that she referred to conciliation as required by the LRA. After the certificate of outcome was issued, the applicant had six days to refer the dispute, she referred only 13 days later

and provided no explanation as to why she could not or did not within the few days that remain for the dispute to be referred after the certificate was issued, refer the dispute. In regard to prejudice, the arbitrator observed that the applicant had explained that it was important for her to have the 'dismissal' effected by the second respondent set aside as it was recorded on the PERSAL system. The arbitrator noted that the council had no jurisdiction to assist the applicant in this regard and that the forum for appropriate relief would probably be this court. For all of those reasons, condonation was refused, with no order as to costs.

[7] The test to be applied is one that recognises and reinforces the distinction between a review and an appeal. This court is entitled to intervene if and only if the arbitrator's decision is one that falls outside of a band of decisions to which a reasonable decision-maker could come on the available material. In *Head of Department of Education v Mofokeng & others* [2015] 1 BLLR 50 (LAC), the LAC said the following:

> [30] The failure by an arbitrator to apply his or her mind to issues which are material to the determination of a case will usually be an irregularity. However, the Supreme Court of Appeal ("the SCA") in *Herholdt v Nedbank Ltd* and this court in *Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and others* have held that before such an irregularity will result in the setting aside of the award, it must in addition reveal a misconception of the true enquiry or result in an unreasonable outcome…
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> [32] …Mere errors of fact or law may not be enough to vitiate the award. Something more is required. To repeat: flaws in the reasoning of the arbitrator, evidenced in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material factors etc. must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong enquiry, undertaken the enquiry in the wrong manner or arrived at an unreasonable result. Lapses in lawfulness, latent or patent irregularities and instances of dialectical unreasonableness should be of such an order (singularly or cumulatively) as to

result in a misconceived inquiry or a decision which no reasonable decision-maker could reach on all the material that was before him or her.

[33] Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the inquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the inquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will *ex hypothesi* be material to the determination of the dispute. A material error of this order would point to at least a *prima facie* unreasonable result. The reviewing judge must then have regard to the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA. Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, if an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The arbitrator however must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination.

[8] The applicant has raised a number of grounds for review. They suggest primarily that the arbitrator committed a gross irregularity in that he failed to take into account that the applicant had been dismissed by the respondent, that the contract had been extended, that the applicant had a reasonable explanation for the failure to refer the dispute timelessly, that the arbitrator's decision was not rational, and that the decision to which the arbitrator came was one that no reasonable decision-maker could reach.

[9] The determination of reasonableness must necessarily be made by reference to the papers that served before the commissioner, and to exclude such additional evidence that the applicant seeks to introduce in these proceedings. The case before the arbitrator was that the reason for the delay was that the bargaining council failed to set the matter down for conciliation timeously, and that she had been dismissed after the expiry of the contract. The latter contention was repeated in the replying affidavit. On the evidence before him, in my view, the arbitrator made a decision that falls within the bounds of reasonableness.

[10] It is apparent from these proceedings (and also those under review) that the applicant's main complaint is that her employment record in the form of the PERSAL system has been tarnished by what she contends is irregular disciplinary action, which she wishes to reverse. This complaint has nothing to do with an unfair dismissal claim, nor does it bear on the present proceedings. The case made out in the present application is limited to one of a review of the condonation ruling, and does not extend to any decision to record the reason for dismissal on the PERSAL system as one related to disciplinary action.

[11] In short, the arbitrator exercised a discretion judicially, and his ruling is not unreasonable having regard to the evidence that served before him. For these reasons, the application stands to be dismissed.

[12] Finally, in regard to costs, the court has a broad discretion in terms of s 162 make orders for costs according to the requirements of the law and fairness. Ordinarily, the court is reluctant to make orders for costs against aggrieved individuals who pursue a remedy against their employers in good faith. There is no reason to consider that the present application does not fall into that category, and I accordingly intend to make no order as to costs.

I make the following order:

1. The application is dismissed.

André van Niekerk

Judge

REPRESENTATION

For the applicant: Adv F P Phamba, instructed by Machete Attorneys.

For the respondent: Adv E N Gaisa, instructed by State Attorney