THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR2995/19

In the matter between:

NTSIELENI EMMANUEL NETSHITOMBONI **Applicant**

and

NATIONAL CONSUMER COMMISSION **First Respondent**

THE COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION **Second Respondent**

G.S JANSEN VAN VUUREN N.O **Third Respondent**

Heard: **21 November 2024**

Delivery: **29 May 2025**

JUDGMENT

BALOYI, AJ

<u>Introduction</u>

[1] This is an application in terms of section 145 of the Labour Relations Act[1]. The applicant seeks the review and setting aside of the Award of the third

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[1] Act 66 of 1995, as amended.

respondent (the Commissioner) issued under the auspices of the second respondent, the Commission for Conciliation Mediation and Arbitration (CCMA), in which the Commissioner found that the dismissal of the applicant was substantively and procedurally unfair and ordered the first respondent to pay six months compensation to the applicant. In the CCMA, the applicant sought reinstatement, and the Commissioner concluded that reinstatement was not appropriate because the relationship of trust with the employer had broken down and the applicant's psychiatrist had recommended in a report that *"[the applicant] should be removed from the toxic environment at work*".

[2] The applicant disputes a breakdown of the relationship with the employer and the Commissioner's reliance on the psychiatrist's recommendation that he be removed from the toxic work environment. He seeks that the award be set aside and replaced with an order that he be reinstated retrospectively and without loss of benefits.

[3] The application is opposed by the first respondent which, in addition to contesting the grounds for review relied upon by the applicant, has raised points *in limine* that – (i) the application is brought out of time and the applicant has not demonstrated good cause for condonation; and (ii) the applicant acquiesced in the award and is precluded from bringing this review application.

[4] I accordingly deal first with condonation and the defence of peremption, either of which dispose of the matter if decided against the applicant.

<u>The facts briefly</u>

[5] It is only necessary to set out the following brief facts.

[6] The applicant was employed by the National Consumer Commission (NCC), the first respondent, as Senior Manager Information Technology from 15 August 2011 until he was dismissed on 14 February 2017. It is common cause that he was dismissed without a hearing and with immediate effect for gross insubordination after he defied an instruction of the first respondent's Commissioner, Mr Ebrahim Mohamed, not to leave the management

committee on 13 February 2017. The letter of termination dated 14 February 2017 states that the following reasons for dismissal – (i) disregarding Mr Mohamed's instruction not to leave a meeting of the management committee on 13 February 2017; (ii) leaving work early without the permission and in disregard of his line manager's refusal to give permission to leave early on 13 February 2017; and (iii) arriving late at work, leaving work early or absence from work without permission of his line manager, Mr Anton van der Merwe.

[7] Dissatisfied with his dismissal, the applicant referred a dispute of unfair dismissal to the Commission for Conciliation, Mediation and Arbitration (CCMA) which appointed the third respondent to arbitrate the dispute after conciliation of the dispute failed.

[8] In an award dated 8 November 2019, the Commissioner found that the dismissal of the applicant was substantively and procedurally unfair. The Commissioner held that the circumstances around the applicant's dismissal are such that a continued employment relationship would be intolerable and that reinstatement was not appropriate. The Commissioner ordered that the applicant pay compensation of R481 204.50 (less tax) by no later than 30 November 2019.

[9] It is common cause that the first respondent discharged the award and made payment to the applicant's bank account of the awarded amount on 29 November 2019.

[10] On 19 December 2019, the applicant instituted the review application. He seeks the review and setting aside of the award, and that it is substituted with an order of reinstatement without loss of benefits. The application is opposed by the first respondent on the following grounds – the review application is brought out of time and has not shown good cause for condonation; the applicant perempted the award by accepting payment of the amount awarded by the third respondent; the award of the third respondent is unassailable and reinstatement is inappropriate.

Condonation

[11] The applicant instituted the review application on 19 December 2019, 6 weeks after the date of the award. The complaint of delay relates to the filing of the record and the delivery of the amended notice of motion and supplementary founding affidavit, delivered the record 3 months after the CCMA delivered the record. The applicant seeks condonation of the delay.

[12] According to the applicant, the Registrar informed him on 28 January 2020 that the CCMA had filed the record on 24 January 2020. His attorneys collected the record on 7 February 2020 for transcription, and the transcribed record was received on 25 February 2020, delivered to the first respondent by his attorneys on 23 March 2020. The applicant delivered an amended notice of motion and supplementary affidavit on 15 May 2020 – his explanation for the delay is the intervening nationwide lockdown declared by the President as a result of the Coronavirus epidemic.

[13] The applicant brought the review application without any delay, and there was no delay in uplifting the record after his attorneys were informed of its availability, and the first respondent does not suggest that he wilfully delayed its transcription and filing. The fact of, and the disruption to everyday activities brought about by the President's declaration of a state of disaster and nationwide lockdown in the relevant period are a notorious fact. It would be unreasonable to insist that, notwithstanding these circumstances which affected every person in the country and brought life as we knew it to a standstill, the applicant should have delivered the record in that same period.

[14] I am satisfied that there is good cause to condone the delay, and the delay is condoned.

<u>Peremption</u>

[15] The facts relied upon by the first respondent are that it paid the amount ordered by the third respondent within the stipulated period. The applicant did not object to the payment or inform the first respondent that he did not want payment and that he intended to seek a review of the award, even as he was aware that the award required payment to be made by 30 November 2019. He instead requested the first respondent to withdraw his pension fund

benefits from the Government Employees Pension Fund, of which he was a member. After he received payment, he did not tender repayment of the amount paid to him in terms of the award, and only did so for the first time in his replying affidavit, in response to the first respondent pointing this out in its answering affidavit. According to the first respondent, this conduct demonstrates that the applicant elected to abide by the award and is precluded from bringing this review application.

[16] Our law does not permit a party who acquiesces in a judgment or award to later change their mind and pursue an opposite or course inconsistent with their first election – see *Balasana v Motor Bargaining Council & others*[2]. It is said, one may not blow hot and cold, or have one's cake and eat it. The Labour Appeal Court held this to be the correct position of law in *National Union of Mineworkers of SA & others v Fast Freeze*[3]. A party claiming peremption bears the *onus* to prove that, either expressly or by conduct, the other party acquiesced in the judgment or award.

[17] The Court in *Relton Fred Booysen v The Sol Plaatjie Municipality and 2 others*[4] *(Relton)* held that the following facts were pertinent to demonstrate acquiescence – (i) the applicant never indicated any intention to challenge the arbitration award at the outset of receiving the award; (ii) the award stipulated a date for compliance and this was adhered to by the respondent; (iii) the applicant was paid as stipulated in the award and retained the payment, without any demur; (iv) the applicant never indicated that he was dissatisfied with the award, nor did he seek to engage the first respondent on this, prior to, at the time or immediately after he was paid; (v) the applicant was represented and his representative did not raise any dispute about the award; (vi) the applicant never tendered repayment of the money paid to him, when and after filing the review application.

[18] The Court in *Relton* could have been writing the judgment in the present matter. I agree with the first respondent that the factors considered by that

[2] [2011] 2 BLLR 161 (LC); (2011) 32 ILJ 297 (LC) at para 11.
[3] (1992) 13 ILJ 963 (LAC).
[4] (C103-16) 8 December 2017 (unreported).

court in finding that the applicant in that matter had perempted the award and therefore was precluded from bringing a review application, apply in the present application. To that list, I would add the further factor that the applicant requested the first respondent to withdraw his pension fund benefit from the GEPF. As with *Relton*, Mr Netshitomboni, (i) never indicated any intention to challenge the arbitration award at the outset of receiving the award even as the award stipulated a date for compliance and this was adhered to by the first respondent; (ii) was paid as stipulated in the award and retained the payment (and only belatedly tendered repayment in the replying affidavit, obviously prompted by the first respondent's allegations in the answering affidavit which mentions the payment as ordered in the award, a fact not disclosed in the founding affidavit, and that the applicant has retained the payment and never offered to repay it); (iii) never indicated that he was dissatisfied with the award, nor did he seek to engage the first respondent on this, prior to, at the time or immediately after he was paid, which payment he received without protest. It is fair to say there could be no clearer, unequivocal case of acquiescence in an award.

[19] I find that the first respondent has discharged the *onus* to prove that the applicant has acquiesced in the award and therefore perempted the award.

<u>Conclusion</u>

[20] Having found that the applicant perempted the award, it follows that he is precluded from bringing this review application, and the application must fail on this basis. It is therefore not necessary that I deal with the merits of the review application.

[21] Accordingly, the following order is made.

<u>Order</u>

1. The applicant's late delivery of the amended notice of motion and supplementary affidavit is condoned.

2. The application to review and set aside the award of the third

respondent that the first respondent compensate the applicant in the amount R481 204.50 to the applicant is dismissed.

3. There is no order as to costs.

MS Baloyi

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv KA Tema

Instructed by: Mabuza Attorneys

For the First Respondent: Adv M Msomi

Instructed by: Cowan Harper Madikizela Attorneys