

SOUTH AFRICA / JUDGMENT

Chetty v Rafee NO and Others (JS755/13) [2016] ZALCJHB 400 (14 October 2016)

[2016] ZALCJHB 400

COURT

Labour Court Johannesburg

BEFORE

Bekker

CASE / FILE NUMBER

JS755/13

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THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JS755/13

In the matter between:

STRINIWASAN CHETTY

Applicant

and

COMMISSIONER MOHAMED

RAFEE, N.O.

First Respondent

THE COMMISSION FOR

CONCILIATION

MEDIATION AND

ARBITRATION

Second Respondent

NEO SOLUTIONS (PTY)

LTD

Third Respondent

Heard:

25 January 2016

Delivered:

14 October 2016

JUDGMENT**BEKKER AJ****Introduction**

- [1] This is an application for the review of a ruling issued by the First Respondent Commissioner dated 6 August 2013 wherein it was held that the Applicant was not an employee of the Third Respondent and that the Commission for Conciliation, Mediation and Arbitration (CCMA) therefore lacked jurisdiction to entertain his claim for an alleged unfair dismissal.
- [2] Dissatisfied with the ruling issued by the Commissioner, the Applicant filed a review application in this Court on 31 March 2015.
- [3] A substantive application for condonation was also brought by the Applicant on 8 April 2015, seeking condonation for the late service and filing of his review application.
- [4] Both applications are opposed by the Third Respondent ("the Employer").

Background

- [5] The Applicant alleges that he entered the service of the Employer during October 2012. He resigned during May 2013 as a result of alleged non-payment of his monthly remuneration.
- [6] Having referred an unfair dismissal allegation to the CCMA, conciliation failed to resolve the dispute, where after the matter was arbitrated on 31 July 2013.
- [7] At the onset of the arbitration proceedings, the Employer raised the issue that the Applicant was never employed by it, but rather rendered his duties as an independent contractor to the Employer. This deprived the CCMA of jurisdiction to entertain the Applicant's dispute.
- [8] For reasons as set out in the Commissioner's ruling, he held that the Applicant was not an employee and dismissed his claim.
- [9] It is this ruling that the Applicant has taken on review.

Condonation and review

- [10] The review application was brought approximately 18 months late. Although the Applicant relies on Section 145 of the Labour Relations Act (LRA)[1] in bringing the current application, it should have been brought in terms of the stipulations of Section 158(1)(g) of the LRA, dealing with the review of rulings issued by the CCMA and Bargaining Councils.

- [11] Although no time period is prescribed in the LRA for the bringing of a review application in terms of Section 158(1)(g), it is widely accepted that a period of six weeks for the bringing of a review of a ruling is accepted as reasonable.
- [12] The aspect of reasonableness normally reserved for adjudication of a review of an arbitration award also does not arise with regards to rulings sought to be reviewed in terms of Section 158(1)(g) of the LRA. The test for the review of a ruling is rather whether the ruling was correct or not.[2] Before the Commissioner could thus adjudicate on the issue whether there was a dismissal (and whether that dismissal was then fair or unfair), the Employer challenged the CCMA's jurisdiction on the basis that there was no employment relationship between the parties. This is a true jurisdictional issue and reserved for adjudication in terms of Section 158(1)(g) of the LRA. If the CCMA had no jurisdiction to entertain the Applicant's claim, the question of the reasonableness of the Commissioner's decision does not arise. Even in the event that the reasonableness test was indeed applicable to the current matter (which it is not), the prospects of success do not favour the Applicant.
- [13] The Applicant earned above the threshold as set by the Minister of Labour in terms of the provisions of Section 6(3) of the Basic Conditions of Employment Act[3] and as referred to in Section 200A(2) of the LRA.
- [14] The relationship between the Applicant and the employer also appears not to be an employer-employee relationship. The documentation relied on by both parties paints a picture of both parties being desirous for the Applicant to render his service to the employer in a fashion resembling an independent contractor relationship.
- [15] Even if I am wrong in holding that the Applicant has questionable prospects of success on review (and in circumstances where the Applicant has erroneously relied on the reasonableness test for review), there is another factor that the Applicant failed to address sufficiently (or at all) in his quest for condonation, being the reasons for the delay.
- [16] The Applicant avers that he is a lay person and thus not au fait with the provisions of the legislation and the rules of this Court dealing with a review of arbitration awards and rulings.
- [17] The Applicant averred as follows:
- 17.1 He sought legal aid during October 2013 after the ruling was granted on 6 August 2013;
- 17.2 Prior to seeking legal aid, the Applicant was referred to an attorney but could not afford a deposit for the attorney to take on his matter;
- 17.4 That, during or after October 2013, the Law Society of the Northern Provinces referred him to Schindler Attorneys on a pro bono basis, although the Applicant does not state when this referral took place;
- 17.4 That, he eventually consulted with Schindler Attorneys during February 2014;

17.5 That, after the consultation (and still during February 2014), he was arrested for the alleged theft of a motor vehicle and pointing of a firearm in KwaZulu-Natal;

17.6 That, he has spent the rest of the year of 2014 attempting to resolve the criminal matter;

17.7 That, it was only during the early part of 2015 that the Applicant was able to secure the necessary documentation (and to gather sufficient facts) to complete the review application, explaining why same was only filed at the end of March 2015.

[18] The explanation tendered by the Applicant for the lateness is lacking in several respects. He does not explain why it took approximately four months since October 2013 to consult with Schindler Attorneys (during February 2014).

[19] There is further no proper explanation (dealing with specific facts and time periods) for the extensive delay that ensued from February 2014 (when the first consultation with Schindler Attorneys was held) until the review application was eventually brought at the end of March 2015.

[20] It is trite that, in seeking condonation, good cause for condonation is shown where an applicant for condonation gives a full explanation that shows how and why the default occurred. The Court will decline the granting of condonation if it appears that a default was wilful or due to gross negligence.

[21] Inordinate delays in litigation damage the interest of justice, as in *casu*. The Constitutional Court held as follows with regards to an explanation for condonation having to cover the entire period of the

delay:

‘As stated earlier, two factors assume importance in determining whether condonation should be granted in this case. They are the explanation furnished for the delay and prospects of success. In a proper case these factors may tip the scale against the granting of condonation. In a case where the delay is not a short one, the explanation given must not only be satisfactory but must also cover the entire period of the delay’.[4]

[22] The explanation given by the Applicant for the delay is insufficient. He failed to advance a full explanation for the period of the delay and did not cover the entire period of the delay.

[23] It is highly questionable that the Applicant was not able to find the time (at least from February 2014) to attend to the bringing of the current review application, notwithstanding the fact that he was involved in a criminal matter. The explanation is simply

unacceptable. Condonation is not merely for the asking.

[24] With regards to the question of costs, the Employer requested an order for costs against the Applicant. When the matter was argued, the Applicant's counsel indicated that it would not be in the interest of justice if, in the event that the Applicant's condonation application is unsuccessful, the Applicant is ordered to pay the Employer's costs. This is not a matter

where there should be a departure from the normal rule that costs follow the result. Apart from the fact that the Applicant has questionable prospects of success on review (coupled with the fact that the wrong test for review was advanced in the main application), the Applicant did not take the court into his confidence by failing to elaborate on the explanation for the delay and then for the entire period of the delay. There is also no current working relationship between the parties.

[25] In the circumstances, it would be in the interest of justice if the employer is not left out of pocket in opposing the relief sought by the employee.

Order

In the circumstances, I make the following order:

1. The application for condonation for the late filing of the review application by the Applicant under this case number is dismissed.
2. The Applicant is directed to pay the Third Respondent's costs on the party- and-party scale.

Wilhelm Bekker

Acting Judge of the Labour Court of South Africa

APPEARANCES:

FOR THE APPLICANT:

Adv W Bruinders

Instructed by Schindler Attorneys

FOR THE THIRD RESPONDENT: Ms F Suder from Suder Attorneys

[1] No 66 of 1995.

[2] SA Rugby Players Association and Others v SA Rugby (Pty) Ltd and Others (2008) 29 ILJ 2218 (LAC) at paras 39-40. Twoline Trading 413 (Pty) Ltd t/a Skosana Contract Labour v Abraham Mongatane and Others 2014 JOL 31668 (LC) at paras 24-29.

[3] No 75 of 1997.

[4] Ethekwini Municipality v Ingonyama Trust 2013 (5) BCLR 497 CC.

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