

SOUTH AFRICA / JUDGMENT

Empact Group (Pty) Ltd v Du Toit and Others (PR 116/22) [2024] ZALCPE 6 (23 February 2024)

[2024] ZALCPE 6

COURT

Labour Court Port Elizabeth

BEFORE

Norton

CASE / FILE NUMBER

PR 116/22

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IN

THE LABOUR COURT OF SOUTH AFRICA, GQEBERHA

CASE

NUMBER: PR 116/22

ECPE

324-21

In

the matter between:

EMPACT
GROUP (PTY) LTD
Applicant
and
DU
TOIT, F
N.O
First Respondent
CCMA
Second Respondent
MANONI,
N
Third Respondent
CUNNINGHAM,
A
Fourth Respondent

Heard:

30 January 2024

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email and publication on the Labour Court's website. The date and time for hand-down is deemed to be on 23 February 2024.

JUDGMENT

NORTON, AJ

Introduction

1. Ms Manoni and Ms Cunningham (the Third and Fourth Respondents) worked at Greenacres Hospital in Gqeberha. They were hostesses, earning R3 500 a month, serving food to patients in the wards. On Christmas Day in 2020, during the height of the Covid pandemic, at the end of their shift they donned Christmas hats, threw caution to the social distancing winds and took photographs of themselves hugging and kissing in a festive spirit. Unfortunately for them the photographs appeared on WhatsApp and Facebook, and their employer seeing them feared reputational harm.
2. The Applicant charged them with misconduct, and they faced a disciplinary enquiry in January 2021. There was no dispute that they had been trained on COVID protocols, and they admitted guilt, seeking a written warning as a sanction. This was not to be, and they were dismissed.
3. In summary, the employees referred an unfair dismissal dispute to the CCMA and were ultimately successful, with the arbitrator, the First Respondent finding that the dismissals were procedurally fair, but substantively unfair. The commissioner ordered reinstatement and back pay.
4. The award was made in default as the Applicant's representative, having emailed the CCMA and employees 2 days before the arbitration, that his witness was on maternity leave, failed to attend, and the matter proceeded in his absence.
5. The Applicant then sought to review and set aside the award, but during that process fell foul of the Practice Manual which requires the record to be filed within 60 days of the registrar of the Labour Court informing the Applicant that the CD and bundles from the CCMA are ready for collection.
6. The Applicant subsequently launched an application to reinstate the review.

7. The issue before me is whether the Applicant has made out a sufficient case to reinstate the review, and if I am in agreement that the Applicant has, then to consider the review application. Ultimately the Applicant seeks an order to review and set aside the award, and to refer the matter back to the CCMA for a hearing de novo before a different commissioner.
8. I set out the factual chronology below (as time periods are particularly relevant in this matter), then discuss the relevant legal issues that arise, and thereafter I apply the law to the facts and make an appropriate order.

Chronology

9. On 25 December 2020, the Third and Fourth Respondents committed misconduct.
10. On 6 January 2021, they were dismissed. A later appeal failed. The employer pointed to noncompliance with the Disaster Management Act and the risk that their conduct could lead to the cancellation of the contract between the Empact Group and Netcare Greenacres Hospital.
11. The employees referred their dispute to the CCMA. Conciliation proved to be unsuccessful and the dispute proceeded to arbitration.
12. Despite the set downs the arbitration did not proceed on 22 April, 10 June, 10 August, 21 October (on line), 11 November 2021 and 1 February
2022. It appears that both parties sought postponements over time, and at least on one occasion the CCMA could not proceed because of interconnectivity problems.
13. On 19 April 2022[1], the Applicant represented by Mr Jabu Mathebula, sent an email to the CCMA – requesting a postponement, due to Deidre Johannes (the representative who had been managing the matter) being on maternity leave until 2 May 2022. He wrote

Dear Colleagues, I was allocated this matter for arbitration and discovered that it is a part heard and initially arbitrated by my colleague Deidre Johannes. Unfortunately, she is on maternity leave and due to return to work on 2 May 2022. Accordingly, we would like to request for postponement on the matter. We attach herewith proof of documentation in support of this request. We are looking forward to your favourable response”[2]

14. Mr Mathebula is, according to his email signature, a Human Resources, Employee Relations Specialist.
15. On 21 April 2022, Mr Mathebula, assuming all was in order, did not attend the arbitration. This turned out to be poor judgment on his behalf as the arbitrator elected to proceed nonetheless. The arbitrator reasoned that there had been numerous postponements, the request for the postponement did not comply with the CCMA rules, and he was mindful of the need to resolve labour disputes fairly and quickly.[3]

16. On 28 April 2022, the arbitrator handed down a Default award. He found that the dismissal was procedurally fair but substantively unfair. He ordered reinstatement to 28 October 2021. In addition, he ordered payment of R21 000 to both employees by 6 May 2022.
17. On 31 May 2022, faced with an adverse award, the Applicant served a review application on the parties. The application was filed on 9 June 2022 with the Labour Court.
18. Around the 17 June 2022 the Registrar of the Labour Court informed the Applicant's attorneys that the record from the CCMA was available for collection.
19. On 29 June, a legal secretary at Snyman Attorneys asked a colleague working in Gqeberha to uplift the CD and documents from the Labour Court there.[4]
20. Around 8 December 2022 Snyman Attorneys serves the transcribed record on the parties. Ms Moyo, had in December 2022 taken over the file from a departing attorney, and noticed that the bundle of documents was missing. She emailed a colleague at the Gqeberha office to locate the rest of the record. It was found a couple of days thereafter.
21. Around 12 December 2022 Ms Moyo served and filed the completed record.
22. On 20 January 2023 Ms Moyo served Mr Mathebula's supplementary affidavit on the parties. He explained that he had supplied proof to justify the request to postpone (presumably meaning the medical record that Ms Johannes had given birth on 25 January 2022), that it was a part heard, and that in any event he was not privy to the matter and would be of little assistance.[5] He then went on to make legal submissions regarding the principles which apply when a commissioner (or any presiding officer) considers whether or not to grant a postponement.[6]
23. On 14 February 2023, the employer applied for reinstatement of the review application as it had been deemed to be withdrawn as per the Practice Manual, (the "manual").
24. On 30 January 2024, the Applicant argued the matter before me, there was no appearance from the Third and Fourth Respondents.

Legal

issues

25. The record was filed about 3 months late, necessitating a reinstatement application, as the review application is deemed to have lapsed. (The 60 days must be interpreted to refer to court days and not ordinary days as per the definition of "day" in the manual).
26. The facts trigger a consideration of the following legal issues:
 - 26.1. The provisions of the Practice Manual;
 - 26.2. The considerations applicable to the refusal or granting of a postponement;

26.3. Whether the Applicant has discharged the onus for reinstatement of the review application.

27. The provisions of the Practice Manual

27.1. According to clause 11.2.2 “...records must be filed within 60 days of the date on which the applicant is advised by the registrar that the records has been received.”

27.2. According to Clause 11.2.3 “If the applicant fails to file a record within the prescribed period (60 days from the registrar notifying the applicant that the record may be collected), the applicant will be deemed to have withdrawn the application ...”

27.3. According to Clause 16.2 of the Practice Manual, “A party to a dispute in which the file has been archived may submit an application on affidavit, for the retrieval of the file...”

28. It is trite that where there has been non-compliance with the 60-day period contemplated in practice-directive 11.2.2, in order for the review to be revived an Applicant in the position of the Empact Group is in essence seeking an indulgence.

29. The Court in *Overberg District Municipality v Independent Municipal & Allied Trade Union on behalf of Spangenberg & others*[7] stated:

“[40] When deciding whether to reinstate a review, or to order its retrieval from the archives, or in deciding whether or not to condone noncompliance with time periods stipulated in the manual, the court must apply the traditional test used in condonation applications, save that the prospects of success need only be assessed on whether a case has been made out which could succeed if proven.”

30. The Applicant bears the onus of establishing good cause to reinstate the review. In *Samuels v Old Mutual Bank*[8] Tlaletsi DJP held at paragraph 14,

“The consolidated Practice Manual which came into operation on 2 April 2013 constitutes a series of directives issued by the Judge President over a period of time. Its purpose is inter alia to provide access to justice by all those whom the Labour Court serves; promote uniformity and / or consistency in practice and procedure and set guidelines on standards of conduct expected of those who practice and litigate in the Labour Court. Its objective is to improve the quality of the court’s service to the public and promote the statutory imperative of expeditious dispute resolution.”

At paragraph 17 the court held,

“In essence an application for the retrieval of a file from the archives is a form of an application for condonation for failure to comply with the court rules, time frames and directives. Showing good cause demands that the application be bona fide; that the applicant provide a reasonable explanation for the default; and show that he / she has reasonable prospects of success in the main application, and lastly that it is in the interests of justice to grant the order. It has to be noted that it is not a requirement that the applicant must deal fully with the merits of the dispute to establish reasonable prospects of success. It is sufficient to set out facts which, if established, would result in his / her success...”

31. In summary then “good cause” as evidenced in the Samuels case denotes the following factors: bona fides; a reasonable explanation for the delay; reasonable prospects of success in the

main application; and the interests of justice.

32. With respect to reasonable prospects of success, the key issue will be whether the commissioner committed a reviewable irregularity when denying the employer’s application for a postponement. Acting Justice Mthombeni in *Impala Platinum Refineries Ltd v National Union of Mineworkers obo Retselisitsoe and others*[9] usefully sets out the elements to consider in a postponement application. They are: prejudice to either party, whether prejudice

could be cured by an appropriate cost order, whether the application was bona fide or a mere tactical manoeuvre, and whether it would be in the interest of justice and fairness to grant or refuse the postponement.[10]

Analysis

and discussion

33. I do not doubt the Applicant’s bona fides when making the application to reinstate the review. Ms Moya acted swiftly when realising that the record was incomplete and sought to file the completed record with haste. The supplementary affidavit followed soon thereafter. When the matter was argued before me the pleadings and record were indexed and paginated.
34. There is however no explanation for the delay. Somewhere between June to December 2022 the attorneys dropped the ball. The duration of 3 months (after the 60 day period – bearing in mind the definition of “day” refers to “court days”)

is not though excessive, and must be viewed together with other considerations such as prospects of success in the review. In this

regard the decision of the commissioner to proceed attracts scrutiny. Granted there had been numerous postponements, and the application

did not satisfy the CCMA rules. Mr Mathebula’s absence no doubt aggravated the situation.

35. However, Mr Mathebula did attach the birth certificate, which could have left no doubt that Ms Johannes was genuinely on maternity leave. His application, as informal as it was, was made bona fides. Mr Mathebula was not seeking to score an opportunistic or tactical point. Ms Johannes was returning on 2 May (in about 3 weeks’ time), and the arbitration could have proceeded 1 month or so later (i.e. in mid-May). The arbitrator could also have granted a cost order against the employer to mitigate the employee’s inconvenience – that was not considered. There is no doubt that it was far more prejudicial to the one party (the employer) to proceed; than prejudicial to the employee party to postpone. All in all, when

applying the variables expressed in the Impala Platinum Refineries decision it was in the interests of justice to grant the postponement.

36. I am satisfied that the Applicant's have demonstrated good cause to reinstate the review. I am also satisfied that the decision of the arbitrator to proceed on an unopposed basis was unreasonable and constitutes a reviewable defect contemplated in section 145(2)(a)(ii) of the LRA.
37. In the circumstances I make the following order:

Order

38. The application to reinstate the review application succeeds.
39. The arbitration award under case number ECPE324-21 is reviewed and set aside.
40. The Applicant is to notify Ms Manoni and Ms Cunningham before the 15 March 2024 that the dispute is to be arbitrated de novo before a different commissioner.
41. Before the 31 March 2024, the Applicant is to arrange a set down for arbitration with the CCMA, the date of which must be communicated to the two employees.

D Norton

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant

: T Moyo

Instructed by:

: Snyman Attorneys

For the Respondents : No appearances

[1] Presumably the date in the affidavit of 21 April 2022 in para 11.9 is an error

[2] Pg 48 of the pleadings

[3] Paragraph 5 onwards of the Arbitration award

[4] E2 attachment to the Applicant's affidavit for reinstatement

[5] Para 5.14

[6] Para 6.1

[7]

(2021) 42 ILJ 1283 (LC)

[8]

(2017) 38 ILJ 1790 (LAC)

[9]

[2017] 10 BLLR 1032

[10] Paragraph 32

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