
SOUTH AFRICA / JUDGMENT

Girley v Sithole NO and Others (JR2527/13) [2016] ZALCJHB 154 (13 April 2016) [2016] ZALCJHB 154

COURT

Labour Court Johannesburg

BEFORE

Baloyi

CASE / FILE NUMBER

JR2527/13

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THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR 2527/13

In the matter between:

MABASA GIRLEY

Applicant

and

COMMISSIONER NADIA SITHOLE N.O

First Respondent

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

Second Respondent

EOH MANAGEMENT SERVICE PUBLIC

Third Respondent

Heard: 17 December 2015

Delivered: 13 April 2016

SUMMARY: Review application. No reason given for accepting submissions made from the bar over evidence under oath. Ruling refusing condonation application set aside.

BALOYI, AJ

Introduction

- [1] Review and set aside of the First Respondent's ruling under the auspices of the CCMA is the relief sought by the Applicant. In the said ruling, an order refusing the Applicant's condonation application was made. The review application is opposed and the Third Respondent moved for dismissal of the application with costs.

Factual

Background

- [2] After her dismissal, on 22 August 2013, the Applicant referred unfair dismissal dispute to the CCMA with assistance of Nkoana Attorneys. The period of two weeks elapsed after such referral without having heard from the CCMA. She was as a result prompted to seek progress from her attorneys and she was apparently not satisfied when told that the CCMA had not allocated a date for her matter. She took it upon herself and contacted CCMA regarding the date. The CCMA official informed her that there was no record of her referral and was further advised to make a fresh referral accompanied by condonation application. She obliged and at the time of making a fresh referral, the 30 day period within which a referral was to be made had elapsed. The referral was in fact late by 15 days.
- [3] The reason for lateness was rested on the dispute being initially served and referred on 04 September 2013 through Nkoana Attorneys.

The fresh referral was accompanied by condonation application made on advice from the CCMA official. No opposition to the condonation was filed. The application was eventually scheduled for hearing and came before the Second Respondent. There is no record of what transpired during the hearing of the application before the Second Respondent. No notes captured by the Second Respondent were made available for purposes of this review. It is, however, apparent from the ruling that the Third Respondent's opposition came only in the form of arguments. The Second Respondent refused condonation application on the basis that the Applicant failed to prove that she had previously referred the matter and went on to accept the Third Respondent's arguments that she had no prospects of success.

- [4] The Applicant on grounds set out in section 145 of the Labour Relations Act attacks the First Respondent ruling in the following

respects:

4.1 That the First Respondent failed to take into account that the Applicant appeared in person and should have allowed her to contact her attorney to secure the proof in question before rendering the decision made.

4.2 The Third Respondent took into account what the Third Respondent said without any answering affidavit filed.

[5] The Third Respondent relied on the following contentions in opposition of the application:

5.1 That the Applicant failed to attach her attorney's confirmatory affidavit and that she failed to provide proof of what she alleges. The First Respondent purely decided the matter based on what was placed before her.

Evaluation

[6] Since the subject matter of this review application is centered around condonation, it is therefore of utmost importance to stress that determination of condonation applications is founded upon the passing of the test as established in *Melane v Santam Insurance Company Limited*.^[1] The test is so settled and forms core of our law in condonation applications and deserves no repetition herein save for mentioning

that elements for consideration are degree of the delay, reason for delay, prospects of success and prejudice. It needs to be said that the granting or refusal of condonation is also taken with a measure of discretion.

[7] Crucial point to note is that condonation applications made before the CCMA cannot be bench marked with those before the court. The CCMA Rules, however, provide guidance regarding filing and opposition of applications with affidavits being the mode of conveying evidence. Creation of rules was part of ensuring that principles of natural justice should not be ignored. The discretion which the commissioner is loaded with should also be exercised judicially while minding prejudice to either party.

[8] The discretion vested on commissioners in terms of section 138 of the Labour Relations Act is centered around handling of arbitration

proceedings. There is nothing precluding commissioners to applying the very discretion in motion proceedings. The First Respondent can thus not be faulted for having proceeded with condonation application to which no opposing papers were filed and heard the arguments presented by the Third Respondent. If this approach is followed, then the rules of evidence come to the fore in so far as the weight to be attached to averments made by one party under oath as against those of the other party made from the bar.

[9] In this instant matter, it seems, as is the case, that the First Respondent attached more weight to the arguments made by the Third Respondent against averments made under oath by the Applicant. There is no specific reason as to why the Third Respondent's arguments were preferred over the evidence of the Applicant. The absence of the record creates more difficulties as it remains unknown as to whether the Applicant was afforded an opportunity

to respond to the Third Respondent's arguments. In *Madonsela v CCMA and Others*,^[2] the quick fix method applied by a commissioner was disapproved and the court held as follows:

'[3] I am of the opinion that the commissioner committed a grave irregularity. The commissioner failed to adhere to the rules of the CCMA. Rule 19 requires the answer to the application for condonation to be under oath. Sabers Wholesalers filed an unsworn statement. There is no indication that Mr Madonsela was informed that he could reply to that statement. The commissioner did not call on the parties to appear and deliver their arguments. The rules of the CCMA are there to ensure that effect is given to the rules of natural justice. Mr Madonsela had no opportunity to deal with the allegations made by Sabers Wholesalers. There is no indication that he even knew about it.'

[10] The denial by the Third Respondent that initial referral was not received seemed to be opportunistic. It possibly came upon seeing that the Applicant was not at the time in possession of proof of service effected by her attorneys. When the fax report was produced for the first time in this review application, the Third Respondent elected to deny that the referral was sent to its correct fax number. The Third Respondent gave what it regarded as its correct fax number in its answering affidavit to the review application and distanced itself from the fax number used. This denial is once again opportunistic as the Third Respondent's known fax number appeared on the face of the arbitration award which is normally provided and confirmed by the party concerned. Furthermore, it was indisputable that the review application was served on the very fax number denied by Third Respondent and the application was subsequently opposed.

[11] The First Respondent was not bound to determine the dispute based on what was not before her. I agree with the Third Respondent on this point, particularly regarding the absence of proof which only came for the first time before this court. Taking into account all background facts, application of discretion coupled with rules of evidence and natural justice is what the First Respondent was required to do. The Applicant's complaint that she should have at least been given opportunity to bring whatever proof she needed given that she was a lay person is sustainable under the circumstances. There is no doubt that the Applicant became a victim of legal technicalities in this respect and the First Respondent allowed this to prevail.

[12] First Respondent's failure to apply her mind to these fundamental issues points to reviewable irregularity and her decision

cannot be found to be that of reasonable decision maker. This is a matter which does not warrant a cost order. The Applicant is also to blame on the circumstances which led to delays in prosecution of her unfair dismissal claim.

Order

[13] In the premises, the following order is made:

13.1 The ruling issued by the First Respondent under case number GAJB25324-13 is reviewed and set aside and is substituted by the order reading as follows;

13.1.1 Condonation application is granted,

13.1.2 There is no order as to costs.

BALOYI AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Mr Khoza of Retail and Allied Workers Union.

For the Third Respondent: Advocate M Lennox

Instructed by:

Botoulas Krause & Da Silva Inc.

[1] 1962 (4) SA 532 (A) at 532B-E.

[2]

(2002) 5 BLLR 440 (LC) at para 3.

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Prepared on 11 October 2026 · Esheria