
SOUTH AFRICA / JUDGMENT

Jackson and Others v GPSSBC and Others (JR2509/13) [2014] ZALCJHB 302 (6 August 2014) [2014] ZALCJHB 302

COURT

Labour Court Johannesburg

BEFORE

Van Niekerk

CASE / FILE NUMBER

JR2509/13

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REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

NOT REPORTABLE

CASE NO JR 2509/13

In the matter between:

MOLEWA JACKSON & 53 OTHERS Applicant

and

GPSSBC

First Respondent

PANELIST JCB CHOEMAN

Second Respondent

DEPARTMENT OF PUBLIC WORKS

Third Respondent

Date heard: 19 June 2014

Judgment

delivered: 19 June 2014

Date edited: 6 August 2014

EX-TEMPORE

JUDGMENT

VAN NIEKERK J

[1] This is matter number JR2509/2013. It is an opposed application in which the applicant seeks to have reviewed and set aside a ruling made by the second respondent, Mr JCB Schoeman, to whom I shall refer as the Commissioner. The Commissioner's

ruling was preceded by two prior rulings, which have some significance in these proceedings.

[2] The first was made by Commissioner Mello on 11 March 2013. In that, ruling, the Commissioner found that a dispute involving the applicants and their employer, the third respondent, concerning an alleged unfair labour practice had been referred late but that, in the circumstances, the late referral should be condoned with no order as to costs. That ruling was the subject of a separate rescission ruling issued on 19 August 2013 in which the same Commissioner, Commissioner Mello ruled that the condonation ruling issued on 11 March 2013 should be set aside and that another Commissioner should consider the application afresh.

[3] The basis of the decision by Commissioner Mello to rescind the earlier ruling made on 11 March 2013 was that it was clear that an answering affidavit filed on behalf of the third respondent had been filed timeously but that he had not had regard to that affidavit when he came to the decision that he did. To the extent that the ruling made by Commissioner Mello on 19 August 2013 has been challenged, it is clear from the provisions of section 144 of the Labour Relations Act that a Commissioner who has issued a

ruling may rescind or vary that ruling in circumstances, amongst other things, where the ruling was erroneously sought or was made

erroneously in the absence of any party affected by the award.

[4] In these circumstances, it is clear from the terms of the ruling that the initial ruling to grant condonation had been made in the absence of an answering affidavit timeously filed and to that extent the Commissioner was entitled to rescind the

ruling.

[5] The ruling that is specifically the subject of these proceedings is one made by Commissioner Schoeman on 11 October 2013. He, of course, was the other Commissioner to which the matter had obviously been referred. In his award, the Commissioner notes that the

application for condonation was filed on account of the late referral of a dispute to an alleged ongoing unfair labour practice. He also recalls the application of the 90 day time-limit established in terms of the Act and more particularly the obligation to refer an unfair labour practice dispute within 90 days of the employee party having become aware of the unfair labour practice. The Commissioner then sketches the background to the dispute, which concerned the application of the Bargaining Council's resolution 1 of 2007 relating to Occupation Specific Dispensations. It is not necessary for me to canvass the merits of the claim at this point but the Commissioner found that the subject matter of the dispute was one that concerned benefits. He also recorded that it was common cause that the degree of lateness involved was just over three years.

- [6] The test to be applied by the Commissioner is that which is set out in *Melani v Santam Insurance Co Ltd* 1962 (4) SA 572 (A), a case on which this court regularly relies to in exercising the discretion conferred on it to grant condonation or refuse it in appropriate circumstances. The test that is applied there is that the decision maker must necessarily consider the degree of lateness, the explanation proffered for the delay, the prospects of success and the importance of the case, sometimes referred to as the prejudice to the parties. Again, these are not individually decisive factors, they are obviously inter-related and what is required on the part of the decision maker is that a discretion be exercised judicially, having regard to all the facts and circumstances that are the subject of the application.
- [7] The Commissioner then proceeds to consider the degree of lateness and the explanation therefore. The Commissioner refers to a number of decisions by this court in which delays of two months and seven months have been regarded as excessive and comes to the conclusion that the degree of lateness was indeed excessive and that the explanation for the delay ultimately, he finds, is not acceptable. Of some significance is the Commissioner's decision in regard to the prospects of success. Here the Commissioner took the view that the dispute was not one that considered benefits. Benefits are matters not directly based,

he observed, on services rendered by employees, for example, contributions to pension funds and medical aid funds. What he

concluded in the present matter is that the issue really concerns what amounted to a claim for remuneration, something that the courts have raised consistently, does not constitute or concern a benefit for the purposes of the definition of unfair labour practice.

Again, in regard to prejudice, the Commissioner found that while employees who were subjected to unfair labour practices are certainly

prejudiced, the right to finality in cases of excessive delay is trumped and that the respondent on those proceedings would be

prejudiced if condonation was to be granted. The Commissioner concluded, therefore, that in the light of the above factors, the application for condonation should be refused and the application was accordingly dismissed with no order as to costs.

[8] In the present proceedings, there is some uncertainty about precisely the basis on which the application for review is sought. It seems that an application was filed timeously, that certain grounds of review were recorded in the founding affidavit in handwriting and that sometime afterward, there was an amendment filed in terms of which, in effect, the founding affidavit was effectively supplemented. Again, when the matter was argued this morning, the case boiled down to a number of clear points. The first relates to the decision by Commissioner Mello to rescind his prior ruling. The submission in this regard, as I understood it, was that once the CCMA had made its ruling in regard to condonation, in other words, the ruling made in March 2013, it was *functus officio* and the Commissioner therefore had no right to rescind that ruling. The second broad attack on the award relates to the affidavit that was before the Commissioner when he considered the application for condonation in October 2013 and, in particular, the fact that the affidavit was not properly attested and here I understood the submission to be that the omission of the words “Commissioner

of Oaths” from the stamp applied by the attesting Commissioner was fatal. The third is that, in any event, the Commissioner

had a material interest in the dispute and ought on that basis not to have attested to the affidavit.

[9] I deal with these issues *seriatim*. First in regard to the *functus officio* argument, it is clear to me from the provisions to which I have already referred, that is section 144 of the Labour Relations Act,

that a Commissioner is entitled *mero motu* to rescind any ruling made in circumstances where the ruling was erroneously sought or erroneously made. In this instance, as appears from the terms of the award, the Commissioner made a ruling in ignorance of an opposing affidavit that had been timeously filed. Clearly an order made in those circumstances denied the respondent the right to be heard and the Commissioner, in my view, correctly rescinded the order and further correctly ordered that the condonation application be heard by another Commissioner. That is a course of action which is entirely consistent with the provisions of the Act and which gives effect to the interests of justice and in particular, the right of the respondent to be heard prior to a decision being made by the CCMA. If it were to be otherwise, the CCMA would be bound simply to enforce orders made without affording respondents the right to be heard where they filed opposing papers timeously, in other words, exercised their right to be heard in terms of the CCMA’s rules. So, there is no merit, in my view, in the submission that concerns the actions of Commissioner Mello or the ruling that he made either on 11 March 2013 or the subsequent rescission ruling made on 9 August 2013.

[10] Turning next to the ruling made by Commissioner Schoeman, again here, in regard to the failure by the attesting Commissioner to insert the words ‘Commissioner of Oaths’ on the face of the affidavit, this was not fatal, what matters here is that the person commissioning

or acting as a Commissioner of Oaths is indeed a Commissioner of Oaths in terms of the applicable regulations. One might often have to read that, for example, where a Commissioner, as the Commissioner did in the present case in the founding affidavit in the review application, simply indicates that he is a member of the South African Police Service, for example, and holds a particular rank. That, in terms of the regulations, appoints him as a Commissioner of oaths. In the present

instances, the office of the Commissioner is reflected as an Advocate of the High Court. Advocates are in terms of the regulations

Commissioners of Oaths. The business address is set out and all the other details that are required by the regulations have been set out. The fact that the stamp does not reflect the words “Commissioner of Oaths,” in my view, is not material and it certainly has no impact on the validity of the affidavit.

[11] Turning next to the issue of the Commissioner’s material interest in this dispute, of course, the regulations provide that Commissioners should be in a sense impartial or unbiased or have no interest in the dispute to which any affidavit might be related.

In the present instance, while there is some reference in the founding affidavit and particularly in the pages inserted consequently on the amendment to an interest that the Commissioner may or may not have had in the dispute between the parties, that is not dealt with in any detail. The position of Adv Naidoo, what interest he had in the dispute, what role he played in the dispute, is simply not articulated in sufficient detail for the court to sustain the applicant’s submissions,

[12] This failure to deal fully with all the relevant facts and the fact that the court is bound by the terms of the affidavits has the necessary consequences that the court is not able to set aside the affidavit or come to any conclusion in relation to the Commissioner’s duties in regard to that affidavit. In any case, it would seem to me, having regard to the Commissioner’s ruling, that the matter was decided on the applicant’s own version.

[13] In other words, nothing in the opposing affidavit materially swayed the Commissioner and the Commissioner, as he was obliged to do, applied the Melane test. The degree of lateness was a matter of common cause. The reasons for the lateness and the prospects of success are all matters that the Commissioner clearly decided on the basis of the applicant’s submissions and in those circumstances it seems to me that the content of the opposing affidavit played no real role in the decision under attack in these proceedings.

[14] To restate the principles applicable to an application such as the present, the Constitutional Court, the Supreme Court of Appeal and the Labour Appeal Court have all set out clearly that the test is not one of correctness; the test is one of reasonableness. In other words, this court is entitled to interfere with the Commissioner’s award if, and only if it considers that the award is so unreasonable that no reasonable decision maker could come to the decision that is sought to be impugned on the basis of the available material. In other words, this court, even if it would have come to a different decision on the same facts, is not entitled to

intervene or interfere with the Commissioner's award.

- [15] The award must be so unreasonable that it falls outside of the bounds of decisions to which reasonable people could come on the available material. The test establishes a high threshold and the Labour Appeal Court has often observed that it is not easy to overcome that hurdle and that it is not often that this court will be entitled to interfere with decisions made by Commissioners. In the present instance, it is clear to me that the Commissioner fully understood the nature of the inquiry before him. He understood the principles to be applied, he applies the leading authority, *Melane v Santam* and his application of fact to principle, in my view, cannot be called into question.
- [16] Given that, the Commissioner fully appreciated the inquiry that he was obliged to undertake and given the outcome of the award, which was that in the face of a significant delay and in the absence of a reasonable explanation for that delay and in the absence of any material prospects of success, the application for condonation should be refused, that, in my view, is not an unreasonable decision or put in another way, it is not a decision to which a reasonable decision maker could not come. For those

reasons

then, in my view, the application to review and set aside the Commissioner's ruling, stands to be dismissed.

- [17] I want to say something about the manner in which this application has been conducted. The applicants clearly feel aggrieved at the treatment they got from their employer. They clearly feel aggrieved at the fact that the Occupation Specific Dispensation was not extended to them. It appears from the papers that the attorney that they initially consulted, a Mr Carrim from Polokwane, charged, from my calculations, in excess of R40 000 to do not much more than submit a referral to the Bargaining Council, together with an application for condonation. In my view, the fees charged are excessive in relation to the work done, certainly on the face of it, and it would appear that the applicants have been done a gross injustice. They have remedies by way of referral of this matter to the Law Society and are entitled to seek recourse in that regard.
- [18] In regard to the present matter, the third respondent filed an opposing affidavit and answering affidavit late, without any application for condonation. The heads of argument that were to be filed in terms of the Rules of this court were filed late and there was an application for the condonation for the late filing of those heads submitted during the course of the hearing. Again, these are issues that commonly cause delay in this court. I have been reluctant to postpone this matter simply on a count of the failure to submit heads timeously.
- [19] As I have indicated, it seems to me that the third respondent's heads are in any case directed against the terms of the application as originally filed. It does appear that the so-called amendments that were introduced never came to the attention of the third respondent and

it, in fairness, was not aware of the case that it was required to meet until this morning. This is not the way in which litigation ought to be conducted in this court. For those reasons, again, particularly what seems to me to be a failure to conduct this litigation in accordance with the Rules, despite the order that I intend to make, I will exercise my discretion in terms of section 162 and make no order as to costs in this matter.

For those reasons I make the following order:

1. The application is dismissed.

ANDRE VAN NIEKERK

JUDGE OF THE LABOUR COURT

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