
SOUTH AFRICA / JUDGMENT

Kubheka v Commission for Conciliation, Mediation and Arbitration and Others (JR472/16) [2016] ZALCJHB 510 (15 December 2016) [2016] ZALCJHB 510

COURT

Labour Court Johannesburg

BEFORE

Van Niekerk

CASE / FILE NUMBER

JR472/16

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THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Case no:JR 472/16

In the matter between:

DEAN SIKHUMBUZO MUZOMUHLE KUBHEKA

Applicant

and

COMMISSION FOR CONCILIATION,

First Respondent

MEDIATION AND ARBITRATION

DAN PRETORIUS N.O

Second Respondent

WORLEY PARSONS RSA PROPRIETARY LIMITED

Third Respondent

Heard: 13 December 2016

Judgment:

15 December 2016

VAN NIEKERK J

- [1] This is an application to condone the late filing of an application for review. The arbitration award under review was issued on 4 September 2015. In her award, the second respondent held that the applicant's dismissal was substantively and procedurally fair. At the time, the applicant was both an employee of the third respondent and a director, in the latter capacity representing the interests of a shareholder in the form of an Employee Trust, of which he was a trustee.
- [2] There is a dispute as to the date on which the applicant received the award. The applicant avers that he received the award by post on 7 October 2015. The third respondent avers that the award was made available to the applicant during September 2015.
- [3] The review application was filed on 9 March 2016. On the applicant's version, the review was filed 111 days late. On the third respondent's version, it was filed 175 days late. I deal with this issue below.

Legal principles

- [4] Condonation is not there merely for the asking, nor are applications for condonation a mere formality (see NUMSA v Hillside Aluminium
- [2005] ZALC 25; [2005] 6 BLLR 601 (LC); Derrick Grootboom v National Prosecuting Authority & another [2013] ZACC 37)). A party seeking condonation must make out a case for the indulgence sought and bears the onus to satisfy the court that condonation should be granted.
- [5] This court is required to exercise a discretion, having regard to the extent of the delay, the explanation proffered for that delay, the applicant's prospects of success, and the relative prejudice to the parties that would be occasioned by the application being granted or refused.
- [6] In this court, that formulation, which has its roots in *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A), has long been qualified by the rule that where there is an inordinate delay that is not satisfactorily explained, the applicant's prospects of success are immaterial. In *National Union of Mineworkers v Council for Mineral Technology* [1999] 3 BLLR 209 (LAC) the LAC said the following:

... without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused.

- [7] This principle was recently reaffirmed in *Collett v Commission for Conciliation, Mediation and Arbitration* [2014] 6 BLLR 523 (LAC), a unanimous judgement of the LAC, Musi AJA held as follows:

There are overwhelming precedents in this court, the Supreme Court of Appeal and the Constitutional Court for the proposition that where there is a flagrant or gross failure to comply with the rules of court condonation may be refused without considering the prospects of success. In *NUM v Council for Mineral Technology* [1999] 3 BLLR 209 (LAC) at para 10, it was pointed out that in considering whether good cause has been shown the well-known approach adopted in *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532C-D ... Should be followed but:

‘There is a further principle which is applied and that is without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without good prospects of success, no matter how good the explanation for delay, an application for condonation should be refused.’

The submission that the court a quo had to consider the prospects of success irrespective of the unsatisfactory and unacceptable

explanation for the gross and flagrant disregard of the rules is without merit.

- [8] Where an applicant seeks to ascribe blame for a delay on the part of a legal or other representative, the courts have made clear that the applicant may not rest content in the knowledge that the representative concerned has been furnished with instructions – it is incumbent on the applicant to follow up and ensure that those instructions are being executed. There is a limit beyond which a litigant cannot escape the consequences of an attorneys lack of diligence (see *Salojee and another NNP v Minister of Community Development* 1965 (2) SA 135 (A)). An applicant in these circumstances must satisfy the court that none of the delay is to be imputed to him or herself.
- [9] There is a further consideration that must necessarily be taken into account, consequent on the publication of this court’s practice manual and recent amendments to the LRA. In the recent decision by Myburgh AJ in *Makuse v CCMA & others* (JR 2795/11, unreported, 18 August 2015), the court alluded to measures recently instituted to address systemic delays, particularly

in review applications. The practice manual, introduced in April 2013, records that a review application is ‘by its very nature an urgent application’. The practice manual also requires that all of the necessary papers in any review application be filed within 12 months of the date of the launch of the application. Although in the present instance the practice manual was not in force at the relevant time, the classification of the review application is one that necessarily requires its prosecution with diligence and urgency remains apposite. As the court observed, the corrective steps taken by this court and the legislature (in the form of the 2014 amendments to the LRA) the statutory imperative that labour disputes must be effectively and thus expeditiously resolved. What this requires is a strict scrutiny of condonation applications and an approach that affords

due regard to the statutory purpose of expeditious dispute resolution.

Analysis

[10] As I have indicated, in so far as the degree of lateness is concerned, the court is obliged to accept the version deposed to in the answering affidavit, i.e. that the referral was made 175 days late. By any account, this is an inordinate delay, one of almost six months. The essence of the explanation for the delay in filing the review application is one that is ascribed to his belief that he had six months within which to review the award and to the conduct of the applicant's various legal advisers. He states that after receipt of the award, he contacted his legal insurers on 19 October 2015 with a request to appoint a different attorney to assist him. (A Mr Backus had represented the applicant at the arbitration hearing.) The first consultation with the new attorney, Ms Naidoo of SN Attorneys, took place on 8 December 2015, some 49 days after the applicant had been provided with the new attorney's contact details. SN Attorneys attempted to contact Backus but to no avail and then closed their offices between 18 December 2015 and 4 January

2016. At the end of January, Naidoo sought a mandate from the insurer to brief counsel on an opinion on the applicant's prospects of success in a review application. A consultation was held on 3 February 2016 and a report was provided by counsel to Naidoo on 4 February 2016. What is particularly relevant at this stage is that by 3 February 2016, the applicant must be made aware that his view that he was entitled to bring the review application within a period of six months of receipt of the award was incorrect, and that any application for review was already significantly out of time. Yet the

review application was filed some five weeks later. There is simply no explanation for this delay, which almost equates to the period within which the application ought to have been filed. It is also of some concern that the review application was served on the offices of the third respondent only on 24 March 2016, in circumstances where the founding affidavit had been deposed to on 9 March.

[11] The failure by the applicant on his own version to explain satisfactorily the full period of the delay is aggravated by the fact of his failure to challenge, on oath, the version deposed to by the applicant and in particular, the averments made in the affidavit deposed to by Backus. These are to the effect that he assists SN Attorneys with matters from time to time, as he did in the present instance. He states that after the arbitration hearing was concluded, he returned the file to Naidoo on or about 19 August 2015. He states further that he received the arbitration award by telefax and forwarded it by email to SN Attorneys. He avers that the applicant sent him an sms and that in response, during September 2015, he forwarded the arbitration award to him, advised the applicant of his opinion regarding a possible review application and told the applicant that the file was with SN Attorneys. Backus also avers that SN attorneys had always been the attorneys of record (this averment is sustained by the contact details reflected on the face of the arbitration award) and that it was never necessary for the applicant to seek new attorneys. Insofar as the applicant seeks to infer that Backus

was dilatory in returning the file to SN Attorneys, this is denied. Backus states that he returned the file during August 2015 and that to the extent that the applicant seeks to create the impression that his firm was position of or dealing with the file after the award was delivered, this is denied.

- [12] In the absence of any replying affidavit, the third respondent's version must prevail, i.e. that the applicant was furnished with a copy of the award in the early part of September 2015, and that the award thus came to his knowledge before the date on which he says he received the award by post. Backus's version also seriously calls into question the applicant's attempts to ascribe delays in bringing the review application to Backus.
- [13] In these circumstances, I am not satisfied that the applicant has furnished a reasonable explanation for what amounts to an inordinate delay in filing the review application.
- [14] In accordance with the principles elaborated above, the applicant's prospects of success in the main application are immaterial. Even if I am incorrect in coming to this conclusion and I ought properly to have regard to the applicant's prospects of success, in my view, these appear minimal. The primary ground for review is that the second respondent arrived at an unreasonable decision because she failed to apply her mind to the evidence before her. In particular, the applicant contends that the second respondent failed to appreciate the distinction between the various roles held by the applicant and the hierarchy that applied. The applicant appears to suggest that the fact that he was a director of the third respondent had the necessary consequence that the persons who issued the instruction that form the basis of the disciplinary action taken against him were not authorised to supervise him, as a higher ranked official.
- [15] A cursory perusal of the arbitration awards reveals that the second respondent did consider this issue. At para 956 the second respondent says the following:

This was one of the main areas covered by the respondent's witnesses. Dreyer expended on the need to see the operations role as coming first and then balancing the responsibilities of being a trustee\director with this; or juggling, to find time to meet the extra commitments of quarterly meetings, inputs and queries. Glover stated he dulled the applicant's operations role stayed the same and was paramount. Brodie discussed with the applicant that after his appointment as a director there was no change

operationally. Gaskell stated operational needs to preference and the reporting lines on the organic gram stayed the same. Agenbag

told the applicant he was still a C&I engineer on the site.

- [16] And further at paragraphs 957 and 958:

- [957] The applicant specifically conceded that Dreyer, Glover, Brodie and Gaskell told him this. However he did not agree. His vision wavered from a position at once he became a director, he was no longer a C&I engineer, a position described by Dreyer as being a warped frame

of reference and delusional, to an assertion that his multiple roles meant that he had 'flexibility' with regard to his duties on site. He also later attempted to justify his very different perception of his roles from that of his predecessor Dreyer by arguing that conditions had changed. This was disputed by Dreyer who pointed out that he was still in those roles when the respondent merged with TWP. the applicant later further conceded that he still had an operational role by saying that in his view his operational role had less priority.

- [958] A useful analogy from two of the management witnesses was to see the three roles as different 'heads', each carrying its own responsibilities. It was clear from the respondent's evidence that a director 'hat' was temporary in that the applicant was only a director by virtue of his two-year appointment as a trustee. This was also envisaged to be specifically related to inputs he was expected to make on behalf of the beneficiaries of the trust.
- [17] It is apparent from these paragraphs that the second respondent indeed applied his mind to the applicant's contentions regarding the hierarchy for which she contended and his position in that hierarchy. On the evidence before, she rejected his assertions that by virtue of his holding the office of a director, he was obliged to take instructions from supervisors whom he considered to rank beneath him. This being so, the true reason for review is not that the second respondent failed to have regard to the evidence concerning the applicant status – it is that the applicant disagrees with the second respondents finding. The threshold for review is one that prevents a formidable hurdle to an applicant. This court is empowered to intervene if and only if the decision to which the arbitrator came was unreasonable in the sense that no reasonable person could come to that decision on the available material. In other words, arbitrators are allowed to be wrong and the fact of a disagreement with a finding or an assertion that it is incorrect is not a sufficient basis for review. Further, it is apparent from the award that the second respondent, for reasons that she outlines, found the applicant's evidence to be unsatisfactory. Again, it is not ordinarily open to the review court to revisit credibility findings made by an arbitrator. For these reasons, in my view, the applicant's prospects of success are minimal, if they exist at all.
- [18] In relation to costs, this court has a broad discretion in terms of s 162 to make orders for costs according to the requirements of the law and fairness. The applicant has represented himself in these proceedings. I accept that he feels genuinely aggrieved by the second respondent's award but the fact that he may have been misguided in initiating these proceedings is not a sufficient basis to order him to pay the third respondents costs. In my view, the interests of the law and fairness are satisfied by there being no order as to costs.

For the above reasons, I make the following order:

1. Condonation for the late filing of the review application is refused.
2. The review application is dismissed.

ANDRÉ VAN NIEKERK

JUDGE OF THE LABOUR COURT

APPEARANCE

For the Applicant: In person

For the Third Respondent: Ms A Vatalidis, Werkmans Attorneys

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