

SOUTH AFRICA / JUDGMENT

Maarman v Commission For Conciliation, Mediation and Arbitration and Others (JR 1464/2020) [2023] ZALCCT 68 (31 July 2023)

[2023] ZALCCT 68

COURT

Labour Court Cape Town

BEFORE

Mabaso

CASE / FILE NUMBER

JR 1464/2020

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IN

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case

No: JR 1464/2020

In

the matter between:

RAUIRI
MAARMAN
Applicant
And
COMMISSION
FOR CONCILIATION
MEDIATION
AND ARBITRATION First
Respondent
PRETORIUS
DAN N.O.
Second Respondent
DOMINICAN
CONVENT SCHOOL
Third Respondent

Heard:

09 February 2023

Delivered:

31 July 2023

JUDGMENT

MABASO AJ

Introduction

[1] The Second Respondent ("the Arbitrator"), after arbitrating a dismissal dispute between the Applicant ("Mr

Maarman") and Third Respondent ("the School"), issued an arbitration award concluding that the dismissal of the

former was substantively unfair but procedurally fair, as a result, the School was ordered to pay Mr Maarman a compensation of R 126 000.00. The Applicant is now challenging this decision and asking this Court to substitute it with an order of reinstatement. On the other hand, the School launched a cross-review application challenging limited parts of the findings of substantive unfairness.

The latter application was delivered 18 weeks out of time, as such, it is accompanied by a condonation application.

[2] Hereinafter this Court deals with the School's condonation application ("Cross-review") and, thereafter, the main review application.

Cross-review (The School's condonation application)

[3] The arbitration award was issued on 08 September 2020; in terms of section 145(1)(a) of the Labour Relations Act[1] (LRA), this application should have been launched within six weeks from this date. The School only launched this application on

26 February 2021. In terms of section 145(1A) of the LRA, this Court may, on good cause shown, condone this late delivery. The School's review application is accompanied by a condonation application, and therein acknowledges that this review was filed more than four months late and that the delay is excessive.

[4] In *SATAWU v SAA*,[2] the Court being satisfied with the explanation provided by an applicant and the reasons for the delay, the Labour Appeal Court

(LAC) granted a condonation application that was four months out of time, and it followed this yardstick:

"...The correct approach in determining whether good cause has been shown was laid down in Melane v Santam Insurance Co. Ltd:

"In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised

judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually

relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily

these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true

discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is

an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate for

prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked. I would add that discursiveness should be discouraged in canvassing the prospects of success in the affidavits. I think that all the foregoing clearly emerges from decisions of this Court, and therefore I need not add to the evergrowing burden of annotations by citing the cases.”

[5] In *Moila v Shai and Others*,^[3] the LAC said the following about both an excessive delay and unreasonable explanation:

‘Where, in an application for condonation, the delay is excessive and no explanation has been given for that delay or an “explanation”

has been given, but such “explanation” amounts to no explanation at all, I do not think it is necessary to consider the prospects of success.’

[6] Matters in this Court must be resolved expeditiously and reading all authorities mentioned above it seems necessary that this Court when faced with a condonation application wherein a delay is excessive, investigate the proffered reasons for such delay. If satisfied with the explanation, then it may grant condonation, but if not, then it may refuse it as there might not be a need to look at the aspect of prospects of success.

[7] In this matter, the School has delivered what is commonly known as a cross-review, which was filed after Mr Maarman had delivered a supplementary affidavit in his review application.

[8] The explanation for the delay herein is that: Upon the School being served with the arbitration award on 08 September 2020 it proceeded to deposit the compensatory amount into Mr Maarman’s account. Meaning it complied with the terms of the arbitration award, but Mr Maarman transferred the money back into the School’s account. The School does not explain what happened between the date of receiving the money back and the date when

they lodged the cross-review application. They only contend that upon receipt of the records and the supplementary affidavit in February 2021 they looked at the allegations made by Mr Maarman in seeking reinstatement and thereafter decided to launch this review application.

- [9] This Court concludes that this explanation is not reasonable, considering that the same person represented the School during the disciplinary hearing and arbitration, so the School knew even at the time of receipt of the arbitration award as to what transpired during the arbitration hearing; and had a chance then to bring a review application but opted not to do so; therefore, this Court concludes that the explanation for the delay is unreasonable, consequently, the condonation of the late filing of the review application should not be granted.

The Main review (Mr Maarman's review)

Brief background and the arbitration award

- [10] Mr Maarman was employed by the School, and at the time of dismissal, he was 40 years old and its Deputy Head: Academics and Deputy Headmaster. He stayed at the Schoolyard with both his wife and child. The latter was schooling at the School.
- [11] Mr Maarman was dismissed after being found guilty of assault and threatening behaviour. His victim was Ms Wright, a 60-year-old

teacher and his subordinate. The misconduct occurred within the premises of the School following a discussion between both Mr Maarman

and Ms Wright relating to the poor work performance of the latter.

- [12] The Arbitrator was tasked to decide whether the dismissal of Mr Maarman by the School was fair or not and had to take into account all relevant circumstances presented before her. At the conclusion of the arbitration process, the Arbitrator issued an arbitration award, which is very detailed and consists of 381 paragraphs, under analysis of evidence, proceeded to look at, among other things, the probabilities and the credibility of all the witnesses that testified.
- [13] Most importantly, she accepted the consistency of the version of the School's witnesses, and he commented that Mr Maarman's version relating to whether he committed the offences for which he was dismissed, "was much less clear and relatively inconsistent". Moreover, his version "was much less probable...Some of the changing versions that emerged, especially under cross-examination, made aspects of the Applicant's version highly improbable...". In paragraph 319 of the arbitration award, the Arbitrator confirms the guilty findings.
- [14] Following this conclusion, the Arbitrator investigated whether Mr Maarman should be reinstated, re-employed, or paid compensation. In her conclusion, she pronounced that Mr Maarman committed the offences but the dismissal was substantive unfairness, only relating to the penalty, then said an appropriate remedy was two months' compensation.

[15] In support of this, the Arbitrator in the arbitration award inter alia: looked at the manner in which this violent misconduct took place, the age gap between Mr Maarman and Ms Wright; that Mr Maarman

was a senior to the latter; the issue of gender-based violence; that Mr Maarman had unsuccessfully raised the defence of self-defence;

that following the incident, the School kept both of them apart; the effect of the misconduct on the interpersonal relations and the organization of the School; that the School principal no longer had confidence and trust relationship with Mr Maarman; the concern from the School about physical violence; and the manner in which Mr Maarman presented his evidence during the arbitration.

Grounds of review and applicable principles

[16] Once a dismissal has been found to be substantively unfair, a decision maker is expected to make an enquiry as to whether an of order reinstatement or re-employment or compensation should be made, this is so since section 193(2) of the LRA reads thus:

“The Labour Court or the arbitrator must require the employer to reinstate or re-employ the employee unless—

- (a) the employee does not wish to be reinstated or re-employed;
- (b) the circumstances surrounding the dismissal are such that a continued employment would be intolerable;
- (c) it is not reasonably practicable for the employer to reinstate or re-employ the employee; or
- (d) the dismissal is unfair only because the employer did not follow a fair procedure.”

[17] The Constitutional Court in Toyota[4] at para 135, followed by SARS[5] said the following about the provision mentioned in the preceding paragraph:

“Once the Labour Court or an arbitrator has found a dismissal unfair, it or he is obliged to consider which one of the remedies listed in section 193(1) is appropriate, having regard to the meaning of section 193(2). Considering both the provisions of section 193(1) and section 193(2) is important because one cannot adopt the attitude that dismissal is unfair, therefore, reinstatement must be ordered. The Labour Court or an arbitrator should carefully consider the options of remedies in section 193(1) as well as the effect of the provisions of section 193(2) before deciding on an appropriate remedy. A failure to have regard to the provisions of section 193(1) and (2) may lead to the Court or arbitrator granting an award of reinstatement in a case in which that remedy is precluded by section 193(2).” (Own emphasis)

- [18] Mr Maarman's main concern is that the Arbitrator did not order reinstatement, as prayed for during the arbitration; as a result, he is challenging the Arbitrator's decision in that since the School had allowed him to work for five months after the dismissal had been pronounced indicates that the employment relationship had not broken down, and the manner in which she analysed the issue of a criminal case which had been laid against Mr Maarman.
- [19] It is important to take note that this Court is a reviewing Court, which is not expected to decide a review on a piecemeal approach but has to look at all the circumstances that were before the Arbitrator;[6] the fact that the Arbitrator mentioned the issue of the criminal case in the award does not suggest that it is the only issue she relied on. Instead upon reading the arbitration award clearly, the Arbitrator was emphasizing the point that the apology by Mr Maarman was not genuine. On the issue of keeping him for five months within the School following the latter being made aware of the dismissal finding, Mr Graham Howarth made it clear that it was to accommodate Mr Maarman's child who was staying in the same School with his parents and schooling there, so they did not want to disturb the child and the Arbitrator mentions this in the arbitration award. So, these two points do not suggest that the Arbitrator committed reviewable irregularities. Instead, the Arbitrator gave detailed reasons why she favoured the compensation instead of reinstatement, and her reasoning is in line with what the Constitutional Court said, as mentioned in para 17 above.
- [20] The other ground of review is what Mr Maarman is concerned about how the Arbitrator analysed the issue of the breakdown of the trust relationship,[7] he alleges that Mr Howarth contradicted himself when he testified relating to this issue and did not prove that the trust relationship had broken down, meaning no intolerability circumstances were presented by the School.
- [21] The issue of intolerability is a matter that the Arbitrator had to determine when exercising his discretion relating to whether reinstatement should be ordered or not, in this regard, the Constitutional Court in *Booi v Amathole District Municipality*[8] confirmed that "intolerability should not be easily be reached, and that the employer must provide weight reasons, accompanied by tangible evidence, to show intolerability" and that Court further reiterated that there is a difference between a reviewing Court and appealing Court in that: "A court reviewing an arbitration award of reinstatement on the basis of provisions in section 193(2)(b) does not itself conduct the intolerability enquiry afresh. Instead, it assesses whether the inquiry conducted by the arbitrator led them to a decision which could not have reached by a reasonable decision-maker conducting that inquiry..."[9]
- [22] In casu, the ground that is raised by Mr Maarman relating to the manner in which the Arbitrator handled the assessment of intolerability does not fall within the jurisdiction of this Court as this is not a Court of Appeal. Even if this Court were to reconsider the finding of the Arbitrator relating to this issue, in my view, the Arbitrator did not commit any irregularity considering that she did apply her mind to the facts before her considering what is stated in paragraph 14 above. Consequently, this ground too, is meritless.

[23] Furthermore, the Applicant was dismissed after being found guilty of serious misconduct in that he assaulted an elderly woman, and on page 132 of the records, the evidence of Ms Roy, another woman who was around the area when the incident happened, inter alia said,"

"Being a female, myself, I am scared to be in conflict situation with Mr Maarman being a female. In an authority position or in a leadership position you have to stay calm and follow"

Therefore, since the Employer herein is a school, this Court cannot imagine how the School was expected to keep Mr Maarman following this incident and as Ms Roy also indicated that she was now scared of Mr Maarman.

[24] Further, this Court has considered the remaining grounds of review and is unpersuaded by these grounds, for example, Mr Maarnaan, in paragraph 51 of the founding affidavit, alleges that the Arbitrator committed a gross irregularity in that she took information from the School's closing argument, that had not been raised in the arbitration hearing. These are bald submissions, as no such specific information is mentioned in the affidavits. If Mr Maarman, by this statement, was referring to violence against women, it was also the duty of the Arbitrator to be alive to the enormous problems that violence against women causes. Consequently, the review application has to fail.

Order

1. The Condonation application for the late delivery of the cross-review application by the Third Respondent is dismissed, consequently, its review application is dismissed.
2. The Applicant's Review application is dismissed.
3. Each party to bear its own costs on both matters.

Sandile Mabaso

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Adv K Howard

Instructed by:

Lee Wrench Attorneys

For the Third Respondent: Ms T Moyo

Instructed by:

Snyman Attorneys

[1] Act 66 of 1995, as amended.

- [2] [2015] 2 BLLR 137 (LAC) at para 15. cf. Academic and Professional Staff Association v Pretorius NO and Others
- [2008] 1 BLLR 1 (LC) at paras 17 and 18.
- [3] [2007] ZALAC 1; (2007) 28 ILJ 1028 (LAC) at para 34. cf. Van Wyk v Unitrans Hospitals and Another
- [2007] ZACC 24; 2008 (2) SA 472 (CC) at paras 22 and 33.
- [4] Toyota SA Motors (Pty) Ltd v CCMA and Others
- [2016] 3 BLLR 217 (CC).
- [5] SARS v CCMA and Others 2017 SA 549 (CC), at para 38.
- [6] See Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and others
- [2007] ZALC 66; [2014] 1 BLLR 20 (LAC) at para 18.
- [7] P 14-7, para 39 -50.
- [8] [2022] 1 BLLR 1 (CC) at para 40.
- [9] Booï at para 44.

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