

SOUTH AFRICA / JUDGMENT

Moschinsky v Commission for Conciliation, Mediation and Arbitration and Others (C706/2021) [2023] ZALCCT 44 (14 July 2023) [2023] ZALCCT 44

COURT
Labour Court Cape Town

BEFORE
TC Gandidze

CASE / FILE NUMBER
C706/2021

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Source record

THE
LABOUR COURT OF SOUTH AFRICA, CAPE TOWN
NOT
REPORTABLE
CASE
NO: C706/2021
In

the matter between:

HILDA
MARIA MOSCHINSKY
Applicant
and
COMMISSION
FOR CONCILIATION MEDIATION
AND
ARBITRATION
First
Respondent
COMMISSIONER
ERASMUS ANNEMIE
Second
Respondent
BVI
CONSULTING ENGINEERS WESTERN CAPE
(PTY)
LTD
Third
Respondent

Heard:	28 June 2023 Date of Judgment: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing down judgment is deemed to be 10h00 on 14 July 2023
Summary:	An application to review and set aside an award which found the dismissal for operational requirements to be substantively fair but procedurally unfair and awarding one-month compensation. Rule 7A(8) notice filed late and condonation refused. Review application dismissed on the merits.

JUDGMENT

GANDIDZE AJ

Introduction

[1] The applicant, Hilda Maria Moschinsky (Moschinsky) seeks an order reviewing and setting aside an award issued under the auspices of the first respondent, the Commission for Conciliation, Mediation and Arbitration (CCMA) under case number WECT8703-21, dated 18 October 2021. In the award, the second respondent (commissioner) found Moschinsky's dismissal for operational requirements to have been substantively fair but procedurally unfair and awarded one month's compensation for the procedural unfairness, amounting to R17 700. Moschinsky also seeks condonation for the late filing of the Rule 7A(8) notice. The matter was unopposed.

[2] I will deal with the condonation application first.

Late filing of the Rule 7A(8) notice

[3] Rule 7A of the Rules for the Conduct of Proceedings in the Labour Court[1] (Rules) deals with review applications. There are certain prescribed procedural steps that an applicant is required to take to progress a review application. One of those steps is Rule 7A(8) which provides as follows:

‘(8) The applicant must within 10 days after the registrar has made the record available either –

(a) by delivery of a notice and accompanying affidavit, amend, add to or vary the terms of the notice of motion and supplement the supporting affidavit; or

(b) deliver a notice that the applicant stands by its notice of motion.’

[4] Even though she had no legal representation, Moschinsky followed all the procedural steps that preceded the late filing of the Rule 7A(8) notice promptly and within the time limits prescribed by the Rules. The award was issued on 18 October 2021, and she filed the review application on 29 November 2021, followed by the record on 10 February 2022. The next step was the filing of a Rule 7A(8) notice, and in this case, the ‘Notice of Motion (in terms of Rule 7A(8))’ was filed on 13 June 2022. This is in circumstances where the notice ought to have been filed within 10 days after the Registrar having made the record available to the applicant. In practice, the 10-day period is calculated from when the applicant files a record that is relevant for the purposes

of the review. Since Moschinsky filed the review record on 10 February 2022, the notice ought to have been filed by 24 February

2022. The Notice was filed only on 13 June 2022, some three and a half months out of time. The delay is substantial and therefore ought to be properly explained.

[5] The explanation for the delay is contained in these two paragraphs of the founding affidavit filed in support of the condonation application:

‘8. At the time when I brought the application I was not legally represented, I have now sought legal representation and I am advised that within 10 days after having been provided with the records as per Rule 7A(8) of the rules of this honourable court I was supposed to have informed all Respondents if I intend to alter my Notice of Motion and Founding Affidavit, or not.

9. It is for this reason that I request of the honourable court to allow me an opportunity to fulfil the required notice outside the prescribed time limit.’

[6] The founding affidavit is dated 18 May 2022, but the Rule 7A(8) notice was filed only on 13 June 2022. The Notice of Motion to which the condonation affidavit is annexed is also dated 18 May 2022. For reasons that were not divulged to the Court, both documents were filed almost a month after they had been signed. In oral argument, Mr Mhlongo submitted that “all this happened during Covid”. Apart from the fact that factually by mid-2022 normalcy had returned when it came to the filing of court papers, that version was not set out in the affidavit.

[7] Turning then to Moschinsky’s version on the reasons for the delay, she states that it was only after Moschinsky consulted with a legal representative that she became aware of when she needed to file the Rule 7A(8) notice. But this version cannot be true given that the Notice of Motion signed and filed by Moschinsky in November 2021 recorded that the applicant was required to deliver a notice and accompanying affidavit within 10 days of receipt of the record and reasons from the CCMA. That is a reference to a Rule 7A(8) notice. When I raised this with Mr Mhlongo in oral argument, he submitted that it is not uncommon for unrepresented litigants to sign documents without reading them. I reject this explanation. A simple reading of the two-paged notice of motion which Monchinsky drafted and signed without legal representation would have alerted Monchinsky of the next step after filing the

review record. She had followed all the previous procedural steps within the prescribed time limits and therefore, she must have known what the time frames were. To make matters worse, it took almost a month for the signed documents to be filed, and that delay is not explained at all.

- [8] The delay was substantial and needed to be adequately explained. The explanation before the Court was wholly inadequate. In *NUM v Council for Mineral Technology*[2], the Labour Appeal Court (LAC) said the following:

‘... [W]ithout 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...’

- [9] I would dismiss the condonation application for a lack of a reasonable and acceptable explanation for the delay.

- [10] What then is the consequence of refusing condonation for the late filing of a rule 7A(8) notice that sought to amend the initial review papers? The Rule requires an applicant to either file a notice and supplementary affidavit amending the documents filed in the review, or a notice that an applicant stands by its notice of motion. My reading of the Rule is that one of these two notices must be filed, after which the respondents can file opposing papers, and if the matter is opposed, the review will be ripe for hearing. What then is the situation when condonation for the late filing of the rule 7A(8) notice is refused? In my view, the application must be determined having regard to the initial review papers and I have approached the review application on that basis.

The law and the grounds for review

- [11] Before setting out the grounds for review, the test on review is now trite. An award will be set aside on any of the grounds set out in section 145 of the Labour Relations Act[3] (LRA). In *Sidumo and another v Rustenburg Platinum Mines Ltd and others*,[4] the Constitutional Court held that section 145 is now suffused by the constitutional standard of reasonableness. In other words, the award will be set aside if it is one that no reasonable decision-maker could have arrived at.

- [12] The founding affidavit sets out the grounds for review as follows:

12.1 the commissioner committed gross misconduct and was biased in that she failed to consider relevant evidence that the dismissal was substantively unfair as the retrenchment was not for economic reasons as claimed because the employer failed to engage in a meaningful consultation process and had only one meeting with the applicant.

12.2 the employer was not cash strapped as alleged at the time of the retrenchments – it paid for staff to attend training courses; was covering the repair costs of damage to two rental cars caused by an employee (instead of recovering these costs from the employee); was extending interest-free loans to staff; and subsequent to the applicant's retrenchment, the third respondent employer hired an untrained replacement for a position the applicant held for eight years and at a higher cost, thereby incurring more costs.

12.3 the employer undertook to use LIFO as the selection criterion but retrenched her, a long-serving employee, who performed two jobs for eight years at a much lower salary. Therefore, the intention was never to cut costs but to get rid of the applicant.

12.4 the one month's compensation awarded was unreasonable given that the dismissal was both substantively and procedurally unfair.

12.5 the commissioner committed an irregularity because the applicant's monthly salary was R18 862.00 and not R17 700 as recorded by the commissioner.

[13] Unfortunately, the founding affidavit does not make any specific references to the evidence as reflected in the transcript, and understandably so, given that the transcript was filed subsequent to the filing of the founding affidavit. The same founding affidavit was annexed to the Rule7A(8) notice, which was dealt with above. I have had regard to the findings in the award and the contents of the transcript in deciding the issues raised by the applicant.

Analysis of the grounds for review

[14] Moschinsky complains that the retrenchment was not for economic purposes given that the employer had only one consultation meeting with her. Even though the complaint is not articulated in a manner that is fully comprehensible, a similar complaint was raised during the arbitration proceedings and in the award, the commissioner concluded that financial reasons led to the decision to retrench, based on the evidence presented by Mr Leon Pienaar (Pienaar). The financial distress commenced during the Covid-19 pandemic, and several cost-cutting measures were implemented, including salary reductions. The commissioner also accepted that the employer sought to save costs through retrenchments and that several other departments at the employer were affected by the retrenchments. The conclusion was that there was a fair reason to dismiss Moschinsky for operational reasons. In my view, the finding of the commissioner cannot be faulted and is in fact reasonable, given the evidence presented.

[15] The next complaint relates to the fact that there was no meaningful consultation, as only one meeting was held with the applicant. The award deals with this issue and the conclusion was that it was a valid complaint by Moschinsky, hence the award of compensation for procedural unfairness.

- [16] The complaint that the company was not distressed financially was also raised during the arbitration proceedings. The same arguments raised on review were raised with the commissioner who came to a finding to the contrary. As this is not an appeal, I will not revisit arguments which were considered by the commissioner and rejected. I see no reason to interfere with the commissioner's conclusion that the dismissal was for operational requirements.
- [17] On the selection criterion implemented, the award deals with this issue too. The commissioner recorded that it was undisputed that the other two individuals in the administration department had skills that Moschinsky did not have, and that this was a fair selection criterion. This finding is reasonable.
- [18] The last complaint is that the one-month compensation awarded is unreasonable. In awarding that quantum, the commissioner recorded that she considered that certain procedures were complied with and that Moschinsky received a generous severance package to what the employer was required to pay.
- [19] The complaint ignores that the quantum of compensation is a matter that falls within the discretion of a commissioner. In such a case, the commissioner exercises a discretion in the strict sense or a narrow discretion, which involves a choice between different but equally permissible alternatives.[5] There is no single correct answer, the only requirement being that the compensation must be just and equitable as provided for in section 194(1) of the LRA. This Court will interfere only when it appears that the discretion was not exercised judicially, or where the decision-maker had been influenced by wrong principles or a misdirection on the facts, or that the commissioner reached a decision which, in the result, could not reasonably have been made by a commissioner properly directing herself to all the relevant facts and principles.[6] Monchinsky does not rely on any of these grounds to justify this court's interference with the exercise of the commissioner's decision.
- [20] In *Smith v CCMA and others*, [7] the court found that an employee whose dismissal was substantively fair but procedurally unfair is entitled to nominal compensation only.
- [21] Finally, Moschinsky complains that the commissioner committed a gross irregularity by recording her salary as R17 700 whereas her salary was R18 862. I note that the award records Monchinsky's salary as R17 700, but it is unclear how and when this information was conveyed to the commissioner. The transcript does not reflect Monchinsky's salary nor is there a payslip in the record. In oral argument, I inquired from Mr Mhlongo as to the source document for the figure of R18 862 and he referred me to the increase letter issued to Moschinsky in August 2020 which recorded the annual salary as R224 175. According to Mr Mhlongo, if this amount is divided by 12, the number of months in a year, one gets R18 862.

[22] Even if that may be so, I am unable to correct the award in the manner requested, based on the document that I was referred to. That document refers to an attached summary setting out the breakdown of the annual salary, but that summary did not form part of the record. I was also concerned that the evidence was that, during the Covid-19 pandemic, the employer implemented salary cuts as part of cutting costs, and the letter that Mr Mhlongo referred me to dealing with the reinstatement of salaries was issued post the dismissal of Monchinsky. For these reasons, I will not correct the salary of R17 700 compensation.

[23] In oral argument, Mr Mhlongo argued that the award was reviewable for the further reason that the real reason for the dismissal was discrimination on an arbitrary ground and not economic reasons as alleged. This ground for review was raised in the Rule 7A(8) notice, which I disregarded. To the extent that I was mistaken in disregarding that notice, this ground for review cannot succeed. That cause of action was raised before the commissioner, who explained to Moschinsky that the dispute was referred as an unfair

dismissal based on operational requirements and was conciliated as such. There is no reason for this Court to entertain, on review, a new cause of action which was addressed by the commissioner during the proceedings.

[24] In oral argument, Mr Mhlongo made a further submission that the fact that the employer paid Moschinsky a severance package in excess of the statutory minimum is further proof that the employer was not in financial distress. Above I have already dealt with the finding that the dismissal was for operational requirements given the evidence by Pienaar.

[25] In all the circumstances, no case for the review of the award has been made.

[26] In the premises, I make the following order:

Order

1. The application for review is dismissed.
2. There is no order as to costs.

TC Gandidze

Acting Judge of the Labour Court of South Africa

Appearances: For the Applicant: Mr JJ Mhlongo Instructed by: Legal Aid South Africa

[1] GN 1665 of 1996.

[2]

[1999] 3 BLLR 209 (LAC) at para 10.

[3] Act 66 of 1995, as amended.

[4]

[2007] 12 BLLR 1097 (CC); [2007] ZACC 22 at para 110.

[5] See: MTN Service Provider (Pty) Ltd v Afro Call (Pty) Ltd 2007 (6) SA 620 (SCA) at para 10.

[6] See: National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others 2000

(2) SA 1; [1999] ZACC 17 at para 11.

[7]

[2004] 6 BLLR 585 (LC)

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