

SOUTH AFRICA / JUDGMENT

NUMSA obo Khumalo and Others v Dispute Resolution Centre (DRC) and Others (D07/19) [2024] ZALCD 24 (5 July 2024) [2024] ZALCD 24

COURT
Labour Court Durban

BEFORE
MG Maeso

CASE / FILE NUMBER
D07/19

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IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Not Reportable

Case No: D07/19

In the matter between:

NUMSA obo First

Applicant NICHOLUS KHUMALO AND TWO OTHERS Second

Applicant And DISPUTE RESOLUTION CENTRE (“DRC”)

First Respondent RICHARD LYSTER (N.O.)

Second Respondent ARTAV STEEL (PTY) LTD

Third Respondent

Heard: 25 June 2024

Delivered: 05 July 2024

Judgment

MAESO AJ

INTRODUCTION

1. This is an application to review and set aside an arbitration award issued on the 20 September 2017 under case number MIDB15370. In the arbitration award, the second respondent found the dismissal of the three applicants to be fair and as a result, their claims were dismissed.
2. At the outset, Ms Ramlal for the applicants confirmed that applicant Miya was no longer part of the review, and that the application is in respect of Mr Nicholus Khumalo and Mr Phumlani Khumalo only.
3. The third respondent filed its opposing affidavit on the 15 June 2018 and raised the following points:-
 - 3.1 The review application was not filed within six weeks of the date that the award was served on the applicants.[1] At the time of the opposing affidavit, no application for condonation had been made;
 - 3.2 The Labour Court had notified the applicants on the 15 January 2018 that in respect of Rule 7A(5) of the Labour Court Rules, the record was available to be uplifted for copies of the record as may be necessary, to be furnished on the Registrar and each of the parties.
 - 3.3 Clause 11.2.2 of the Practice Manual of the Labour Court of South Africa (“Practice Manual”) requires copies of the record or portions of the record as the case may be, to be filed on the Registrar and each of the other parties within 60 days of the date on which the applicant is notified by the Registrar that the record has been received.
 - 3.4 The applicants had not filed the record timeously and the review is deemed to be withdrawn in accordance with clause 11.2.3 of the Practice Manual.
4. This was pointed out to the applicants’ attorneys on the 2 May 2018. The applicants’ attorneys were advised that in the absence of an application to reinstate the review, the review is deemed to have been withdrawn.
5. Although a copy of this correspondence was not attached to the opposing affidavit in the court file, its existence was not disputed in the replying affidavit. Instead, the applicants noted the allegation and recorded their intention to bring an application for condonation for the late filing of the review application together with an application to reinstate the review. The replying affidavit is dated 21 June 2018.
6. On the 21 June 2019, an application to supplement the applicants’ replying affidavit was filed with this court. Its purpose was to inform the court that although the applicants had indicated in their replying affidavit that they would file an application for condonation for the late filing of the review application, they wished to supplement that response. In short, the affidavit includes an annexure which purports to be proof that the award was served on the parties on the 25 October 2017, thus alleging that the review application was filed within six weeks of the date that the award was served on the applicants.

7. The annexure is not described in the affidavit. It appears to be a document used by the first respondent recording the identity of the parties to the dispute, including the identity of the commissioner. It also records the date that the award was sent to the parties was 25 October 2017 and not 20 September 2017 when the award was issued.
8. No explanation was given to court why the annexure was only tendered a year after the replying affidavit was filed.
9. Mr Macgregor appearing for the third respondent, did not dispute the explanation. He indicated that he would persist with the point that the review was deemed to have been withdrawn due to the applicants' contravention of clause 11.2 of the Practice Manual and in so doing would also address the applicants' prospects of success in the review application.
10. In these circumstances, the review was filed timeously in accordance with Section 145(1)(a) of the LRA.

Was the arbitration record filed timeously?

11. The question whether the record was furnished timeously to the Registrar and other parties as required by Rule 7A(6) of the Labour Court Rules, is a fact that goes to establishing the jurisdiction of this court to hear the review application.
12. In *Ellerine Holdings Limited v Commission for Conciliation, Mediation and Arbitration and Others* [2002] 23 ILJ 1282 (LC), the court held:-

"Where the non-compliance relates to a statutory provision, i.e. set out in an Act, then failure to comply with those provisions goes to jurisdiction. In such cases (for examples for time limits relate to jurisdiction) an application must be made to court to condone the non-compliance."

13. The same principle applies to non-compliance of the Practice Manual where, in the present case, an objection is raised. Clause 11.2 of the Practice Manual reads as follows:-

"11.2.2 for the purposes of Rule 7A(6) records must be filed within 60 days of the date in which the applicant is advised by the Registrar that the record has been received."

11.2.3 if the applicant fails to file a record within the prescribed period, the applicant will be deemed to have withdrawn the application, unless the applicant has during that period requested the respondent's consent for an extension of time and consent has been given. If consent is refused, the applicant may, on notice of motion supported by affidavit, apply to the Judge President in chambers for an extension of time. The application must be accompanied by proof of service on all other parties. An answering and replying affidavit may be filed within the time limits prescribed by Rule 7. The Judge President will then allocate the file to a judge for a ruling, to be made in chambers, on any extension of time that the respondent should be afforded to file the record."

14. It is not denied that the Labour Court notified the applicants on the 15 January 2018 that the record was available for copies to be made as may be necessary. It is also not disputed that the record was filed approximately 16 days outside the stated 60-days period.
15. It is also apparent that the applicants did not request the third respondent's consent for an extension of time within which to file the record, nor is there any request addressed to the Judge President for a direction as required by the Practice Manual.
16. It was incumbent upon the applicants to successfully apply to this court to reinstate the review as on the facts set out above, the application is deemed to have been withdrawn.
17. It is now established in this court that an application for reinstatement of a review application deemed to have been withdrawn

in terms of paragraph 11.2.3 of the Practice Manual is in essence, an application for condonation for the non-compliance.[2], [3]

18. The applicants must, in these circumstances, show good cause why the record of proceedings under review was not filed within the prescribed time limit.
19. The applicants allege that the transcribing service was paid to transcribe the record on the 1 February 2018 after the applicants' attorneys were placed in funds. On the advice of the transcribing service, the applicants' attorneys expected to receive the transcript between the 8th and 15th March 2018. When the transcript was not available, the applicants' attorneys allegedly contacted the transcribing service, and they were advised that the transcript would be made available by the 9th April 2018.
20. None of the interactions with the recording service described above is corroborated in any way.
21. It is conceded in the founding affidavit in support of the application to reinstate the review, that the transcript ought to have been filed by the 9 April 2018, being the same day the applicants' attorneys were advised they would receive the transcript from the transcribing service. Accordingly, the applicants should have been on high alert, knowing that time was of the essence to file the transcript. At the very least the applicants should have been ready to request an extension of time within which to do so. There is no indication in the papers that this was the case.
22. The applicants' attorneys only consulted with the applicants on the 20 April 2018. No explanation is given for this delay, which is material given that the time period within which the transcript should have been filed had already lapsed.
23. It is further alleged that it was only at the meeting of 20 April 2018 that it was discovered that the record of the arbitration proceedings was allegedly incomplete. No explanation, why this perceived defect in the record was only recognized on the 20 April 2018 when the record was delivered on the 9 April 2018.

24. Whether the record was incomplete is challenged by the third respondent. It is argued that there is no reason why the filing of the record should be delayed when the outstanding documents are limited to closing arguments filed in the arbitration together with the results of the polygraph tests.
25. No submissions are made in the context of the arbitration award, why these documents rendered the record incomplete for purposes of the review. I agree with Mr Macgregor that the omission of these documents should have not delayed the filing of the record.
26. Condonation is not there merely for the asking nor are applications for condonation a mere formality.[4], [5] The applicants therefore must make out a case for an indulgence from the court for their non-compliance and bear the onus to satisfy the court that condonation should be granted.

DEGREE OF LATENESS AND PROSPECTS

27. The applicants state that the record was delivered approximately 16 days late.[6]
28. Compounding this, the court cannot ignore the fact that the application for reinstatement and condonation for the late filing of the record was only filed on the 21 June 2019. This was eleven months after the applicants had indicated in their replying affidavit to the review application of their intention to bring an application to reinstate the review application.
29. The applicants are required to explain the period of delay before and after the deemed withdrawal, but they have not done so.
30. For an applicant to succeed with condonation, it must demonstrate that it acted promptly in launching the reinstatement application. The facts before the court indicate that the applicants failed to do so.
31. The applicants therefore have failed to provide a reasonable explanation for the delay in filing the record.
32. The Labour Appeal Court in *NUM v Council for Mineral Technology* [2002] 23 ILJ 1229 (LAC) held that:-

“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.”
33. In any event, I have considered the applicants’ prospects in this matter.
34. The challenge to the award is with respect to Nicholus Khumalo and Phumlani Khumalo only.
35. In respect of Nicholus Khumalo, it was argued that there was no direct evidence to link him to the shooting of Mr Mthungwa.

36. Both Nicholus Khumalo and Phumlani Khumalo were charged with:-

36.1 “Gross misconduct in that information has been received which implicates your involvement in a plan to kill the supervisor, Michael Mthungwa and which has led to a serious breakdown of the employment relationship.”

37. The applicants’ founding affidavit in support of the review application is criticized by the third respondent in that it does not set out the factual and legal grounds upon which the applicants rely to have the award set aside.

38. The applicants’ supplementary affidavit however identifies grounds for review relevant to applicants remaining in the matter:-

38.1 Failed to take into account after Mthungwa was shot, Nicholus Khumalo took him (Mthungwa) to the hospital and that if Nicholus Khumalo was involved in a plot to kill Mthungwa, he would not have taken him (Mthungwa) to the hospital.

38.2 Failed to appreciate that there was no evidence to link Nicholus Khumalo and Phumlani Khumalo directly to the shooting of Mthungwa

38.3 Took into account hearsay evidence and disregarded relevant and material evidence.

39. This court is limited to deciding issues that are raised in the applicants’ founding and supplementary affidavits. Rule 7A(8)(a) of the Labour Court Rules permits the applicant to deliver a supplementary affidavit within 10 days after the record has been made

available. This allows the applicants an opportunity to supplement and/or amend the factual and legal grounds upon which he or she relies in light of the record. A weak founding affidavit can be replaced and/or augmented by a supplementary affidavit.[7]

40. I am satisfied that the applicants’ supplementary affidavit rectifies and amends the founding affidavit in that the allegations contained in the supplementary affidavit are linked to the applicants’ grounds for review.

41. The third respondent led the evidence of Mr Mthungwa, who at the arbitration wore a T-shirt bearing the words:-

“Can’t believe. Shot nine times and still alive”

42. His evidence was that the applicants did not like him as he was very strict and that he had been shot by two men, one of which he identified as Mr Miya, the applicant who is no longer party to this matter.

43. The second respondent described Mr Mthungwa as an impressive witness. No aspect of his evidence was doubted or disbelieved. Nothing in the record was brought to the court’s attention to challenge the second respondent’s conclusion.

44. The three applicants all had issues with Mr Mthungwa arising from a poor relationship with him in the workplace and this provided the motive for the events which played out
45. Mr Mbatha, called in support of Mr Mthungwa's case, implicated Mr Phumlani Khumalo. He confirmed that when he met Phumlani Khumalo the day after the shooting and having told Phumlani Khumalo that Mr Mthungwa had been shot the night before, Phumlani Khumalo's response was to express pleasure in the fact that Mthungwa had been shot. More importantly, Mr Phumlani Khumalo praised the shooter and in so doing, described the shooter as Mr Nkosithando Mbatha. Given that Mr Mthungwa was convalescing in hospital at the time, the only possible reason Phumlani Khumalo would have known that one of the shooters was Mr Nkosithando Mbatha, was because he had prior knowledge of the plot to kill Mr Mthungwa.
46. The second respondent found Mr Mbatha to be an excellent witness. His evidence was described as having the "ring of truth". It was perfectly plausible for the second respondent to conclude that if Mr Mbatha was to fabricate a version and risk his own personal safety by giving evidence at the arbitration, he would have comprehensively implicated the applicants. Mr Mbatha had also informed his mother, who is married to Mr Mthungwa, that people in the workplace wanted to poison Mr Mthungwa. When Mr Mthungwa gave evidence, he said that his wife had told him that she was afraid that he would be poisoned by people at work. Nothing was raised in the pleadings or during argument to persuade the court that based on the evidence this did not provide corroboration of the evidence of Mr Mbatha.
47. The commissioner concluded that the overwhelming weight of the evidence supports the version that Mr Nicholas and Mr Phumlani Khumalo had been part of the plan to kill Mr Mthungwa.
48. In coming to its conclusion, the second respondent referred to the established cases on how to resolve conflicts of fact which he confirms guided him in reaching his

conclusion.

49. None of this was seriously challenged during argument.
50. The second respondent deals with the polygraph tests. These indicated deception in their answers to questions put to them concerning their involvement in the plan to kill Mr Mthungwa. It was also common cause, that the witness, Mr Mbatha, had undergone a polygraph test and the results indicated that he answered the questions honestly.

51. Notwithstanding this, the second respondent records that he did not place much significance on the outcome of the polygraph tests. At best, the second respondent confirmed that polygraph test results can be used to substantiate or corroborate other evidence that points to guilt. The second respondent confirmed that leaving the polygraph test aside, there was sufficient direct and circumstantial evidence to implicate all applicants in the gross misconduct which warranted their dismissal.
52. This conclusion is correct in law and reasonable in respect of an assessment of the facts and evidence before the second respondent. It also indicates that the polygraph results were irrelevant for the review.
53. The challenge in respect of Nicholus Khumalo taking Mthungwa to hospital being an indication of his innocence rather than his involvement in a plot to kill Mthungwa, is more suited to an appeal. In any event, however, it was not disputed that Nicholus Khumalo was Mr Mthungwa's neighbor and at the time of the incident, Mr Mthungwa's uncle was visiting Nicholus Khumalo. It would have been highly suspicious if Nicholus Khumalo had not helped Mr Mthungwa in the presence of Mr Mthungwa's uncle. Nothing arises from this challenge.

54. The courts have repeatedly stated the review test as:-

"The test for review is trite. Is the decision reached by the commissioner one that a reasonable decision maker could not reach?"[8]

55. It is also accepted that when conducting this test, it is necessary for the court to inquire into and consider the merits of the matter and the entire evidence on record in deciding what is reasonable.

"The result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact as well as the weight and relevance to be attached to the particular facts, are not in or of themselves sufficient for an award to be set aside, but are only a consequence if their effect is to render the outcome unreasonable

..."[9]

56. The Labour Appeal Court has confirmed the test on review to be:-

"In short; a review court must ascertain whether the arbitrator considered the principal issue before him/her; evaluated the facts

presented at the hearing and came to a conclusion which was reasonable to justify the decisions he or she arrived at".[10]

57. The review court is not required to consider every factor individually, consider how the commissioner treated these factors and then determine whether a failure by the commissioner to deal with it is sufficient to set aside the award. This piecemeal approach has been criticized by the courts. Instead, the court must consider the totality of the evidence and then decide whether the decision made by the commissioner is one that a reasonable decision maker could make.[11]

CONCLUSION

58. Nicholus Khumalo and Phumlani Khumalo were charged with gross misconduct arising from their involvement in a plan to kill the supervisor, Mr Mthungwa. It was further alleged that the involvement has led to a serious breakdown of the employment relationship.
59. As indicated above, the findings made by the second respondent in respect of Mr Nicholus Khumalo and Phumlani Khumalo's involvement in the attempt to shoot Mr Mthungwa are reasonable and arise from the evidence placed before him. The second respondent's conclusion falls within a range of decisions that a reasonable decision maker could make and for that reason, the applicants do not have prospects of success in the main application.
60. On an objective assessment of all the facts, I find that the applicants have failed to show good cause why the review application should be reinstated, or condonation granted for its failure to file the record within the time limits set by the Practice Manual. Moreover, even if consideration is given to the merits of the review application, for the reasons set out above, there seems to be little prospect of it succeeding.
61. In as far as costs are concerned, the third respondent argued that costs should follow the result given that NUMSA no longer enjoys a bargaining relationship with the third respondent. I am therefore satisfied in the circumstances in this matter that it is equitable for the applicants to pay the third respondent's costs jointly and severally.

ORDER

62. It is ordered that:

62.1 The application to reinstate the review application is dismissed.

62.2 The applicants are ordered to pay the costs of the third respondent jointly and severally.

MG MAESO

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicants: Ms P Ramlall

Harko Brijlal, Reddy

For the Respondent: Mr B Macgregor

Macgregor Erasmus

- [1] As required by Section 145(1)(a) of the Labour Relations Act 66 of 1995
- [2] Overberg District Municipality v Independent Municipal and Allied Trade Union obo Spangenberg and Others [2021] 42 ILJ 1283 (LC)
- [3] Tatyn Trading CC t/a Tatyn Consulting Services v Steiner and Others [2014] 5 BLLR 516 (LC)
- [4] Grootboom v National Prosecuting Authority and Another [2014] 1 BLLR 1 (CC)
- [5] NUM and Another v Hillside Aluminum [2005] ZALC 25; [2005] 6 BLLR 601 (LC) at paras 6 & 20
- [6] Para 7.5, founding affidavit, application to reinstate
- [7] A Myburgh and C Bosch “reviews in the Labour Court” Lexis Nexis [2016] at page 438 - 441
- [8] Sidumo and Another v Rustenberg Platinum Mines Limited and Others 2007 28 ILJ 2405 (CC) paras 78 and 79.
- [9] Heroldt v Nedbank Limited and Another 2012 9 BLLR 857 (LAC)
- [10] Goldfield Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA and Others [2014] 35 ILJ 943 (LAC) at para 16
- [11] Goldfield at paras 18 and 19

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