

SOUTH AFRICA / JUDGMENT

Pather v Commission for Conciliation Mediation and Arbitration and Others (JR 1944/10) [2012] ZALCJHB 105 (9 October 2012)

[2012] ZALCJHB 105

COURT

Labour Court Johannesburg

BEFORE

Gush

CASE / FILE NUMBER

JR 1944/10

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REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

case no: JR 1944/10

In the matter between:

PRENAVEM PATHERApplicant

and

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATIONFirst Respondent

COMMISSIONER L CELLIER, NOSecond Respondent

CONVENE VENTURE PHILANTHROPYThird Respondent

Heard: 24 January 2012

Delivered: 9 October 2012

Summary: Application for condonation and review of arbitration award: Inadequate reasons offered for delay. Application for condonation dismissed.

GUSH J

The applicant in this matter applies to review and set aside the award of the second respondent who dismissed the applicant's

application to the first respondent on the grounds that the dismissal of the applicant by the third respondent was both substantively and procedurally fair. The applicant in addition applies for the late filing of the review application to be condoned.

The third respondent has opposed both the review and the condonation applications.

The applicant had been employed by the third respondent in January 2009 on a fixed term contract for a period of 18 months expiring on 31 July 2010. On 19 June 2009, the applicant was dismissed by the respondent for misconduct.

The applicant, aggrieved by her dismissal, referred a dispute to the first respondent who in turn, after the matter had been conciliated and referred to arbitration by the applicant, appointed the second respondent to arbitrate the dispute. The arbitration took place on 8 March 2010 and the second respondent issued the award on 10 March 2010.

The applicant alleges that she collected the award from the first respondent on 6 April 2010 and thereafter filed an application to review and set aside the award on 30 August 2010, 21 weeks after the applicant collected the award and 15 weeks after the expiry of the statutory period within which applications to review awards of CCMA commissioners may be filed with this Court.¹

At the same time as filing the review application the applicant filed an application to condone the late filing of the review

application.

The Delay: The applicant's explanation for and the circumstances surrounding the late filing of the review application

are:

After the arbitration which had been concluded on 8 March 2010, the applicant contacted a senior CCMA commissioner Mr. Docrat (who according to her email address had ostensibly at her request changed the commissioner appointed to hear the arbitration) on 16 March regarding concerns she had "regarding the arbitration hearing".

The award, which is dated 10 March 2010, had by this time been completed.

The applicant records that she contacted the first respondent on 29th March and had been told that the arbitrator had dismissed her application but had omitted to sign the award. This she apparently conveyed to Mr Docrat.

The applicant avers that she collected the award on 6 April and on 19 April again contacted Mr Docrat requesting assistance. Mr Docrat (correctly) advised the applicant on 21 April that she would be required to approach an attorney for assistance should she remain dissatisfied with the outcome.

The applicant advised Mr Docrat that she had fallen ill in April and she sets out in her affidavit that she was admitted to hospital shortly after 19 April to have her gall bladder removed.

On 26 June 2010, the applicant contacted Ms Vermaak (an attorney who at all relevant times was employed by the applicant's

attorneys) requesting her to consider taking on her case "pro bono". The applicant records that she "provided Vermaak with the background to [her] matter" in her request for assistance.

The applicant received a reply from Ms Liesl Williams an attorney employed by the same firm on 28 June 2010 requesting further

information in order for the applicant's request to be considered.

On 30 June, Ms. Williams advised the applicant her request was being considered and that she would revert to the applicant.

Inexplicably, the applicant was only advised of the acceptance of the pro bono instruction on 20 July 2010.

The applicant records that consultations followed on 20 July 2010 and that a "notice of motion and founding affidavit ... were prepared".

On 6 August 2010, the applicant was advised that first draft of the affidavit had been completed and was to be settled by Advocate

Michael van As.

The applicant advised her attorneys that, whilst she was to be hospitalised for depression for three days from 10 August, they

could contact her by email if necessary.

Ms Vermaak went on leave for the period 10 to 17 August 2010. On Vermaak's return she advised the applicant that she, Vermaak had discussed the matter with van As who had, "in the meantime" settled the papers and that she, Vermaak, had then instructed van As to draft the necessary application for condonation. (It bears pointing out that at this stage the

applicant had been in possession of the award for some 19 weeks and the attorneys, assuming, not unreasonably, that they would have perused the award before agreeing to represent the applicant, some 7 weeks).

The finalising of the applicant's papers however was further delayed by Vermaak's involvement, until 24 August, "in assisting another client with violent strike action" (sic).

That matter apparently having been dealt with by the applicant's attorneys, they arranged a consultation on 27 August when the application papers were signed and thereafter filed on 30 August 2010.

The applicant avers that this is a reasonable explanation for the delay and attaches a confirmatory affidavit by Vermaak. Vermaak

offers no explanation whatsoever for any of the delays but simply “confirms the contents” of the applicant’s

founding affidavit in so far as it relates to her.

Prospects of Success and Prejudice: the applicant in the founding affidavit in the application for condonation refers to the founding affidavit in the review application and avers that this establishes that she has excellent prospects of success in succeeding with the review. As for prejudice, the applicant simply avers that she diligently pursued her matter and that only she would suffer prejudice should the application not be granted and that the third respondent would not suffer any prejudice if her application was granted.

I shall consider the applicant’s prospects of success below.

The third respondent opposed the applicant’s application for condonation on the grounds that the application was excessively

late; that the applicant’s explanation for the delay was inadequate; that despite the applicant’s averments to the

contrary the third respondent would suffer prejudice should condonation be granted. As regards prospects of success, the third

respondent referred, as did the applicant, to its opposing affidavit in the review application in support of its contention that the applicant had no prospects of success.

In particular, the third respondent took issue with the applicant’s explanation for the delay and specifically:

The absence of medical reports; and

The absence of confirmatory affidavits from her attorneys regarding the delays in filing the review application.

The applicant and her attorneys in the replying affidavit when dealing with these specific issues display a disturbingly cavalier

approach to the indulgence the applicant seeks from the Court. This is particularly so given that the applicant seemingly did nothing to pursue her matter between 19th April and 26th June on the strength of her having undergone a Cholecystectomy on 22nd April and that her attorneys were first approached on 26th June and only filed the application on 30th August.

In her replying affidavit, the applicant, in answer to the specific point raised by the third respondent regarding the absence of medical reports, simply produces a certificate confirming that she had undergone a gallbladder removal (Cholecystectomy) without any reference whatsoever to the time it would take to recover and when she would have been in a position to resume and “actively”

pursuing her matter.

As for a confirmatory affidavit dealing with the unexplained delays occasioned by her attorneys, the applicant simply promises that a confirmatory affidavit would be filed in due course, (but wasn't). To put the delay in filing the application during the period 26th June to 30th August in context, it includes:

An unexplained delay between 28th June when the applicant provided her attorneys to be with the documentation and award and 20th July when the attorneys decided to accept the applicant's instructions;

a delay whilst Ms Vermaak went on holiday from 10th August and 17th August; and

an unreasonable explanation between 17th August and 27th August when the applicant eventually signed the affidavit.

All of these delays cry out for some explanation from the applicant's attorneys. In the absence of an explanation and any suggestion by the applicant that she took any steps whatsoever to expedite the filing of her application in the face of these

delays

The relief that the applicant seeks in her notice of motion is an order reviewing and setting aside the second respondent award and substituting it with an order ‘that the applicant's dismissal is both procedurally and substantively unfair’. It is necessary to record that the fixed period for which the applicant was employed expired on 31 July 2010, exactly one month before the application for review was filed.

In argument, the applicant's counsel suggested, firstly that the applicant did not apply for the court to substitute its finding but merely that the matter be referred back and secondly that in order to do so, the court should have regard to the prayer for "further or alternative relief" contained in the notice of motion.

As far as the applicant's prospects of success are concerned in relation to the delay and the explanation therefor, both counsel relied on principles enunciated in *Melane v Santam insurance Co Ltd*² viz.

‘Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success and the importance of the case. ... 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.’³

In the matter of Moila V Shai No and Others,⁴ Judge Zondo JP in dealing with an application for condonation held:

‘I do not have the slightest hesitation in concluding that this is a case where the period of delay is excessive and the appellant's purported explanation for the delay is no explanation at all. I accept that the case is very important to the appellant. However, the weight to be attached to this factor is too limited to count for anything where the period of delay is as excessive as is the case in this matter and the explanation advanced is no explanation at all. If ever there was a case in which one can conclude that good cause has not been shown for condonation without even considering the prospects of success, then this is it. 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 that it is necessary to consider the prospects of success.’⁵

Zondo J continued to hold the following:

‘In Chetty v Law Society, Transvaal 1985

- (2) SA 756 (A) Miller JA, on behalf of a unanimous court, dealt with the term 'sufficient cause' or 'good cause' when used in the context of an application for rescission of a judgment. At 765D-E he said:

“For obvious reasons a party showing no prospect of success on the merits will fail in an application for rescission of a default

judgment

against him, no matter how reasonable and convincing the explanation of his default. An ordered judicial process would be negated if, on the other hand, a party who could offer no explanation of his default other than his disdain of the Rules was nevertheless permitted to have a judgment against him rescinded on the ground that he had reasonable prospects of success on the merits.” (Emphasis added.)

[Although the italicized part of this passage was said in respect of an application for the rescission of a judgment, I can see no reason why as a matter of principle it cannot or should not hold good in respect of an application for condonation...]⁶

I am satisfied that given the specific circumstances of this matter, the delay “is excessive”. At best for the applicant it would have become obvious to her and her attorneys on 20th July that the period within which the application for review was to be filed had expired on 18 April 2010.

It is far more probable that when the applicant requested assistance on 26th June the attorneys were aware that the applicant’s matter had been heard by the first respondent in March 2010 and that the statutory time limit had already expired. In the absence of an explanation it begs the question why the review application was not filed sooner. Despite this, the applicant offers no more than a chronology of events without any reasonable explanation for the delays.

As far as the merits of the applicant’s case and her prospects of success are concerned, the record and documents filed in this matter reflect that the applicant referred a dispute to the first respondent concerning her dismissal by the third for misconduct.

The applicant’s dismissal followed a disciplinary enquiry into the applicant’s alleged misconduct namely:

‘1 breach of your duty of good faith to your employer and breach of confidentiality in that you accessed Ms Ann Lamont’s computer and downloaded an e-mail she had sent to third parties;

2 dishonesty, in that you advised Ms Ann Lamont that you have obtained the said e-mail from a co-employee when in fact this is not the case;

3 insolence\insubordination as exhibited in your e-mail to Ms Ann Lamont dated 10 June 2009 in which e-mail you accused her of inter-alia being a liar;

4 unauthorised absence from work and failure\refusal to apply for leave in that in your e-mail to Ms Ann Lamont and 10 June 2009, you simply announced that you would be taking 11 June 2009 off to go to the CCMA and that it would be taken off, and you are indeed absent on 11 June 2009 without authorisation.’

The applicant referred a dispute regarding her dismissal to the first respondent who appointed the second respondent conduct the arbitration.

At the conclusion of the arbitration the second respondent found:

‘On the submissions before me I must find the applicant guilty of all four counts of misconduct, some more gross and others. In their totality, I had been persuaded that the applicant’s actions had rendered the continued employment relationship be intolerable and that dismissal was appropriate.’

And issued the following award:

‘With due regard to the testimony and evidence before me, to which I have applied my mind, I find, which I believe is just and equitable, that the dismissal of the applicant was both substantively and procedurally fair. The applicant’s application is herewith dismissed.’

Whilst the applicant suggests that the second respondent failed to apply his mind to the material placed before him the applicant's

grounds of review are essentially based on a defect in the arbitration proceedings in that the second respondent committed a

gross irregularity in the manner in which he conducted the arbitration and in particular how the second respondent dealt with

the evidence.

The conclusion reached by the second respondent in his award and the analysis of the evidence do not suggest that the outcome is one to which a reasonable decision-maker could not have arrived. At best for the applicant in order to demonstrate good prospects of success, the applicant is required to show that the irregularity deprived the applicant of a fair hearing.

In the matter of Director-General, Department of Public Works and Another V Public Service Sectoral Bargaining Council and Others,⁷ Molahlehi J said the following:

'The critical question in determining whether to interfere with an arbitration award because of latent or patent defects is, as was

stated in Goldfields Investment & another v City Council of Johannesburg & another, to determine whether the defect is so serious as to prevent the trial of the issues resulting in the denial of a fair hearing of the affected party. In this regard, Schreiner J dealing with the same issue in that case observed that -

"[i]f it did prevent a fair trial of the issues then it will amount to a gross irregularity. Many patent irregularities have this effect. And if from the magistrate's reasons it appears that his mind was not in a state to enable him to try the case fairly this will amount to a latent gross irregularity. If, on the other hand, he merely comes to a wrong decision owing to his having made a mistake on a point of law in relation to the merits, this does not amount to gross irregularity".

I am not satisfied that the applicant's prospects of success in showing that the applicant was denied a fair hearing are

sufficient to outweigh what is a patently poor and inadequate reason for the delay in filing the application to review the second

respondent's award.

In the review application, the third respondent's challenged the nature of the relief sought by the applicant viz that despite having been employed on a fixed term contract which would have expired on 31 July 2011 the applicant simply sought an order declaring her dismissal to be both procedurally and substantively unfair. The applicant's response was simply to state that should she succeed with the review application she would then proceed to "launch an automatically unfair dismissal dispute in this Court although during argument counsel for the applicant suggested that the Court should consider "further or alternative relief".

In the circumstances, I make the following order:

The applicants application for condonation is refused;

There is no order as to costs.

D H Gush

Judge of the Labour Court

APPEARANCES:

FOR THE APPLICANT: Adv Hally

Instructed by Norton Rose

FOR THE THIRD RESPONDENT: S Hardie, Stephen Hardie Attorneys

Note

At the conclusion of the hearing of the matter, as there was some uncertainty as to the status of the third respondent, the parties

were given leave to ascertain and determine whether the third respondent, a section 21 of the Companies Act 61 of 1973 company, had been deregistered and to this end judgment was reserved.

The parties later confirmed that the third respondent was in fact still registered and operating albeit under another name. The newly named entity assumed responsibility and undertook to abide by the decision of the court.

In the interim however, the court file containing the entire pleadings in the matter was misplaced in the courts offices and eventually the applicant's attorneys were asked to provide the court with a duplicate set of the pleadings which they duly did.

The court wishes to express its gratitude to the applicant's attorneys for their assistance.

1Section 145 (1)(b) of the Labour Relations Act 66 of 1995

2 1962

(4) SA 531 (A).

3At page 532 para C – E.

4(2007) 28 ILJ 1028 (LAC).

5At page 1037 para 34.

6Page 1038 para 35/6.

7(2012) 33 ILJ 1649 (LC) at para 23.

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