

SOUTH AFRICA / JUDGMENT

POPCRU obo Gaeratane v Bobbejaan NO and Others (JS444/14) [2017] ZALCJHB 170 (14 February 2017) [2017] ZALCJHB 170

COURT

Labour Court Johannesburg

BEFORE

Van Niekerk

CASE / FILE NUMBER

JS444/14

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THE

LABOUR COURT OF SOUTH AFRICA

JOHANNESBURG

Not Reportable

Case no: JR 444/14

POPCRU

obo PGG

GAERATANE Applicant

and

DAVID

BOBBEJAAN

N.O. First

Respondent

SAFETY

& SECURITY SECTORAL BARGAINING COUNCL Second

Respondent

SOUTH

AFRICAN POLICE

SERVICES Third

Respondent

MINISTER

OF

POLICE Fourth

Respondent

Heard

on: 09 February 2017

Delivered: 14 February 2017

JUDGMENT

VAN NIEKERK J

- [1] This is an application to review and set aside an arbitration award issued by the first respondent, to whom I shall refer as ‘the arbitrator’. In his award, the arbitrator upheld the dismissal of the applicant for misconduct.
- [2] The arbitration award is dated 12 June
2013. The applicant states that he received the award only on 6 December 2013. That may be so, but it is not disputed that the award was furnished to the applicant’s representatives on 12 June
2013. There is no explanation as to why the applicant himself received the award only some six months later. Strictly, the review application ought to have been filed by 24 July 2013. On this basis, the application for review is some nine months late. In any event, even if the applicant had been furnished with the award on 6 December 2013 as he contends, the review application ought to have been filed by no later than 27 January 2014, in which event the application is 12 weeks late and not nine weeks as averred by the applicant. Either way, given the time limit prescribed by s 145, the delay is excessive.
- [3] The explanation for the delay is terse. The applicant states that on receipt of the award, the requested his union representative to file an application for review. On account of what described as administrative delays, the union delayed the instruction of attorneys to proceed with the application. The attorneys managed to contact the applicant only on 10 April 2014 and a consultation was scheduled for 12 April 2014. The applicant states that the founding affidavit was drafted on 14 April 2014 and the application was filed ‘immediately thereafter’. I this is not entirely accurate – the founding affidavit was commissioned only on 22 April 2014 in the papers served on 25 April.
- [4] The applicable legal principles are clear. 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. 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.

[5] That formulation, which has its roots in *Melane v Santam Insurance Co Ltd* 1962

(4) SA 531 (A), has long been qualified in this Court 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.

[6] 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

... 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.'

[7] When 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 *Saloojee and another v 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.

- [8] 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.
- [9] In my view, the explanation for the delay in this matter is inadequate. In particular, there is no evidence by the applicant that he took any steps to ensure that his representatives were prosecuting the review application with due diligence. There is no acceptable explanation for the delay in the request for legal assistance addressed to the union and the instructions given to the attorneys. That delay in itself is in excess of the time limit within which the application ought to have been filed. There is no explanation as to what administrative delays in particular prevented union officials from prosecuting the review timeously. Further, there is no explanation for the delay in sieving and filing the application, given that by that stage, all of the applicant's representatives must have been aware that the application was already significantly out of time. In the absence of a reasonable explanation for in excess of delay, does not necessary for me to consider the applicant's prospects of success in the review application. Even if these were relevant, the grounds for review articulated in the founding affidavit do not serve to make out a case that meets the required threshold. This court is entitled to intervene if and only if the decision to which the arbitrator comes (i.e. the outcome of the proceedings under review) falls outside of a band of decisions to which reasonable decision-makers could come on the available material. This threshold serves to preserve the distinction between appeals and reviews and to limit intervention by this court, as the LAC has observed more than once, to exceptional cases. It is not enough for the applicant to believe that the arbitrator's decision was wrong, nor is it sufficient, as the applicant appears to contend, that the arbitrator is in considering the record of the disciplinary proceedings initiated against the applicant as opposed to the evidence that was led before him. It is incumbent on the applicant establish that notwithstanding the misdirection upon which it relies, the outcome of the proceedings failed to meet the reasonableness threshold referred to above.

[10] Given the broad discretion conferred on this court by s 162 of the LRA, and having regard to the collective bargaining relationship that exists between the parties, in my view, the requirements of the law and fairness are best served by each body bearing its own costs.

[11] In the premises I make the following order:

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

Van Niekerk J

Judge of the Labour Court

APPEARANCES

APPLICANT: Mr M Lekota, CHSM Inc Attorneys

THIRD RESPONDENT: Advocate L Gcabashe SC, Office of the State Attorney

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