

SOUTH AFRICA / JUDGMENT

Sobudula v Pretorius NO and Others (PR74/18) [2021] ZALCPE 13 (9 December 2021) [2021] ZALCPE 13

COURT

Labour Court Port Elizabeth

BEFORE

Z Lallie

CASE / FILE NUMBER

PR74/18

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THE

LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

Not

Reportable

CASE

NO: PR74/18

In

the matter between:

PHAKAMISA
GLADSON SOBUDULA Applicant
and
WILLIAM
RICHARD PRETORIUS N.O First
Respondent
SAFETY
AND SECURITY SECTORAL
BARGAINING
COUNCIL Second
Respondent
SOUTH
AFRICAN POLICE SERVICES Third
Respondent

Heard:

21 July 2021

Delivered: This judgment was handed down electronically by circulation to the Applicant and the Third Respondent's Legal Representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing- down is deemed to be 15h00 on 9 December 2021.

JUDGMENT

LALLIE. J

- [1] This is an application to review and set aside a ruling of the first respondent who will be referred to as the arbitrator in this judgment in which he dismissed the application which had been filed by the applicant seeking condonation of the late filing of his rescission application. The application is opposed by the third respondent.
- [2] The applicant and the third respondent missed the laid down time limits in filing the review application and the answering affidavit respectively and sought condonation for the delay. When this matter served before court both parties withdrew their opposition of each other's condonation application. After taking into account the submissions on behalf of each party on condonation I was satisfied that they both showed good cause to have their delay condoned and granted both applications.
- [3] The facts which led to this application are that the applicant was employed by the third respondent until he was dismissed for misconduct when he held the rank of Warrant Officer. He referred an unfair dismissal dispute to the second respondent, the Safety and Security Sectoral Bargaining Council (the SSSBC) which, in its attempts to resolve it scheduled its arbitration on 23 November 2017. The applicant failed to attend the arbitration and his matter was dismissed. In an attempt to revive the arbitration the applicant applied for the rescission of the ruling dismissing his arbitration. The rescission application was opposed by the third respondent and in a ruling issued on 5 March 2018, the arbitrator dismissed the condonation ruling. It is that ruling which the applicant seeks this court to review and set aside.
- [4] Both parties were in agreement on the relevant authorities for purposes of the application at hand. The first is *Herholdt v Nedbank Ltd*[1] where it was held that when a commissioner has misconceived the dispute before him or her in arbitration proceedings, his or her arbitration award may be reviewed and set aside. The second is *Head of the Department of Education v Mofokeng and Others*[2] where it was held that errors committed by a commissioner when conducting an arbitration may justify reviewing and setting an award aside if they have a distorting effect on the award.

- [5] It is common cause that the third respondent failed to comply with the SSSBC rules when filing the answering affidavit in the condonation application in that it filed it outside the prescribed period. The third respondent failed to seek condonation of the non-compliance. The answering affidavit was therefore not properly before the arbitrator. In taking his decision on condonation, the arbitrator erred in overlooking the delay and taking into account an answering affidavit that was not properly before the SSSBC.
- [6] A further error which the commissioner committed in determining the condonation application was denying the applicant the right to a fair hearing as he decided the matter on the papers when in terms of the SSSBC rules it should have been set down for hearing. In *Kungwini Residential Estate & Adventure Sport Centre Ltd v Mhlongo N. O & Others*[3] it was held that commissioners are not at liberty to deviate from the mandatory rules which require them to schedule matters for hearing. The deviation which denies the parties the right to a fair hearing renders their awards unreasonable.
- [7] The arbitrator's conduct of taking into account an answering affidavit which was not properly before him supports the conclusion that he misconceived the dispute before him. He conducted the enquiry whether to condone the applicant's delay in filing the rescission incorrectly in that he omitted to ensure that the delay was condoned before considering the condonation application. The arbitrator further misconceived the dispute before him by deciding the application on the papers instead of having the matter scheduled for hearing. Had the arbitrator not committed the errors he would have disregarded the third respondent's answering affidavit as it was not properly before him. He would also have had the matter set down for hearing. The errors had an impact on the award in that the arbitrator relied on some submissions which were made in the answering affidavit in reaching his decision. The arbitrator's noncompliance with the rule that the condonation application be set down for hearing denied the applicant a fair hearing. Both errors rendered the condonation ruling unreasonable. All the submissions and arguments which were raised on behalf of the third respondent in an effort to defend the reasonableness of the ruling could not succeed in light of the errors the arbitrator made and the authorities which regulate them and are binding on the Labour Court.
- [8] The applicant sought an order substituting the condonation ruling. That order may not be appropriate because a decision whether the late filing of the rescission application should be condoned can properly be made after the matter has been set down for hearing and the parties afforded a fair hearing.
- [9] The applicant also sought a costs order against the third respondent. He however did not illustrate how fairness justified the order when the latter opposed this application in an attempt to protect its rights which flow from the condonation ruling.
- [10] In the premises, the following order is made:

Order:

1. The condonation ruling issued by the second respondent under case number PSSS191-17/18 and dated 5 March 2018 is reviewed and set aside.
2. The matter is remitted to the second respondent for the condition application to be determined de novo by an arbitrator other than the first respondent.
3. There is no order as to costs.

Z. Lallie

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Advocate P.T Masihleho

Instructed by:

Phatshoane Henney Attorneys

For the Third Respondent: Advocate T. Mqobi

Instructed by:

The State Attorney

[1]

(2013) 11 BLLR 1074 (SCA).

[2]

(2015) 36 ILJ 2802 (LAC).

[3]

[2006] 5 BLLR 423 (LAC).

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