

SOUTH AFRICA / JUDGMENT

South African Municipal Workers Union and Another v South African Local Government Bargaining Council and Others (JR 1517/12) [2013] ZALCJHB 190 (1 August 2013)

[2013] ZALCJHB 190

COURT

Labour Court Johannesburg

BEFORE

F A Boda

CASE / FILE NUMBER

JR 1517/12

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REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGEMENT

Not Reportable

Case no: JR 1517/12

In the matter between:

SOUTH AFRICAN MUNICIPAL WORKERS' UNIONFirst Applicant

GRIFFITH MBELESecond Applicant

and

SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCILFirst Respondent

KHOZA S N OSecond Respondent

LEGODI M M N OThird Respondent

SEDIBENG DISTRICT MUNICIPALITYFourth Respondent

Heard: 12 July 2013

Delivered: 01 August 2013

JUDGMENT

BODA AJ

The Applicants seek an order declaring that the Bargaining Council's categorization of the dispute as an unfair labour practice on the certificate of non-resolution issued on 5 December 2008 under case number GPD110806 has no significance and or bearing on its jurisdiction. Alternatively, they seek an order reviewing and setting aside the arbitration ruling issued by the Third Respondent dated 20 August 2010 under case number GPD 110806. The Applicants seek condonation for the late delivery of the review.

The facts of this matter are largely common cause. The Second Applicant ("Mbele") was employed by the Fourth Respondent as an Ambulance Driver in the Emergency Medical Services Department in the Midvaal area of the Sebokeng District Municipality with effect from 1997 until his date of dismissal on 3 October 2008. The Second Applicant referred a dispute about the fairness of the dismissal to the CCMA for conciliation. It duly obtained condonation for the late referral.

On 5 December 2008, the Bargaining Council declared the unfair dismissal dispute unresolved. The Second Respondent Commissioner issued a certificate of non-resolution and erroneously categorized the dispute as an unfair labour practice and recommended that the dispute be referred to arbitration.

The dispute was enrolled for arbitration on 9 December

2009. At the commencement of the proceedings, the Fourth Respondent's attorney raised a preliminary point to the effect that the dispute was categorised as an unfair labour practice dispute on the certificate of outcome from conciliation and that "because the certificate of outcome is obviously a jurisdictional documents, and it is binding and if there is something that is incorrect on it, it should be referred for review". The Fourth Respondent's attorney argued further that the Bargaining Council is bound by the certificate and does not have powers to change it. The Applicants argued that it was not their fault that the dispute was categorised as unfair labour

practice instead of unfair dismissal. The Applicants argued further that the fact is that the unfair dismissal dispute was conciliated

and even the notice of conciliation stated that the dispute was about unfair dismissal. This fact was common cause.

On the same day, the Third Respondent made an oral ruling to the effect that the Applicants should review the certificate. On 7 January 2010, the First Applicant addressed a letter to the Bargaining Council. The First Applicant asked the Bargaining Council to request the Second Respondent to change the certificate so that the matter can continue without any further delays. In my view this was not an unreasonable request. It is a request that should have been readily accepted for reasons that will follow.

On 5 May 2010, the First Applicant again requested the Bargaining Council to enrol the matter for arbitration. The letter was written in similar terms to the letter dated 7 January 2010 and also quoted and attached one of the Labour Court cases. Once again

this request should have been accepted and the matter should have been enrolled for arbitration. It was not because of the erroneous

view about the status of the certificate.

The Bargaining Council then enrolled the matter for 29 July 2010. At the commencement of the hearing, the Fourth Respondent's attorney, Ms Koulountis, again raised a preliminary point to the effect that the certificate of outcome was not rectified or set aside in accordance with the "advisory ruling" issued on 9 December 2009. The Applicants raised that they addressed letters to the Bargaining Council and managed to

convince them that the Bargaining Council has jurisdiction to correct the certificate and indicated further that the error was on the part of the Council and not the Applicants and therefore the employee should not be prejudiced by the error. In reply, the Fourth Respondent's attorney stated that the Applicants "were clearly advised that review of the certificate of outcome was the appropriate action to be taken".

On 20 August 2010, the Third Respondent issued a ruling recording that on 9 December 2009, she "made an advisory ruling to the effect that the applicant should have the certificate rectified at the Labour Court".

In her analysis of the issues, the Arbitrator recorded that Mr Maloka was made to understand that the certificate must reflect the correct nature of the dispute and he undertook to have the certificate corrected. Further, the Arbitrator stated that she is bound by her own ruling which she made on 9 August 2009, and the law does not permit her to go against it. The Arbitrator then dismissed the matter and stated that only the Labour Court can change the "advisory ruling".

The Applicants correctly submit that a certificate of outcome has no legal significance beyond a statement that the dispute referred to conciliation was conciliated and was resolved or unresolved, as the case may be.

See NUMSA v Driveline Technologies (Pty) Ltd & another [2000] 1 BLLR 29 (LAC), Seeff Residential Properties v Mbhele NO & others [2006] 27 ILJ 1940 (LC).

The above principle was also applied in the case of Bombardier Transportation (Pty) Ltd v Mtiya NO & others [2010] 31 ILJ 2065 (LC) at p2072, para 12; p2073 - 2074 at paras 14 and 15. In this particular case, the Court stated in paragraph 14 that:

“In short, a certificate of outcome has nothing to do with jurisdiction. If a party wishes to challenge the CCMA’s jurisdiction to deal with an unfair dismissal dispute, it may do so, whether or not a certificate of outcome has been issued. Jurisdiction is not granted or afforded by a CCMA commissioner issuing a certificate of outcome. Jurisdiction either exists as a fact or it does not.”

In BMW SA (Pty) Ltd v National Union of Metal Workers of SA obo Members [2012] 3 BLLR 274 (LAC), the Court held:

“The Labour Court declined to review and set aside the CCMA’s certificate of outcome citing Van Niekerk J in Bombardier Transportation (Pty) Ltd v Mtiya NO & others [2010] 8 BLLR 840 (LC) at paragraph 15. This approach is the correct one. See Waglay JA (as he then was) in Gillet Exhaust Technology (Pty) Ltd t/a Tennaco v NUMSA on behalf of members & another (2010) 31 ILJ 2552 (LAC) at paragraph 17.”

The certificate was also irrelevant because thirty days had passed since the referral of the dispute and the CCMA was obliged therefore to arbitrate the dispute and to give the second applicant access to justice.

The prospects of success in this review are accordingly unassailable.

However, there is a long delay in the matter.

The ruling under review is dated 20 August 2010. The proceedings were launched on 25 June 2012. The application was brought approximately 1 year and 10 months since the date of the issuing of the ruling. If the earlier date, when the oral ruling was made namely 20 July 2010, is taken into account, the delay is 2 years and 5 months.

In the founding papers, the Applicants provide the following explanation in support of the application for condonation:

Before matters are referred to the Labour Court, there are certain procedures that the First Applicant has in place that it must follow. The necessary procedures finalized in February 2011 when the legal unit of the National Office recommended the present application.

Around the same period, February 2012, the same unit had to consider another matter which involved LJ Mbele and the Fourth Respondent. This matter was confused with the present matter. The confusion became apparent in February/March 2012. In April 2012, the matter was referred to the Applicants’ attorneys. Advice was provided on 9 May 2012 and the present application was launched on 25 June 2012.

In *Melane v Santam Insurance Co (Pty) Ltd* 1962 (4) SA 531 (A) at 532-D, the Court laid down the test for condonation in ordinary circumstances as follows:

“In deciding whether sufficient cause has been shown, the basic principle is that the court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefore, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that there are no prospects of success there would be no point in granting condonation”.

The explanation has many gaps. The Union is clearly negligent in the way it handled the Second Applicant's matter. The Union did not pursue the Second Applicant's claim with even ordinary diligence. I am not impressed by this explanation at all and the respondents counsel was correct to criticise it as unacceptable.

This is accordingly a case where the prospects of success are unassailable but the delay is significant and the explanation is

extremely poor. The general rule in condonation applications is that the prospects of success are irrelevant if the explanation is poor. In *NUM v Council for Mineral Technology* [1999] 3 BLLR 209 (LAC), the general principle was stated -

“... without a reasonable and acceptable explanation for the delay, the prospects for success are immaterial and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused.”

This general rule takes into account that when a Union does not properly handle a case of its member, the member is free to litigate against it and seek redress. The general rule exists for obvious reasons. A party who has prospects of success cannot sit back and ignore time periods. This general rule was emphasized by the Fourth Respondent's Counsel during argument. The general rule does have exceptions.

There are three discernible instances in the case law where this general rule has not been applied. The first instance is in a case where to have applied the general rule, would have compelled an employer to take back a dishonest employee. *South African Post Office v CCMA & others* [2012] 1 BLLR 30 (LAC)). The second instance where the general rule would not be applied is where the proceedings were a nullity. *Eskom v Marshall & Others* [2003] 1 BLLR 12 (LC). The third is where there is a continuing wrong. *NEHAWU obo Mafokeng & others v Charlotte Theron Children's Home*

[2004] 10 (BLLR) 979 (LAC). The principle that these cases establish is that there may be times when considerations of justice must give way to the need to expedite labour disputes especially when the prospects of success are not just good but in fact unassailable. There was in each of these cases some exceptional circumstance that led to the relaxing of the general rule. Hence if it is in the interests of justice not to apply the general rule, because

doing so would lead to a grave injustice, the rule should not apply. In *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others* [2000] ZACC 3; 2000 (5) BCLR 465 (CC), the Constitutional Court ("CC") held -

"It is appropriate that an application for condonation be considered on the same basis and that such an application should be granted if that is in the interests of justice and refused if it is not. The interests of justice must be determined by reference to all relevant factors including the nature of the relief sought, the extent and cause of the delay, the nature and cause of any other defect in respect of which condonation is sought, the effect on the administration of justice, prejudice and the reasonableness of the applicant's explanation for the delay or defect."

In the present case, it is not in the interests of justice to apply the general rule because the Second Applicant was not given his day in Court and his prospects are unassailable. There is an exceptional circumstance warranting the non-application of the general rule. The second applicant was denied a hearing as a result of ineptitude. There was thus a denial of access to justice which is a fundamental human right. Not to grant condonation would be unjust in this circumstance. A perusal of the law reports would have alerted the Second and Third Respondents to the fact that the point raised by the employer, was simply nonsense. A certificate of outcome has no jurisdictional significance. They should have arbitrated the dispute and simply ignored the mistake in the certificate of outcome. They could also have granted an amendment to correct the error. The employer should not have taken this preposterous point and the Commissioners should not have upheld it. Much was made of the fact that the employer may be prejudiced if condonation were to be granted because it may not be in a position

to deal with the dispute as a result of witnesses not being available. Nothing like this, however, appears from the answering

affidavit. In the result, condonation should be granted and the review should succeed.

However, I must mark my disapproval with the way in which the First Applicant dealt with this matter. It should bear the costs of this application. In the result, I make the following Order:

The late delivery of the application for review is condoned.

The rulings issued by the Second and Third Respondents to the effect that the dispute referred to them could not be arbitrated, because of an incorrect categorization of the dispute on the certificate of outcome is hereby reviewed and set aside.

The matter is remitted back to the First Respondent to arbitrate the unfair dismissal dispute referred to it under case number

GPD110806.

The Applicant is to pay the costs of this application.

F A Boda

Acting Judge of the Labour Court

APPEARANCES

FOR THE APPLICANT: ADV J NALANE instructed by

CHEADLE THOMPSON & HAYSOM

FOR THE FOURTH RESPONDENT: ADV A COOK instructed by

CLIFFE DEKKER HOFMEYR

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Prepared on 14 October 2026 · Esheria