

SOUTH AFRICA / JUDGMENT

Tunzi v Commission for Conciliation, Mediation and Arbitration and Others (JR158/22) [2023] ZALCJHB 262 (12 September 2023) [2023] ZALCJHB 262

COURT

Labour Court Johannesburg

BEFORE

B M Sono

CASE / FILE NUMBER

JR158/22

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Source record

IN THE LABOUR COURT OF
SOUTH AFRICA, JOHANNESBURG
Not Reportable
case
No: JR158/22
In

the matter between:

MAWETHU
TUNZI
Applicant
and
COMMISSION
FOR CONCILIATION, MEDIATION
and
ARBITRATION
First Respondent
NORMAN
MATHEBULA
N.O.
Second Respondent
UPS
SCS (PTY)
LTD
Third Respondent

Heard:

28 June 2023

Delivered:12 September 2023

JUDGMENT

SONO, AJ

Introduction

- [1] This is an application to review and set aside the ruling made by the Second Respondent acting as the arbitrator in a matter where the Applicant had referred a dispute relating to unfair dismissal out of the prescribed time frames in terms of section 191 (1)(b)(i) of the Labour Relations Act[1], (the LRA) and sought condonation thereof.
- [2] The Second Respondent issued a ruling dismissing the Applicant's application for condonation of the late referral of the dispute relating to his alleged unfair dismissal.

Background

- [3] The Applicant was dismissed from employment with the Third Respondent following a disciplinary hearing on 19 July 2021. He was thus required to refer the dispute to the First Respondent on or by 18

August 2021. He in fact referred to the dispute on 22 December 2021.

- [4] The referral was clearly made out of time. He accordingly brought an application to condone the late referral.
- [5] In his application for condonation, the Applicant indicated inter alia, that the referral was some 124 (one hundred and twenty-four) days late. As an explanation for this lateness, the Applicant stated

that he relied on the trade union to which he was a member of, who were handling the matter on his behalf to refer the matter on his behalf but they failed to do so timeously and by the time he realised, the dies had run out and he was late. He was adamant that he did not commit fraud for which he was disciplined and dismissed.

- [6] Regarding the prospects of success, the Applicant contended in his application for condonation of the late referral of the dispute that the Third Respondent failed to take into account certain material evidence that they had in their possession when determining the disciplinary hearing. This evidence constituted pictures and the attendance register which according to him, indicated that he did not sign.
- [7] At the heart of this review application, is the Applicant's complaint that the Second Respondent decided the matter on paper and failed to hear the parties face-to-face and in essence that the Second

Respondent failed to take into account material aspects of his condonation application, especially in light of the fact that the

Third Respondent did not oppose the condonation application.

[8] The Third Respondent did not oppose the condonation application.

[9] In his condonation ruling, the Second Respondent held that a delay of 124 days is excessive and that he is not persuaded by the Applicant's explanation for the delay which is unreasonable and unacceptable

considering the fact that he did not account for all the period of the delay.

[10] The Second Respondent further held that he was not persuaded that the Applicant had prospects of success because the Applicant was dismissed for fraud.

[11] The Second Respondent furthermore held that he is not persuaded that the Applicant would be severely prejudiced if the referral is not condoned because he is the author of his own misfortune.

[12] The Second Respondent further held thus:

'In *Liberty Association of Africa Ltd v Prof. G.C. Kachelhoffer NO and Another*

(2001) 22 ILJ 2243 (LC) the Labour Court held that the enquiry into whether prejudice is present or not entails comparing the present

position of the parties involved with what I (sic) would have been had it been instituted within a reasonable time. Prejudice will be considered to be present if because of the delay the recollections of the parties or the person whose decision is being reviewed have paled.; persons who deposed to affidavits or testify are no longer available; and where documents or other forms of evidence are no longer available.'

[13] The Second Respondent then found that the Third Respondent would suffer prejudice if condonation was granted, notwithstanding that the Third Respondent did not file any opposing papers to the application for condonation where the prejudice mentioned in the Second Respondent would have been set out.

Analysis

[14] It is apparent from the Second Respondent's ruling that the Third Respondent did not file any papers to oppose the condonation application that was brought by the Applicant. It is thus unclear as to how the Second Respondent came to the conclusion that any party's memory had paled.

[15] It is trite that in every condonation application, the Applicant must set out and meet the following requirements in order to make out a case for condonation:

15.1 The entire period of delay must be explained;

15.2 The explanation must be reasonable;

15.3 The applicant must show prospects of success;

15.4 Prejudice to the parties.

[16] The Labour Appeal Court in *Chetty v Baker McKenzie* held that to be successful, there has to be an explanation which covers the entire period of delay. [2]

[17] In his Application for condonation, the Applicant explains that he was misled by his trade union that the case was going on at the Bargaining Council.

[18] Indeed, the Applicant in his condonation application does explain that the matter was "on-going" at the Bargaining Council until 28 November 2021. It is not apparent why the matter went to the Bargaining Council but what is clear is that the Applicant was not sitting and doing nothing about the matter. The Second Respondent failed to take this fact into account when he dealt with the extent of the delay and the explanation therefore.

[19] Regarding the prospects of success, he states that his time records indicate that he did not commit the fraud. The Second Respondent should have found that the Applicant had a proper defence to the charge of fraud or at best, that there was a dispute of fact. Instead, he found that the Applicant did not have prospects of success because he was charged with fraud.

[20] Clearly, the Second Respondent misconstrued his duties in relation to handling the condonation application. He postulated the Third Respondent's case and consequently argued the case for the Third Respondent in their absence. That the Applicant was found guilty and dismissed for misconduct related to fraud is not conclusive of the fact that the Applicant committed the misconduct let alone indicative that the Applicant was guilty of fraud.

[21] Instead of making conclusions that were not supported by the evidence in the affidavit by the Applicant especially in circumstances where the Third Respondent did not file any opposing papers, at best, the Second Respondent should have invited the parties to appear and address the application face-to-face before him or found that the Applicant had a claim against the Second Respondent. Whether or not such a claim would be proven was a matter for arbitration.

Test for Review

[22] In *Jonsson Uniform Solutions (Pty) Ltd v Brown and Others*, the court said the following:[3]

‘[33] The generally accepted view is that we have a bifurcated review standard, viz reasonableness and correctness. The test for the reasonableness of a decision was stated in *Sidumo* and another v *Rustenburg Platinum Mines Ltd* and others as follows:

“Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?”

- [34] In assessing whether the CCMA or the bargaining council had jurisdiction to adjudicate a dispute, the correctness test should be applied. The court of review will analyse the objective facts to determine whether the CCMA or bargaining council had the necessary jurisdiction to entertain the dispute. (see *SARPA v SA Rugby (Pty) Ltd and others; SA Rugby (Pty) Ltd v SARPU*).
- [35] The issues in dispute will determine whether the one or the other of the review tests is harnessed in order to resolve the dispute. In matters where the factual finding of an arbitrator is challenged on review, the reasonable decision-maker standard should be applied. Where the legal or jurisdictional findings of the arbitrator are challenged the correctness standard should be applied. There will, however, be situations where the legal issues are inextricably linked to the facts so that the reasonable decision-maker standard could be applied.
- [36] It is therefore important to determine whether the dispute, between the parties, is a jurisdictional one or not. The dispute to be resolved determines the test to be applied. In this matter, the dispute between the parties was whether there was in fact a dismissal. If there was no dismissal the Bargaining Council would not have jurisdiction. If there was a dismissal the Bargaining Council would have jurisdiction. The existence or otherwise of a dismissal is therefore a jurisdictional issue. The correctness standard and not the reasonableness standard should therefore be applied. The court a quo, as both parties agreed, applied the wrong standard.'
- [23] In his application to review and set aside the ruling issued by the Second Respondent, the Applicant contends that the First Respondent erred in not calling for a physical hearing of the matter. He further contends that the Third Respondent had in its possession evidence including pictures and time sheets which showed that, he did not commit the misconduct and so he ought not to have been dismissed unlike the three other employees that he was charged together with. This contention in the absence of any opposing submission from the Third Respondent indicated that the Applicant had a claim to prove and for the Third Respondent to defend and thus prospects of success.[4]The Third Respondent failed to apply his mind to the allegations made by the Applicant in his affidavit in support of the condonation

application. Importantly, he misconstrued his duties as the commissioner in the matter and behaved as though he was bound by the

finding of the employer (the Third Respondent in this matter) that the Applicant was guilty of fraud.

- [24] Although, whether to grant condonation is a matter of discretion by the decision maker, the First Respondent erred in his conduct in relation to assessing the matter in that, he assumed facts on behalf of the Third Respondent and thereby committed a reviewable irregularity.

- [25] Regarding the papers before this court, the Third Respondent's answering affidavit in the review application was filed late and in terms of the Practice Manual of this court, if there is no objection thereto, the Respondent does not have to file a condonation application. The Applicant in this matter however objected to the late filing of the Third Respondent's, answering in his replying affidavit and oral argument before court.
- [26] The Third Respondent did not file an application for condonation and submitted that if the court is so inclined, the matter may be remitted for a fresh hearing before another commissioner instead of substituting the Second Respondent's finding.
- [27] I am inclined to remit the matter for a fresh hearing before another commissioner.
- [28] In the interest of justice and fairness, this court does not believe that any of the parties should be visited with a costs order more so because the Applicant appeared on his own behalf.
- [29] Accordingly, I make the following order:

Order

1. The application to review and set aside the ruling issued by the Second Respondent under case number GALV3282-21 dated 14 January 2022 is granted;
2. The matter is remitted to the First Respondent for hearing before a commissioner other than the Second Respondent;
3. No order as to costs.

B M Sono

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant: Self For the Respondent: Mr A J Posthumus Instructed by: Snymans Inc Attorneys

- [1] Act 66 of 1995, as amended.
- [2] [2022] ZALAC 12 (LAC); (2022) 43 ILJ 1599 (LAC) at para 29.
- [3] Jonsson Uniform Solutions (Pty) Ltd v Brown and Others [2014] ZALCJHB 32 (LAC); [2014] JOL 32513 (LAC) at para 33
- 35 and National Union of Mineworkers of South Africa and Another v Voltex (Pty) Ltd t/a Electric Center and Others
- [2000] ZALC 6; [2000] JOL 6264 (LC).
- [4] Melane v Santam Insurance Co Ltd 1962

- (4) SA 531; [1962] 4 All SA 442 (A) at 532 C - F mentioned various factors usually relevant to the granting of condonation. Holmes JA stated: “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 if there are no prospects of success

there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate for the prospect 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...” (own emphasis added)

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