IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN DURBAN

CASE NO D184/04

DATE 09.05.2008

M HLATSHWAYO	**APPLICANT**
And	
THE COMMISSION FOR CONCILIATION, MEDIATION & ARBITRATION	**FIRST RESPONDENT**
BESS PILLEMER N.O	**SECOND RESPONDENT**
SARA LEE HOUSEHOLD	**THIRD RESPONDENT**

JUDGMENT

AC BASSON, J

Herewith brief *ex tempore* reasons for my order.

[1] This was an application to review and set aside the arbitration award under Case No KN7009/03. The award was rendered by the second respondent under the auspices of the first respondent, the CCMA. I will refer to the second respondent

as “the Commissioner” and the first respondent as “the CCMA” and throughout this judgment I will also refer to the third respondent merely as “the respondent”.

Brief summary of the evidence

[2] The applicant was dismissed following an e-mail that he sent to his manager, a certain Miss. Moodley (hereinafter referred to as “Moodley”) in which he *inter alia* said:

> *“I Hate your attitude as a manager.”*

The ‘*Hate’* part of the e-mail is in caps. He also stated that:

> *“I am watching your step as you are watching me.”*

[3] Although I agree with the applicant that the e-mail as a whole should be read into context, these words appears to be the crux of the issue in this particular case. I will return to the merits of the review hereinbelow.

Application for condonation for the delay in filing of the record

[4] Before turning to the merits of the review application, it is

necessary to firstly deal with the applicant's application for condonation for the delay in filing of the record which period is in excess of two years and four months.

[5] The Applicant filed an application for condonation insofar as it was necessary to do so. Although the rules do not provide for a specific time period within which a record must be filed, as was correctly pointed out by the Respondent, this Court nonetheless has a discretion to consider whether or not the delay was reasonable.

[6] It is trite that the Labour Relations Act, 66 of 1995 ("the LRA") is premised on the principle that disputes should be resolved expeditiously and that a litigant, especially an applicant, should ensure that he or she does not undermine the expeditious resolution of disputes by unduly delaying the prosecution of a matter. Although the respondent also has a duty to ensure that an applicant who unduly drags his or her feet should move forward and should even approach this Court for an appropriate order, essentially it is the applicant that is *dominus litus* and it is for the applicant to ensure the expeditious resolution of a dispute. It is trite that inordinate delays in prosecuting a review to finality protract disputes and that it is not in the interest of justice to delay bringing disputes to a finality especially in the employment context. Depending on the circumstances of a

case, this Court may, should it be of the view that it is in the interest of justice, dismiss a review where the applicant delays prosecuting its claim and fails to provide an acceptable explanation for the delay. See *National Union of Metal Workers of South Africa obo Nkuna Others v Wilson Drills-N Bore (PTY) LTD t/a A & General Electrical*- (2007) 28 *ILJ* 2030 (LC) and *Numsa and Others v AS Transmission and Sterling (Pty) Ltd* (1999) 12 *BLLR* 1237 (1) SA 673. See also *Bezuidenhout v Johnston No & Others* (2006) 27 *ILJ* 2337 (LC). In the latter case reference is made to Stratford AJA in *Pathescope Union of SA Ltd v Mallinicks* 1927 AD 292 where the Court held as follows:

> *"That a plaintiff may, in certain circumstances, be debarred from obtaining relief to which he would ordinarily be entitled because of unjustified delay in seeking it is a doctrine well recognised in English law and adopted in our own courts. It is an application of the maxim vigilantibus non dormientibus lex subveniunt…"*

The court went further to say:

> *"Where there has been undue delay in seeking relief, the court will not grant it when it its opinion it would be inequitable to do*

so after the lapse of time constituting the delay. And in forming an opinion as to the justice of granting the relief in face of the delay, the court can rest its refusal upon potential prejudiced, and that prejudice need not be to the defendant in the action but to third parties".

[7] I also find the following comments made in the *Bezuidenhout*-case of particular relevance to the present case:

> *"[30] If any party delays the process, I believe it is in the first instance incumbent on the applicant party (who is dominus litus) to take timeous steps to compel compliance with the LRA and/or the rules of this court. I believe the applicant bears the primary responsibility of ensuring that the functionaries comply with their responsibility to despatch the record of proceedings within ten days of receipt of the notice of motion. The applicant party needs to take early and effective steps to compel the functionaries to comply with their obligations if they fail to do so."*
>
> *…..*
>
> *"[33] In short first and foremost the applicant in any matter must diligently pursue that matter and take every reasonable step to ensure that all necessary steps are taken within the prescribed periods therefore. Where*

other parties such as the functionaries involved are also required to take steps within prescribed periods, early action must be taken again primarily by the applicant party to compel compliance with these functionaries. Respondent parties have a secondary but equally important responsibility to take such steps as are available to them to ensure compliance by the other parties with time periods and directives."

See also *Mohlomi v Minister of Defense* 1997 (1) SA (CC) at 129H-130A, wherein Didcott J said:

"Nor in the end is it always possible to adjudicate satisfactorily on cases that have gone stale. By then witnesses may no longer be available to testify. The memories of ones whose testimony can still be obtained may have faded and become unreliable. Documentary evidence may have disappeared".

See also *National Savings Investments (SA) (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration & Others* (unreported case number JR171/02) where this Court held that:

"[13] The first question to be considered in exercising the discretion is whether there has been undue or unreasonable delay and secondly whether the delay should be condoned. Whether any steps were taken during the interval, will also be an important factor as that may indicate the seriousness or commitment of a litigant in bringing his or her claim to finality".

…….:

"In respect of the question of whether or not the delay was reasonable or unreasonable, the Court will have to make a value judgement in the light of all the circumstances. Once it has been fond that the delay was unreasonable, the Court will then have to exercise a discretion which must be exercised judicially as to whether or not the unreasonable delay should be condoned".

[8] I am of the view that the delay in the present matter is unreasonable. A delay of two years and four months is an exceedingly long time period and requires that a good explanation be tendered for this delay. I can also not disregard the fact that the delay has caused the Respondent to inform its overseas partners that the matter had died a natural death. It is common cause that the respondent did not bring an application to dismiss nor is there such an application before

this Court at present. However, I am of the view that this Court may *mero motu* raise this issue and consider whether or not the applicant's dilatory conduct in pursuing a matter should bar him from obtaining the relief sought (see the quotation from the decision in *Pathescope Union* (*supra)*.

[9] I have considered the explanation tendered against these principles. The delay is excessive. It took the applicant two and a half years to file the record. I also find the explanation for the delay wanting. Blame is put on the Mr Mafu of the union, who merely attributes the delay to his ill-health. Although an affidavit deposed to by Mafu is attached to the papers, the explanation tendered does not explain the extensive delay. Although Mafu's ill-health may tender an explanation for part of the delay, it simply does not explain or adequately explain a delay of more than two years. Mafu also does not confirm in his affidavit whether he was indeed paid R10 000,00 for his services, as alleged by the applicant, and that the money is now unaccounted for. The explanation for the extreme delay is therefore in my view simply not reasonable and I am therefore of the view that the review should be dismissed on this basis alone.

Merits of the review

[10] Insofar as I may be wrong in dismissing the application on this basis alone, I will now proceed to evaluate the merits of the review application. I have read the papers in light of the heads of argument filed on behalf of the respective parties and will now proceed to briefly summarise some of the issues that I have taken into account in coming to a conclusion.

[11] At the outset I should point out that I am in agreement with the Respondent's submission that no coherent allegations are made in the founding affidavit that support this application for review. The founding affidavit simply does not contain the allegations that comply with the requirements of section 145 of the LRA read with the case law that has defined the test for reviews. In terms of Rule 7A(1)(c) of the Rules, an applicant's founding affidavit should set out the factual and legal grounds upon which the decision of the CCMA arbitrator is to be reviewed and set aside. Rule 7A(8) of the Rules only permits the applicant's founding affidavit to be supplemented. A supplementary affidavit cannot cure the defects contained in a founding affidavit. On this ground alone I am also of the view that the application for review falls to be dismissed.

[12] More in particular in respect of the procedural fairness of the dismissal, the applicant makes a vague attempt on the Commissioner's finding that the dismissal was procedurally fair.

No proper ground for review is raised in respect of the procedural fairness of the dismissal.

Merits of the review

[13] Although not necessary in light of the aforegoing to consider the merits of the review, I will nonetheless do so in order to bring finality to this dispute.

[14] The Commissioner, in a fairly well reasoned judgment, gives a detailed and, in my view, a largely accurate summary of the evidence. I will not for purposes of this brief judgement repeat the evidence but will suffice with a brief exposition of the most important facts as they have emerged from the evidence.

[15] Moodley, the Applicant's manager, received an e-mail from the Applicant (see also paragraph [2] *supra*). She testified that she had been working with the applicant for more than two years. On 20 February 2003 Moodley reprimanded the applicant when she found him with another employee in his office. She told the other employee to leave as he was disturbing the applicant who had work to do. Not very long after this incident Moodley then received the said e-mail from the applicant. Moodly testified that she was shocked, disturbed and that she felt intimidated by the contents of the e-mail, particularly because the applicant

who sent her the e-mail used words such as "*I Hate your attitude*" and "*I am watching your step as you [sic] watching me!*". Moodley immediately reported the incident to her manager and she also asked her husband to come and fetch her as she felt intimidated. It was briefly also her evidence that the relationship between her and the Applicant, who was her subordinate, was destroyed as a result of this incident.

[16] Mr. Msomi (hereinafter referred to as "Msomi"), the HR director, also confirmed that he was informed by Moodley of the incident and that he had arranged for extra security for her as well as for other female employees. He also confirmed that he was shocked at the inappropriate and disrespectful language used in the e-mail. It was also his evidence that Moodley was a kind person and that she had treated the other employees positively. Msomi testified that he and Mr. Douglas Kilburn had met with the Applicant about the e-mail in an effort to try and resolve the issue. During that meeting the applicant confirmed that he was the author of the e-mail. Msomi then asked the applicant to retract the words used in the e-mail. Msomi confirmed that the Applicant had refused and that he told the meeting that it was his constitutional right to use the words.

[17] After Kilburn had left the meeting, another employee - the human resources manager Mr. Goodwill Ngcobo - joined the

meeting. In Ngcobo's presence the Applicant was again requested to retract the e-mail. Again the Applicant refused. Msomi testified that he was of the view that the Applicant was given an opportunity to retract the e-mail and because he refused to do so it was decided to charge the applicant.

[18] I will not refer to the procedural fairness in light of the fact that the Applicant has abandoned the attack on the procedural fairness of the dismissal. Suffice to point out that an external chairperson was appointed and it was also *inter alia* his evidence that he also spoke to the Applicant and also gave him an opportunity to retract the words or the e-mail but that the Applicant had refused to do so.

[19] In essence it was the Applicant's evidence that he was not generally disrespectful towards Moodley. It was his evidence that Moodley had shouted at him when she asked the other employee to leave his office. It was further his evidence that it was not his intention to convey an attitude that he hated Moodley or that he had tried to intimidate her.

[20] The Commissioner concluded that the dismissal was substantively and procedurally fair. I have perused the transcript of the hearing as well as the pleadings and I am of the view that the Commissioner's conclusions in this regard are

reasonable. In coming to this conclusion I had regard to the decision in *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* (2007) 28 ILJ 2405 (CC) and particularly paragraph [107] of the judgment where the Constitutional Court said:

> *"[107] The reasonableness standard was dealt with in Bato Star. In the context of s 6(2)(h) of PAJA, O'Regan J said the following: '[A]n administrative decision will be reviewable if, in Lord Cooke's words, it is one that a reasonable decision-maker could not reach.'"*

[21] The question is thus not whether or not the conclusion reached by the Commissioner is one which this Court would have reached. In essence the question is whether or not the conclusion reached by the Commissioner is one that a reasonable decision-maker could not reach. In *Edcon Limited v Pillemer NO & Others* (DA4/06) the Labour Appeal Court held that this –

> *"boils down to saying the decisions of the commissioner are to be reasonable …. Meaningful strides are taken to refocus attention on the supposed impartiality of the commissioner as a decision-maker at the arbitration whose functions is it to weight all the relevant factors*

and circumstances of each case in order to come up with a reasonable decision. It is in fact the relevant factors and the circumstances of each case, objectively viewed, that should inform the element of reasonableness or lack thereof." (at paragraph [21] of the judgment).

[22] In considering this test, the Court should always bear in mind the distinction between a review and an appeal. It is not the function of this Court to consider whether or not the decision by the Commissioner is correct. The function of the court on review is merely to consider whether or not the Commissioner's decision falls within the boundaries of reasonableness. In this regard the following comments by Ngcobo, J is particularly instructive:

"[245] With this in mind, the drafters appear to have opted for the narrowest species of review. By adopting 'a simple, quick, cheap and non-legalistic' approach to the adjudication of unfair dismissals, the drafters of the LRA intended that, as far as is possible arbitration awards would be final and would only be interfered with in very limited circumstances. In order to give effect to this, they deliberately chose the narrow grounds of review similar to those contained in s 33(1) of the Arbitration Act and

reproduced them in identical terms. They did this well aware of the jurisprudence under s 33(1) of the Arbitration Act. And they were aware of the well-established rule of statutory construction that when the legislature deliberately includes language in a statute which in the same or similar context has been subject to judicial interpretation, it intends the provision to bear the same meaning already given by the courts."

[23] I am of the view that the Commissioner's reasoning in coming to her decision is sound. Her conclusion that the e-mail was not sent to initiate the respondent's grievance procedure is sound. The Applicant had been an employee for a long time period, more than nine years, and he should have known also that the contents such an e-mail is unacceptable. The Commissioner further found that the words that was used by the Applicant, namely that he hates Moodley or to be more correct to say that he hated her attitude as a manager and that he was watching her, was intended to instil fear in her. This finding is not unreasonable in light of the evidence of Moodley to the effect that she was shocked and that the e-mail had instilled fear in her. Msomi also testified that he was shocked at the inappropriate, disrespectful and insolent language used by the Applicant. I further find this conclusion reasonable in the circumstances of the facts of this case. An employee of nine

years' service should know that these words would instil fear in another employee who happened to be his manager. Apart from the fact that these words will instil fear in a co-employee, such an e-mail is simply inappropriate in a working environment. .

[24] I also find the Commissioner's finding that the respondent's witnesses corroborated each other in material aspects reasonable. Her conclusion that the evidence of Msomi, Kilburn and the chairperson all confirmed that the applicant had been afforded an opportunity to withdraw his e-mail but that he refused to do that is consistent with the record. I also find that the Commissioner's conclusion that the fact that the applicant had refused to withdraw the e-mail served to endorse the fact that the applicant meant to scare and intimidate Moodley, reasonable.

[25] In the event I find that the Commissioner's finding that the dismissal was substantively and procedurally fair, to be reasonable. This is not a finding that no reasonable commissioner could have arrived at. In the event the application to review is dismissed. I can find no reason why costs should not follow the result.

AC Basson, J

APPEARANCES:

For the Applicant: Adv T Seery instructed by Deneys Reitz

For the Respondent: RCW Pemberton – Garlicke and Bousfield