LOM Business Solutions t/a Set LK Transcribers

IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN CASE NO: JR436/2006

2008-02-28

In the matter between

SOUTH AFRICAN POST OFFICE LIMITED APPLICANT

And

CCMA 1st RESPONDENT

COMMISSIONER S KHOZA 2nd RESPONDENT

CWU obo NDLOVU J P 3rd RESPONDENT

J U D G M E N T

CELE J: The applicant seeks to have an arbitration award dated 31 October 2005, issued by the second respondent as the commissioner of the first respondent, reviewed and set aside. The applicant wishes to have the matter thereafter remitted to the first respondent for a *de novo* arbitration hearing before a commissioner other than the second respondent. As an alternative to the remittal of the matter, the applicant asked for a substitution order to declare the reinstatement of Mr Ndlovu as incompetent in the circumstances.

Mr Ndlovu in whose favour the award was issued did not oppose the application. The review application was filed out of the six weeks period prescribed by Section 145 of the Labour Relations Act, 66 of 1995, hereafter referred as the Act. The applicant has filed a condonation application having being granted an indulgence by this court and this indulgence was granted on 31 January 2008. Before that date there had not been any application for condonation for the late filing of the review application. The condonation application has been opposed at the instance of Mr Ndlovu. Mr Labea appeared as a union official on behalf of Mr Ndlovu whilst Advocate Lafuane appeared for the applicant.

It is necessary to revisit the background facts very briefly, and so the background first:

Mr Ndlovu started working for the applicant as a teller in February 1991. In 2002 he was stationed at Emndeni, Soweto at a branch known as Zwelithini which was a pay-point built within a supermarket. He worked under the supervision of the only colleague he had, one Mr Xolani Clement Ntombela. A Miss Nancy Seroke operated a post office savings account with the applicant. She operated the account through a savings book on which transactions would normally be reflected. When she transacted the account in order to pay for school fees for her child, she realised that some money had been unlawfully withdrawn. In transacting through that savings book, she would use her identity book in order to identify herself to the post office tellers. The discovery made by herself was on 25 November 2002. This is when an amount of R1 100 was according to her, unlawfully withdrawn. The

withdrawal transaction was executed by Mr Ndlovu at Zwelithini Post Office branch. He had used what is referred to as a pin code or authorisation number of Mr Ntombela in the performance of that transaction. On that day, namely 25 November 2002, Mr Ntombela was off duty. Ms Seroke launched a complaint pertaining to the unlawful withdrawal of R1 100 from her post office savings account.

The applicant investigated the complaint through its Mr William Henry Lang, this was his chief investigating officer. There was another second investigating officer who was involved in the matter. Mr Ndlovu was then charged with a misconduct described as fraud.

The chairperson of the internal disciplinary hearing, one Ms Muriel George, found Mr Ndlovu to have committed the act of misconduct with which he was charged. She invited Mr Ndlovu to address her in mitigation of the sanction. Mr Ndlovu declined to mitigate.

The applicant's code provided for a final written warning sanction in cases of a first offender where mitigatory factors are given. Mr Ndlovu was a first offender. A sanction of dismissal was imposed on him due to the absence of mitigating factors being adduced by him as he so declined. He was aggrieved by the sanction of dismissal and he referred an unfair dismissal dispute for conciliation and arbitration. The second respondent found the dismissal of Mr Ndlovu to have been substantively unfair and ordered the applicant to reinstate him retrospectively. It is that order which is sought to be reviewed and set aside.

The arbitration hearing, Mr Ndlovu put it beyond dispute that he executed the disputed transaction. Mr Lang testified in the arbitration

hearing and he said that Mr Ndlovu should have had his pin code as should have been the case with Mr Ntombela, in other words Mr Ndlovu should have used his own pin code and not that of his colleague. According to him, the use, the mere use of Mr Ntombela's pin code number, was an indication that Mr Ndlovu processed the transaction unlawfully and therefore in the absence of the client and her savings book. He said that no employee was authorised to use the other employee's authorisation or pin code number. He said that Mr Ndlovu knew the procedure as he had been trained on the same. He testified that a transaction history showed that Ms Seroke lived in Midrand and would withdraw money either at Halfway House or at Marshalltown and not at Zwelitha in Soweto.

Ms Ausie Swanepoel was the second investigating officer, testified on the rules which the applicant put in place for its tellers to follow whenever they effected withdrawals. She pointed out that there was a duty to protect the clients from fraudulent withdrawals. She really said nothing particularly incriminatory against Mr Ndlovu.

Ms George said that she had found, not only that the signature on the withdrawal slip of the R1 100 transaction and Ms Seroke's savings book, did not correspond but that Mr Ndlovu had used somebody else's authorisation number to authorise the transaction. According to her Mr Ndlovu had conceded in the enquiry before her that he was not supposed to have used the same pin code number and therefore he could not have explained why he did this to Ms George. Accordingly Mr Ndlovu, went against the applicant's rule which says nobody may use somebody

else's password under any circumstances. She said that had Mr Ndlovu given her mitigating factors, she would have been in a position to give him the benefit of doubt and not dismiss him. So much was that evidence which unfolded before the commissioner in the sense that Mr Ndlovu did not really come up with a version that disputed the execution of this transaction.

The applicant for the review canvassed some review grounds in its application, the founding affidavit was attested to by Selby Labea, and in that the following appear as grounds for review: The arbitrator exceeded his powers as a commissioner as he ordered reinstated in circumstances where that was not competent. The problems which the arbitrator identified with the dismissal impacted on procedural fairness which would only warrant compensation. The award was made, notwithstanding a finding by the arbitrator that the respondent indeed committed fraud, which finding denoted that the respondent was dismissed for a valid reason. So much for the review grounds canvassed.

I then come back to the reasons proferred for the delay. I have pointed out that the application for review was late, it was only filed very late, only after the third respondent had insisted on this and had intimated that the application was not properly before court. In fact, when the matter was last before court on 31 January 2008, it was at the instance of the third respondent who sought to have the review application dismissed because of it not have been properly prosecuted but the parties agreed that the application was to be abandoned.

I point out that the third respondent had initiated an application in terms of Section 158(1)(c) of the Act for the award to be made an order of court. It is apparently in the prosecution of that application that they came across the application for review. Any party who seeks an indulgence from court for a late filing of a matter such as a review application, needs to profer amongst others three reasons for the delay, prospects of success, the degree of lateness, in other words how far is the deviation from the rule and any prejudice to the other party, the administration of justice and some such considerations. The parties have addressed me on this as these are issues that have been traversed in their papers.

I look firstly then at the reasons proferred by the applicant. These appear from paragraph 10 of the founding affidavit and this affidavit was attested to by Nyiko Magayisa who said that it was in his legal capacity as an employee of the applicant, as a manager, labour law, said the following:

> "The applicant is a nationwide entity which has branches everywhere, in every corner of this country and employs a huge staff compliment which has 16 000 employees. The applicant's head office is situated in Pretoria. All decisions regarding the defense or institution of court proceedings involving the applicant are made at head office. There is an internal practice within the applicant whereby any branches which receive an arbitration award, have to

relay such award to head office and obtain the latter's directive as to the further conduct of the matter.

It is obvious that the shear size of the applicant and the volume of matters it gets involved in, dictate that it is not always possible to seek and obtain head office's directive within the stipulated six weeks for purposes of filing a review application. In some instances, the applicant fails to meet the deadline and consequently has to ask for condonation. The present matter is one of the matters wherein the compliance with the six week period, could not be achieved. In the light of this, an application for condonation should have been filed as soon as it became apparent that the applicant was not going to make the deadline.

It was unbeknown to the applicant's head office that an application for condonation had not been filed until the applicant was alerted thereto by the third respondent in May 2007. Up until that point, the file in this matter was handled by an employee relations manager in the relevant branch of the applicant. The employee relations manager took over the file in 2006 after it was relayed back to the branch from head office …". I stop there.

When the matter was then argued before me by Mr Lafuana, he struggled for words to try and support this explanation. I put a proposition

to him that according to this explanation, it must follow that an entity such a government or a department of state which employs much more than 16 000 employees would therefore find so much reliance in an explanation such as this in not complying with the timeframes that are prescribed by the rules of this court. He realised the full implications of this. In fact, when Mr Labea took the stand, he pointed out that this cannot be an acceptable reason for failing to comply with the timeframe, to this I agree with him. He quickly pointed out that there are a number of applications of a similar nature where the applicant complies with time where he features or he has featured. In the one case, he was two weeks late and this court found against him.

The reason proferred is not a good enough reason and once it is not a good enough reason, it bags the question whether I even need to consider the prospects of success. There are so many decision of the Labour Appeal Court that are relevant in this regard.

I want to cite one of such, it is a decision in *Moale v Shai NO & Others*, (2007) 28 ILJ 1028 (LAC), that is a decision by the Judge President of this division. At paragraph 34 he has this to say, “where in an application for condonation, the delay is excessive and no explanation has been given for that delay or an explanation has been given but such explanation amounts to no explanation at all, I do not think that it is necessary to consider the prospects of success”.

Indeed, this is one situation when in the absence of a sufficient explanation being tendered, it becomes really unnecessary to go so far as looking at the prospects of success.

In the present case, the award was issued on 31 October 2005, the review was filed on 20 February 2006, the award would have reached the applicant before the end of 2005 being mindful of the case number that we have here and one looks at the period of six weeks expiring somewhere or elapsing on 9 December 2005 or soon thereafter if one considers the fact that perhaps the applicant received it a little later than the date of issue. It has been conceded by the parties and in fact by the applicant that there is a period of about 10 weeks during which the application is late. The reason proferred is indeed far from being good enough.

In that finding alone, I am persuaded to dismiss the review application. I am mindful of the fact that in the case that I have referred to of the Labour Appeal Court, the period, the longevity of the period there was excessive. It is more than a year in fact and the Judge President weighed that period against the reasons that were proferred and then made the finding that I referred to.

In the present case, the period of 10 weeks or a period thereabout cannot be regarded as excessive but it is a period long enough indeed to call for an explanation. When I look at that period and look at the explanation, the explanation is as good as there been no explanation at all. I am not talking of an explanation that is perhaps just a weak or flimsy, this one is just appalling, in fact any court that would uphold this kind of an explanation, would be inviting the non compliance of the rules of this court and therefore creating a very caotic situation.

In the event I am wrong in that conclusion, I should go so far as looking at the prospects of the success. The parties addressed me, that it

is, the chairperson of the disciplinary hearing who said in her own words that had there been mitigating factors submitted before her, she in all probabilities would have not dismissed Mr Ndlovu. The commissioner looked at this evidence and then found that, Mr Ndlovu was not warned or appraised of the full consequences of failing to advance mitigating circumstances and as a result of that, he issued the award in his favour.

Again, when one looks at that and indeed Mr Luvuno has conceded that that being the case, there are indeed no prospects of success. When one therefore looks at there being no prospects of success as conceded against a weak reason given, it is clear in my mind that indeed condonation for the late filing of the review application is clearly not justified. No good cause has been shown. As a consequence I am unable to grant this application.

The following order will issue:

1. Condonation for the late filing of the review application is not granted;
2. The review application is dismissed with costs;
3. The award in this matter is made an order of court in terms of Section 158(1)(c) of the Labour Relations Act.

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CELE AJ

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