

**1. IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG**

CASE NO: JR1244/05

2. In the matter between:

JUSAYO, NOMONDE

Applicant

and

MUDAU, ROBERT (N.O)

1st Respondent

COMMISSION FOR CONCILIATION MEDIATION

AND ARBITRATION

2nd Respondent

ESKOM HOLDINGS LIMITED

3rd Respondent

2.1.1.1

JUDGMENT

JAMMY, AJ

3. The record before the Court in this matter is replete with an intimidating array of review and condonation applications, each of them opposed by the party against whom the relief in each case is sought

4. In the order of their submission, the applications are the following:

4.1 The Applicant's application for review of an arbitration award made by the First Respondent under the auspices of the Second Respondent, on 13 April 2005, supported by founding and supplementary affidavits.

4.2 The Third Respondent's answering affidavit in that application,

contemporaneously with a counter-review application.

- 2.3 An application by the Third Respondent for condonation of the late filing of that counter-review application.
- 2.4 An application by the Applicant to amend its original notice of motion.
5. Augmenting these applications, as one would expect in opposed proceedings, are founding, supplementary, answering and replying affidavits, resulting in a voluminous record which, in my perception, is out of proportion to the relatively crisp issues requiring determination in these proceedings.
6. I do not, for the sake of rational development, propose to deal with the various applications in the order in which they have been presented. A logical progression indicates to me that it is appropriate for me to address first the issue of the Third Respondent's counter-review application and the question of its condonation or otherwise.
7. This in turn however necessitates a brief examination of the chronology of the successive developments in the matter.
 - 7.1 The Applicant was dismissed by the Third Respondent on 1 July 2004.
 - 7.2 The substantive and procedural fairness of that dismissal was challenged by the Applicant by way of referral to the Second Respondent where, following an unsuccessful attempt at conciliation, the issue was referred to arbitration by the First Respondent.
 - 7.3 On 13 April 2005, the First Respondent, following the arbitration hearing, made an award to the effect that the Third Respondent was to pay the Applicant "compensation to the value of 12 months at the rate of R23 000 per month, which equals R276 000", that amount to be paid within fourteen days of the date of the award.

- 7.4 On 5 May 2005, the Applicant, in terms of Section 144(b) of the Labour Relations Act 1995, applied to the Commission for Conciliation Mediation and Arbitration for the variation of the First Respondent's award "insofar as the Commissioner omitted to address the Applicant's request for reinstatement".
- 7.5 Pursuant thereto, the First Respondent on 20 May 2005, made a "Variation Ruling" in which he recorded that -

"After listening to the parties during the arbitration proceedings, I duly applied my mind and came to a conclusion that reinstatement could not be an appropriate remedy. I concluded further that the circumstances surrounding the dismissal was such that a continued employment relationship would be intolerable".

- 7.6 Concluding further that "it was not reasonably practicable for the employer to reinstate or re-employ" and that "the award was neither erroneously sought nor erroneously made", he dismissed the application for variation.
8. The Applicant then launched an application in terms of Section 145(1)(a) of the Labour Relations Act 1995 for the review and setting aside of the award by the insertion of a further order reinstating her to the position that she held in the employ of the Third Respondent, retrospectively to 1 July 2004. Integral thereto was a contingent application for condonation in case the Court was to find that the review application had been launched outside the prescribed time limits as a consequence of the intervening application to the Second Respondent for variation of the order.
9. This was followed by a supplementary application for the amendment of the notice of motion by the deletion therein of the unaugmented prayer for retrospective reinstatement and the substitution therefor of an order for payment of the compensation decreed in the original arbitration award in addition to such reinstatement.

10. The amended application was, as I have indicated, and save for the condonation application which it embodied, opposed by the Third Respondent on its merits, the submission being that there was nothing in a proper reading of the award to indicate that the First Respondent had failed properly to consider the issue of reinstatement in the context of his assessment of the working relationship between the Applicant and her Manager. What he had failed to do however, having determined in his own mind the existence of an incompatible relationship between them, was to consider and to take into account the Third Respondent's offer to the Applicant to relocate her to another position in its Head Office and her unsubstantiated rejection thereof. The First Respondent's conclusion, in the face of that omission, that the Applicant had been unfairly dismissed, could therefore not be sustained in the face of the evidential material before him and his award accordingly fell to be reviewed and set aside on that basis.
11. With that objective, the Third Respondent launched a contingent application for condonation of the late filing of its counter-review application. I use the term "contingent" because it is the Third Respondent's submission that the question whether or not such filing was indeed late, is open to debate. What is contended in that regard is that the time period for the filing of that application commenced to run from the date when the answering affidavit in the main review application was due. The Applicant on the other hand submits that that time period commences to run on receipt of the award, as in the case of any other review application.
12. The Third Respondent's condonation application therefore, it states, has been filed "in the event that it transpires that its interpretation is wrong". If that is the case, then what emerges is that the application has been filed six months late. The reason for that, it is explained, is that –

"... both the Third Respondent's Attorneys and I were under the *bona fide* impression that it would not be necessary to deliver the counter-

review application until such time as the answering affidavit is due”.

13. If that is indeed a mistaken perception, then, it is submitted, -
 14. “...that it was nonetheless formed in good faith and on the basis that it would be convenient and make common sense, particularly to avoid the papers becoming prolix, to serve the counter-review application with the answering affidavit. In that way the Court will be less burdened with numerous affidavits”.
15. That submission, in my view, cannot be sustained. Had the counter-review application been launched as a substantive application in its own right following the publication of the award, then manifestly the Court would have been burdened with fewer affidavits than is now the case, since no condonation would have been required. What emerges moreover, as an incorrect interpretation, or more pertinently, a disregard of the applicable Rules, on the part of the Third Respondent’s legal advisers, cannot in any circumstances, and whether or not made in good faith, excuse or justify a failure to comply with them. The Rules in question are not arbitrary but are formulated for a purpose – to ensure the ordered, regulated and expedited pursuit of the procedures to which they apply. They contain no provision for the course of action which the Third Respondent presumed to implement. The application in question contains no submissions that could not have been made when the award was initially published and appears, as has been suggested, to have been an afterthought.
16. A further ground for the refusal by this Court of condonation for its late filing and the consequent dismissal of the counter-review application, is submitted by the Applicant as being what it describes as an act of per-emption on the part of the Third Respondent in relation to the initial award made by the First Respondent. Following the Applicant’s unsuccessful application on 5 May 2005 to the Commission for Conciliation Mediation and Arbitration for the variation of the arbitration award issued by the First Respondent in order to address the Applicant’s request for reinstatement, the Third Respondent, on

24 June 2005, wrote to the Applicant as follows -

17. "Dear Ms Jusayo

Arbitration Award

18. The above matter refers and in particular the ruling for your application to vary the Arbitration Award.

Kindly furnish us with your banking details in order for us to deposit the amount of money due to you in regard to compensation as per the Arbitration Award".

19. In these circumstances, the Applicant submits, the Third Respondent is debarred from pursuing its review application on the basis that it has acquiesced in the arbitration award that is the subject of review by its indicated willingness to comply with the order to pay to the Applicant the compensation awarded to her.

20. In –

Dabner v S A Railways and Harbours 1920 AD 583

21. Innes, CJ said this –

"The Rule with regard to peremption is well settled and has been enunciated on several occasions by this Court. If the conduct of an unsuccessful litigant is such as to point indubitably and necessarily to the conclusion that he does not intend to attack the judgment, then he is held to have acquiesced to it".

22. This principle was endorsed in –

National Union of Metalworkers of S A and Others v Fast Freeze (1992) 13ILJ 963 (LAC)

in which the Court stated –

“If a party to a judgment acquiesces therein, either expressly or by some unequivocal act wholly inconsistent with an intention to contest it, his right of appeal is said to be preempted, i.e. he cannot thereafter change his mind and note an appeal. Preemption is an example of the well known principle that one may not approbate and reprobate, or, to use colloquial expressions, blow hot or cold, or have one’s cake and eat it”.

23. That, submits the Applicant, is the precise position in which the Third Respondent placed itself in writing the letter above referred to. Its indicated and unreserved intention to comply with the order against it to pay the calculated amount of compensation to the Applicant in compliance with the First Respondent’s order, precluded absolutely its right subsequently to contest the award in terms of which that order was made.
24. Counsel for the Third Respondent, faced with what I consider to be this virtually unassailable contention, endeavoured valiantly to characterise the letter in question as constituting not a preemption, but an offer of compromise by the Third Respondent. This, manifestly, it cannot be said to be. It is, on the face of it, and notwithstanding its reference to the pending variation review by the Applicant, an unreserved indication of its intention to abide by the compensation award against it by payment of the amount thereof into the Applicant’s designated bank account. That, put simply, is not a compromise offer but an acknowledgement of debt and an undertaking to discharge it.
25. On that basis alone, the counter-review application must be rejected but additional thereto is the determination which I have reached that the application, as contended by the Applicant, is radically out of time. The requirements, both in relation to time limits and otherwise, for the institution of review proceedings, are clearly, concisely and unambiguously set out in

the Rules and, in the absence of any substantive and legitimate grounds for condonation in that context, require precise compliance. The only reason advanced by the Third Respondent in support of its contingent condonation application is, as I have stated, a common mistake of both its legal advisors and itself. That, I repeat, is not an acceptable excuse and for both of the reasons set out above therefore, condonation is refused.

26. I now turn finally therefore, to the Applicant's review application in which it seeks the inclusion in the First Respondent's award and in addition to the compensation there provided for, of an order that the Applicant be reinstated in his former employment with the Third Respondent.
27. That inclusion, as I have stated, was refused by the First Respondent in his Variation Ruling of 25 May 2005, on the basis that none of the criteria prescribed in Section 144 of the Labour Relations Act as prerequisites to justify the order sought were applicable and that, in any event, a continued relationship between the Applicant and her employer would be "intolerable", rendering the reinstatement of the Applicant impractical.
28. The Applicant submits that this conclusion, reached without further elaboration, ignores the peremptory requirement prescribed in Section 138(7) (a) of the Labour Relations Act, that the Commissioner must issue an arbitration award (and by inference in this instance, a ruling relating thereto) "with brief reasons". Save for recording that he had "listened to the parties during the arbitration proceedings" and in that context, having "applied my mind", the First Respondent, without further substantiation, recorded his conclusion, "that reinstatement could not be an appropriate remedy" and "that a continued employment relationship would be intolerable". Furthermore, he states, once again without elaboration, "it was not reasonably practicable for the employer to reinstate or re-employ".
29. There is, in my view, substance to the Applicant's submission that, in its disregard of the trite requirement that any conclusion in arbitration proceedings must, to an adequate extent, be substantiated, the ruling in

question in this instance does not meet that requirement. The First Respondent's failure, having found the dismissal of the Applicant to have been unfair, to deal in his award with the issue of reinstatement in the context of the provisions of Section 193(2) of the Labour Relations Act, is a reviewable irregularity on his part and on that narrow basis, this application is justified.

30. For all of the reasons that I have traversed therefore, the order that I make is the following:

30.1 The application for the amendment of the Applicant's Notice of Motion is granted.

30.2 The arbitration award made by the First Respondent on 13 April 2005, read with his order of 20 May 2005 refusing variation thereof, is reviewed and set aside to the extent of the First Respondent's failure to deal with the issue of the reinstatement of the Applicant. That issue is to revert to the Second Respondent for adjudication by an arbitrator other than the First Respondent.

30.3 The counter-review application by the Third Respondent is dismissed.

24.4 The Third Respondent is to pay the Applicant's costs of these proceedings.

B M JAMMY
ACTING JUDGE OF THE LABOUR COURT

26 March 2008

Appearances:

For the Applicant: Advocate K Lengane instructed by Dolamo-Bam Attorneys

For the Third Respondent: Advocate F A Boda instructed by Mabuza Attorneys