IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN CASE NO: JR1330/07

2010-08-19

In the matter between

SOUTH AFRICAN POLICE SERVICES Applicant

And

CAPTAIN NXUMALO & OTHERS Respondent

O R D E R

STEENKAMP, J:

This is an application to review and set aside the ruling of the third respondent, who is an arbitrator, under the auspices of the second respondent, the Safety and Security Sectoral Bargaining Council. The award was made on 11 April 2007, under case number PSSS868-06/07. That ruling deals only with an application for condonation made by the employee, who is the first respondent in this application, Captain Joel Nkoniseni Nxumalo.

In his ruling, the arbitrator found that there was in fact no need for the employee to have applied for condonation because, so the arbitrator found, his referral was not out of time. He did so on the basis that the employee was only notified about the outcome of his appeal on 1 February 2007 and not, as the applicant in this review application

argues, on or about 20 December 2005.

It is, however, common cause that the employee was represented throughout his disciplinary hearing and at arbitration by his trade union and that the trade union was informed of the outcome of the employee's appeal hearing by 20 December 2005.

Mr *Makare*, who appears for the applicant, has argued that in making the ruling he did, the arbitrator committed a gross irregularity in that he failed to appreciate that there was a need for an application for condonation. Mr Makare further argued that the arbitrator committed an error of law, which of course on its own constitutes reviewable conduct. In this regard he referred me to the fairly recent Supreme Court of Appeal case of the *Pepcor Retirement Fund v Financial Services Board* 2003 (3) ALL SA 21 (SCA). In that case the Supreme Court of Appeal applied the well known *dictum* set out in *Hira v Booysen* 1992 (4) SA 69 (A) 93B-C.

Mr Makare further argued that that made the award reviewable, also on a test of unreasonableness as set out in the now well known case of *Sidumo v Rustenburg Platinum Mines* (2007) (21) *ILJ* 2405 (CC).

It appears evident to me that the employee's union was properly informed of the outcome of the appeal hearing in circumstances where he was represented by his union, and that also is common cause. It was grossly unreasonable of the arbitrator not to take that fact into account. I am satisfied that that finding was so unreasonable that it is not one that a reasonable arbitrator could reach.

Mr Makare agreed with me that, should I find that the award is reviewable, this is a matter that should properly be referred back to the Bargaining Council for another arbitrator to decide afresh.

With regard to costs, I take into account that the employee is an individual. He has had to incur his own legal costs in order to defend an award that was made in his favour, albeit erroneously. In law and fairness, I do not deem it proper to saddle him with a further costs order.

In those circumstances, I make the following order:

1. The condonation ruling of the third respondent dated 11 April 2007 under case number PSSS868-06/07 is reviewed and set aside;

The matter is referred back to the second respondent, the Safety and Security Sectoral Bargaining Council, for a hearing *de novo* before a different arbitrator;

2. There is no order as to costs.

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