REPUBLIC OF SOUTH AFRICA

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THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 514/2014

In the matter between:

Deanne GORDON	Applicant
and	
JP MORGAN EQUITIES SA (PTY) LTD	First Respondent
V SMITH N.O.	Second Respondent
CCMA	Third Respondent

Heard: 17 March 2016

Delivered: 31 March 2016

Summary: Condonation – review – rule 7A – record and supplementary affidavit delivered late – commissioner falling asleep and preventing applicant from concluding cross-examination – good prospects of success on review – condonation granted.

JUDGMENT

STEENKAMP J

Introduction

[1] The applicant, Deanne Gordon, was dismissed by the first respondent, JP Morgan Securities, while she was on "gardening leave" and shortly before she was due to leave its employ. She referred an unfair dismissal dispute to the CCMA (the third respondent). Commissioner Vicky Smith (the second respondent) dismissed her claim and upheld the dismissal as being fair.

[2] The employee applied to have the arbitration award reviewed and set aside in terms of s 145 of the LRA.[1] She delivered the record of the arbitration proceedings and her supplementary affidavit – contemplated by rule 7A(8) – late. She applies for condonation. The company opposes it. Her main grounds of review are that the commissioner fell asleep during the proceedings and prevented the employee's legal representative from completing his cross-examination.

Background facts

[3] Ms Gordon was employed as an SA Equity Strategist. She was the head of the Equity Research Team and she was an executive director. She resigned and was given "gardening leave" for three months from July to September 2013. The company alleges that she sent a number of emails containing confidential information to her husband shortly before she resigned. A disciplinary inquiry was held and she was dismissed on 20 September 2013, ten days before the expiry of her gardening leave.

[4] The arbitration took place over four days on 11 and 12 February, 13 March and 22 May 2014. The employee was represented by her attorney of record, Mr Imraan Haffegee of Haffegee Roskam Savage. The company was represented by Mr Itayi Gwaunza of its attorneys of record, Edward Nathan Sonnenbergs (ens). [In these proceedings, the condonation application was argued by Messrs Lourens Ackermann and Stuart Harrison respectively].

[1] Labour Relations Act 66 of 1995.

[5] The commissioner upheld the dismissal. The employee timeously applied to have it reviewed; but she filed the record and her supplementary affidavit late.

The record

[6] The record was delivered on 16 February 2015. On the applicant's calculation, it is 26 days out of time; on that of the first respondent, either 29 or 83 days.

[7] The employee delivered her review application on 16 July 2014. The CCMA delivered the record (or part of it) to the Registrar on 21 July.

[8] The CCMA delivered a notice in terms of rule 7A(3) – i.e. that it had delivered the record to the Registrar – on 21 July; and the Registrar informed the applicant on 23 July in terms of rule 7A(5). In terms of rule 7A(6) read with clause 11.2 of the Practice Manual of this Court, the applicant had to deliver the transcript of the arbitration and the documents used at arbitration – i.e. the arbitration record – within 60 (court) days, i.e. by 16 October 2014, failing which the review application would be deemed to have been withdrawn.

[9] The employee's attorney discovered that the record was incomplete, missing about 85 pages of documents used by the employee and three lever arch files provided by the company at the arbitration. He made inquiries from the CCMA and wrote to it on 27 August 2014. In response, the CCMA delivered a second notice in terms of rule 7A(3) on 3 September 2014, together with the three missing lever arch files. However, it omitted the documents supplied by the employee as they "could not be located".

[10] In the interim, the applicant's attorney had the arbitration proceedings transcribed at a cost of R20 000, 00. It was ready for collection on 17 September 2014.

[11] On 7 October 2014 the CCMA delivered a third notice in terms of rule 7A(3) on 7 October 2014 with the remaining documents that it had now located.

[12] The Registrar issued another notice in terms of rule 7A(5) on 8 October 2015. The applicant argues that the 60 day period runs from this date, expiring on 6 January 2015. The company says it should be calculated from 23 July 2014 when the first notice was issued. The employee eventually delivered the complete record on 16 February 2015.

The supplementary affidavit

[13] The applicant delivered her notice and supplementary affidavit in terms of rule 7A(8) on 24 February 2015, a week after delivering the record.

Extent of delay

[14] The employee says she filed the record 26 days late; the employer says it was either 29 or 83 days late.

[15] I agree with Mr *Ackermann* that the moment from which to calculate the running of the 60 day period envisaged in the practice manual is, on the facts of this case, 7 October and not 23 July 2015. To hold that the CCMA had delivered "the record" in July when it was incomplete, would be to elevate form over function. The employee could only deliver the complete record once she had received it from the CCMA, i.e. after 7 October 2015; and she could only apply her mind to it in order to deliver her supplementary affidavit in terms of rule 7A(8) after she had had an opportunity to consider the full record, i.e. after 7 October.

[16] If this is considered to be the relevant period of delay – i.e. between 26 and 29 days – it is not excessive.

Reasons for delay

[17] The main reason for the delay is that the CCMA delivered the record in three batches over a period of three months.

[18] The further reason is that the company imposed a "confidentiality regime" on about 500 pages that it considered confidential information. The applicant's attorney, Mr Haffegee, outsourced the copying the arbitration documents to a printing company; but, because of the confidentiality regime, he had to be present when those documents were copied. That

was time-consuming, especially since he practices in Cape Town and Johannesburg.

[19] The piecemeal filing of the record by the CCMA also necessitated time-consuming checking and rechecking of the record for duplications and omissions.

[20] The applicant's attorneys, Haffegee Roskam Savage, also closed down from 16 December 2015 to 9 January 2016. Whilst this is not a good reason for the delay in itself, as the *dies* in this Court continue to run during the time when, as a judge of this Court has put it, the country goes into a "collective slumber", it would be obtuse to ignore it altogether.

[21] The extent of the delay is not excessive and the explanation, although not entirely satisfactory, is arguable. These factors have to be weighed up together with the prospects of success on review.

Prospects of success

[22] In my view, the applicant has at least arguable prospects of success on the two main grounds she raises on review.

Arbitrator fell asleep

[23] The employee alleges that the arbitrator fell asleep during the arbitration proceedings. Her attorney, Mr Haffegee – who represented her at the arbitration – says in his affidavit:

> ""[T]wo of the review grounds are that the Commissioner fell asleep and that I was not allowed to complete my cross-examination of the company's main witness".

[24] In response, the company's attorney, Mr Gwaunza, says:

> "Saved to deny the merits of the two review grounds, the contents hereof are admitted".

[25] Despite the company's subsequent argument to the contrary, the admission by Mr Gwaunza seems obvious on a simple reading of his statement. He denies that the employee's ground of review has any merit;

but he admits "the contents" of the averment, i.e. that the Commissioner fell asleep.

[26] If that is so, the applicant has good prospects of success on review. In this regard Mr *Ackermann* referred to *Value Logistics (Personnel Services) (Pty) Ltd v Letsoalo*[2] where the court held:

> "It goes without saying that a party in compulsory statutory arbitration proceedings can expect, at minimum, for an arbitrator to be alert and awake during the proceedings. An allegation under oath that an arbitrator was sleeping during the proceedings is extremely serious, as it indicates misconduct of a fundamental nature by an arbitrator and one would expect that it would prompt a response under oath from the arbitrator and an investigation and response by the bargaining council. None was forthcoming from either the arbitrator or the council. In the absence of any such response, I accept the allegations. This finding alone renders the entire award liable to be set aside on review."

[27] It must be said, though, that Mr Gwaunza – later on in his answering affidavit – denies that it is common cause that the Commissioner fell asleep. He says:

> "At best for the applicant, even if the second respondent fell asleep, which isn't common cause, it was for a short period of time, she could replay the audio recording, she had the benefit of extensive closing submissions by the parties and it is not contended that for the remainder of the arbitration, pre and post the recusal application, the second respondent fell asleep, which makes up the bulk, by far, of the proceedings."

[28] Unfortunately the commissioner did not go on oath to give her version of events in this application. (From the transcript of Mr Haffegee's application for recusal in the arbitration it appears that she said: "I was listening. My eyes were closed.")

[2] [2014] 10 BLLR 1018 (LC) para [17]. In refusing leave to appeal, the Court said: "Third, the finding that the arbitrator was not fully awake throughout the inquiry is attacked. I remain of the view that the arbitrator should have responded to this serious allegation against him, and that his failure to do so is supportive of the finding that there is substance to the matter." See [2014] ZALCJHB 400 (14 October 2014).

Cross-examination not concluded

[29] The second main ground of review is that the commissioner prevented Mr Haffegee from completing his cross-examination of the company's main witness, Mr Kern.

[30] This arises from an odd set of circumstances. Mr Haffegee had started cross-examining Mr Kern on 12 February 2014. The arbitration was postponed to 13 March. On that day, neither Mr Kern nor Mr Gwaunza was initially available. The CCMA refused another postponement. Mr Gwaunza flew from Johannesburg to Cape Town. In the meantime, the commissioner instructed Mr Haffegee to commence with the applicant's case, despite his objection that he had not finished his cross-examination of Kern.

[31] If Mr Haffegee's cross-examination of Mr Kern was curtailed by the commissioner, the applicant may well have been deprived of a fair hearing, leading me to conclude that she has good prospects of success on review. For example, in *Lippert v CCMA*[3] Rabkin-Naicker J pointed out that the commissioner having interrupted the employee's cross-examination of a witness deprived him of a fair trial of the issues.

[32] A similar point was made in *Ngwathe Local Municipality v SALGBC*:[4]

> "By disallowing the employer's witness to complete his evidence in chief and also disallowing cross- and re-examination, the arbitrator infringed on the employer's right to natural justice and specifically the employer's right to have its case fully and fairly determined. In the words of the LAC, the process that the arbitrator employed did not give the employer 'a full opportunity to have their say in respect of the dispute'.
>
> The right of a party to give and adduce evidence is regarded as a fundamental right to a fair trial. This right cannot be dispensed with lightly. It is true that this right is not absolute but it can only be departed from in exceptional circumstances."

[3] [2014] ZALCCT 42 para [16].

[4] [2015] ZALCJHB 55 paras [19] – [20] (footnote omitted).

Conclusion

[33] On a conspectus of all these interrelated factors, I am satisfied that the interests of justice require that the review application be heard on the merits.

[34] With regard to costs, I take into account that the applicant's prospects of success on review weighed heavily in my decision to exercise my discretion in favour of granting condonation. Should the applicant be vindicated, she should be entitled to her costs on review and in this application. The converse applies if the company is successful on review. Fairness dictates that the costs of this application be costs in the cause of the review application.

Order

[35] I therefore make the following order:

35.1 Condonation is granted for the late filing of the record and the applicant's supplementary affidavit.

35.2 The costs of this application are to be costs in the cause of the review application.

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Anton J Steenkamp
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	Lourens W Ackermann Instructed by Haffegee Roskam Savage.
FIRST RESPONDENT:	Stuart Harrison of Edward Nathan Sonnenbergs.