

**IN THE LABOUR COURT OF SOUTH AFRICA**

**HELD AT BRAAMFONTEIN**

**CASE NO JR 350/09**

In the matter between:

**RAMOGOPEDI HANS BERENDS**

**APPLICANT**

and

**SOUTH AFRICAN POLICE SERVICE**

**1<sup>ST</sup> RESPONDENT**

**COMMISSIONER JAMES MOTSHEKGA**

**2<sup>ND</sup> RESPONDENT**

**THE SAFETY AND SECURITY SECTORAL  
BARGAINING COUNCIL**

**3<sup>RD</sup> RESPONDENT**

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**JUDGMENT**

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**VAN NIEKERK J**

[1] This is an application to review and set aside a ruling made by the second respondent, who refused to condone the late referral of an unfair dismissal despite to the third respondent, the bargaining council.

[2] The applicant was dismissed on 12 November 2007 after having been found guilty in a disciplinary hearing on charges of corruption and extortion. It was alleged that the applicant and two of his colleagues (who are not parties to these proceedings) had extorted money from a foreign national in circumstances where she had been threatened with arrest. For reasons that are not apparent

from the papers, the appeal process commenced only in 2008. The decision of the appeal authority upholding the applicant's dismissal was telefaxed to the applicant's attorney of record on 27 October 2008. The applicant states that he became aware of the notice on 28 November 2008.

[3] On 4 December 2008 the applicant referred a dispute to the bargaining council. In an affidavit filed in support of an application for condonation for the late referral of the dispute, the applicant, the applicant stated the following under 'Reasons for lateness' in the pro forma affidavit completed by him:

*"I am in deep grieve: stress: My son past away on 25 -07-2008 after he was run over by a m/t while he riding his bycycle. (2) On the 24-Oct 2008 I received news that my brother Michael Berends were also run over by a Truck in Cape Town on 15<sup>th</sup> Oct 2008. I went to Cape Town to support him emotionally and to be there for him. He lost his one leg and is still in Tygerberg Hospital. I returned to JHB and recieved the dismissal report from my attorney on 28-11-2008. My attorney did not know that he should send a dispute letter to SSSBC and Dir De Kock. (sic)"*

[4] Under the heading "Prospects of success, the applicant recorded the following:

*"My dismissal is unfair. It is based on a criminal case fabricated by our seniors Snr Supt Cole and Supt Goosen.  
The complainant never attended the hearing and INsp Berends investigated this and found that on the 14 June 2004 she was not even in the country.  
The presiding officer who is a friend of Supt Goosen and Snr Supt Cole failed to recuse himself as requested by the member.  
The security guard is not a active as a security. He lied. Nico Smit and Supt Goosen lied about dropping Jackson Mokgolo off (sic)."*

[5] In his ruling, the commissioner set out the applicable test for good cause, recording that it was incumbent on him to take into account the degree of lateness, the reasons for the lateness, the applicants prospects of success and the balance of convenience, including any prejudice to the other party, and that what was required was an objective conspectus of all the facts, and that none of the factors was individually decisive. In regard to the degree of lateness, the commissioner observed that the referral had been made 8 days late, which he considered to be 'relatively minimal' In regard to the reason for lateness, the commissioner rules that he was not satisfied that the applicant had provided a plausible reason and explanation for the late referral. The applicant had not stated that he was unaware of the prescribed 30-day period, nor had he explained when he returned to Johannesburg after his visit to Cape Town on 15 October 2008. In regard to the averment that his attorney was unaware of the requirement to address a dispute letter to the bargaining council, no confirmatory affidavit deposed to by the attorney had been submitted. In regard to the prospects of success, the commissioner records that the applicant's case, in essence, was that his dismissal was based on a criminal case fabricated by his seniors. The commissioner concludes, "After considering the Applicant's submission(s) and the documents contained in the Council's file, my view is that Prima facie, the Applicant has – on his own uncontested version- poor prospects of success". After further considering the issue of prejudice and referring to a number of authorities, the commissioner refused to condone the late referral.

[6] In these proceedings, the applicant claims that the commissioner committed a reviewable irregularity in coming to the decision that he did. In his application for review, the applicant has sought to make out a case that was made before the commissioner. He has annexed to his application a number of documents that postdate the application for condonation, and which appear to have been acquired for the purposes of this application. These documents were obviously not before the commissioner when he made his ruling. In his notice to

the effect that he would abide by the decision of the court in this application, the commissioner notes that he made the condonation ruling only on the basis of the documents submitted by the applicant. Documents that do not appear to have been placed before the commissioner include medical records relating to the condition of the applicant's brother (these are date stamped 16 February 2009), as well as an affidavit signed by one Vela Mack Chivoze on 13 November 2007, in which he stated that in his capacity as a control immigration officer at the Department of Home Affairs, he has access to the population register and the movement control system. He states, under oath, that he was requested by the South Africa Police Services "to establish the legality of Zhou Li she is Taiwan citizen and Permanent Resident in South Africa (sic)". He states further "Ms Zhou Li she depart on 2004/01/20 and she wanted to come back in country 2004/07/09 and she was not given permission to come in the country she entry the country on the 2004/08/04." The commissioner of oaths who attested to the affidavit is none other than the applicant. In these proceedings, the applicant relies on this to proclaim his innocence of the charges against him, and to submit that his prospects of success in his unfair dismissal claim are good. When questioned about the affidavit at the hearing of this application, the applicant cheerfully admitted to having been the member of the South African Police Services who is reflected as having requested the deponent to ascertain Zhou Li's movements, that he did so for personal purposes, that he attested to the affidavit and that he saw no conflict of interest in his actions. That aside, I fail to appreciate on what basis the deponent was able to depose to an affidavit regarding the whereabouts of a "Zhou Li" with no reference at least to a passport number or some other means of identification, particularly in circumstances where the foreign national from whom the applicant was accused of extorting money is described in the papers as "Li Zhou Jasmine".

[7] Be that as it may, since this is an application in which the reasonableness of the commissioner's decision is to be assessed, that decision must be evaluated by having regard only to the material before him, and in respect of

which his ruling was made. These included the referral form, the application for condonation and the supporting affidavit, and the record of the decision of the appeal authority. To the extent that the applicant in these proceedings has sought to make out a case that was not made to the commissioner, this court is not empowered to have regard to the material now proffered by the applicant.

[8] Turning now to the award under review, the commissioner can hardly be faulted for regarding a delay of 8 days as not material. In regard to the explanation for that delay, there was nothing before the commissioner to verify the averments made in the applicant's affidavit. In relation to the reason for the delay, the commissioner cannot be faulted for noting that the outcome of the appeal hearing (the dismissal letter) had been sent to the applicant's attorney, but that there was no explanation from the applicant (other than the averment that he was in Cape Town) or from his attorney as to events after 27 October 2007. In regard to prospects of success, the papers before the commissioner included the referral of the dispute, in which the applicant claimed no more than that the evidence given at the hearing by the employer's witnesses was fabricated, and that the presiding officer had "*ultered tapes, so that evidence be weak of the employees on the transcripts* (sic)." The finding of the appeal authority, also before the commissioner, traverses some 19 pages. It records the grounds for appeal raised by the applicant, and deals in some detail with each of them, by reference to the record of the proceedings, and concludes that the first respondent's witnesses had established that the applicant (and his two co-accused) had wanted to arrest a Li Zhou, demanded and received money from her, and were subsequently identified in a photo parade, and that the penalty of dismissal was appropriate in the circumstances. The appeal authority noted that in contrast, the grounds of appeal submitted by the applicant were technical in nature (the admissibility of certain evidence was challenged) and on the merits, amounted to no more a bare denial. Having regard to the findings of the appeal authority, read as a whole, the commissioner's view, (i.e. that on the applicant's

own version, his prospects of success were poor) is sustainable by the material before him and is not unreasonable.

[9] In so far as the applicant has clearly considered the nature of these proceedings to constitute an appeal, it should be recalled that in a review application, the issue is not whether the commissioner's decision was right or wrong, or whether this court would have come to a different conclusion on the same papers. The test is now well established, and permits this court to interfere with the commissioner's decision if and only if it is a decision to which no reasonable decision-maker *could* come. On the papers before him, the commissioner came to a conclusion that some would no doubt regard as harsh, but in my view, it is not a decision that is so unreasonable that it falls outside of a band of decisions to which reasonable decision-makers could come.

[10] For these reasons, the application must fail.

I make the following order:

1. The application is dismissed.

**ANDRE VAN NIEKERK**  
**JUDGE OF THE LABOUR COURT**

Date of application: 03 June 2010

Date of judgment: 22 June 2010