REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case No: JR 859/2013

In the matter between:

MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	**Applicant**
And	
THE PSA obo MAHLANGU	**First Respondent**
ADV. Z SIBEKO	**Second Respondent**
GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL	**Third Respondent**

Heard: **05 July 2016**

Delivered: **14 September 2016**

JUDGMENT

BERKOWITZ, AJ

Introduction

[1] This is an application in which the applicant seeks to review and set aside an arbitration award made by the 2nd respondent (the arbitrator) acting under the auspices of the 3rd respondent; as well as for the condonation for the late filing of the review application.

[2] The 1st respondent (the employee) opposed the relief sought by the applicant, and in turn sought for the arbitration award to be made an Order of Court in terms of section 158 (1)(c) of the Labour Relations Act 66 of 1995, which relief the applicant opposed.

[3] The review application, the condonation for the late filing of the review application, and the application in terms of section 158 (1)(c) were dealt with simultaneously.

Condonation

[4] The application was not brought within the six-week period prescribed in s145 of the Act. I must therefore, first consider applicants' application for condonation for their non-compliance with the six-week time-limit imposed by s 145 of the Act.

[5] The following material facts emerge from the affidavits filed in support of, and in opposition to, the application for condonation, as well as the s158(1)(c) application:

i) the arbitration award was received by the applicant on 31 January 2013;

ii) the applicant's regional office directed a memo on 5 February 2013 to its national office to obtain the necessary authorisation to proceed with the review application, which authorisation was only received on 25 March 2013;

iii) the review application was filed on 30 April 2013 i.e some six weeks out of time;

iv) the lengthy delay of 17 months in filing the record was as a result of the attorney previously handling this matter having left the employ of the applicant, and the new attorney encountering various difficulties in furthering the review application, although the record of proceedings had been transcribed on 8 July 2013 after having been made available to the applicant on 29 May 2013;

v) the first respondent filed an answering affidavit on 13 February 2015, after the review application was served on first respondent for a second time by the applicant on 31 October 2014, after the first respondent indicated that they were unable to trace the review application that had initially been served on them on 28 April 2013;

vi) The first respondent took issue with the delay occasioned by the lack of communication between the regional and national offices of the applicant, and that the explanation was insufficient and lacking in particularity;

vii) no submissions were made by the first respondent in regard to the delay in filing the record.

[6] The approach which the court is required to adopt in condonation applications has been set out in the often-quoted judgement of *National*

Union of Mineworkers v Council for Mineral Technology [1999] 3 BLLR 209 (LAC), where it was held that:

'The approach is that the court has a discretion, to be exercised judicially upon a consideration of all facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefore (sic), the prospects of success and the importance of the case. These facts are interrelated; they are not individually decisive. What is needed is an objective conspectus of all the facts. A slight delay and a good explanation may help to compensate for prospects of success which are not strong. The importance of the issue and strong prospects of success may tend to compensate for a long delay. There is a further principle which is applied and that is that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused.'

[7] There is, *in casu*, an additional consideration, and that is that of strict scrutiny in condonation applications in cases of individual dismissals.

[8] In *Queenstown Fuel Distributors CC v Labuschagne NO & others* (2000) 21 ILJ 166 (LAC); [2000] 1 BLLR 45 (LAC) at paras 24 and 25 Conradie JA stated as follows:

'[24] ... In principle, therefore, it is possible to condone non-compliance with the time-limit [in s 145(1)(a)]. It follows, however, from what I have said above, that condonation in the case of disputes over individual dismissals will not readily be granted. The excuse for non-compliance would have to be compelling, the case for attacking a defect in the proceedings would have to be cogent and the defect would have to be of a kind which would result in a miscarriage of justice if it were allowed to stand.

[25] By adopting a policy of strict scrutiny for condonation applications in individual dismissal cases I think that the Labour Court would give effect to the intention of the legislature to swiftly resolve individual dismissal disputes by means of a

restricted procedure, and to the desirable goal of making a successful contender, after the lapse of six weeks, feel secure in his award.

[9] It is generally accepted that if an applicant does not provide an acceptable explanation for its delay, the court need not consider the other factors and refuse condonation, but this is not a rule that is cast in stone. It applies where the other factors do not in themselves raise issues that could necessitate the court's interference to grant the indulgence sought.

[10] In this regard Waglay DJP (as he then was) had this to say in *SA Post Office Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2011) 32 ILJ 2442 (LAC) :

> [38] As the commissioner arrived at his decision without considering all of the evidence before him, he arrived at a conclusion that was not justifiable in relation to the evidence presented at the arbitration. In terms of the Sidumo & another v Rustenburg Platinum Mines Ltd & others, this was clearly a decision reached by the commissioner that a reasonable decision maker could not have reached.

[11] And further at 40 and 41:

> [40] This then leads to the crucial question of whether this is a kind of matter where the interest of justice demands that this court intervenes and grants the condonation sought.
>
> [41] The interest of justice is not a vague and catch-all phrase that may be latched onto in order to justify one's own feeling of the inequity that may result if there is no interference from the court. This factor must be utilized only where the absence of interference by the court would offend one's sense of justice.

[12] The delay in this matter is substantial and while the delay is explained, the explanation is by no means convincing. Consideration must still be given to

the other factors in a condonation application before the court can exercise its discretion to grant or refuse the indulgence.

[13] As regards prospects of success, I am of the view, for the reasons set hereunder, that the applicant has exceptional prospects of success on the merits.

Background facts

[14] The employee was employed as a clerk of the Small Claims Court at the Mdutjana Magistrates Office, and was charged with 6 allegations of misconduct.

[15] Charges 1; 2 3 & 4 pertained to the employee receiving R 300-00 on 4 different occasions from 4 different members of the public in (August 2010 , February 2011, March 2011 & May 2011 respectively) whilst acting in his capacity as a clerk of the Small Claims Court, and from which payments only R150-00 was paid by the employee to the Sheriff of the Court for the purposes of serving summons on behalf of each of the 4 members of the public, whilst the employee had failed to account for the remaining R150-00 received in each instance.

[16] The employee pleaded guilty to charges 1; 2 and 4, and was found not guilty on charge 3.

[17] Charge 5 was different from the other 4 charges in that it concerned itself with section 38 of the Small Claims Court Act 61 of 1984, and the procedure that where a debtor and a creditor have reached an agreement to settle their dispute, payment would be made at the offices of the Small Claims Court and the Clerk of the Court will only act as a witness to the payment. The clerk is not supposed to handle money from either party. The employee, contrary to what the said Act provides, is alleged to have

received R1700-00 from a debtor and only paid the money over to the creditor when a summons was received by the debtor in respect of the R 1700-00.

[18] Significantly, [for reasons which will become clearer later in this judgment], the arbitrator in dealing with the charges in his arbitration award recorded that

"The charges related to failure by the applicant to account for monies which the applicant received from the members of the public and which the applicant gave to the sheriff of the court".

[19] The fifth charge was styled as follows in the disciplinary proceedings :

"you are charged with misconduct in that around May 2011 at or near Mdutjana magistrate office, while employed as clerk of the small court, you receive R1700-00 from Lechele Jermina which was about judgement granted in favour of Ms Sbongile Makitia while you know or ought to have known that it is unlawful to do so and as such violating regulations governing conduct of clerks of Small Claims Court" (sic).

[20] The 6th charge was withdrawn at the outset of the disciplinary hearing.

[21] The employee contended that he was unaware that he was not permitted to receive money from members of the public. The applicant on the other hand contended that the employee was well aware that the Clerk of the Small Claims Court was not permitted to receive money from members of the public.

[22] Following a disciplinary hearing, the employee was dismissed and he referred an unfair dismissal dispute to the 3rd respondent.

[23] The employee was represented by a member of PSA (Public servants Association of South Africa) at the arbitration, and at the commencement of

the arbitration, both parties confirmed that the issue in dispute had been narrowed down and that the dispute was not about the merits, but only about the appropriateness of the sanction, as the sanction of dismissal was regarded as being too harsh.

[24] The arbitrator confirmed that the sanction of dismissal was too harsh, and found

> "The evidence of the respondent that the offences that the applicant was charged with serious is correct. However there is no evidence by the respondent to show that as a result this it can no longer trust the applicant. In the absence of such evidence I agree with the applicant that the sanction of dismissal was harsh under the circumstances. This does not mean that the actions of the applicant are condoned and should not go unpunished. The appropriate sanction would have been one that would have made the applicant o repeat what he did like suspension without pay." (sic)

[25] The arbitrator's award was that the employee be re-instated to the position he held prior to his dismissal, but that the applicant should however not pay the employee for the period between his dismissal and his reinstatement.

[26] The applicant submitted there were a number of grounds which rendered the award reviewable. The first ground was that there was no rational connection between the evidence presented and the award made in other words, the decision of the arbitrator was not one that could be reached by a reasonable decision-maker based on all the available material. *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae) (2013) 34 ILJ 2795 (SCA)*

[27] A Mr Masuku (Masuku), who chaired the employee's disciplinary hearing, gave evidence on behalf of the applicant at the arbitration.

[28] In regard to charge 5 he was asked what his reasons were for finding the employee guilty on charge 5. His response was that his reasons were contained in his outcome report from the disciplinary hearing which had been admitted as evidence at the arbitration and marked as bundle A1. He testified that he found the employee guilty of this charge based on the fact that the evidence before him at the disciplinary hearing was that the employee was aware that he was not supposed to receive money from members of the public as Mr Phahlane (the court manager) and Mr Kanyane (the chief administration clerk) both confirmed that they had made the employee so aware, and that Kanyane had also warned the employee that his immediate predecessor in the position of clerk of the Small Claims Court (a Mr Msiza) had been removed from this position because he had received money from members of the public, and Msiza was subsequently dismissed for such misconduct.

[29] From the arbitration award it is clear that the arbitrator failed to record or consider the content of charge 5 and the evidence presented in relation thereto, and it needs to be determined whether this failure by the arbitrator constituted an irregularity which had the effect of rendering an unreasonable outcome.

[30] However, before determining what effect, if any, this failure on the part of the arbitrator had on the outcome, given the nature of Masuku's evidence, it first needs to be determined whether the arbitrator *could have* considered such evidence, which Mr van der Merwe on behalf of the employee contended that the arbitrator could not.

[31] In this regard, two issues needed to be considered :

i) was the arbitrator prevented from considering evidence outside of the so-called "terms of reference" of the arbitration, more precisely,

could evidence relied upon in proving the employee's misconduct at the disciplinary hearing be considered by the arbitrator when the challenge at the arbitration was confined only to the appropriateness of the sanction; and

ii) was the arbitrator prevented from considering such evidence by virtue of the fact that Masuku's evidence was hearsay evidence ?

Could the arbitrator consider evidence outside of the parties 'terms of reference'?

[32] It was contended on behalf of the employee that because the issue for determination was only the appropriateness of sanction, that the findings made in relation to the guilt of the employee could not have been taken into consideration.

[33] In *Hulamin Ltd v Metal & Engineering Industries Bargaining Council & others* (2014) 35 ILJ 3417 (LC), this Court found that where the issue to be decided at arbitration was only about the severity of the sanction and not about guilt, that the arbitrator was not thereby prevented from looking at the nature and ambit of the misconduct itself in order to assess the fairness of the sanction.

[34] In *casu*, and in keeping with the *Hulamin* decision supra, the arbitrator would not have been permitted to revisit the question of whether or not the employee was guilty of the misconduct, because the issue was only about the fairness of the sanction, but in determining the appropriateness of the sanction, the arbitrator, in my view, not only could, but in fact had to determine (not the employee's guilt) but the employee's awareness i.e. whether he in fact knew that he was not permitted to receive money from members of the public; whether despite such awareness he nevertheless still proceeded to receive money, and if having knowingly received money

when he was not permitted to, whether this meant he could no longer be trusted by the applicant.

Could the arbitrator consider hearsay evidence?

[35] In *Tshongweni v Ekurhuleni Metropolitan Municipality* (2010) 31 ILJ 3027 (LC) the Court held at [13] that:

> For example, in Naraindath v CCMA & others (2000) 21 ILJ 1151 (LC) Wallis AJ (as he then was) held that an arbitrating commissioner was entitled to have regard to the record of an internal disciplinary hearing and to the evidence of a witness who had been cross-examined at the hearing - the fact that the evidence was hearsay did not render it inadmissible. This approach was recently approved by the Labour Appeal Court in the Foschini Group v Maidi & others (2010) 31 ILJ 1787 (LAC).

[36] In *casu*, the employee did not challenge the findings of Masuku at the arbitration; he did not object to the document which contained Masuku's reasons for finding the employee guilty on charge five being introduced into evidence at the arbitration; Masuku was not cross-examined at the arbitration in regard to his findings on charge five ; there was no objection at the arbitration that the evidence of Masuku was hearsay evidence and that it should not be admitted; and the witnesses upon whose evidence Masuku had relied had been cross-examined during the disciplinary hearing.

Did the arbitrator reach a decision that a reasonable decision-maker could not reach based on all the available material?

[37] Having established that the arbitrator was entitled to, and that he could and should have considered the hearsay evidence of Masuku, I now turn to deal with whether the failure by the arbitrator to have done so meant that the arbitrator reached a decision that a reasonable decision-maker could not have reached.

[38] Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable*. Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)* (2013) 34 ILJ 2795 (SCA). .

[39] In terms of item 3(4) of the Code of Good Practice: Dismissal it is 'generally not appropriate to dismiss an employee for a first offence, except if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable'.

[40] Charges 1; 2 and 4 were different from charge 5. Whilst the arbitrator in summarising the evidence of Masuku in his arbitration award referred to the reasons for Masuku finding the employee guilty on charge five, not only did the arbitrator not deal with charge five, (which concerned the Small Claims Court Act, and had nothing to do with the sheriff of the court or with not accounting, which the arbitrator recorded were what the charges against the employee related to), but as a result thereof he failed to deal with Masuku's finding that the employee was aware he could not receive money from members of the public, and therefore also failed to take such awareness into consideration in determining the appropriateness of the sanction.

[41] To me, it is self-evident that an employee who is aware that statutory legislation regulates that he is not entitled to receive money whilst employed in the position that he is, but yet nevertheless knowingly does so, acts dishonestly and is someone that cannot be trusted.

[42] By failing to consider and appreciate that the employee was somebody that could not be trusted, in circumstances where the arbitrator on the contrary found that there was no evidence to show that the applicant could no longer

trust the employee, meant that the arbitrator reached a decision that a reasonable decision-maker could not have reached.

[43] The misconduct was serious and of such a gravity that it rendered a continued employment relationship intolerable. A reasonable decision-maker would have concluded that dismissal was the appropriate sanction.

[44] As the prospects of success on the first ground of review are unassailable, the remaining grounds of review need not be dealt with.

[45] Turning to the consideration of the prejudice that the parties will suffer if condonation is granted or refused, the applicant has been ordered to re-instate the employee. If that order were allowed to stand, the applicant would have to re-instate an employee into a position in public office in circumstances where the employee cannot be trusted. The prejudice to the employee on the other hand is that he has an award in his favour and has waited for years for its implementation.

[46] Having now considered the necessary factors to determine whether or not condonation should be granted, the crucial question is whether this is a kind of matter where the interest of justice demands that this court intervenes and grants the condonation sought.

[47] In the matter of *National Education Health & Allied Workers Union on behalf of Mofokeng & others v Charlotte Theron Children's Home* (2004) 25 ILJ 2195 (LAC), the LAC held that in an exceptional case, even where the delay may be substantial, the explanation for it less than adequate and the prospects of success interminable, sometimes it is in the interest of justice to grant condonation.

[48] Taking into account that the employee received money from vulnerable members of the public whilst he was employed in a position of public office, and moreover whilst operating in the Department of Justice and Constitutional Development as the Clerk of the Small Claims Court; that this type of behaviour was prohibited by statutory legislation; where the employee's predecessor was dismissed for the very same reason of receiving money from members of the public, and that to place an employee who was guilty of dishonesty back in a position where honesty and integrity were paramount, would be outrageous and would amount to condoning his misconduct. In so far as the employee occupied the position of an interpreter and not that of Clerk of the Small Claims Court at the time of his dismissal changes nothing – a similar, if not an even higher level of trust and confidence is required of a Court interpreter.

[49] To me, this is a case where it would offend against one's sense of justice if the Court were not to interfere.

[50] Taking into account the period of the delay, the fairly reasonable though not completely full and satisfactory explanation, the respective prejudice to both parties and the merits of the review application, I am of the view that the late filing of the application should be and is hereby condoned.

[51] With regard to costs, whilst the applicant has been successful, and that costs would ordinarily follow the result, due to the less than satisfactory manner in which the applicant pursued the review application, I do not consider a costs order to be appropriate.

[52] In the result, I make the following order:

1. The late filing of the review application is condoned.

2. The arbitration award made under case number GPBC 2802/ 2012 is reviewed and set aside and substituted with a finding that the dismissal of the employee, Mr Mahlangu was fair.
3. The application in terms of S158(1) (c) under case Number J 2397/13 is dismissed.
4. There is no order as to costs.

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BERKOWITZ AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: Advocate S Malatji

Instructed by: The State Attorney

For the Respondent: Advocate F van der Merwe

Instructed by: Otto Krause Inc