THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR2704/2012

SACCAWU obo MABITLE, J **Applicant**

and

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION **First Respondent**

MOTLATSI, P **Second Respondent**

EDGARS GROUP LIMITED **Third Respondent**

Heard: 13 July 2016

Delivered: 18 October 2016

Summary: Application for condonation for late filing of record - good cause not shown and application dismissed - Review of arbitration award that dismissal for misconduct for not serving a customer was substantively fair - award not so unreasonable as to be reviewable on the *Sidumo* test.

JUDGMENT

BAILEY, AJ

Introduction

[1] This is an application to review and set aside an arbitration award of the Second Respondent made on 25 September 2012 in which he found that the dismissal of Gabriel Mabitle (the employee) was substantively fair.

[2] There is also an application to condone the Applicant's late filing of the record of the review application.

[3] The Third Respondent opposes both applications.

Background

[4] Given the length of time that has elapsed since the employee's dismissal it is appropriate to set out the background to this case.

[5] The employee was employed by the Third Respondent at the Sandton City Edgars Store as a Specialist Retail Associate on 6 March 2000. He was dismissed for misconduct on 24 August 2007.

[6] The employee was a shop steward. He, along with other employees in the jewellery department, was involved in a dispute with the Third Respondent concerning the performance of duties which allegedly fell outside of their job description. The employees sought extra pay for performing those duties. The Third Respondent notified the employees in May 2007 that they would not receive extra pay for performing those duties.

[7] The Third Respondent received a number of complaints from customers concerning the employees' refusal to perform various duties.

[8] The employee was charged with the failure to demonstrate acceptable

conduct in the performance of his duties in that:

a. The employee unlawfully and unreasonably withheld his labour during the month of May 2007 with respect to the provision of customer services in the watch and jewellery department, which resulted in collective customer complaints;

b. On 24 May 2007 the employee failed to follow the implemented work guidelines in relation to the watch department, by failing to assist a customer in the replacing of a watch strap and battery of a watch resulting in a lack of customer service, total disregard to the PIPP values, potentially losing the customer and also bringing the name of the Company into disrepute; and

c. On 24 May 2007 the employee refused to obey a lawful and reasonable instruction from the departmental manager, Elvis Seoma (Seoma), relating to assisting a customer in replacing a watch strap and battery to a watch resulting in an act of gross insubordination against a superior and a breach of the trust relationship between the employer and employee.

[9] The employee referred the matter to the First Respondent for arbitration. The Third Respondent took the point that the First Respondent did not have jurisdiction to arbitrate the dispute because the employee was charged with an offence involving an element of industrial action. The Second Respondent found that the Labour Court by virtue of its inherent jurisdiction would have the competence to deal with the matter and referred the matter to the Labour Court. The Labour Court remitted the matter back to the First Respondent, which resulted in the arbitration eventually being heard in 2012 despite it having been referred to the First Respondent in 2007.

[10] The employee challenged the substantive fairness of his dismissal before the First Respondent and the Second Respondent found the dismissal to have been substantively fair.

<u>The Applicant's condonation application</u>

[11] The Applicant seeks an order to condone the late filing of the record of the review application.

[12] The principles of condonation were established in *Melane v Santam Insurance Company Limited*[1] where the court held that:

> 'In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the 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 therefor, the prospects of success and the importance of the case. Ordinarily these facts are inter-related; they are not individually decisive, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate prospects which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the Respondent's interests in finality must not be overlooked.'

[13] The review application was instituted on 2 November 2012. The Applicant only filed its Rule 7A(8) notice on 21 January 2014. The Applicant's degree of lateness was therefore approximately 13 months. A brief summary of the Applicant's timeline setting out its explanation for the delay concerning the explanation for the delay reveals that:

a. The Applicant instituted the review application on 2 November 2012;

b. The First Respondent made the record available on 9 November 2012;

[1] 1962 (4) SA 531 (A) At 532C-E

c. The Applicant collected the record from the Labour Court in July 2013;

d. The Applicant arranged for the record to be transcribed in July 2013;

e. The Applicant collected the transcription in October 2013;

f. On 4 October 2013 the Applicant noticed that the record which had been transcribed was incorrect and communicated that fact to the First Respondent, who then made the correct record available to the Applicant on 11 October 2013;

g. The Applicant collected the record and arranged transcription, which was completed on 2 December 2013; and

h. The Rule 7A(8) notice was filed on 21 January 2014.

[14] The Applicant bears the onus to show good cause for the delay. The Applicant did not explain the seven-month delay between the First Respondent making the record available and the Applicant collecting it from the Labour Court. Nor did the Applicant explain the delay of approximately three months between taking the record to be transcribed and collecting it. The Applicant's explanation for the delay of over three months between the First Respondent making the correct record available and the filing of the Rule 7A(8) notice was because it took just under two months for the transcription to be completed and the need for the Applicant to consult with the employee after receiving the transcribed record.

[15] The Applicant's primary explanation for the delay was due to the First Respondent making the incorrect record available. However, once the First Respondent was notified that it had made the incorrect record available, it took a period of seven days for the First Respondent to make the correct record available. I agree with the Third Respondent that this in itself illustrates that the mistake made by the First Respondent is not a sufficient explanation for a delay of over a year and the Applicant has not explained

the delay of 10 months out of the total of 13 months by which the filing was delayed.

[16] In argument, the Applicant's representative submitted that he was removed from the matter because he and the employee did not understand each other. The case was subsequently moved back to him and he was unable to explain what transpired in his absence. In my view, this does not amount to an explanation at all.

[17] Clearly, the delay was excessive and the reasons the Applicant has proffered for the delay are totally inadequate, unsatisfactory and simply do not pass muster.

[18] It is established in our law that it is incumbent upon an applicant seeking condonation to demonstrate that a miscarriage of justice will occur if an applicant's case is not heard[2]. The Applicant did not mention in either its heads of argument or its explanation for the late filing of the record the prejudice it would suffer if its case was not heard. By contrast, the Third Respondent submitted that it will suffer a greater degree of prejudice than the employee because the Third Respondent would suffer greater financial risk because of the dilatory manner in which the Applicant had dealt with this review application. The Third Respondent had also been led to believe that the employee had found alternative employment.

[19] I am therefore satisfied that the Applicant has simply not made out a case concerning the prejudice the employee would suffer should the application for condonation not be granted. Nor has the Applicant made out a case concerning the importance of the matter.

[20] Moreover, the Applicant's prospects of success in the review application are, as will be seen later in this judgement, somewhat poor.

The merits of the review application

[2] See *National Union of Metalworkers of SA obo Thilivali v Fry Metals* (2015) 36 ILJ 232 (LC)

[21] The Applicant has raised several grounds of review. The Applicant contends that the Second Respondent committed a gross irregularity in failing to properly consider the material evidence before him, specifically concerning:

a. The Second Respondent's finding that there was evidence that the employee and his colleagues stopped performing certain duties when they were notified that their request for additional remuneration had been declined when contrasted with the Second Respondent's finding that such notification took place on 23 May 2007 and there was no evidence that the employee withdrew his labour before then;

b. The material contradictions in Seoma's evidence whether or not the customer required services relating to a watch strap and battery or only a watch strap;

c. The Second Respondent's finding that the employee and his colleagues had not brought it to the Third Respondent's attention that the tools in their department were not working;

d. The Second Respondent's finding that Seoma gave the employee an instruction to assist the customer on 24 May 2007; and

e. The Second Respondent's finding that the employee failed to assist the customer on 24 May 2007.

[22] It is well established that the test to apply when considering whether to interfere with a commissioner's arbitration award is that of a reasonable decision-maker as set out in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[3]. The test was clarified in *Heroldt v Nedbank*[4] in the following terms:

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[3] (2007) 28 ILJ 2405 (CC) at para 110

[4] (2013) 11 BLLR 1074 (SCA) at para 25

> 'Material errors of fact, as well as the weight and relevance to be attached to the particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of consequence if their effect is to render the outcome unreasonable.'

[23] I now consider each of the grounds of review in turn.

The findings about withdrawing labour

[24] The Second Respondent found that the Third Respondent notified the employees on 23 May 2007 that their request for additional remuneration had been declined. He also found that the customer complaints the Third Respondent presented were dated prior to 23 May 2007 and could not therefore have been about the employee.

[25] I am satisfied that these findings were in relation to the first charge on which the Second Respondent found that there was no basis to charge the employee. I am also satisfied that there is nothing in the arbitration award to suggest that the Second Respondent's findings concerning the first charge in any way contributed to the Second Respondent's findings concerning charges 2 and 3 and that the dismissal of the employee was substantively fair. Consequently, the review cannot succeed on this ground.

Seoma's alleged contradictions

[26] The Applicant's representative made much in argument that Seoma had contradicted himself whether or not the customer had required services concerning a watch strap and battery or only a watch strap. Despite Seoma having not stated in his evidence in chief that the customer also required assistance with a battery, I am satisfied that Seoma's evidence in the face of strenuous cross-examination and taken as a whole reveals that the customer required assistance with both a watch strap and battery and not only with a watch strap. It cannot therefore be said that there was a contradiction in Seoma's evidence. Moreover, it became common cause between the parties that at the very least the customer required assistance with a watch strap and the Second Respondent was correct in my view to

conclude that the critical question was whether or not the employee assisted the customer. I am not therefore persuaded that the Second Respondent committed an irregularity when he considered Seoma's evidence. Consequently, the review cannot succeed on this ground.

Whether broken tools were brought to the Third Respondent's attention

[27] I am also not persuaded that the Second Respondent committed an irregularity in finding that the employee and his fellow employees had not informed the Third Respondent that the tools were not working. Ultimately, as the Third Respondent pointed out, not only had the employee reduced the watch strap before calling Seoma out of the graduation ceremony but there is insufficient evidence on the record on which I can rely to support the contention that the tools were in fact broken. Consequently, the review cannot succeed on this ground.

Whether there was an instruction and whether the employee assisted the customer

[28] I agree with the Third Respondent's representative that the grounds of review concerning the Second Respondent's finding that Seoma gave the employee an instruction to assist the customer on 24 May 2007 and the employee failed to assist the customer on that day flow out of two mutually destructive versions. The employee's explanation for his failure to assist the customer was due to the tools having been broken but he also contends that that he assisted the customer. As the Third Respondent's representative pointed out in argument, the Applicant simultaneously maintains that the employee assisted the customer and that he was unable to do so because the tools were broken. Both of these versions cannot be true. Moreover, the employee's version that he called Seoma to the scene to obtain authorisation to send the watch to the suppliers appears to have come across as an afterthought because that part of the employee's version was never put to Seoma while under strenuous cross-examination.

[29] Clearly, the Second Respondent accorded less weight to the employee's version and reasonably concluded that the employee received an

instruction and failed to assist the customer. Consequently, the review cannot succeed on this ground.

[30] Ultimately I am satisfied that the Second Respondent considered the evidence before him and drew a conclusion that another arbitrator could have drawn. The award is therefore not reviewable.

[31] I do not deem it appropriate to order any costs.

Order

[32] I make the following order:

a. The application for condonation is dismissed;

b. The application for review is dismissed; and

c. There is no order as to costs.

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Bailey, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant: Mr P Ngoato (SACCAWU official)

For the Third Respondent: Ms V Reddy of Norton Rose Fulbright South Africa Inc