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THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no JR 217/15

In the matter between:

SAMWU obo MTHIMKHULU & ANOTHER	Applicant
and	
COMMISSION FOR THE CONCILIATION, MEDIATION AND ARBITRATION	First Respondent
ERIC MYHILL *N.O.*	Second Respondent
ADT SECURITY (PTY) LTD	Third Respondent

Heard: 2 June 2016

Delivered: 21 July 2016

JUDGMENT

VAN NIEKERK J

[1] This is an application to condone the late filing of an application to review and set aside a ruling made by the second respondent (the arbitrator). In his ruling, the arbitrator held that the CCMA had no jurisdiction to determine the unfair dismissal dispute referred to it by the applicants.

[2] The basis for the ruling is recorded in the body of the award. The arbitrator notes that the individual applicants were dismissed, amongst other reasons, for participating in an unprotected strike. The applicant conceded that the strike was unprotected, but denied that the CCMA did not have jurisdiction. The arbitrator referred to section 191 (5)(b) (iii) of the LRA, which requires a referring party, where the reason for dismissal is participation in a strike does not comply with the provisions of chapter IV, to refer the matter to this court for adjudication.

[3] The review application was filed some eight weeks late. The applicants received the award on 27 October 2014, and therefore ought to have delivered the application on or before 8 December 2014. The explanation proffered for the review concerns intra-union disputes at the relevant time, and a challenge to the suspension and/or expulsion of certain union officials, including a Mr Makhura, who had been assisting the applicants. That matter was the subject of a judgment by the High Court in early December 2014. The deponent to the founding affidavit avers that in these circumstances, it was 'difficult' for Mr Makhura to arrange for attorneys to file the review application. This was duly accomplished and on 17 December 2014, a consultation was arranged with the applicants' attorneys of record. The deponent further states that it was 'around late in December 2014' that the attorneys managed to secure and read all of the available documents used during the arbitration hearing in order to draft a founding affidavit for the present application. The deponent then says that the

attorneys 'agreed to quickly launch the application without any further delay, despite them not having transcript of the record of arbitration proceedings and their offices were closed for December holidays and opened on 19 January 2015.'

[4] What the explanation for the delay overlooks is the period after the attorneys' offices reopened and the date of the filing of this application, on 11 February 2015. At the time the attorneys had been given instructions and the available bundle of documents it would have been fairly simple matter to file the present application. Indeed, the individual applicants are both experienced shop stewards, and could have done so themselves. What concerns me is that the delay in the period from mid-January to 11 February 2015 is left entirely unexplained. All concerned with the matter must by mid-January have realised that the application was more than a month late. It was incumbent on them to have acted with due diligence and to have ensured that the application was filed as soon as possible. Their failure to explain what amounts to a further delay of some four weeks tips the scales against them, and renders the explanation proffered by the applicants unsatisfactory.

[5] Strictly speaking, in the absence of a satisfactory explanation for a not insignificant delay, it is not necessary for this court to concern itself with the applicants' prospects of success. Even if I were to afford the applicants the benefit of the doubt in this respect, the grounds for review assumed and recorded in the founding affidavit are misguided. The grounds for review are predicated on a reasonableness threshold, i.e. is the decision reached by the second respondent one that a reasonable decision maker could not reach? It is well-established that when a jurisdictional ruling is challenged by way of review, the test is one of correctness, not reasonableness. The review application is therefore entirely misconceived and in the circumstances, I fail to appreciate on what basis the applicants have any prospects of success in the review application. Even if I were to afford the founding affidavit a generous reading and

import a correctness test, I fail to appreciate how it can be said that the arbitrator's decision was incorrect. On the papers before him, it was not in dispute that the first of the charges brought against the individual applicants was inciting others to take part in an illegal strike or 'participating in such strike'. While the other charges related to acts of misconduct a dismissal for which would ordinarily be justiciable by this court, the applicants ought properly to have referred the dispute to this court given that at least one of the primary reasons for dismissal fell within this court's jurisdiction. They might then have sought this court's intervention by way of a referral by the director of the CCMA in terms of s 191 (6), or agreement that the court acts in terms of s 158 (2).

For the above reasons, I make the following order:

1. Condonation for the late filing of the review application is refused
2. The review application is dismissed.

ANDRÉ VAN NIEKERK
JUDGE OF THE LABOUR COURT