



Not Reportable

**THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG**

Case No: JR 1471/15

In the matter between:

SIMON MABE

Applicant

and

**COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION**

First Respondent

N HLABA (N.O.)

Second Respondent

ADT SECURITY (PTY) LTD

Third Respondent

Heard: 16 March 2017

Delivered: 29 March 2017

Summary: (Review – condonation ruling – referral excessively late – explanation for inability to refer dismissal dispute insufficient – prospects of success poor – evidence of conduct of suspected bias insufficient to support reasonable apprehension of bias)

JUDGMENT

LAGRANGE J

Introduction

- [1] This is an application to review a condonation ruling by the second respondent, who refused to condone the late referral of the applicant's dismissal dispute. The applicant had been dismissed for incapacity on 28 February 2015.
- [2] The referral was made nearly 3 months late. He referred his dismissal dispute on 20 June 2015, whereas it should have been referred on 30 March 2015. In other words, it took the applicant nearly 4 months to refer the unfair dismissal dispute from the date of his dismissal. A referral which takes four times longer than it should have is exceptionally late by any standard.
- [3] The arbitrator found that the delay was not justified because the applicant did not bring documentation to substantiate his illness. Apart from the failure to explain the delay, the arbitrator found that he did not have reasonable prospects of his success if his case proceeded to arbitration because the applicant's own doctor had said that he was not fit to work and the employer's document doctor had confirmed this. Moreover, the applicant said that it was difficult for him to walk sometimes.

Grounds of review

- [4] The applicant's grounds of review may be summarised as follows:
 - 4.1 The applicant complains about an alleged private discussion with the third respondent's representatives in the context of a situation where the respondent had not opposed the condonation application.
 - 4.2 The Commissioner was also grossly unreasonable in holding that he hadn't provided a reasonable explanation for the delay when it was evident that it was undisputed that he was ill and unable to walk.
 - 4.3 The employer also did not follow a fair process in determining whether his incapacity necessitated his dismissal or whether his duties could have been adapted.

- [5] There is an obvious contradiction in the applicant's claim that he was too ill to attend to his case but that his employer should have placed him on light duty instead of terminating his services. The third respondent pointed out in its answering affidavit that the applicant had in fact applied for disability benefits which had been granted on the basis that he was totally and permanently disabled. It cannot be said that the Commissioner was wholly unreasonable in taking this into account in reflecting on his prospects of success.
- [6] The Commissioner had noted that the applicant had failed to provide any supporting documents to explain his inability on account of illness to refer his matter over a period of four months. Although he had claimed to have gone to a herbalist, the applicant had also not provided any certificate from his traditional healer in support of his claim. He also claimed that his medication made him sleepy. All of this points to the fact that he was receiving medical assistance of one kind or another and in the circumstances ought at least to have been able to get some documentary support to validate his claim that he was simply unable to take the steps necessary to challenge his dismissal. I note also that he claimed to have sought legal advice but had not been helped but gave no details of where he had sought such legal advice and when he had tried to obtain it, which might have been an important consideration in explaining the long delay. In cases of this nature, where the delay is so extensive, an applicant should give a more detailed explanation why during the time when they were obtaining medical attention and presumably visiting medical practitioners, it was simply not feasible for them to attend to the submission of referral forms either personally or with assistance.
- [7] The more serious allegation made by the applicant concerns the alleged private conversation the Commissioner's held with the third respondent's representative in his absence after the Commissioner said she would issue a ruling. The detail of this alleged discussion in the applicant's founding affidavit is extremely brief and lacking in detail. The third respondent's employee relations manager denies having any private conversation with the Commissioner, whether in the presence of the applicant or not, in any shape or form. The applicant did not file any

replying affidavit, so the evidentiary basis for finding in the applicant's favour on this point is simply insufficient. At the hearing of the review application, it emerged that the basis for the applicant's contention was simply that the third respondent's representatives had remained in the conciliation venue after the hearing was adjourned and not that he had any direct evidence of any further interaction between the arbitrator and those representatives. Strictly speaking, this was not part of the factual material set out in the applicant's review papers, but even if it was admitted as evidence it would not be sufficient grounds for concluding that the arbitrator had acted improperly. In the circumstances, I am not satisfied that the applicant has demonstrated on the evidence that the Commissioner was guilty of conduct that would reasonably create an apprehension of bias on her part.

- [8] In the circumstances, I am not satisfied that the applicant has laid out sufficient grounds for the court to set aside the condonation ruling.

Order

- [9] The review application is dismissed.
- [10] No order is made as to costs.

Lagrange J
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:

In person

THIRD RESPONDENT:

M Lennox instructed by Eversheds

LABOUR COURT