

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR1771/16

In the matter between:

POPCRU

First Applicant

SS NDLOVU

Second Applicant

and

JACKSON MUTHUKWANE, N.O

(cited in his capacity as Commissioner)

First Respondent

SAFETY AND SECURITY SECTORAL

BARGAINING COUNCIL

Second Respondent

SOUTH AFRICAN POLICE SERVICES

Third Respondent

Heard: 28 May 2019

Delivered: 13 September 2019

JUDGMENT

LALLIE, J

Introduction

- [1] This is an application to review and set aside an arbitration award of the first respondent (the arbitrator). The applicants delayed in bringing the application and filed an application to have the delay condoned. The third respondent opposed both the review and condonation applications.

Condonation application

- [2] The condonation application will be determined first as its outcome will determine the necessity of considering the review application as, should the applicants fail to show good cause, condonation cannot be granted. Absent condonation the review application will not be properly before Court. It is trite that in determining whether the applicants have shown good cause to have the delay condoned the court has to consider the extent of the lateness, the explanation for the delay, prospects of success in the review application, prejudice each party stands to suffer should condonation be granted or refused as well as the interest of justice. All the factors should be considered collectively and balanced against each other¹.
- [3] The extent of the delay is three weeks and one day. Although the third respondent argued that it is excessive I disagree. The explanation proffered for the delay is that the second application lost his mobile telephone after the arbitration and it became impossible for the first applicant to communicate the arbitration award to him. The review process could only be initiated in August 2016 after the second applicant had physically gone to the first applicant's offices to enquire about the outcome of the arbitration. After the visit the first applicant had to follow its internal procedures for filing review applications. The process added to the delay as relevant decision-makers were not available. The decision to enlist the services of a law firm to file the review application was taken and the application was filed on 8 September 2016.

¹ See: *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A); *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others* 2000 (2) SA 837 (CC).

- [4] The third respondent opposed the application for condonation on the grounds that the applicants' had not shown good cause to have it granted. It attacked the applicant's failure to give specific dates including the date on which the second applicant visited the first applicant's offices to enquire about the outcome of the arbitration. It also attacked the applicants' attorneys for filing the application 10 days after receiving instructions and the lack of detail in respect of the delay caused by the first applicant's internal procedures.
- [5] While I agree with the third respondent that the applicants' had to provide a reasonable explanation for the entire delay, I have to take into account that a reasonable explanation is not required to be flawless. The applicants could have filed the review application earlier, however, the lack of detail in their explanation of the delay did not render it unreasonable. The third respondent did not disclose the prejudice it stands to suffer should condonation be granted while the gravity of the prejudice of losing the right to be heard should condonation be denied is undeniable. The applicants made allegations which, if proved, would render their review application successful. They, therefore, have good prospects. A consideration of the relevant factors supports the applicants' version that they have shown good cause. Their application for condonation should succeed.
- [6] The factual background of this matter is that the second applicant was employed by the third respondent as a constable. He shot and killed Mr Seretsane with his service firearm on 29 June 2013. On the same date he pointed that same firearm at Mrs Motsamai. The third respondent instituted disciplinary action against him in which he faced a charge of murder and unlawfully pointing his service firearm. The second applicant was dismissed and the first applicant challenged the fairness of the dismissal by referring a dispute to the second respondent (the bargaining council). Having arbitrated the dispute, the arbitrator found the sanction of dismissal appropriate and the second applicant's dismissal substantively fair. He, however, found the dismissal procedurally unfair and awarded him compensation equivalent to his two months' salary.

Grounds of review

- [7] The applicants based their review application on errors made by the arbitrator in the conduct of the arbitration. The third respondent correctly submitted that the applicants failed to make out a case for review in their founding affidavit. As the applicants' case is based on the arbitrator's alleged errors the applicable test for review is the one laid down in *Herholdt v Nedbank*² where it was held that irregularities committed by arbitrators in the conduct of arbitrations will render the awards reviewable only when they result in unreasonable awards. An award becomes unreasonable when the arbitrator misconceives the dispute before him or her by conducting the wrong enquiry incorrectly or reaching an unreasonable decision.
- [8] The applicant bears the onus of establishing valid grounds for review. Rule 7A (2)(c) requires the applicant to set out in the founding affidavit factual and legal grounds upon which the applicant relies to have the award reviewed and set aside. The applicants did not disclose the facts on which their grounds for review are based. They submitted that the arbitration award is wrong in fact and in law and was irregularly arrived at. The applicants further submitted that the arbitrator disregarded and misinterpreted evidence tendered at arbitration. He failed to comply with the provisions of the Labour Relations Act³ (LRA) pertaining to conducting arbitrations properly and fairly. He made factual findings which are inconsistent with evidence. He exceeded his powers and failed to apply his mind to the relevant facts and law.
- [9] In the absence of factual averments on which defects the applicants seek to base their review application on, the submissions do not constitute valid grounds for review. The reason is that the applicants did not establish the manner in which the arbitrator acted irregularly. The third respondent established that the arbitrator dealt with the issue before him, applied his mind, considered the evidence led and issued a reasonable award. The applicant did not establish the existence of valid grounds for review. They

² (2013) 34 ILJ 2795 (SCA).

³ Act 66 of 1995, as amended.

therefore presented no grounds for this court to interfere with the arbitration award. Their application cannot succeed.

[10] The third respondent sought a costs order against the applicants on the grounds that they brought a review application devoid of merit. The applicant denied. I have considered the submission of costs and the provisions of section 162 of the LRA. Although the applicants' case was not strong, I am not convinced that the applicants' case was till born as the third respondent submitted.

[11] In the premise, the following order is made:

Order

1. The late filing of the review application is condoned.
2. The application for review is dismissed.
3. No order is made as to costs.

Z. Lallie

Judge of the Labour Court of South Africa

Appearances:

For the applicant: Tlou Makgamatha of MM Mitti Inc. Attorneys

For the Respondent: Advocate J. Ramaepadi

Instructed by: State Attorney