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(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.

02/5/19
DATE SIGNATURE

THE JUDICIARY · REPUBLIC OF SOUTH AFRICA ·

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: J1048/19

In the matter between:

THE STATE INFORMATION TECHNOLOGY AGENCY SOC LTD (SITA) **Applicant**

and

THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION (CCMA) **First Respondent**

COMMISSIONER M NAIDOO **Second Respondent**

K A SETUMU **Third Respondent**

Heard: **30 April 2019**

Delivered: **2 May 2019**

Summary: **An application to review a ruling made during arbitration proceedings. Is it just and equitable to review the ruling before the fairness or otherwise of the dismissal has been finally determined. Parties at arbitration are entitled to a fair hearing. Where a defect is so patent that**

it would lead to an unfair hearing – an irregularity – it would be just and equitable for the Labour Court to correct the defect before the final determination of the issue in dispute. The Labour Court is there to play a supervisory role – using its review powers. Where a court intervenes in incomplete proceedings urgency is inherent given the imperatives in section 1 of the LRA. Held: (1) The ruling made by the commissioner is reviewed and set aside (2) It is replaced with an order that the applicant is not to provide the third respondent with a copy of the forensic report (3) There is no order as to costs.

JUDGMENT

MOSHOANA, J

Introduction

[1] This is an application brought in terms of section 158(1) (g) of the Labour Relations Act[1] (LRA). The application is brought on an urgent basis. The application is opposed by the third respondent.

Background facts

[2] The third respondent, Mr Setumu (Setumu) was employed as a Lead Consultant: Application Development. Setumu faced allegations of misconduct. On or about 28 March 2018, he was suspended pending an investigation into allegations of what the applicant considered to be serious misconduct. Pursuant to a disciplinary hearing, Setumu was found guilty and dismissed on 4 December 2018.

[3] Aggrieved by his dismissal, Setumu referred a dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). The dispute was enrolled for con-arb on 11 January 2019. Before the commencement of the process, Setumu raised a preliminary point seeking an order that the applicant be compelled to disclose the

[1] Act 66 of 1995 as amended.

Procurement Investigation Report dated 27 August 2018 (the so-called forensic report). The applicant made submissions to oppose the granting of such an order. After hearing those submissions, the second respondent made a ruling contained in a one paged document to the following effect:

> "1 The respondent must by 14:00 today provide the applicant with a copy of the forensic investigation report drafted by Bowmans Attorneys."

[4] The second respondent made a further ruling which is no longer a subject matter of this review application[2]. Following the rulings made, the matter was postponed to 1 April 2019 and then 3 April 2019 for the continuation of the arbitration. In the interim, the applicant failed to comply with the rulings as it was unhappy with them. On 1 April 2019, the second respondent, for reasons that are not apparent anywhere, recused himself from the matter. The matter was then allocated to another commissioner. On 2 April 2019, the allocated commissioner issued a further ruling to the following effect:

> 1. Both parties was (sic) present on even date.
>
> 2. The Respondents have failed to comply with the Ruling by Commissioner F Naidoo dated 11 January 2019 "Directing the Respondent to furnish the Applicant with a copy of a forensic report (see annexure A".
>
> 3. The Respondent wishes to approach Labour Court on an urgent basis in terms section 158(1) of the LRA.
>
> The Respondent is granted 30 days to approach Labour Court, failing which CCMA is directed to set the matter down for arbitration, before me, and notify parties accordingly."

[5] Aggrieved by the impugned ruling, the applicant launched the present application on 26 April 2019 to be heard on 30 April 2019. The application was opposed by Setumu.

Evaluation

[2] By agreement between the parties an order was made reviewing and setting aside such a ruling.

[6] Setumu raised a number of points in opposing the review application. The first point related to urgency. It became apparent during the submissions by Mr Tema, appearing for Setumu, that he accepted that the application should be treated as one of urgency. Therefore, it is unnecessary to consider the issue any further. However, if Mr Tema did not accept it, I do exercise my discretion to hear this application as one of urgency. In my view, in matters where the Labour Court ought to intervene and exercise its supervisory functions, urgency is inherent given the imperatives in section 1 of the LRA[3]. The allocated CCMA Commissioner directed the applicant in the presence of Setumu to approach this court within 30 days from 2 April 2019. This ruling is not a subject of review and thus it stands and is binding on the parties. That being the case, it is inappropriate for Setumu to oppose the hearing of this matter on an urgent basis.

Was condonation required?

[7] Setumu contended that the impugned decision was made on 11 January 2019, therefore the six weeks period has since expired and condonation is required before this Court can exercise its jurisdiction. Under section 158(1) (g) this Court is entitled to entertain what may be termed a common law review. The section does not set out a time period within which to bring the review application. Accordingly, what applies in this instance is the delay rule. The position was clarified in *OUTA v SANRAL*[4] thus:

> "At common law application of the undue delay rule require a two stage enquiry. First, whether there was unreasonable delay and, second, if so, whether the delay should in all the circumstances be condoned..."

[3] In *Steenkamp v Edcon Limited* [2019] ZACC 17, the Constitutional Court said the following: "*[52] Where procedural irregularities arise, the process provided for in section 189A (13) of the LRA allows for the urgent intervention of the Labour Court to correct such an irregularities as and when they arise so that the integrity of the consultation process can be forced back on track. These views apply mutatis mutandis to reviews within the contemplation of section 158(1B) of the LRA. Judicial management or oversight is contemplated in section 158(1B).*"

[4] [2013] 4 All SA 639 (SCA).

[8] Further, the position was recently clarified by the Constitutional Court in *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd*[5] as follows:

> "[48] Legality review, on the other hand has no similar fixed period. This court in *Khumalo* endorsed the test enunciated by the Supreme Court of Appeal in *Gqwetha* for assessing undue delay in bringing a legality review application...Firstly, it must be determined whether the delay is unreasonable. This is a factual enquiry upon which value judgment is made, having regard to the circumstances of the matter. Secondly if the delay is unreasonable, the question becomes whether the Court's discretion should nevertheless be exercised to overlook the delay to entertain the application.
>
> [51] ...and legality review for the purposes of delay is that when assessing the delay under the principle of legality no explicit condonation application is required. A court can simply consider the delay, and then apply the two step *Khumalo* test to ascertain whether the delay is undue an, if so, whether it should be overlooked.

[9] In the light of the above, it is not necessary for a condonation application to be launched by the applicant in the present matter.

Was there a delay and was it undue or unreasonable?

[10] Applying the two step approach, I must first determine whether there was a delay or not. It is common cause that the impugned ruling was made on 11 January 2019.

[11] In *Weder v MEC for Health Western Cape*[6] Van Niekerk J made the following suggestion:

> "What then is a "reasonable time" in the context of s 158 of the LRA? It is tempting simply to assume that it should be six weeks, by analogy to the time period provided for in s 145. At the most, it cannot be more than the 180 days provided for in PAJA; in fact, given that PAJA does not apply, and that the process is closely aligned to that set out in s 145 and

[5] Case no: CCT 91/17 [2019] ZACC 15 delivered on 16 April 2019.
[6] [2013] 1 BLLR 94 (LC)

rule 7A, I would suggest that anything more than six weeks should at least trigger an application for condonation."

[12] The Labour Appeal Court (LAC) had an occasion to consider the suggestion by Van Niekerk J in *G4S Secure Solutions (SA) (Pty) Ltd v G Malinga*[7] and said the following, which seem to reverberate the sentiments currently echoed in *Buffalo*. It said:

> [11] It is not permissible for a court to fix a certain time which it regards as a reasonable time; nor is it permissible to insist that an application for condonation should be made after a specific time. An application for condonation must be made when the delay is unreasonable and must be made at the earliest opportunity. The correct approach is that outlined by Brand JA in *Associated Institutions Pension Fund v Van Zyl*, followed in *Collet v CCMA* and others namely:
>
> "[46] ... It is a longstanding rule that courts have the power, as part of their inherent jurisdiction to regulate their own proceedings, to refuse a review application if the aggrieved party had been guilty of unreasonable delay in initiating the proceedings...
>
> [47] The scope and content of the rule has been the subject of investigation in two decisions of this Court. They were *Wolgroeiers* case and *Setsokosane*...As appears from these two cases and the numerous decisions in which they have been followed, application of the rule requires consideration of two questions:
>
> (a) Was there an unreasonable delay?
>
> (b) If so, should the delay in all the circumstances be condoned?
>
> [48] The reasonableness or unreasonableness of a delay is entirely dependent on the facts and circumstances of any particular case (see e.g. *Setsokosane* at 86G). The investigation into the reasonableness of the delay has nothing to do with the Court's discretion. It is an

[7] LAC JA68/2016 delivered on 05 September 2017.

> investigation into facts of the matter in order to determine whether, in all the circumstances of that case, the delay was reasonable. Though this question does imply value judgment it is not to be equated with the judicial discretion involved in the next question, if it arises, namely, whether a delay has been found to be unreasonable, should be condoned (see *Setsokosane* at 86E-F)."

[13] In my view, the LAC rejected the suggestion by Van Niekerk J to fix a period of six weeks and to insist on condonation. This present application was launched on 26 April 2019. On the facts of this case, the review application was launched fifteen weeks after the decision was taken. On the facts and the circumstances of this case a delay of fifteen weeks is in my view, applying a value judgment, reasonable. The parties knew that the next time when the arbitration was to sit was in April 2019. During that intervening period, Setumu did not act on the decision by insisting on compliance before the next arbitration date. During argument, Mr Kirsten, appearing for the applicant submitted that in the interim period, the parties were engaged in settlement discussions. This was disputed by Mr Tema. Nowhere in the papers is this mentioned by the deponent of the applicant. However, it is common cause that after the ruling was made, the applicant's attorney intimated that the ruling may not be complied with at the mentioned time and that a review application is being considered.

[14] If I am wrong to say the delay of fifteen weeks is not unreasonable in the circumstances of this particular case, then I gravitate to the next question. The second step is for this Court to exercise discretion on whether the delay ought to be overlooked. In this regard, the Court in *Buffalo* said the following:

> [53] ...There must however be a basis for a court to exercise its discretion to overlook the delay. That basis must be gleaned from the facts made available or objectively available factors.

> [54] The approach to overlooking a delay in a legality review is flexible...This entails a legal evaluation taking into account a number of factors. The first of these factors is potential prejudice to affected parties as well as possible consequences of setting aside the impugned decision.

[15] The available factors in this matter are that after the ruling, Setumu did not seek to take any steps in the interim to enforce the ruling. Further, Setumu accepted a ruling that the applicant should approach this Court within 30 days from 2 April 2019. Having accepted the ruling, there is thus no demonstrable prejudice to Setumu. The setting aside of the impugned decision bears no adverse consequences to Setumu. At the arbitration proceedings, Setumu only need to show that he was dismissed – a common cause fact – thus far. The onus to justify the dismissal lies with the applicant. In the circumstances, I exercise my discretion by overlooking this delay.

Is the impugned decision reviewable or not?

[16] Section 158(1B) prevents this Court from reviewing a decision made before final determination of the issue in dispute. However, if this Court forms an opinion that it is just and equitable to review a decision, it can do so. This Court has supervisory powers over the proceedings at the CCMA or Bargaining Councils. Of course determining what is just and equitable is a difficult horse to ride. In my view, section 138 (1) of the LRA somewhat guarantees parties at arbitration a fair hearing[8]. A commissioner who does not give parties a fair hearing commits a gross irregularity which would ultimately taint the award to be made. The effect of this ruling is that the applicant would be compelled to present evidence which is not required to advance its case.

[17] At arbitration proceedings parties present evidence in order to advance their respective cases. The evidence required is one that would address the issue in dispute. The ruling to compel the applicant to provide a copy of a report (documentary evidence), which would not advance Setumu's case is nothing but harassment of the applicant as a party to the

[8] In addition, section 33(1) of the Constitution guarantees everyone the right to administrative action that is lawful, reasonable and procedurally fair.

arbitration proceedings. Being harassed, the applicant did not enjoy a fair hearing. The applicant submitted that the report contains legally privileged information. It being a legally privileged document it should not be disclosed[9]. It is not disputed that such a submission was made before the commissioner made the impugned decision. The ruling is bereft of the reasons why such a valid legal submission was rejected. Although commissioners are not obliged to give detailed reasons, a commissioner must not leave a reviewing court guessing as to the reasons why a particular decision was made. This in itself is a reviewable irregularity. The only conclusion this Court can arrive at is that the decision was aimed at harassing the applicant and subject it to an unfair arbitration process. In my opinion, it is not just and equitable to allow this ruling to stand. Accordingly, this ruling stands to be reviewed and set aside.

[18] Another factor is that parties to the arbitration proceedings must only present relevant evidence in order to ensure a fair hearing. Nowhere in the impugned ruling does the commissioner deal with the issue of the relevance of the report for the determination of the issue in dispute – the alleged unfair dismissal. For this reason, too, this ruling cannot stand.

[19] During argument, Mr Tema submitted that the findings in the report exonerated Setumu of any wrongdoing. Therefore, the question is what would Setumu use the report for to advance his case at arbitration?

[20] In his evidence before me, Setumu alleges that the report would prove inconsistent application of the disciplinary process. He testifies that the applicant is afraid that its malice would be exposed once the report is produced. I do not understand this evidence. Firstly, Setumu has been exonerated. That being so, he is not to be compared with any of the fingered persons. How then does inconsistent application of the disciplinary process feature? In my view it does not feature at all.

[9] In common law jurisdictions, legal professional privilege protects all communications between a professional legal adviser and his or her clients from being disclosed without the permission of the client. The privilege is that of the client and not that of the lawyer. As to the four requirements to be shown see Thint (Pty) Ltd v NDPP and others; Zuma v NDP 2009 (1) SA 1 (CC) namely (a) legal practitioner having acted in a professional capacity; (b) client having consulted in confidence; (c) communication for the purposes of obtaining legal advice and (d) the communication must be privileged.

[21] He further testified that he has a constitutional right to documentation. There is no such right located in the Constitution. Section 35 (3) of the Constitution guarantees an accused person a right to a fair trial, which includes being provided with information. Setumu is not an accused person and does not have a constitutional right to documentation.

[22] For all the above reasons, I am of the opinion that it would be just and equitable to set aside the impugned decision.

[23] In the results, I make the following order:

Order

1. The matter is heard as one of urgency;
2. The ruling dated 11 January 2019, related to the disclosure of the forensic report, is hereby reviewed and set aside;
3. It is replaced with an order that the applicant is not compelled to provide a copy of the Procurement Investigation Report dated 27 August 2018;
4. There is no order as to costs.

GN Moshoana

Judge of the Labour Court of South Africa

Appearances

For the Applicant:	Adv P Kirsten.
Instructed by:	Bornman Brink Inc, Pretoria
For the Respondents:	Adv K A Tema.
Instructed by:	Nkosi Attorneys, Pretoria.