THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR 2226/2021

In the matter between:

LEHLOHONOLO SAMUEL REGINALD TSHABALALA Applicant

and

AIR LIQUIDE (PTY) LTD First Respondent

COMMISSIONER EVA NGOBENI *N.O.* Second Respondent

NATIONAL BARGAINING COUNCIL FOR THE CHEMICAL INDUSTRY Third Respondent

Heard: 08 November 2023

Delivered: 28 November 2023

(This judgment was handed down electronically by circulation to the parties' legal representatives, by email, publication on the Labour Court's website and released to SAFLI. The date on which the judgment is delivered is deemed to be 28 November 2023 .)

JUDGMENT

VAN NIEKERK, J

[1] The applicant seeks to review and set aside a ruling issued by the second respondent (the arbitrator) who on 22 August 2021, refused to condone the late referral of a dispute concerning what the applicant alleged to be an unfair dismissal.

[2] The material facts are contained in the award under review and need not be repeated here. It is sufficient for present purposes to record that the applicant was employed by the first respondent until 27 November 2020, when he signed an agreement recording the termination of his employment by mutual consent. The agreement also made provision for a payment of R 2 254 509.40 to be made by the first respondent to the applicant. The payment was made to the applicant, who accepted it unconditionally. The applicant later disputed the fairness of what he contended to be a dismissal, and referred the dispute to the third respondent, the bargaining council. It is not in dispute that the referral was made 198 days late. The applicant's explanation for the delay was, in essence, that he became aware after signing the agreement that his position had been re-advertised, and that the redundancy of his position had been the subject of a misrepresentation by the third respondent. The third respondent's position was that in the absence of a challenge to the validity of the agreement and a tender to return the money paid consequent on the agreement, the applicant remained bound by its terms. In any event, so the first respondent contended, the position advertised was with a different entity, and was not the position from which the applicant had been retrenched.

[3] The arbitrator (correctly) recalled the factors to be taken into account in determining whether condonation ought to be granted. The arbitrator came to the following conclusion:

> 19. The Applicant's submissions made on the extent of the delay, the reasons for the delay and prospects of success are interrelated, and the reason for which emanate from the apprehension that the mutual agreement reached with the Respondent was obtained through misrepresentation. The agreement signed thereto between the parties is termed 'retrenchment agreement'. However, it is apparent that

redundancy of the Applicant's position was not the only material element leading to the agreement. There is an indication that throughout consultation and negotiations, parties were in agreement that continued employment relationship is irretrievably broken down as outlined on clause 1.2.

20. Furthermore, the Applicant failed to account for the period of over 90 days on discovery that the Respondent had re-advertised his position. By the Applicant's own admission, termination of employment was by mutual agreement, save for the misrepresentation; therefor, the issue of section 189 (3) consultation does not arise. Consequently, the reasons given for the delay is not acceptable. There are no reasonable prospects of success on the matter.

[4] The test to be applied in these proceedings is well-established. The arbitrator was required to exercise a discretion, in a judicial manner, having regard to all of the relevant facts and circumstances. The threshold in the present application is one of reasonableness, and this court is entitled to interfere with the arbitrator's exercise of her discretion only if she committed some reviewable irregularity which has the consequence that her ruling falls outside of a band of decisions to which a reasonable decision-maker could come on the available evidence.

[5] I am not persuaded that the arbitrator's decision fails to meet the reasonableness threshold. The arbitrator appreciated the test to be applied, and considered each of the elements of the test. The period of delay was excessive. The arbitrator was particularly swayed by the fact that the applicant had failed to account for a period of delay in excess of 90 days, being the period between the date on which the applicant contends he became aware that his position had been re-advertised, and the date on which the dispute was referred. It is trite that in an application for condonation, the applicant is required to satisfactorily explain the full period of the delay. In *eThekwini Municipality v Ingonyama Trust* 2013 (5) BCLR 497 (CC), the Constitutional Court said the following:

> In a case where the delay is not a short one, the explanation given must not only be satisfactory but must also cover the entire period of the delay. Thus in

Van Wyk v Unitas Hospital and another (Open Democratic Advice Centre as Amicus Curiae), this Court said in this regard:

i. 'An applicant for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of the delay. And, what is more, the explanation given must be reasonable.'

[6] Further, the arbitrator correctly concluded that the issue of any compliance or otherwise with section 189 of the LRA was not relevant, since the dispute between the parties concerned the settlement agreement and the applicant's contention that he was induced to sign the agreement on the basis of a material misrepresentation made by the third respondent. In terms of the applicable authorities, a failure to proffer a satisfactory explanation for an unacceptable delay ought in itself to have resulted in the refusal of condonation. In *National Union of Mineworkers v Council for Mineral Technology* [1999] 3 BLLR 209 (LAC) the LAC said the following:

> … without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused.

[7] In the absence of a satisfactory explanation covering the full period of an excessive delay, the refusal to condone the late referral of the applicant's dispute is a reasonable outcome. . In summary: the arbitrator appreciated the nature of the enquiry that she was expected to conduct, she applied the correct legal test and took into account all relevant factors. The arbitrator committed no reviewable irregularity, and her conclusion is one that meets the reasonableness threshold. There is thus no basis on which to interfere with the arbitrator's ruling.

[8] In so far as the applicant raises as a ground for review the fact that his replying affidavit was not placed before the arbitrator despite it having been filed timeously, this is not in dispute. The arbitrator records that the ruling was made without the benefit of the applicant's replying affidavit; it would seem that the affidavit had not been placed in the file. The replying affidavit addresses the issue of jurisdiction (in particular, the jurisdiction of the CCMA

to determine the validity of a settlement agreement), the nature of the termination of the applicant's employment and the redundancy of his position. In regard to the first matter, the applicant contended that the bargaining council was not required to determine the validity of the retrenchment agreement, since his claim was one of unfair retrenchment. The applicant further denied that he was required under the doctrine of peremption to tender payment of what he had received in terms of the agreement. Further, the applicant adduced evidence in relation to the nature of the termination of his employment, and the basis on which he sought to challenge the retrenchment agreement. The content of the replying affidavit is devoted entirely to the issue of the applicant's prospects of success in his dispute regarding what he claimed was an unfair retrenchment. As I have indicated, the applicant's prospects of success in his claim of unfair retrenchment were not relevant – the main dispute before the arbitrator related to the existence of a dismissal. Any prospects of success fell to be determined in respect of that issue. Put another way, the content of the replying affidavit had no bearing on the issues that were dispositive of the application for condonation. The result would have been no different if the affidavit had been placed before the arbitrator prior to her making her ruling. The present application thus stands to be dismissed.

[9] The third respondent did not seek an order for costs, and none will be granted.

I make the following order:

1. The application is dismissed.

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André van Niekerk

Judge of the Labour Court of South Africa

Appearances:

For the applicant: N Moyo

Instructed by: Nkosana Moyo Attorneys

For the third respondent: L Frahm-Arp, Fasken