Sneller Verbatim/JduP

IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN CASE NO: JR421/01

2002.05.31

In the matter between

SHOPRITE CHECKERS Applicant

and

CCMA AND OTHERS Respondents

J U D G M E N T

NGCAMU, A.J: The applicant in this matter seeks to review and set aside the arbitration award made by the second respondent. The third and fourth respondents are opposing the review. The fourth respondent was dismissed by the applicant after she had been found guilty of misconduct. After the conciliation had failed, the dispute was arbitrated. The

commissioner made an order reinstating the fourth respondent. For the purposes of this judgment the fourth respondent will be referred to as "Nkosi".

The applicant filed an application for review within the six-week period provided in the Labour Relations Act. It however failed to file a rule 7A(8) notice. The applicant seeks to have the failure to file the notice condoned.

The rule 7A(8) notice is four months late. The explanation given is that the applicant was of the view that the notice had been filed and served on or about 10 October 2001, together with a transcript of the record. It was submitted that this was a *bona fide* error. The error was only noticed when the third and fourth respondents filed an application in terms of section 158(1)(c) of the Labour Relations Act, dated 3 January 2002. Steps were then taken to serve the rule 7A(8) notice.

The respondents have submitted that the application for condonation is defective in that the condonation application is filed simultaneously with an application of the matter to be condoned. The submission by the respondents is that the application was only filed after a point *in limine* had been raised.

The submission raised by the respondents has no merit.

There is no rule of law preventing the filing of an application for condonation after a point *in limine* had been raised. This point cannot stand. The applicant is entitled to apply for condonation as soon as it become clear that there is a need for such an application. This has to be done within a reasonable time. The period of delay in filing of the notice is not insignificant. The court, in considering the application for condonation, must take into account certain factors which have been recognised by this court. (See *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A); and *Gilbey Distillers & Vintners (Pty) Ltd v Shinga* (case number DA14/98 (1999) LAC).

The court has to look at:

1. the degree of lateness;
2. the explanation therefor;
3. the prospects of success;
4. the importance of the case; and
5. the prejudice to the opposing party.

It is common cause that the transcript record was filed and served. What remained was the filing of the rule 7A(8) notice. The applicant submits that it has prospects of success in the review application. This is denied by the respondents.

Having considered the contentions of both parties I am satisfied that the prospects of success are evenly balanced in respect of both parties. I have come to this conclusion based on the submissions made by both parties.

The fourth respondent was dismissed on account of dishonesty. The case is important for both parties. The applicant cannot keep an employee who cannot be trusted. On the other hand, the fourth respondent should not be unfairly dismissed. All the requirements for the review have been complied with. The review application is set down together with the application for condonation. The application in terms of section 158(1)(c) is also before court. In my view there will be no prejudice to the respondents.

The practitioners often omit to file rule 7A(8) notice. The notice is normally filed immediately or together with the filing of the transcript record. The purpose of the notice is to indicate that there is no change in the previous grounds of review set out in the founding affidavit. If the notice is not filed, the review application is defective. The purpose of the application for condonation is to correct the defect.

I accept the explanation given by the applicant in that the failure to file the notice was a *bona fide* error. The

application for condonation is accordingly granted.

Miss Nkosi was dismissed after she had been found guilty of fraudulently abusing the clock-in system, the effect of which was that she was paid while she was not at work, or absent from her work station without authorisation. The commissioner reinstated Miss Nkosi after the arbitration hearing.

The applicant has set out several grounds of review. The applicant has submitted that the commissioner unjustifiably found that the dismissal was procedurally unfair. The commissioner set out in the award the issue to be determined. He recorded that the issue to be determined was whether the reason for the dismissal was a fair reason. He further recorded that the procedure was not in dispute. The effect of this is that the commissioner was only limited to the question of substantive fairness of the dismissal. In his analysis of the evidence he pointed out that the "procedure was not in dispute". Notwithstanding this, the commissioner proceeded to deal with the procedural aspect of the dispute, and finds that:

"I believe that the procedure followed during the disciplinary hearing was defective in that witness (1) chaired the inquiry ... it is crystal clear that witness (1) testimony confirmed his involvement in this from the onset. He testified to have seen

the applicant return from the college. It is my opinion that the chairperson of the disciplinary hearing, and also as witness (1), in this matter was not neutral."

Witness "(1)" in the proceedings was Nieuwoudt.

On the point of procedural unfairness no evidence was led. The commission did not indicate to the parties that he was going to base his decision also on procedural unfairness. The result is that the parties were not given an opportunity to lead evidence or to address the commissioner on this point. The commissioner based his decision on a point in respect of which there was no evidence. The commissioner relied on evidence that had not been placed before him. The award can be set aside if the commissioner relied on evidence not placed before him. (See *Pep Stores (Pty) Ltd v Laka NO and Others* (1998) 9 BLLR 952 (LC).

The award can also be set aside if the commissioner makes a finding on the issues not before him, on the basis that he has exceeded his powers. The commissioner's findings that the disciplinary hearing was chaired by Nieuwoudt was unjustified in that the disciplinary hearing was chaired by Kleynhans. No evidence was led before the commissioner to justify the conclusion that Nieuwoudt chaired the disciplinary

hearing. This is a mistake by the commissioner, which led to the conclusion that the dismissal was procedurally unfair. If the mistake is so gross that it prevented the party from having the case, it amounts to a misconduct. (See *Abdull and Another v Cloete NO and Others* (1998) 3 BLLR 264 (LC); *Gold Fields Investments Ltd and Another v City Council of Johannesburg and Another* 1938 TPD 551).

Mr Kotze for the respondent did not address fully on the issue of procedural unfairness. He merely submitted that the commissioner admitted that the procedure was not in dispute.

After considering the matter, I am of the view that the commissioner committed a gross mistake in finding procedural unfairness on the basis that Nieuwoudt chaired the hearing when he did not. This mistake amounts to a misconduct on the part of the commissioner. The commissioner also committed an irregularity and exceeded his powers by making a finding on procedural unfairness when this was not an issue before him. This makes the award reviewable. It shows that the commissioner did not apply his mind properly and did not appreciate his duties. The award can be reviewed on this ground alone.

It was submitted by Miss Linston for the applicant that

the commissioner committed a gross irregularity in finding that Nkosi had authorisation for the manner in which she studied. Nkosi gave evidence that she was given authority by Muller. Nieuwoudt merely denied that the applicant was given authority. The applicant did not give evidence that indeed Muller did not give any authority. Muller, who was alleged to have given authority, never testified. Nkosi's evidence on this point stood unchallenged.

The applicant relies on improbabilities in Nkosi's version in that she did not dispute that she told Nieuwoudt she was studying at the back of the delicatessen. She also did not tell Nieuwoudt that there was an agreement with Muller. The applicant submitted that the commissioner was faced with two conflicting versions. The applicant has submitted further that Nkosi failed to submit proof that an agreement existed.

This argument does not have merit. Nkosi did not testify that the agreement was in any written form. The applicant's witness did not have any personal knowledge of the authorisation that Nkosi had obtained from Muller. The denial by the applicant's witness of the existence of the agreement does not in any way show that Muller did not authorise Nkosi to attend classes. The commissioner applied his mind on this

point. The commissioner went further to say that the testimony of Nkosi could not be convincingly challenged.

The issue was whether the previous manager gave authorisation. It was for the applicant to call Mr Muller to deny the authorisation. There was no evidence placed before the commissioner to challenge the authorisation. The witnesses for the applicant who gave evidence are not aware of such authorisation, and therefore could not challenge it. The commissioner applied his mind to the question of the agreement. It was upon the applicant to submit evidence in rebuttal. It failed to do this. This could have been done by calling Muller to testify. On the evidence before the commissioner the version of Nkosi, regarding the agreement, stood unchallenged.

Miss Kleynhans, when questioned by the commissioner, could not dispute that Nkosi had authorisation. On page 109, line 20 of the record, she stated:

" --- Ja (indistinct) so surely she must have got his authorisation to attend these classes."

The commissioner was criticised for finding that the applicant was unable to produce evidence to prove that Nkosi had left the store on 17 August 2000 at approximately 14:05

and returned approximately at 16:07. The commissioner's findings on this point was based on the fact that the video was never produced. Nieuwoudt gave evidence on what he alone had viewed.

It is correct that Nkosi did not challenge Nieuwoudt's evidence on this. The commissioner applied his mind to the evidence of Nieuwoudt but did not accept it. The commissioner is not required to comment on each aspect of the evidence.

In my view the applicant was not prejudiced in any way. I say so because the gist of Nkosi's case is that she had authority from Muller to leave without clocking out. For that reason it does not matter if she returned at 16:00 or a few minutes thereafter. The fact that the time of departure and return was not challenged cannot be said to mean that Nkosi had no authorisation.

The commissioner has also been criticised for not disclosing that he had previously been involved as an official of the South African Commercial Catering and Allied Workers' Union. This submission has no basis. The commissioner is not required to disclose his past activities during the arbitration. Nkosi was not a member of the South African Commercial Catering and Allied Workers' Union, but of Retail and Allied

Workers' Union. The commissioner's past involvement with this union cannot make the reward reviewable. These submissions are accordingly rejected.

I must also point out that I am not satisfied with the transcript record filed in this matter. In many instances the evidence is recorded as "indistinct", making it difficult to know what the response was.

After considering the matter as a whole I have come to the conclusion that the award is to be reviewed and set aside. I have decided to do so for the reason that the commissioner exceeded his powers in deciding an issue of procedural fairness which was not before him. The second reason is that the record is so poor that crucial evidence does not appear from the transcript as a result of poor recording.

In the circumstances it would be fair to refer the matter back to the first respondent to be dealt with by another commissioner. I have decided not to make any order for costs. I have done so because I have found that some of the complaints by the applicant had no merit. Had the commissioner confined himself to the issues before him, and the record clear, I would not have interfered with the award.

O R D E R

The order I make is accordingly the following:

(a) The arbitration award is reviewed and set aside.

(b) The matter is remitted to the first respondent, to be arbitrated by another commissioner.

(c) There is no order for costs.

ON BEHALF OF THE APPLICANT:	ADV LINSTON
ON BEHALF OF THE RESPONDENTS:	ADV KOTZE