IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

Case No. **JR283/04**

In the matter between:

MARIA MOTHIBE Applicant

and

THE COMMISSION FOR CONCILIATION,
MEDIATION & ARBITRATION First Respondent
DESMOND LYNCH Second Respondent
PREMIER FOODS LIMITED Third Respondent

JUDGMENT

Nel, AJ:

1. When this matter came before the court on 18 August 2005, the Applicant requested a postponement. The Third Respondent opposed this application and contended that, at the very least, the condonation application should be argued and determined. I agreed with this proposition and accordingly what is now being considered by me is the Applicant's condonation application.

2. In order to place the condonation application in its proper context, I briefly set out the material background facts.

3. The Third Respondent contended that it terminated the Applicant's services on the basis of its operational requirements. The Applicant, however, referred an alleged unfair dismissal dispute to the First Respondent (hereinafter referred to as "the CCMA").

4. The dispute remained unresolved and the Applicant requested that it be arbitrated before the CCMA.

5. The Third Respondent challenged the CCMA's jurisdiction as it alleged that the dismissal was based on its operational requirements. This jurisdictional point was argued before the CCMA on 27 September 2002. The Applicant maintained that the CCMA had jurisdiction, also submitting that resolution of a dispute in the CCMA would be more cost effective.

6. The Second Respondent who heard the arguments on the jurisdictional point gave his ruling on or about 3 October 2002, finding that the CCMA had jurisdiction to hear single cases of retrenchment in light of the amendments to the Labour Relations Act. I shall hereinafter refer to the Second Respondent as "the Commissioner".

7. The legal representatives of the Applicant and the Third Respondent thereafter held a pre-arbitration conference on 29 January 2003 in terms of which it was also recorded that "*the jurisdictional point in limine raised by Third Respondent has already been ruled upon by the CCMA and the parties have agreed to have the matter arbitrated upon in the CCMA*."

8. The arbitration proceeded on 13 February 2003 before the Commissioner. The Third Respondent's present attorneys of record represented it in this arbitration and Mr Marius Bezuidenhout ("Bezuidenhout") represented the Applicant in the arbitration proceedings.

9. The Commissioner, in an award dated 18 February 2003, ("the award") found the Applicant's dismissal to have been substantively and procedurally fair, upheld her retrenchment and dismissed the Applicant's dispute.

10. On 28 May 2003, more than 3 months after the issuing of the award, the Applicant applied for the rescission of the award. The Third Respondent opposed this application. Although the application was out of time and not accompanied by a condonation application, the Applicant's rescission application was dismissed by a different Commissioner than the Second Respondent on 17 September 2004 ("the rescission ruling.

11. On 1 April 2004, approximately seven months after the issuing of the rescission ruling, the Applicant served the review application, which is the subject of this judgment, on Third Respondent.

12. The Third Respondent argued that it was common cause that the arbitration award was issued and received by the parties on 18 February 2003. On this basis the Third Respondent argued that the Applicant should have delivered her application for the reviewing of the arbitration award by 31 March 2003 and the application was accordingly twelve months out of time. Technically I believe this is correct. It is perhaps open to the Applicant to argue that, as her rescission application was only dismissed on 17 September 2004, her review application is only approximately six months out of time.

13. With regard to periods of delay, the Third Respondent referred me to a number of examples of how this court has treated various periods of delay:

13.1 A delay of six months was considered unreasonable in Ruijgrok vs Foschini (Pty) Ltd & Another (1999) 20 ILJ 1284 (LC).

13.2 A delay of nine months was regarded as excessive in Van Niekerk vs Zondie NO & Another (2001) 22 ILJ 1202 (LC).

13.3 A delay of eight months was found to be substantial in Grilo vs Julius Solomon Group & Others (2002) 23 ILJ 2052 (LC).

13.4 A statement of defence that was filed six months out of time was found to be a "*long delay*" in National Union of Metalworkers of South Africa & Others vs Eberspøcher SA (Pty) Ltd (2003) 24 ILJ 1704 (LC).

14. The Third Respondent further appealed to me that I should also bear in mind that the entire process herein had been characterised by lengthy delays on the part of the Applicant. In this regard it was pointed out that, after the award, the rescission application was brought some three months later and then, obviously with reference to this review application, it was brought, as stated above, either technically twelve months late, or if a more lenient approach is adopted, about six months late. We are herein dealing with what I regard as a considerable and lengthy delay, whether it is 6 or 12 months.

15. It was argued before me that, in reality, no explanation for the lengthy delay in bringing the review application was provided by the Applicant.

16. In considering the Applicant's condonation application, one finds that there are a number of periods of time for which the delay is not explained either in any detail, or at all.

17. In the first instance one sees that, whilst the CCMA rescission ruling was on 22 September 2003 faxed to the particular union the Applicant had consulted, the Applicant contends that she only received the ruling "*on (sic) October 2003*". The Applicant does not give a specific date. In any event, what I know is that, on 26 October 2003, more than a month after the ruling was issued, the Applicant visited the Department of Labour for assistance.

18. The next time stipulated by the Applicant is the broad period January/February 2004, when the Applicant alleges that she was advised by the CCMA (and not the Department of Labour) that the best was for her to apply for review. Very little, if any, explanation is given for the reasons for the delay over the period from 26 October 2003 till January/February 2004.

19. Then again one is confronted with the fact that the Applicant simply states that she visited the Labour Court in February 2004, and was referred to the Wits Law Clinic for assistance. The Applicant then becomes specific and says that she proceeded to the Wits Law Clinic on 3 March 2004. Again one is left in the dark as to what exactly the reasons for the delay were. As a result of the absence of specific dates, one is also left to speculate whether the visits to the Labour Department and later the Labour Court were in the beginning, the middle or the end of the broad periods stated namely January/February 2004 and February 2004. Whatever the specific period of the delay is, there is no explanation for it.

20. The Third Respondent, in dealing with the Applicant's explanation for the delay broke up the delays in specific periods. In summary, the Third Respondent argued that, for these stipulated periods, the Applicant should have made full and frank disclosure and should have provided as full an explanation as possible for her failure to comply with the Rules of Court. In this regard I was referred to MM Steel Construction CC vs Steel Engineering and Allied Workers Union of South Africa & Others (1994) 15 ILJ 1310 (LAC) at 1314 E – G, where Nugent J stated the following:

"*The bald allegation is made that after having instructed its consultant, the Appellant 'on numerous occasions thereafter … contacted the labour consultancy*

to enquire about the case and was informed that the statement of defence had been filed with the Court and that it was awaiting a trial date.' No detail at all is provided of when these conversations took place, who participated in them, the context in which they took place, or the precise content thereof. In my view this falls far short of the full and frank disclosure which is required of an Applicant for an indulgence."

21. These sentiments, with which I agree, apply to the present matter as I find that the Applicant did not at all provide me with a full and frank disclosure which she is required to give as she is seeking an indulgence from this Court. On this leg of the enquiry, the Applicant in my view falls short of what is required of an applicant who seeks an indulgence from a Court by way of condoning a failure to comply with time periods stipulated.

22. I turn to deal with the Applicant's prospects of success. I do not intend in any great detail dealing with the applicable law in review applications.

23. I agree with the Third Respondent's contention that it appears as if the Applicant is alleging that the Commissioner committed misconduct and a gross irregularity in the arbitration proceedings. I will consider whether I believe that the Applicant has prospects of success on any one of these two grounds for review on which she relies. I will also consider whether there are perhaps any other reasons or grounds why the Applicant may have prospects of success in her review application.

24. In respect of the Applicant's actual grounds of a review that the Commissioner refused certain evidence which the Applicant intended to present at the arbitration, I am satisfied that the Applicant has not substantiated this allegation and I could not find anything in support of this proposition of the Applicant.

25. The Applicant alleged that the Commissioner was biased or partial and unreasonable in dealing with the arbitration hearing. As is the case with so many of the allegations made by the Applicant, she fails to provide any substantive support for what she alleges. I could also again not find anything in the record to support this allegation of the Applicant. It was argued before me that this is a very serious allegation to be made by a litigant and that this unfounded allegation must be met with an adverse costs order. I shall deal with this later.

26. In respect of the proposition that the CCMA did not have jurisdiction to arbitrate the dismissal dispute, I am satisfied that the parties have clearly and expressly agreed to have the matter arbitrated before the CCMA. I agree with the Third Respondent's proposition that Section 141(1) of the LRA does not provide the CCMA with a discretion and that it must arbitrate a dispute if the parties agree thereto.

27. As far as the proposition that the Commissioner committed misconduct and/or a gross irregularity in allowing the Third Respondent to seek a postponement on 27 September 2002, having considered the circumstances in which the Commissioner acted, I am satisfied that the Commissioner's conduct in this regard is also not a ground for review.

28. The Applicant's allegation that the Commissioner failed to apply his mind, as best I can determine, appears to be based on the allegation that the Commissioner had two other arbitrations to deal with on the same date. This being the only discernible basis of attack by the Applicant in this regard, the Applicant has not satisfied me that there is substance in this allegation. I could find no specific allegations made by the Applicant in respect of the Commissioner's award itself on which she relies in support of the allegation that the Commissioner failed to properly apply his mind.

29. As to the proposition that the Commissioner's conduct, in standing the matter down for one hour, amounts to a reviewable irregularity, this suggestion is also devoid of substance.

30. I am also of the view that the Applicant's allegation is unfounded that the Commissioner accepted the instructions of the Third Respondent's attorneys to rule out her evidence. The Applicant led evidence on her own behalf and her witnesses gave evidence. The Applicant again failed to direct me to any specific facts in support of these allegations of hers and this ground of review also stands to be rejected.

31. Likewise, I find the Applicant's contention that the Commissioner was at all times listening to the evidence presented by the Third Respondent, but disallowing the evidence brought forward by her and her representative, as again being without substance, unsubstantiated and destined to be rejected.

32. Having regard to all the allegations contained in paragraph 7 of the Applicant's Founding Affidavit, it is not entirely clear whether these paragraphs all are in support of the contention (made in paragraph 7.9) that the Commissioner had failed to apply his mind in the matter. What is apparent to me is that some of the specific grounds contained in this paragraph are allegations that belong more appropriately in an appeal. I could not find support for any of these allegations made by the Applicant. They certainly do not make out grounds for reviewing the award. I do not intend dealing with each and every allegation contained in the Applicant's paragraphs 7.1 to 7.9 as I am satisfied that there is no substance therein contained in support of a possible successful review.

33. On the whole, I am satisfied that there are no prospects of successfully reviewing the arbitration award herein as:

33.1 I am of the view that there was no wrongful or improper conduct on the part of the Commissioner that amounts to misconduct in relation to the arbitration proceedings under consideration;

33.2 I am likewise satisfied that the arbitration proceedings in issue were such that the Applicant was afforded the opportunity to have her case fully and fairly determined and that the Commissioner in no way conducted himself in any manner other than to allow a fair trial of all the issues;

33.3 I am of the view that no gross irregularity occurred which renders the arbitration in question reviewable.

34. Applicant further for the first time is in her heads of argument attempting to raise the ground of review that her representative at the arbitration proceedings, Bezuidenhout, had misrepresented himself as an admitted Attorney and that he accordingly was not entitled to represent her. The Law Society of the Northern Province, in a letter dated 4 November 2004, advised that Bezuidenhout served articles from 2 October 2000 until 1 October 2002, but that according to their records, he had not been admitted as an Attorney at that time (being November 2004).

35. I do not express myself on the question whether, assuming it to be true that Bezuidenhout misrepresented himself as an admitted Attorney, and could therefor not represent the Applicant before the CCMA, this in and by itself is indeed a

ground to review the Commissioner's award as I am satisfied that this ground of review was not raised before and it therefor cannot be entertained now.

36. Turning to deal with the importance of the matter and the possible prejudice to the parties, should condonation be granted or refused, it is a matter of fact that the termination of employment herein took place on 31 January 2002. That constitutes a period of nearly 3½ years ago. It is trite that one of the important purposes of the Labour Relations Act is that matters should be dealt with expeditiously. The facts and/or the law herein do not involve the public interest nor are they novel or unusual legal points. I am satisfied that the Applicant herein is to a large extent, if not totally, responsible for the fact that this matter is only now serving before this Court. It would appear to me that in the process she already was granted an indulgence when her rescission application was heard out of time without her having applied for condonation. I do not believe that the Applicant has made out a case that this matter is of such importance, and that the prejudice that she will suffer, if condonation is granted, is of such a nature that, on this leg of the application, the Applicant has made out a case.

37. The way in which the Courts approach condonation applications has long been established very clearly namely that a Court will, in the exercise of its discretion, look at the length of the delay, the explanation or reasons therefor, the prospects of success in the main matter as well as the prejudice which the parties may suffer should condonation be granted or refused. (Melane vs Santam Insurance Co Ltd 1962 (4) SA 531 (A) at 532B-F)

38. It has further repeatedly been held by this and other Courts that, where an Applicant for condonation has not provided a sufficient or proper explanation for the delay in taking the relevant action, a Court will not be prepared to condone the default, even if the prospects of success are good.

39. Then there is a line of authorities which support the proposition that where an Applicant has not demonstrated any prospect of success, condonation should be refused as, to grant condonation, will be without purpose.

40. Then another possible approach is that, if there is not a reasonable and acceptable explanation for the delay, the prospects of success are immaterial.

41. Whichever one of the approaches the Court adopts, it has been driven to the same conclusion, namely that condonation herein should not be granted. The Court has arrived at this conclusion first of all looking at the matter in its totality, considering the length of the delay, the explanation and reason therefore, prospects of success and the importance of the matter and the possible prejudice to the parties. On this basis the Court concludes that the application should fail.

42. On the basis that there are no prospects of success in the review application, which is the view of this Court, the application should also fail.

43. On the basis that the Court finds that there was not a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and the application should also be refused.

44. The end result is, accordingly, that the application for condonation is dismissed. It follows that the application to review also fails.

45. The Third Respondent urged me to grant a costs award against the Applicant on the attorney and client scale. In support of this request it was alleged that the Applicant deposed to blatant untruths and made deliberate attempts to mislead this Court. I have considered the manner in which the Applicant has conducted this whole process. In particular I view in a negative light the fact that the Applicant resisted the jurisdictional point the Third Respondent initially argued, then agreed to proceed to arbitration before the CCMA, yet now argues that the CCMA lacked jurisdiction. I will give the Applicant the benefit of the doubt I have as to her behaviour and particularly whether she intentionally tried to mislead and lie to this Court. This does not assist the Applicant in avoiding an award of costs against her as I am satisfied that, having regard to how this Court normally approaches the determination of whether to award costs to a party, there are no reasons why the costs should not follow the result in this matter.

46. In the result, the following Order is made:

46.1 The applicant's condonation application is dismissed;

46.2 As a result, the Applicant's review application is also dismissed;

46.3 The Applicant is ordered to pay the Third Respondent's costs.

NEL AJ

DATE OF HEARING: 8 AUGUST 2005

DATE OF JUDGMENT:

APPEARANCES:

FOR THE APPLICANT: ADV V J M MALEMA

INSTRUCTED BY: MZAMO ATTORNEYS

FOR THE RESPONDENT: MS N VAN DER WESTHUIZEN

INSTRUCTED BY: SONNENBERG HOFFMANN GALOMBIK