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IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN CASE NO: JR684/06

2008-04-25

In the matter between

M Z HLTATSWAYO Applicant

And

SOUTH AFRICAN POLICE SERVICE & OTHERS Respondent

J U D G M E N T

BASSON, J: This is an application to review and set aside of the arbitration award of the second respondent (I will refer to the second respondent as "the arbitrator"), under the auspices of the Safety & Security Sectorial Bargaining Council (the first respondent). The applicant also seeks condonation of the late filing of the application to review.

I will first deal with the application for condonation. It is trite that an applicant for condonation is seeking the indulgence of this court and must therefore show good cause for this court to exercise a discretion in

its favour.[1] The applicant for condonation must set out all the facts that are necessary to enable this Court to determine whether or not there is good cause to grant condonation. These facts should be set out in the founding affidavit supporting the application for condonation. In the leading case of condonation applications, *Melane v Santam*, 1962 (4) SA 531 (AD), the Appeal Court (as it then was) sets out at pages 532B-E, the various factors that a Court must take into account when considering an application for condonation. They are: the degree of lateness, the explanation for the delay, the prospects of success, the importance of the case and other considerations. It is clear from this decision in *Melane* (*supra*) that these factors are interrelated and should not be considered separately. The approach in the *Melane*- case, has been cited with approval in various decisions of this court and the Labour Appeal Court. See, for example, *NUM v Council for Mineral Technology* 1999 (3) BLLR 709 (LAC).

A reasonable and acceptable explanation for the delay is pertinent to the enquiry as to whether or not condonation should be granted. Where no such explanation is forthcoming, no examination of the prospects of success needs to be undertaken. See also *NUM & Others v Western*

[1]See *Saraiva Construction (Pty) Ltd v Zululand Electrical & Engineering Wholesalers (Pty)* Ltd 1975 (1) SA 612 (D) at 614H – A: *"It is clearly necessary for the applicant to furnish an explanation of his default, and if it to be of any assistance to the Court in deciding whether 'good cause' has been shown the explanation must show how and why the default occurred. If such an explanation is furnished the correct approach, I think is to consider all of the circumstances of the case, including the explanation, for the purpose of deciding whether it is a proper case for the grant of relief. If it appears that the default was willful or was due to gross negligence on the part of the applicant the Court may well decline, on that ground alone, to grant the indulgence sought."*

Holding Gold Mine, 1994 (15) ILJ 610 (LAC) at 613D *et seq*[2] and *Waverly Blankets Limited v C Tokoza & Others*, 1999 (20) ILJ 2564 (LAC) at para 11.[3]

In other words, if an applicant for condonation does not explain the default or tenders an unsatisfactory explanation, condonation will not be granted. See also *Ferreira v Silinga*, 1994 SA 271A. The mere fact that the party has decidedly strong prospects of success is not in itself sufficient cause to grant condonation. See in this regard, *Torwood Properties (Pty) Ltd v SA Reserve Bank*, 1996 (1) SA 215 (W) at 230H[4]

10 The court was also referred to a decision of *Uitenhage v SA Review*, 2004 (1) SA 292 (SCA) at para [6],[5] where the court referred to the kind of

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[2] "*Condonation of the non-observance of the rules of this court is not a mere formality. It is for the appellants to satisfy this court that there is a sufficient cause for excusing them from compliance: Saloojee & another v Minister of Community Development 1965 (2) SA 135 (A) at 138E-F. An unsatisfactory and unacceptable explanation for the delay remains so, whatever the prospects of success on the merits: cf Chetty v Law Society, Transvaal 1985 (2) SA E 756 (A) at 768A-C. The factors to be taken into account are the following: 1 The delay of more than seven weeks is substantial. The appellants' explanation for the delay is unsatisfactory in a number of material respects: (a) No explanation at all is provided for the delay from 12 February, when the determination was made in Pretoria, and 23 February, when a copy of the determination arrived at NUM's head office in Johannesburg. (b) It appears from the affidavit of Masebo that NUM considered the determination and by 26 February had brought an application for the variation of the determination in respect of the successful applicants. (c) The date of the meeting referred to in para 8 of Masebo's affidavit is not given nor is it said who participated in the meeting. Was it the Welkom branch of NUM or the branch committee at Western Holdings?"*

[3] *"[11] The fact of the matter is that in the absence of any attempt at justifying the delay which occurred after 10 May 1999, the employees' prospects of success did not even fall to be considered (NEHAWU v Nyembezi [1999] 5 BLLR 463 (LAC) at para [10]; Mziya v H Putco Ltd [1999] 2 BLLR 103 (LAC) at 107A-C; Zondi & others v President of the Industrial Court & another [1997] 8 BLLR 984 (LAC) at 989E-F)."*

[4] "*To regard a mere belief in the correctness of one's case as being good cause for a failure to take steps to protect oneself against the eventuality that that view is held to be wrong is not tenable. It has been held in a number of cases that the mere fact that a party has a strong case is not of itself sufficient cause to grant condonation. See, for example, Immelman v Loubser en 'n Ander 1974 (3) SA 816 (A) at 824B-C, where Muller JA put the J matter in these terms: 'Redelike vooruitsigte op sukses by appèl is natuurlik ook 'n belangrike oorweging. Maar hoewel dit 'n belangrike oorweging is, is dit nie noodwendig in elke geval 'n deurslaggewende oorweging nie.'*

[5] *[6] One would have hoped that the many admonitions concerning what is required of an applicant in a condonation application would be trite knowledge among practitioners who are*

detail that an applicant for condonation should set out in the application for condonation. It is stated in this decision that the applicant for condonation must set out in fair detail the obstacles that it had encountered or experienced in complying with the time limits as provided for in the rules.

In the present case, the review application was submitted nine months late. The applicant concedes in his application for condonation that this delay is substantial. The essence of the explanation for the delay is the allegation that the applicant did not have money to pay for the services of an attorney to prosecute the application for review. He explains that his erstwhile attorney withdrew from assisting him due to lack of funds. No confirmatory affidavit from Mr Morotolo is attached. He also states that he had approached various other attorneys to assist him and that he also approached a law clinic to assist him. No particulars whatsoever are given of the law clinics that he had approached, nor does the applicant explain when he approached the legal clinics and the reasons why the law clinics declined to assist him. No proof whatsoever of these efforts are attached to the papers.

The applicant then sets out that he had approached his union on 14 January 2007 to assist him. The applicant does not explain why he only sought the assistance of his union almost one year after he became

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entrusted with the preparation of appeals to this Court: condonation is not to be had merely for the asking; a full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility. It must be obvious that, if the non-compliance is time-related then the date, duration and extent of any obstacle on which reliance is placed must be spelled out."

aware of the arbitration award. The applicant also does not explain why he did not approach the Labour Court in person.

In the light of the aforegoing, I am of the view that the condonation application should be refused, on the basis that the applicant has not shown that he had exercised diligence and that he had taken the necessary steps to prosecute the application for review within the prescribed time period. The explanation for the delay is extremely vague and in my view entirely unsatisfactory. In the premises I am of the view that the application for condonation stands to be dismissed on this ground alone.

The review application

Although not necessary to do so in light of the aforegoing, I have, nonetheless in the interest of finality, proceeded to consider the review application. Having considered the papers and the submissions advanced on behalf of both parties, I am of the view that the review of the award should also be dismissed. I intend giving very brief reasons for this decision in light of the fact that it is not necessary to consider the application for review in view of the fact that the application for condonation has been refused.

It appears from the papers that the parties have agreed that the arbitrator (the second respondent) need not hear evidence and that the arbitrator will dispose of the arbitration and the dispute with reference to the record only. It was further agreed that the parties would submit their representations in writing.

The issue before the arbitrator was whether or not the applicant's dismissal was substantively and procedurally fair.

It was common cause that cargo belonging to Hi-Fi Corporation was hijacked on the R21 on or about 23 October 2002. It was further common cause that a certain Mr. Scholz (witness for the third respondent – the South African Police Service) had identified the applicant (Hlatswayo) as the person from whom he had bought the allegedly hijacked goods. The applicant was subsequently charged with misconduct. The first charge was a charge of theft and the second charge was a charge of possession of suspected stolen or robbed property. He was found guilty on the second charge, namely possession of suspected stolen or robbed property and was dismissed. It was essentially the applicant's case that he was not guilty of misconduct.

The arbitrator (the second respondent) accepted in his award that there was no evidence that the applicant was actively involved in the highjacking of the cargo in light of the fact that the driver of the highjacked vehicle was not able to identify the applicant as one of the highjackers. It was, however, the evidence of Scholz that he had been offered stolen goods by the applicant, whom he was able to clearly identify and that he had paid the applicant in cash for the stolen goods.

Scholz also testified at the disciplinary hearing that he had taken the cell number of the applicant in order to place a further order. The police arrived a few days later and confiscated some of the goods. Scholz testified that it was pointed out to him that the goods were stolen and that the goods emanated from a hijack a few days earlier. Scholz was

adamant that it was the applicant who had offered the stolen goods to him.

Although it was the applicant's evidence that he was not guilty as charged, he admitted that he went to Scholz's business and that he had at least one telephone conversation with Scholz. The applicant could not explain why Scholz would implicate him in the hijack.

The arbitrator accepted that Scholz was a reliable witness and took into account that there was no reasonable explanation as to why Scholz would have wanted to implicate an innocent person. The arbitrator concluded that the evidence showed on a balance of probabilities, that the applicant did deliver the hijacked cargo or part thereof to Scholz. He also concluded that it would be nonsensical to suggest that the person delivering the goods, was not or could not have been in possession of the goods. He therefore concluded that he was satisfied that the applicant was guilty of misconduct and that the conduct was serious enough to warrant a dismissal and that the penalty (of dismissal) fell within the reasonable band of penalties available to the employer in such circumstances.

The applicant on the other hand submitted that the arbitrator's should be reviewed on various grounds. I do not intend repeating what these grounds are. Suffice to point out that these grounds are set out on page 9 of the founding affidavit and that I have considered them against the record and the submissions on behalf of both parties.

The review test has been laid down by the Constitutional Court in *Sidumo & Others v Rustenburg Platinum Mines Ltd & Others* 2007 (20)

ILJ 2405 (CC) where the court stated that the test is whether or not the decision arrived at by the decision maker was one that a reasonable decision maker could not reach?

I also had regard to a recent, yet unpublished decision by the Labour Appeal Court in *Edcon Limited v Pilmar*, DA4/06,[6] where the Labour Appeal Court held as follows in respect of this discretion:

> *"[21] The so called 'reasonable decision maker test' serves as a basis for the decision in Sidumo. If the commissioner made a decision that a reasonable decision maker could not reach, he/she would have acted unreasonably which could then result in interference with the award. This, in my view, boils down to saying the decision of the commissioner is to be reasonable. To my understanding the dictum in Sidumo is not about shifting from the 'reasonable employer test' in favour of the so-called reasonable employee test. Instead, meaningful strides are taken to refocus attention on the supposed impartiality of the commissioner as a decision maker at the arbitration whose function it is to weigh all the relevant factors and circumstances of each case in order to come up with a reasonable decision. It is in fact the relevant factors and the circumstances of each case, objectively viewed, that should inform the element of reasonableness or lack thereof."*

[6] Now reported as (2008) 29 ILJ 614 (LAC).

In *Bato Starfishing (Pty) Limited v Minister of Environmental Affairs*, 2004 (4) SA 290 (CC), Ncobo, J pointed out that it was the intention of the LRA that as far as possible, arbitration awards should be final and should only be interfered with in very limited circumstances.

I have evaluated the evidence presented to the chairperson of the disciplinary hearing (since it was placed before the arbitrator by agreement) and I am of the view that is clear that the arbitrator had taken into account all the evidence that was presented and that the arbitrator then came to a reasonable decision. It certainly is a decision to which a reasonable decision maker could have arrived at in light of the evidence. Put differently, it is not a decision that no reasonable decision maker could reach.

Insofar as the applicant had alleged that there was an element of inconsistency in respect of Mr Mofokeng, who was a co-accused and who was acquitted, I am of the view, if regard is had to the evidence, that it was reasonable for the chairperson to have acquitted Mr Mofokeng of the charges against him.

In the premises, I am of the view that the decision reached by the arbitrator is one that a reasonable decision maker could have arrived at. In the premises the application for review is dismissed.

I make no order as to costs.

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AC BASSON, J

REVISED AND SIGNED ON: 15 July 2009