

IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN PORT ELIZABETH

REPORTABLE

CASE NO: P86/07

In the matter between:

NUMSA OBO NKINQA

APPLICANT

AND

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

1ST RESPONDENT

M. KOORTS N.O.

2ND RESPONDENT

FORD MOTOR COMPANY (PTY) LTD

3RD RESPONDENT

JUDGMENT

MOLAHLEHI J

Introduction

[1] The first issue to consider in this matter is the condonation for the late filing of the Applicant's review application. In the review application the Applicant represented by NUMSA seeks to review and set aside the arbitration award issued by the Second Respondent (the Commissioner) under case number ECPE 1679-05 dated 31 May 2006, in terms of which the dismissal of the Applicant, Mr Nkinqa, was found to have been fair.

[2] The Third Respondent has also filed an application for the condonation of the late filing of its answering affidavit.

Background facts

- [3] The applicant was employed by the third respondent as machine operator with effect from 27th May 2002. The issue that led to the dismissal of the Applicant was his absence from the workplace from 17th March 2005 up to 12th April 2005. Due to this absence from work without authority a letter was forwarded to the Applicant informing him that he has deserted his employment and that his services were terminated for that reason. He was also advised that he had 24 hours to make a representation to the Third Respondent as to why the termination of his services should not stand.
- [4] The applicant testified that the reason for his absence was as a result of the depression he suffered after losing his wife during January 2005. He received medical attention for his condition from both the psychiatrist and psychologist who had submitted reports about his condition. The Applicant did not however submit any medical reports or certificates for his absence for the period, 17th March to 12th April 2005.
- [5] The Applicant was subsequently dismissed for absence without authorization. He then referred a dispute concerning unfair dismissal to the CCMA on 12th May 2005. At the arbitration hearing the Commissioner found the dismissal of the Applicant to be both procedurally and substantially fair. The Applicant filed a review application as he was unhappy with the outcome of the arbitration

hearing. The review application was late and thus the application for condonation.

[6] The principles governing the requirement for granting or refusal of condonation are well established in our law. In terms of these principles the Court has a discretion which is to be exercised judicially after taking into account all the facts before it. The factors which the Court takes into consideration in assessing whether or not to grant condonation are: (a) the degree of lateness or non compliance with the prescribed time frame, (b) the explanation for the lateness or the failure to comply with time frames, (c) *bona fide* defence or prospects of success in the main case; (d) the importance of the case, (e) the respondent's interest in the finality of the judgement, (f) the convenience of the court; and (g) avoidance of unnecessary delay in the administration of justice. See *Foster v Stewart Scott Inc (1997) 18 ILJ 367 (LAC)*.

[7] These factors are not individually decisive but are interrelated and must be weighed against each other. In weighing these factors for instance, a good explanation for the lateness may assist the applicant in compensating for weak prospects of success. Similarly strong prospects of success may compensate the inadequate explanation and the long delay.

[8] In an application for condonation, good cause is shown by the applicant giving an explanation that shows how and why the default occurred. There is authority that the court could decline the granting of condonation if it appears that the default was wilful or was due to gross negligence on the part of the applicant. In

fact the court could on this ground alone decline to grant an indulgence to the applicant.

[9] Prospects of success or *bona fide* defence on the other hand mean that all what needs to be determined is the likelihood or chance of success when the main case is heard. See *Saraiva Construction (PTY) Ltd v Zulu Electrical and Engineering Wholesalers (PTY) Ltd* 1975 (1) SA 612 (D) and *Chetty v Law Society* 1985 (2) SA at 765A-C.

[10] A further principle which was enunciated in *Melane v Santam Insurance Co Ltd*, 1962 (4) SA 531 (A) at 532C-F, is that 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. It has also been held by the courts that the applicant should bring the application for condonation as soon as it becomes aware of the lateness of its case.

Reason for the delay

[11] In his founding affidavit the Applicant indicates that he received the arbitration award on 6th June 2006 and should have filed its review application by 21st July 2006. However, the review application was only filed on 12th March 2007 some 7 (seven) months outside the prescribed time.

[12] The Applicant forwarded the award to NUMSA at its offices in Port Elizabeth and the matter was handed to Mr Kweni Seema (Seema) who subsequently left the employ of the NUMSA during October 2006. On the version of the

Applicant Seema instructed Sihlali Molefe Inc his erstwhile attorneys to review the award. Sihlali Molefe ceased practice during August 2006 and moved its furniture and files into a storeroom in Sandton.

[13] The Applicant states in its founding affidavit that upon establishing that Sihlali Molefe has ceased to practice, they contacted them with the view to withdrawing the instructions. Before the issue of obtaining the file could be finalized Seema left NUMSA.

[14] NUMSA only managed to reach Sihlale after several attempts only in November 2006 and at that stage he was employed by South African Broadcasting Corporation. He informed NUMSA that since the firm had ceased practice, all the files were moved for storage into a storeroom in Sandton and the security guard could help us to retrieve the files contained in a list and status report of all files with the firm.

[15] The deponent to the founding affidavit states that he visited the premises where the files were stored where he found about 700 (seven hundred) files stored in that storage. He did not find the Applicant's file amongst those files. He only found the file during the first week of March 2007, when he revisited the storage centre. The current attorneys of record, Motaung Attorneys were then instructed process the review application.

The prospects of success

[16] The Applicant's prospects of success are based on the grounds of review as set out in the application for review. In this respect the Applicant contended that in

reaching his decision, the Commissioner, acted contrary to the powers conferred upon him by the legislature and committed gross irregularities in relation to his duties. The Applicant further contended that the Commissioner's decision was not rational or justifiable in relation to the evidence that was led before him and further that he committed misconduct in the manner in which he conducted the arbitration.

- [17] In relation to the conclusion reached by the Commissioner, the Applicant relies on other grounds which relate mainly to the assessment of the testimony of the various witnesses in particular in those instances where he alleged the Respondents witnesses conceded to the version put to them. The emphasis in this regard was a failure by the Commissioner to take into account that the Respondent had failed to show the existence of the elements of desertion.

Evaluation of the application

- [18] There are certain issues relating to the explanation for the delay which I do not intend dwelling into in any details in this judgment. I need to indicate that there is however no explanation as to why the Applicants did not file their condonation application as soon as they became aware that their application was late. The applicants' review application was initiated during March 2007, some 9 (nine) months after the award was issued. The Applicants do not explain why no application for condonation was brought at the time when it should have been readily apparent to Applicant and his advisors that his review application was significantly out of time. The same applies to the applicant's supplementary

affidavit, which was commissioned during July 2007 and served on the Third Respondent on 8th August 2007. This affidavit too did not in any way seek to address the fact that the applicant's review application was out of time.

[19] In due course the Registrar of this Court called for the respective parties' heads of argument, to be served and filed. The Third Respondent's heads of argument were served and filed during early December 2007. In those submissions the Third Respondent specifically highlighted the applicant's delay in initiating the review application. The Third Respondent (in its heads) also pointed out that even were the applicant to now seek condonation, he would also be required to seek this Court's indulgence for his failure to initiate his condonation application the moment that he (or his advisors) realized that he either was or would be late.

[20] The next step in the process was that the Registrar of this Court set the matter down for hearing on 6th February 2008. The Applicant's application for condonation was however only served on the Third Respondent's attorneys of record on or about 1st February 2008. As indicated above although the Applicant has in his replying affidavit endeavoured to explain the reasons why his review application was initiated out of time, what he has failed to do is to explain why the condonation application itself was only launched almost a year after he had initiated his review application.

[21] In my view the Applicant's condonation application is materially defective and ought to be dismissed purely on account of the unexplained delay in bringing the condonation application.

[22] The other difficulty which the Applicant has with his condonation application relates to the prospects of success. As indicated above, without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused. The duty to show the existence of prospect of success rests with the Applicant.

[23] In a review application such as the present, the transcript of the record of the proceedings is essential in assisting the Court in the determination of the prospects of success.

[24] In *Fidelity Cash Management Services (Pty) Ltd v Muvhango SA (2005) JOL 14293 (LC)* where it was held that:

“The court should be placed in a position to assess the different version as they were placed before a commissioner through a full transcription of the record or a satisfactory reconstruction thereof.”

[25] In *Boale v National Prosecuting & Others 2003 12 BLLR (LC) para 5*:

“It is trite that there is duty on an Applicant to provide a review Court with a full transcript of the proceedings he wishes to have reviewed. The Applicant has failed to provide this Court with the full transcript of the proceedings that he wished to have reviewed. Where an Applicant fails to provide a full transcript of the proceedings the review application must be dismissed. The only exception would be where the tape cassettes are missing or where the parties are unable to reconstruct the record.”

[26] In *Life Care Special Health Services (Pty) Ltd t/a Ekuhlengeni Care Centre v CCMA & Others* (2003) 12 LAC 1116 the Labour Appeal Court held that:

“[17] *The reconstruction of the record (or part thereof) is usually undertaken in the following way, the tribunal (in this case the commissioner) and the representatives in this case is ready for the employee and Mr Mvelengwa for the employer to come together, bring in their extent notes and such other documentation as may be relevant. He then endeavoured to the best of their ability and recollection to reconstruct as full and accurate a record of the proceedings as the circumstances allow. This is then placed before the relevant court with such reservations as the participants may wish to note. Whether the product of their endeavours is adequate for the purposes of appeal or review is for the court hearing same to decide, after listening to argument in the event of a dispute as to the accuracy or completeness.*”

[27] In the present instance the applicant has not taken any reasonable steps to have a proper record placed before this Court. Thus the record is incomplete and does not place the Court in a proper position to assess the prospects of success. It is my view that the applicant was duty bound in the circumstances of this case to have utilized the procedure set out above in the *Life Care Special Services’ case* to have the record of the proceedings of the arbitration award reconstructed. And therefore the applicant has failed to demonstrate that there are prospects of success when the merits of the arbitration award are to be considered.

[28] In light of the above the Applicant's application to review and set aside the arbitration award issued under case number ECPE 1679-05 dated 31st May 2006 stand to be dismissed.

[29] In the premises, the review application is dismissed with costs.

Molahlehi J

Date of Hearing : 18th September 2008

Date of Judgment : 25th February 2009

Appearances

For the Applicant : Mr P T Motaung of Motaung Incorporated

For the Respondent: Adv R B Wade

Instructed by : Chris Baker & Associates