IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

CASE NO: JR 1270/08

In the matter between:

MBELE PAHAKAMISA GODREY **Applicant**

and

THE COMMISSIONER, COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **1st Respondent**

ANGLO PLATINUM MINES RUSTENBURG **2nd Respondent**

JUDGMENT

LAGRANGE,AJ

Introduction

1. This is a condonation application brought by the applicant in this matter. The applicant was employed as a Human Resource Assistant by the Second

Respondent in 2003. On 30 October 2006 he was dismissed following a disciplinary enquiry.

2. The misconduct concerned allegations that the applicant had solicited bribes from certain contract employees in order to for them to be made permanent employees. He was found guilty of corruption and bribery, dishonesty and action not in the best interest of the employer.

3. The CCMA commissioner upheld the dismissal as fair after hearing evidence from, *inter alia,* five of the ten contract employees in question. According to the award the evidence of these witnesses which concerned the solicitation of bribes by the applicant in exchange for arranging them to be made permanent employees was not materially contested by the applicant, whose defence consisted of a bare denial of these claims. Only parts of the transcribed record of the arbitration have been filed to date, and no serious attempt has been made to construct the remaining parts of the record. Although part of this may be due to the fact that the commissioner did not keep his own notes of the proceedings, which were electronically recorded, the parties themselves have not as yet, attempted to reconstruct the missing portion of the record, from their own records of the proceedings.

4. As such, the review application was not ripe for hearing. Consequently, in evaluating the prospects of success for the purposes of the condonation application, the court had before it the affidavits of the parties in the condonation application and the incomplete review bundle.

The delay and the reasons for the delay

5. The applicant's original attorneys of record, N.O Ngwenya attorneys, received a copy of the arbitration award on 14 September 2007. According to the applicant, he then instructed them to proceed with the review application on 17 September 2007. Between then and December 2007 he claimed to have been "constantly telephoning" the attorneys "to enquire of progress of my case but to be told that the case did not have merits" (sic). His attorneys had supposedly sent him a letter

on 24 October 2007 advising him that his prospects of success were minimal and to reconsider his decision to proceed with the matter.

6. The applicant clearly did not like the advice he received and referred his matter to another firm of attorneys, W V Ngexekisa Attorneys, in January 2008. The new attorneys eventually filed the review application but only on 23 June 2008, some five months after they were instructed in the matter. No explanation of any kind is tendered for this considerable portion of the delay. However, the applicant's representative, Mr Moyo, invited me to surmise that the applicant must have continued to conduct his relationship with the new attorneys with the same degree of persistence he claimed to have displayed in his dealings with his original attorneys. Even if there was no reason to doubt how assiduously he communicated with his former advisers, on the evidence there is no basis for me to draw such an inference in relation to his dealings with their successors.

7. The overall delay since the applicant became aware of the award and the time he filed this application amounts to approximately 34 weeks, which is more than six times longer than it should have taken.

8. In assessing the explanation for the delay, there is really nothing of substance which can exculpate the applicant from blame. In relation to the time the matter was with the first attorneys, if he was in constant communication with them as he claimed, it is hard to believe that he did not learn by October 2007 that they were of the view he should not pursue a review application. Further, if his attorneys' letter in October confirming such advice had been written then, it is difficult to understand why it would not have come up in the course of his regular communications with the firm before December.

9. Even if I take the applicant's vague statement about his communications during the period between September and December 2007 at face value, there is even less explanation provided for what transpired between January and June 2008, at which stage the filing of the application should have been a matter of urgency. If the applicant believed his previous attorneys had let him down, it is reasonable to expect that he would monitor the activities of their successors more carefully. The

court cannot speculate about the reasons for this significant portion of the delay which remains completely unexplained.

The prospects of success

10. In the founding papers in the condonation application and in argument before me two main points in support of the applicant's prospect of success were canvassed. Firstly, the applicant claims that the failure of the commissioner to make his own notes independently of the electronic record was indicative of bias on the commissioner's part and an obstacle to pursuing any review. Secondly, he alleges that the commissioner ignored the fact that the employer's witness, who claimed to have paid him an initial instalment of R 500-00 on a bribe had stated that this occurred in April 2006, well before the applicant knew that the contract employees in question were going to be made permanent. The applicant noted too that this evidence was not corroborated by the evidence of two other employer witnesses who claim the bribery incident took place in August 2006.

11. The applicant also complained that the commissioner had acted in a partial manner towards him and his representatives, but the respondent denied this and in the absence of anything in the available portion of the transcript to support the applicant, I must accept the respondent's denial.

12. In respect of the first point, Mr Moyo rightly conceded that the failure to keep written notes could not be seen as an act inherently favouring one party over another and therefore could not be indicative of bias on the commissioner's part. In any event, if a record is being kept by mechanical or electronic means there is no obligation on a commissioner to duplicate this in writing, even though it may be prudent to make some notes for his own purposes .

13. On the second issue, it is correct that the witness testified that he was first approached by the applicant in April 2006, and that the other witnesses, according to their statements identified the attempted solicitation of bribes as having taken\ place in August. The arbitrator in his award also appears to have believed the payment made by Mr Mbabe was made in August 2006, and this might have been

an error on his part.

14. Against this, I must consider the evidence of the other two contract workers , which is summarised by the arbitrator. Their earlier written statements, apart from being confirmed by their oral testimony, provide a compelling account of attempts by the applicant to solicit payments from them in exchange for making them permanent employees. Thus, the timing of the alleged payment by Mbabe may not have coincided with the solicitations the applicant allegedly made in August to the other contract employees, and the arbitrator may have incorrectly recorded this. However, this error alone does not provide a material basis for arguing that the arbitrator acted unreasonably in reaching the conclusions he did, on the totality of the evidence as summarised by himself and on the basis of the available parts of the record, including the written statements of the two other witnesses who testified. On the face of the arbitrator's award, most of the evidence of the employer's witnesses was not materially disputed by the applicant, and it is reasonable to suppose that if it had been, the applicant would have relied on this in seeking to set aside the award.

15. Accordingly, the applicant has not made out a cogent case of any reasonable prospects of success.

Conclusion

16. The applicant has failed to put forward persuasive reasons why two of the most important issues that have to be considered in evaluating a condonation application, namely the explanation for all of the delay and his prospects of success, should favour the grant of condonation. I am inclined to agree with the respondent that the applicant's failure to explain the major portion of the lengthy delay alone, should disentitle him to relief.[1] When I further consider the weakness of the case advanced in favour of his prospects of success as evaluated against the evidence available, the case for granting the application cannot be rescued by consideration of the other factors set out in ***Melane v Santam 1962 (4) 531 (A)*****,** at 532C-F. Whilst the case is no doubt important to the applicant

1 See ***NUM v Council for Mineral Technology*** **[1999] 3 BLLR 209 [LAC]** at para [10]

personally, that is the true in the case of all condonation applications where the fariness of the affected employee's dismissal is upheld at arbitration, and there is no additional factor in this instance distinguishing the importance of the case.

Costs

17. The respondent argued that the unsatisfactory conduct of the review and condonation proceedings justified an adverse cost award, but even if I were to agree that they were conducted in a ramshackle and dilatory fashion I am disinclined, in this instance, to hold the applicant himself to account for such procedural shortcomings, and no order was sought against his attorneys.

Order

18. In the circumstances, I make the following order:

18.1. The applicant's condonation application for the late referral of his review application in this matter is dismissed.

18.2. No award is made as to costs.