IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT CAPE TOWN

Not Reportable
Case NO: C648/08

In the matter between:

G J H (BOB) DE VILLIERS Applicant

and

COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION (CCMA) 1st Respondent

COMMISSIONER STEPHAN CLOETE 2nd Respondent

KLAWER KOOP WYNKELDERS 3rd Respondent

J U D G M E N T

GUSH. J

1. The applicant in this matter applies to review the ruling by the second respondent refusing the applicant's condonation application for the late referral of his constructive dismissal dispute to arbitration.

2. The applicant had been employed by the third respondent as a senior manager until the date of his resignation on 22 January 2007. On 30 November

2006, the respondent commenced consulting with the applicant concerning its intention to restructure for operational reasons. At the time of his resignation, the applicant was represented by his erstwhile attorney de Lange. The consultations had reached the stage where the parties were discussing a severance package. The applicant tabled a proposed settlement which the 3rd respondent rejected and the 3rd respondent's proposal was likewise rejected by the applicant whereafter the applicant resigned.

3. The applicant through his attorney, de Lange, referred the constructive dismissal dispute to the 1st respondent on 21 February 2007. The parties then agreed that it would serve no purpose for a conciliation meeting to become convened and that accordingly, first respondent was requested to issue a certificate of outcome. The certificate of outcome was issued on 23 February 2007 which recorded that dispute remained unresolved. It appears from the papers that de Lange purported not to have received the certificate.

4. Despite this, on 29 March 2007, de Lange addressed a letter to the first respondent requesting that the matter be set down for arbitration. At all times relevant to the 2nd respondent's refusal of the application for condonation, the applicant maintained that this letter constituted compliance with the provisions of

the Labour Relations Act (LRA)[1] when requesting arbitration. In argument, however, counsel for the applicant conceded that this request did not comply with the LRA.

5. What is clear from the above circumstances is that there could have been no confusion in the mind of de Lange that the matter had been "conciliated" and that by agreement, a certificate was to be issued and therefore if the matter was to be arbitrated a request to that effect in compliance with the LRA should have been made within 90 days.

6. On the applicant's own version, de Lange did nothing further until 18 September 2007 (some 173 days later) when he again wrote to the 1st respondent regarding the arbitration. The 1st respondent replied by email on 24 October 2007 advising de Lange that no request for arbitration had been received.

7. This was followed by an exchange of letters between de Lange and the 1st respondent culminating in de Lange filing a proper request for arbitration on 29 January 2008. On the following day, the 1st respondent advised de Lange that the request was out of time and advising the applicant that an application for condonation should be brought. The applicant through the offices of de Lange filed the condonation application on 6 May 2008 which was considered and refused by the 2nd respondent on 11 June 2008. It is this decision refusing

[1]66 of 1995; see Section 136 (1) (b) read with Regulation 11(1) and Rule 18(1) of the Rules for the Conduct of proceedings before the CCMA.

condonation that the applicant seeks to review.

8. The applicant then applied to the 2nd respondent for the rescission of his award which application was, for obvious reasons, unsuccessful.

9. The applicant then brought this application on 12 September 2008. This application was filed 13 weeks after the refusal of the application for condonation and 6 weeks and 3 days after the applicant avers he received the outcome of his abortive rescission application.

10. The applicant's application for condonation filed with the 1st respondent is supported by two affidavits. There is a confirmatory affidavit by the applicant himself in which he confirms that he has read and understood the contents of de Lange's affidavit in so far as it refers to him and that at all times, de Lange acted in accordance with his instructions. The paragraph reads as follows:

> "Ek bevestig dat ek die eedsverklaring van Riaan de Lange hierin gelees het en dat die inhoud daarvan insoverre dit op my betrekking het waar en korrek is, en dat hy ten alle tye gehandel het op my instruksies aan hom"

11. In so doing the applicant has not only associated himself with de Lange's conduct in dealing with the matter but avers that de Lange in fact acted on his instructions. It was not the applicant's case that he had been prejudiced by a

delay caused his legal representatives "tardiness or negligence"[2]

12. In the application, de Lange applies for condonation "only if it is found that he was late with his request" and in his affidavit suggests that the application is only necessary due to the fault of the 1st respondent and its "gebrekkige administrasie". In his affidavit, de Lange refers to the letter addressed to the 1st respondent on 29 March 2007 and avers firstly that this constituted a proper request for arbitration and secondly that accordingly a request for arbitration was in fact made timeously viz. within the 90 day period prescribed by the LRA. The affidavit then continues to aver that the 1st respondent only served the certificate in 2008.

13. Conspicuous by its absence, however is any explanation whatsoever regarding the delay of five and a half months between 29 March 2007 when de Lange averred the proper request for arbitration was made and 18 September 2007 when de Lange commenced correspondence with the 1st respondent regarding why the matter had not been enrolled for arbitration. The 2nd respondent refused the condonation application largely due to this unexplained delay.

14. De Lange deposed to the founding affidavit to this application ostensibly

[2] 2nd respondent's award page 8 of the pleadings.

on behalf of the applicant. In this affidavit, the grounds of review are set out as being that the decision of the 2nd respondent was an "obvious error' and that the award should have been rescinded which was not relief the applicant sought in the notice of motion; and that the 2nd respondent "committed serious misconduct" in that "he had failed to appreciate the facts and documents submitted by the applicant in support of the ... condonation application" and persists with the averment that the request for arbitration was made timeously and that the 2nd respondent was wrong in holding that the referral was late.

15. The balance of de Lange's affidavit simply sets out the same facts as contained in the condonation application and the accusations that the 1st respondent was responsible for the debacle due to its bad administration. The affidavit states that applicant "will as required by Rule 7A (8) (a) amend add to/or vary the terms of the Notice of Motion and supplement this affidavit". The applicant however elected not to do so.

16. The applicant's pleadings do not make out a case justifying his application to have the award reviewed and set aside. The founding affidavit relies only on bare averments in the affidavit that the conclusions drawn by the applicant have no basis with scant reference to either the award or the record.

17. The applicants founding affidavit is more in keeping with an appeal against the refusal of the 2nd respondent to grant condonation. In order to succeed

with a review, it must be shown that the decision made by the arbitrator, or the second respondent in this matter, is a decision that a reasonable decision maker could not reach taking into account the material placed before him[3]. In order to successfully review the award the applicant is required to do more than simply make bare averments that the 2nd respondent didn't take into account material before him, that he made an obvious error and committed misconduct.

18. I am not satisfied that the applicant has succeeded in doing so. The averments made in the applicant's founding affidavit are simply statements to the effect that the 2nd respondent was wrong in finding that the request for arbitration was filed late based on the letter of 29 March 2007 and that despite this averment that the request was made timeously; that the certificate was only received in 2008.

19. The applicant was required to provide an acceptable and reasonable explanation why the late referral should be condoned and in particular to explain the delay between the letters of 29 March 2007 and 18 September 2007. The applicant clearly did not do so.

20. In considering the applicant's application, it is also necessary to give consideration to the applicant's prospects of success. The averments made in the condonation application before the 2nd respondent do not support the contention that the applicant had been constructively dismissed and therefore had good prospects of

[3] *Sidumo and Another v Rustenburg Platinum Mines Ltd & Others* 2007 28 ILJ 2405 (CC)

success. The fact was that the parties were still engaged in retrenchment consultations arising from the respondent's decision to restructure when the applicant resigned.

21. I am, in the circumstances, not satisfied that the applicant has made out a case justifying the review and the setting aside of the 2nd respondent's award refusing the applicant condonation.

22. Regarding costs there is no reason why costs should not follow the result. Counsel for the respondent submitted that I should make a punitive costs order in light of the applicant's persistence in not complying with the time limits. I do not agree.

23. Accordingly I make the following order:

The applicant's application is dismissed with costs.

Gush J

Date of hearing: 10 March 2011

Date of judgment: 1 June 2011

Appearances:

For the applicant: Adv H Loots

Instructed by: Kellerman Hendrikse Binedell Attorneys

For the respondent: Adv R G L Stelzner SC

Instructed by: Faure and Faure Attorneys