REPUBLIC OF SOUTH AFRICA

Not reportable

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 1027/15

In the matter between:

Mbulelo BIKWANI	Applicant
and	
CCMA	First Respondent
Elridge EDWARDS N.O.	Second Respondent
SOUTH AFRICAN MEDICAL RESEARCH COUNCIL	Third Respondent

Delivered: 27 October 2016

RULING ON LEAVE TO APPEAL

STEENKAMP J

Introduction

[1] The applicant, Mr Mbulelo Bikwani, applies for leave to appeal against my *ex tempore* judgment of 10 August 2016. In that judgment, I declined to

review a condonation ruling by the second respondent, a commissioner of the CCMA.

[2] This application is bedevilled by the fact that no transcript of the *ex tempore* judgment is available. It appears that the recording equipment in the Labour Court was not working when I handed down judgment (not for the first time, and one of a host of infrastructural problems under which the Court operates). Nevertheless, both parties proceeded to file their submissions on the basis of their own notes and recollection of the judgment that I handed down, without objection. I shall also, insofar as necessary, recap my reasons in the course of this ruling.

The test on appeal

[3] The test to be applied in an application such as the present is that referred to in s 17 of the Superior Courts Act, 10 of 2013. Section 17(1) provides:

> "Leave to appeal may only be given where the judge or judges concerned are of the opinion that –
>
> (a) (i) the appeal would have a reasonable prospect of success; or
>
> (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgements on the matter under consideration;
>
> (b) the decision sought on appeal does not fall within the ambit of section 16 (2) (a); and
>
> (c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties."

[4] The traditional formulation of the test that is applicable in an application such as the present requires the court to determine whether there is a reasonable prospect that another court may come to a different conclusion to that reached in the judgment that is sought to be taken on appeal. The use of the word "would" in s17(1)(a)(i) is indicative of a raising of the threshold, since previously all that was required for the applicant to demonstrate was that there was a reasonable prospect that another court might come to a different conclusion. Further, this is not a test to be applied lightly – the

Labour Appeal Court has recently had occasion to observe that this court ought to be cautious when leave to appeal is granted, as should the Labour Appeal Court when petitions are granted. The statutory imperative of the expeditious resolution of labour disputes necessarily requires that appeals be limited to those matters in which there is a reasonable prospect that the factual matrix could receive a different treatment or where there is some legitimate dispute on the law (See the judgment by Davis JA in *Martin & East (Pty) Ltd v NUM* (2014) 35 *ILJ* 2399 (LAC).

[5] It must also be borne in mind that the applicant seeks leave to appeal against a review judgment – one in which the applicant in any event had a considerable hurdle to overcome on the test for review; and that the underlying ruling by the Commissioner is one on condonation, which is a discretionary ruling.

The condonation ruling

[6] The applicant entered into an agreement with the third respondent, the South African Medical Research Council, shortly before he was due to face twelve allegations of misconduct at a disciplinary hearing. They agreed that his employment would be terminated on 31 July 2015. He referred an unfair dismissal dispute to the CCMA on 25 September 2015, some 25 days late.

[7] At the arbitration, the applicant contended that he referred the dispute late because the SAMRC had created the impression that his dismissal was for operational requirements, but then applied to SARS for a tax directive specifying the reason for termination as “mutual termination”. It had issued two certificates of service, the one simply recording a mutual termination and the other “mutual termination based on operational requirements”. He only referred the dispute to the CCMA after he had been paid in terms of the agreement on 25 September 2015. He had also been in Gabon for two weeks until 3 September 2015.

[8] Concerning prospects of success, the applicant argued that the termination agreement was not valid because there was no “meeting of the minds” concerning the reason for termination. The Council, on the other hand, pointed out that the settlement agreement was signed on a voluntary basis

between parties who were both represented by attorneys. The applicant had not alleged that the agreement was vitiated by misrepresentation, duress or undue influence; nor that it was invalid. And he had accepted payment in terms of the agreement.

[9] The arbitrator noted that it was common cause that the applicant was issued with a notice to attend a disciplinary hearing and that it did not take place because he entered into an agreement that his services would be terminated on 31 July 2015. That was the date of termination and thus the date from which the referral period ran. The referral was thus 25 days late.

[10] With regard to prospects of success, the arbitrator took into account that, despite a delay around uncertainty about the reasons specified for the mutual termination, the applicant had not averred that he was coerced into signing the agreement; that he was at all relevant times represented by an experienced attorney[1]; and that he had received payment in terms of the agreement. He had not offered to repay that money.

[11] The arbitrator also took into account that, as a former CCMA commissioner, the applicant must have been aware of the time periods for referring unfair dismissal disputes. He concluded that the applicant had not shown good cause for the late referral and refused condonation.

The judgment, grounds of appeal and evaluation

[12] The discretionary ruling by the arbitrator was not so unreasonable that no other arbitrator, acting reasonably, could have come to the same conclusion.[2]

[13] The following questions posed in *Goldfields Mining*[3] must all be answered in the affirmative in this case:

> "1. In terms of his/her duty to deal with the matter with the

[1] Mr Parker, who also represents him in this Court.

[2] *Sidumo v Rustenburg Platinum Mines Ltd* (2007) 28 *ILJ* 2405 (CC).

[3] *Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA* [2014] 1 BLLR 20 (LAC).

minimum of legal formalities, did the process that the Arbitrator employed give the parties full opportunity to have their say in respect of the dispute?

2. Did the Arbitrator identify the dispute she was required to arbitrate (this may in certain cases only become clear after both parties had given evidence)?
3. Did the Arbitrator understand the nature of the dispute he/she was required to arbitrate?
4. Did he/she deal with this with substantial merits of the dispute?
5. Is the Arbitrator's decision one that another decision-maker could reasonably have arrived at based on the evidence?"

Grounds of appeal

[14] The applicant nevertheless raises the following grounds of appeal:

14.1 The court misdirected itself when it rejected the applicant’s argument that this case was about repudiation and not about the validity of the settlement agreement;

14.2 the court misdirected itself by finding that the Council was justified in deviating from the terms of the settlement agreement and refusing to recognise the reason for the termination, namely operational requirements;

14.3 the court misdirected itself when it held that the applicant had entered into the settlement agreement in order to avoid facing a disciplinary hearing;

14.4 the court misdirected itself when it found that the applicant should have repaid the money that the Council had paid to him if he wanted to challenge the settlement agreement;

14.5 the court erred in holding that an application for condonation was necessary; and

14.6 the court should not have ordered costs.

Evaluation

[15] There are no reasonable prospects that another court will come to a different finding on any of the grounds raised.

[16] It is somewhat surprising that the issue of whether condonation was necessary is raised again in this application, as Mr *Parker* conceded as much in the hearing of the review application.

[17] The settlement agreement was binding on the parties. There is, therefore, no doubt that the dispute arose on 31 July 2015. It was in full and final settlement. In that regard, the facts of the case can be compared to those in the recent matter of *Gbenga-Oluwatoye*[4] to which Mr *Masuku* referred. In that judgement, Savage AJA said:

> "Contractual principles apply to any agreement entered into between and employer and employee, including an agreement of compromise in terms of which parties agreed to settle any dispute or claim is that may exist between them.
>
> It is not an issue that the appellant and respondent signed the mutual separation agreement. Nor is there any dispute that the agreement records that it was entered into 'in full and final settlement of all claims of whatever nature and however rising between the parties'…
>
> A contract may be vitiated by duress where 'intimidation or improper pressure renders the consent of the parties subjected to duress no true consent'. Compulsion may be exercised by way of physical force, or indirectly, by way of the threat of harm. In order to obtain an order setting aside a contract on the grounds of duress, actual violence or reasonable fear must be shown. The fairness because by the threat of some 'considerable evil' to the person concerned, or to his or her family. The threat or intimidation must be unlawful or *contra bonos mores* and the

[4] *Gbenga-Oluwatoye v Reckitt Benckiser South Africa (Pty) Ltd* (2016) 37 *ILJ* 902 (LAC); [2016] 5 BLLR 425 (LAC) paras 12-15.

> moral pressure used must have caused damage. The burden of proving the existence of duress rests on the party raising it."

[18] In this case, there was no duress. The applicant entered into the agreement in full and final settlement.[5] He was advised by his attorney. He agreed to a mutual termination of his services.

[19] The Council did not repudiate the agreement. As the arbitrator pointed out, there was an issue about the reasons given for the mutual termination; but the fact remains that it was terminated by agreement with effect from 31 July 2015. And the applicant was paid handsomely in terms of the agreement – in excess of R1 million.

[20] It is common cause that the applicant was facing 12 allegations of misconduct. That appears to be the reason why he opted for a mutual termination rather than run the risk of dismissal, but it does not matter. The fact is that his employment was terminated by agreement on 31 July 2015. The only question that was before the arbitrator was whether he should be granted condonation for the late filing of the dispute. The arbitrator ruled that it should not be condoned. That ruling is not so unreasonable that no other arbitrator could have exercised her discretion in the same way.

[21] With regard to costs, this court has a wide discretion.[6] it should have been clear that the arbitrator's ruling on condonation – a discretionary ruling in itself – was reasonable and not open to review. The matter should have stopped there. Instead, the applicant forced the Council to incur further legal costs. There is no reason in law or fairness why costs in the review application, and indeed, in this application for leave to appeal, should not follow the result.

Conclusion

[22] There are no reasonable prospects that a higher court will come to a different conclusion to the one of this Court that the arbitrator's ruling on condonation was not open to review.

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[5] See *Be Bop a Lula Manufacturing & Printing CC v Kingtex Marketing (Pty) Ltd* 2008 (3) SA 327 (A).

[6] LRA s 162.

Order

The application for leave to appeal is dismissed with costs.

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Anton Steenkamp

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	Mushtaq Parker of Parker & Khan Inc.
THIRD RESPONDENT:	Thabani Masuku
Instructed by	Smith Tabata Buchanan Boyes.