



IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

Case no: C511/2016

In the matter between:

PSA obo A M SETERA

Applicant

and

DEPARTMENT OF CORRECTIONAL SERVICES

First Respondent

GENERAL PUBLIC SERVICE SECTOR

BARGAINING COUNCIL

Second Respondent

E MAREE

Third Respondent

Date heard: 27 February 2020

Delivered: By email on May 7 2020

JUDGMENT

RABKIN-NAICKER, J

- [1] This is an opposed application to review a condonation ruling by the third respondent (the arbitrator) in which he dismissed an application for condonation by the applicant employee (Setera).

[2] The referral to the Bargaining Council was approximately one month late. The dispute arose after an incident occurred at Brandvlei Management Area during which several people were assaulted, and one inmate died. Thirty-two officials were charged in relation to the incident of which 14 were members of the PSA. Twelve of the PSA members received written warnings and two were dismissed. The two dismissed were Setera and one May.

[3] It is submitted by the applicant that the Arbitrator's finding regarding the reasons for the delay is not one that a reasonable decision maker could make. The following part of the Arbitrator's analysis bears recording:

"The delay in this matter is approximately 1 month period of time that although not significant still warrants a reasonable and acceptable explanation.

In explaining the delay on behalf of the applicant Ms Mosetic the PSA official claimed that the applicant was charged with 32 other employees on charges of misconduct. She contended that fourteen of these employees were members of the PSA and of these 12 received final written warnings and two, one being the applicant were dismissed.

According to Ms Mosetic an appeal was lodged regarding the two dismissals and when the outcome was received it was treated as one and all documents were in one file. Subsequent to this when the dispute was referred it was for R May and should have included the applicant. At conciliation a certificate was issued and the matter was set down for arbitration on the 3rd of April 2018 and it was when the notice was received on 6 February 2018 that it was determined that the applicants dispute was not referred.

The respondent denied that the hearing took years and stated that it was finalized within 7 months. It was also stated that the applicant was only charged with 5 others and his hearing and that of three others were done separately after they pleaded guilty. Regarding the appeal it was stated that it was addressed to the applicant personally and not to him and May.

Ms Mosetic attributes the delay to the provincial office who handled the dispute and who considered it as one case and held all documents on one file. Who specifically this was at the provincial office is not mentioned nor is a supporting affidavit attached to the application to support this allegation."

- [4] The arbitrator then proceeded to cite certain case law¹ and concluded that that this was a matter in which there was no reasonable and acceptable reason for the delay and that the merits were thus immaterial to his evaluation and the condonation should be dismissed. He referred in particular to the judgment of **Moila v Shai NO & others** to support this proposition. However, that matter involved an excessive delay of more than a year, as the LAC stated:

“[34] I do not have the slightest hesitation in concluding that this is a case where the period of delay is excessive and the appellant's purported explanation for the delay is no explanation at all. I accept that the case is very important to the appellant. However, the weight to be attached to this factor is too limited to count for anything where the period of delay is as excessive as is the case in this matter and the explanation advanced is no explanation at all. If ever there was a case in which one can conclude that good cause has not been shown for condonation without even considering the prospects of success, then this is it. Where, in an application for condonation, the delay is excessive and no explanation has been given for that delay or an 'explanation' has been given but such 'explanation' amounts to no explanation at all, I do not think that it is necessary to consider the prospects of success.”

- [5] In the matter before the Arbitrator, the delay in referring the dispute was one month. An explanation for the delay was given as referred to above. The explanation for the one month delay did not amount to 'no explanation at all'. In these circumstances, this was not a matter in which the prospects of success should have been ignored. In the Courts view therefore, the ruling by the Arbitrator cannot be considered within the bounds of reasonableness.
- [6] In the result, the ruling must be reviewed and set aside. I am not inclined to substitute the ruling on the record before me. I make the following order:

¹ (2007) 28 ILJ 1028 (LAC)

Order

1. The condonation ruling under case number GPBC269/2018 is reviewed and set aside.
2. The application for condonation is referred back to the Second Respondent for re-hearing by an Arbitrator other than the third respondent.



H. Rabkin-Naicker

Judge of the Labour Court

Appearances:

Applicant: MaCgregor Erasmus Attorneys

Respondents: R. Nyman instructed by State Attorney