

IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

Case no:
C268/2019

In the matter between:

KOOGANASEN THEO PILLAY

Applicant

and

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

First Respondent

COMMISSIONER MADELAINE LOYSON N.O.

Second Respondent

SANTAM LIMITED

Third Respondent

Date heard: 17 February 2021 on the papers

Delivered: 17 May 2021 by means of email

JUDGMENT

RABKIN-NAICKER J

- [1] This is an application to review a Condonation Ruling under case number WECT 14634-18. The dispute between the parties has a lengthy history.
- [2] In September 2014, the applicant was dismissed for alleged misconduct. In an Award issued on 7 September 2015, a CCMA Commissioner found that the applicant's dismissal was substantively unfair, and awarded him compensation. Both parties then sought to review the Award and on 6 June 2017, the applicant

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was reinstated by this Court. The third respondent (Santam) petitioned the LAC for leave to appeal the judgment, but this was refused on 30 November 2017.

- [3] On the 25 June 2018, the applicant was issued with a retrenchment notice. The applicant referred an unfair dismissal (retrenchment) dispute to the CCMA for conciliation. On 12 September 2018, Santam brought an application

challenging the jurisdiction of the CCMA to entertain the dispute given that it was referred outside the prescribed 30-day period without an application for condonation.

[4] As set out in the Award:

“9. During the conciliation process on 13 September 2018, the commissioner instructed the parties to make written submission in respect of the issue of condonation. The parties are not in agreement as to exactly what was required to be submitted and the developments thereafter save to say that formal CCMA records do not reflect that commissioner Verhoog made any formal hearing in respect of condonation, nor that a certificate of outcome was issued at all.

10. After a diligent search of all available records at the CCMA by case management officers of the CCMA and I, it is clear that the original case file containing the documents pertaining to the matter was unable to be located and that indeed, no ruling by the commissioner or any certificate of outcome concerning the matter is on record.

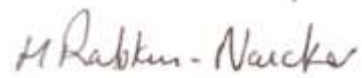
11. It was therefore agreed by the parties that, in order to avoid any further delay in the matter, the issue of condonation be argued afresh before me.”

[5] The Condonation Ruling was issued on 8 March 2019. On the 18 March 2019, the applicant launched a review application aimed at setting aside the Condonation Ruling. In November 2019, the applicant launched an application to hold Santam in contempt of Court for failure to comply with the reinstatement order and certain further relief. In **Pillay v Santam Ltd & another (2020) 41 ILJ 2695 (LC)**, Moshuana J dismissed this application and ordered the applicant to pay costs on a punitive scale.

- [6] The applicant was refused leave to appeal by Moshuana J and the LAC, and he then brought an application for leave to appeal to the Constitutional Court on 30 November 2020, which has yet to be decided. His case at the Constitutional Court is premised on the basis that he was never reinstated and that his purported retrenchment was invalid and unlawful. I agree with submissions on behalf of Santam that the dispute in regard to the allegedly invalid retrenchment is thus *lis pendens*. The applicant has also sought to amend his Notice of Motion in the review before me, *inter alia* to bring in the question of legality of the retrenchment process and raising constitutional issues.
- [7] Having considered a most prolix application, where does this leave this Court? If the applicant is successful at the Constitutional Court, this Court would have decided the review application but its judgment would be rendered moot. The Condonation Ruling will not present a triable issue, should the applicant be successful in the Constitutional Court.
- [8] I am therefore of the view that it is premature to decide a review of the Condonation Ruling at this juncture. I therefore make the following order:

Order

1. The application to review the Condonation Ruling under case number WECT 14634-18 is stayed pending the finalization of the application for leave to appeal to the Constitutional Court, against the Judgment by Moshuana J, under case number C741/19.
2. Costs of this application are reserved for future determination.



H. Rabkin-Naicker

Judge of the Labour Court of South Africa

Representation

Applicant: In person

Third Respondent : Anton Myburgh SC with Pranisah Maharaj-Pillay instructed by
Werksmans Attorneys