THE LABOUR COURT OF SOUTH AFRICA

JOHANNESBURG

Reportable

Case No: JR 2753/12

In the matter between:

UCIMESHAWU obo SAMSON MOHALE **Applicant**

and

THE COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION **First Respondent**

COMMISSIONER JACOB DANIEL SELLO; *N.O.* **Second Respondent**

THE BUTCHER SHOP & GRILL **Third Respondent**

Heard: **13 August 2015**

Judgment: **19 November 2015**

Summary: **Application for review in terms of s 145 of the LRA; Application launched outside the prescribed six weeks' time frame; Application for condonation launched over 16 months after the review;**

Explanation for the delay insufficient and inadequate; No application to condone the late delivery of the condonation application itself; Prospects of success on review extremely poor; Condonation refused and review application dismissed with costs.

JUDGMENT

VOYI AJ.

[1] This is an application to review and set aside an arbitration award that was issued by the Second Respondent ("the Commissioner") on 22 October 2012 under case number GAJB19813-12.

[2] The Commissioner issued the arbitration award following arbitration proceedings that were conducted under the auspices of the First Respondent (*"*the CCMA*")* on 23 August 2012 and 10 October 2012.

[3] The application for review is launched by UCIMESHAWU, a trade union acting on behalf of one Mr Samson Mohale *("*Mr Mohale*").* Only the Third Respondent opposes the review application.

[4] The Applicant's review application is launched in terms of s 145 of the Labour Relations Act ("the LRA").[1] Under ss 1(a) of s 145 of the LRA, it is stipulated that an application for an order setting aside an arbitration award must be applied for '*within six weeks of the date that the award was served on the applicant*,…'.

[5] In the present matter, it is accepted that the arbitration award was served on the Applicant on 22 October 2012. The prescribed six (6) weeks expired on 03 December 2012. The Applicant's review application was only delivered on 17 January 2013, over six (6) weeks after the actual due date for the application.

[1] Act No. 66 of 1995.

[6] In the answering affidavit delivered by the Third Respondent on 14 March 2013, it was pointed out that the Applicant's application for review was brought out of time. Despite being alerted to the need to apply for condonation as per the answering affidavit delivered, the Applicant took no steps to launch the required application until June 2014.

[7] On account of observed delays in the prosecution of the review application, the Third Respondent was prompted to launch an application for the dismissal of the review. The Application to dismiss was launched on 11 February 2014. It was launched in terms of Rule 11 of the Labour Court Rules.

[8] The application to dismiss came before this Court for hearing on 22 April 2014, on which date this Court ordered the Registrar to enrol the review application for hearing on the opposed motion roll. In essence, the application to dismiss was not granted and, instead, the Registrar was directed to enrol the application for review for hearing.

[9] The application for review came before me for hearing on 13 August 2015. On behalf of the Third Respondent, the issue concerning the late delivery of the review application was pertinently raised. It was somewhat conceded on behalf of the Applicant that the review application was, indeed, filed out of time.

[10] The explanation tendered for the late delivery of the review appears at paragraph 4 of the affidavit in support for the Applicant's condonation application. It reads thus:

> 'The review application was applied by myself within six weeks which is in line with section 145 of LRA 66 of 1995 as per form 1, however I am told that I should have filed the papers within six weeks while I only filed them twenty six days late which is not excessive if that is the case, I respectfully submit that the failure was not deliberate and wilfully but it was due to different interpretation of the same section 145 of the Act.'

[11] At the hearing of the matter, the above explanation was expanded upon with a submission that the Applicant filed its application for a case number well within the six (6) weeks stipulated in s 145(1)(a) of the LRA.

[12] It was, therefore, the Applicant's contention that the review application cannot, necessarily, be regarded as late if the application for a case number was filed within six (6) weeks from the date of service of the arbitration award on the Applicant.

[13] An application for a case number is required by Rule 3(1) of the Labour Court Rules. This Rule provides as follows:

> 'Any party initiating any proceedings must apply for a case number before serving any documents. The application for a case number must be made to the registrar in the registrar's office or by fax. If the application is made by fax, Form 1 must be used.'

[14] It is clear from the above provisions of Rule 3(1) that applying for a case number is distinct from serving any documents initiating any proceedings. The notion that the filing of only an application for a case number is in compliance with the prescribed six (6) weeks' time frame under s 145(1)(a) of the LRA is demonstrably incorrect.

[15] It terms of s 145(1)(a) of the LRA, an applicant is required to 'apply' to the Labour Court for an order setting aside the arbitration award within the prescribed six (6) weeks.

[16] In *NCBAWU v Masinga and others*,[2] it was held thus:

> 'The application is one governed by s 145 of the Labour Relations Act 66 of 1995 (the Act). This section provides that in a case such as the present one the aggrieved party must apply for review within six weeks of the date of the award being served on the applicant. I assume that 'apply' means file the

[2] [2000] 2 BLLR 171 (LC).

papers with all relevant parties and file the papers with the registrar. The filing and service of an application is what is intended by the word 'apply'.'[3]

[17] This Court has in the past held that the mere filing of a notice of motion, unaccompanied by a supporting affidavit, cannot be regarded as being in compliance with the requirement to bring an application for review within six (6) weeks.[4] It is even worse in this matter as we are dealing with a filing of only an application for a case number as contemplated by Rule 3(1) of the Labour Court Rules.

[18] If indeed the Applicant truly believed in its understanding and interpretation of the provisions of s 145(1)(a) of the LRA, read together with Rule 3(1) of the Labour Court Rules, it is difficult to appreciate why it eventually applied for condonation.

[19] The Applicant, however, persisted with its erroneous interpretation and argued that the review was not brought out of time. As a fall-back position, the Applicant made reference to its application for condonation which was delivered in June 2014.

[20] Whichever stance is taken by the Applicant, I am unable to find an acceptable explanation for the delay in delivering the review application on time. The explanation which is half-heartedly tendered in the condonation application itself is simply inadequate and falls far short of what is required of a late application.

[21] To make matters worse, the application for condonation itself was delivered way out of time and no explanation for the delay in launching same, as soon as the need to do so arose, is given.[5]

[22] The application for review was delivered on 17 January 2013 and the application for condonation was launched only in June 2014. The Applicant, in the affidavit in

[3] At para 6.
[4] See: *Queenstown Fuel Distributors CC v Labuschagne NO and others* (1999) 20 *ILJ* 928 (LC).
[5] *Seatlolo and others v Entertainment Logistics Service (A Division of Gallo Africa Ltd)* (2011) 32 *ILJ* 2206 (LC) at para 10; *Mogola and another v Head of Department: Department of Education* (2012) 33 *ILJ* 1203 (LC) at para 23(iv).

support of condonation, fails to explain why it took such a long time to launch the application for condonation. This failure, on the part of the Applicant, is in my opinion fatal to the success of the application for condonation itself. [6]

[23] In addressing its prospects of success, the Applicant simply re-visits the merits of the dismissal dispute. The Applicant, therefore, fails to address its prospects of success in relation to the review application.

[24] Nonetheless and gleaning from the review papers as they stand, it becomes apparent that the Applicant's prospects of success with the review are simply non-existent.

[25] The Applicant's grounds for review are not sufficiently articulated and as they stand, they are not adequate to upset the Commissioner's arbitration award. The grounds for review are succinctly set out as follows:

> '*1.* The 2nd respondent was well aware of the charges against me that they were bsed (sic) on assumptions as per annexure "A" attached, but without clear reasons ruled in company's favour.
>
> 2. It was obvious from the company evidence and charges that I did not influence or persuade Susan therefore there was no misconduct committed.
>
> 3. It was also common cause that I had no powers to influence or persuade the senior member of management, Susan but only represented Msawakhe and suggested.
>
> 4. There was no evidence presented that I broke any company rule by suggesting and representing Msawakhe on if he could receive his UIF benefits while he was unemployed.

[6] See: *Roto v Commission for Conciliation Mediation and Arbitration and others* (JR 1546/14) [2015] ZALCJHB 73 (5 March 2015) at para 11(f).

5. The 2nd respondent did not exercise his powers afforded to him by LRA 66 of 995 as amended.

6. It is respectfully submitted that his ruling stands to be reviewed and set aside in terms of the Act as section 145 alternatively at section 158(1)(g)

7. The 2nd respondent did not exercise his discretion properly when considering submissions made to him hence his action was grossly unreasonable towards the applicant.'

[26] The Applicant opted not to supplement the above grounds for the review after delivery of the record of the arbitration proceedings. It simply delivered the notice envisaged by Rule 7A(8)(b) of the Labour Court Rules.

[27] In his arbitration award, the Commissioner correctly pointed out that what was at the heart of the dispute was the role of the Applicant's member (being Mr Mohale) during the conversation which gave rise to the misconduct charges being brought against the said member.

[28] The misconduct charges emanated from an incident which occurred on 2 March 2012. On this date, Mr Mohale was approached by a former employee of the Third Respondent (being one Mr Musawakhe Ngubane) who had recently resigned.

[29] It was Mr Ngubane's desire to obtain Unemployment Insurance Fund benefits despite having resigned. In order to archive this, Mr Ngubane enlisted the help of Mr Mohale. The two approached the Third Respondent's accounts manager, being one Ms Suzan Walklett.

[30] Ms Walklett was approached with a request that the UI19 form be altered to read that Mr Ngubane had not resigned but was dismissed so as to obtain Unemployment Insurance Fund benefits.

[31] It was Mr Mohale's stance that he was merely an interpreter for Mr Ngubane and, therefore, did not directly request the Third Respondent, through Ms Walklett, to

alter its records. It was, however, the Third Respondent's case that this request was directly made by Mr Mohale and that he was not acting as a mere interpreter.

[32] As pointed out above, the Commissioner's approach to the matter was to consider Mr Mohale's role during the conversation with Ms Walklett.

[33] Under his analysis of the evidence and arguments, the Commissioner pointed out that he was faced with two conflicting versions. He expressed himself as follows:

> 'I was faced with two mutually destructive versions and had to conduct a credibility test in order to decide which version to accept. I found the evidence of Walklett to be probable and convincing. She adduced her evidence without any slightest iota of contradiction and she was clearly comfortable during cross-examination. The same could not be said about the Applicant.'

[34] In the end and after making some key observations, the Commissioner concluded as follows:

> 'I, therefore, accept the [Third Respondent's] evidence that [Mr Mohale] approached Walklett to change the reason of Ngubane's termination on the form UI19 from resignation to dismissal.'

[35] The above finding was decisive to the merits of the dismissal dispute. The Applicant's member was disciplined and dismissed on charges pertaining to an act of dishonesty.

[36] Based on what is averred in the founding affidavit in support of the review application, I find no basis to set aside the Commissioner's decision. To me, the said decision falls well within the realm of reasonable decisions that could be made by reasonable decision makers.

[37] On the basis of (i) there being no acceptable explanation for the delay in timeously delivering the application for review, (ii) there being no explanation, at

all, for the late delivery of the application for condonation itself, and (iii) there being no prospects of success with the review application, I have no hesitation in refusing the Applicant's application for condonation.

[38] With condonation being refused, the Applicant's application for review stands to be dismissed. As for costs, I see no reason why same should not follow the results.

Order

[39] I, accordingly, make the following order:

39.1 The Applicant's application for condonation of the late delivery of the application for review is dismissed.

39.2 The Applicant's application for review is dismissed.

39.3 The Applicant is ordered to pay the Third Respondent's costs.

NP Voyi

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Union Official
For the Third Respondent:	Representative from the Employer's Organisation