

IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

Not Reportable

Case No: JR 80/10

In the matter between:

S J MAMETJA

Applicant

And

DEPARTMENT OF HOME AFFAIRS

1st Respondent

COMMISSION FOR CONCILIATION,

MEDIATION & ARBITRATION

2nd Respondent

M RAMOTSHELA N.O.

3rd Respondent

JUDGMENT

Molahlehi J

Introduction

[1] This is an application to review and set aside the arbitration award issued by the 3rd respondent under case number LP 13374-09, in terms of which the application for the condonation of the late referral of the dispute to the 2nd respondent was dismissed.

[2] The applicant who was initially employed by the Department of Justice in Limpopo as administrative clerk and later promoted to the position of senior administrative clerk was at some point seconded to the Department of Home Affairs.

- [3] It would appear that after his transfer; the Department of Home Affairs informed him that he ought to have been dismissed by the Department of Justice. The dismissal ought to have been effected because the applicant had been charged with corruption and extortion. The dismissal was according to the founding affidavit of the applicant based on the conviction on the same charges by the criminal court.
- [4] Thereafter the applicant referred a dispute to the CCMA concerning an alleged unfair dismissal. The referral of the dismissal dispute was accompanied by an application for condonation for the late referral of the dispute.
- [5] As indicated earlier in this judgment the commissioner dismissed the condonation application on the basis that the applicant had failed to make out a case for condonation. The commissioner in dismissing the condonation application reasoned that the period of 11 years was too extensive and that the explanation proffered by the applicant was not satisfactory.
- [6] In the grounds for review, the applicant contends that the commissioner in declining to grant him condonation committed a gross-irregularity in that he failed to properly determine the evidence which was before him. The applicant further complained that the commissioner failed to apply his mind to the merit of the case and the prejudice that the applicant had to suffer if the condonation was not granted. The other ground for challenging the arbitration award is based on the allegation that the commissioner committed a misconduct in arriving at the decision that he made.

[7] During argument, the applicant who represented himself sought to put the blame of the delay on his attorneys and accused them of having to sabotage his case. This allegation is not made anywhere in his papers. He also argued that he was reinstated in October 1996 and January 1997. However, when asked to explain this he said that he received a letter on 26 August 1996 informing him that he was dismissed and the dismissal would take effect as from the 30 September 1996. He also stated that he never reported for work since the 30 September 1996. He also stated that he did not deny the charges which were levelled against him but strangely, argued that he was never dismissed.

The applicable legal principles

[8] It is clear that in applying for condonation for the late referral of his dismissal dispute the applicant was seeking to have the time frames for such a referral as provided for in the Labour Relations Act (the LRA) extended. Thus in this respect what the applicant needed to do was the following:

- “(a) To show that the degree of lateness or non-compliance with the prescribed time frame is not excessive;*
- (b) To provide an explanation for every aspect of the period of the lateness or the failure to comply with time frames;*
- (c) To show that there prospects of succeeding or has bona fide defence when the matter is considered when considered in the main case;*
- (d) To show the importance of the case;*
- (e) To show interest in the finality of the matter and the convenience of the court and;*

(f) *Has to show avoidance of unnecessary delay in the administration of justice. See Foster v Stewart Scott Inc (1997) 18 ILJ 367 (LAC)."*

[9] The commissioner or the court has judicial discretion to grant condonation and does so by taking into account the above factors which are not individually decisive but are interrelated and must be weighed against each other. And in weighing these factors for instance, a good explanation for the lateness may assist the applicant in compensating for weak prospects of success. Similarly, strong prospects of success may compensate the inadequate explanation and the long delay.

[10] An applicant in an application for condonation has to show good cause by providing an explanation that shows how and why the default occurred. There is authority that the court could decline the granting of condonation if it appears that the default was wilful or was due to gross negligence on the part of the applicant. In fact the court could not on this ground decline to grant an indulgence to the applicant.

[11] The prospects of success or *bona fide* defence on the other hand mean that all what needs to be determined is the likelihood or chance of success when the main case is heard. See *Saraiva Construction (Pty) Ltd v Zulu Electrical and Engineering Wholesalers (Pty) Ltd 1975 (1) SA 612 (D) and Chetty v Law Society 1985 (2) SA at 765A-C.*

[12] In *Melane v Santam Insurance Co Ltd 1962 (SA) 531 (A) at 532C-F*, the Court held that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without prospects of success, no

matter how good the explanation for the delay, an application for condonation should be refused. Another important consideration of whether or not to grant condonation is the steps that the applicant took as soon as it became aware that he or she was late in terms of the required time frames. In others words the applicant should bring the application for condonation as soon as he or she becomes aware of the lateness of its case.

[13] The reasons for the delay is set out in the founding affidavit for condonation before the CCMA. In brief the reasons were as follows:

- “1. *The applicant was engagement in negotiations with the respondent.*
2. *The applicant engaged the Public Protected.”*

[14] Under the headings ‘*Prospects of success*’ the applicant states:

- “4.1 *On / about January 1988, the applicant was employed as a Administration Clerk by the Department of Justice with Persal No 16224631.*
- 4.2 *On the 15 November 1995, the Department of Justice seconded the Applicant to work under the Respondent and was promoted to the position of a Senior Administrative Clerk. The applicant was dismissed on the 5 February 1997.*
- 4.3 *It is submitted that there was a procedural defect in that there was no hearing conducted. Regard must be had to the fact that the onus of prove in a criminal case is “beyond reasonable doubt” whereas in Labour matters prove is on the balance of probabilities.*

4.4 *The applicant was dismissed by the Respondent on the grounds that the Department of Justice should have dismissed the Applicant on charges of corruption and extortion, based on the Criminal Court sanction. The Respondent claimed to have given effect to it, which is clearly in contravention of the provisions of the Labour Relations Act pertaining to the law of unfair dismissal.*

4.5 *The Respondent requested the Applicant to make written Representation to show cause why I should not be suspended without pay. After having made the representations, the applicant was promoted to the rank of Senior Administrative clerk.”*

Evaluation

[15] It cannot, in my view, be disputed that the periods of 11 years was indeed excessive and for that reason the commissioner was correct in dismissing the condonation application. The applicant has also failed to make out a case for prospects of success. The applicant both at the CCMA and the court level does not state in what way there exists prospects of success in his case. In this respect all what the applicant states is that his dismissal was both substantially and procedurally unfair.

[16] The applicant in dealing with prospects of success particularly failed to take the commissioner in to his confidence in that he failed to address the contents of the letter dated 21 August 1996, which was addressed to him by the Department of Home Affairs. The applicant needed to in particular deal with paragraph two the letter which reads as follows:

“ In terms of section 26(3) of the Public Services Act, 1994 you are hereby informed by the Department that you are discharged from the Public Service, in terms of section 24 (2) (a) (v) of the Public Service Act, 1994 with effect from 1 October 1996 in accordance with the recommendation of the former Lebowa Public Service Commission. Your last working day will therefore be 30 September 1996.

In terms of section 26 (1) of the Act, you have the right to appeal directly to the Public Service Commission, Private Bag X121, Pretoria, 0001, against this decision, within 21 days of receipt of this letter. It would be appreciated if a copy of your notice of appeal could also be forwarded through your Regional Director to the Director: Personnel Management at Head Office.”

[17] In the light of the above, I am of the view that the applicant fails to make a case justifying interference with the ruling of the commissioner. The applicant has also failed to make out a case that this court should on its own consider to condone the 11 years delay in referring his dispute to the first respondent.

[18] In the premises the review application is dismissed.

Molahlehi J

Date of Hearing: 25 August 2010

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Representation

Applicant appeared in person.