



THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

JUDGMENT

Not reportable

CASE NO: JR 1041/14

In the matter between:

MQOBI CHARLES DUMA

Applicant

and

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

First Respondent

BOITUMELO MOKOENA N.O

Second Respondent

**TRANSPORT, EDUCATION AND
TRAINING AUTHORITY**

Third Respondent

Date enrolled: 19 August 2020 (in Chambers)

Date of judgment: 25 August 2020. Judgment distributed by email by 16:00

JUDGMENT

VAN NIEKERK J

- [1] This is an application to review and set aside a condonation ruling issued by the second respondent (the arbitrator) on 6 May 2014, more than six years ago. In her ruling, the arbitrator refused to condone the applicant's late referral of his unfair dismissal dispute to the CCMA.
- [2] The applicant was employed by the third respondent and dismissed on 31 January 2014 on account of poor work performance. On the same date, he addressed a letter to the third respondent seeking an appointment in a more junior position. He later disputed the fairness of his dismissal and referred a dispute to the CCMA on 27 March 2014. The referral was accompanied by a two-page application for condonation, completed on the pro forma documents used in the CCMA. In regard to the reasons for lateness, the applicant stated that he had requested to be moved to a position and that no response had been communicated to him. In regard to the prospects of success, he states that he was not provided with any specific reasons or examples of poor work performance and further, that the third respondent failed to respond to his request to be moved to a lower position. The third respondent filed an answering affidavit opposing the application for condonation.
- [3] The arbitrator recorded that the referral to the CCMA was reflected as having been received on 27 March 2014 and that the referral was thus 24 days late. The arbitrator considered this to be 'not excessive'. In regard to the reasons for the delay, the arbitrator recorded that the only reason proffered by the applicant was that he was waiting for a response regarding his request to be placed in a lower position. She noted that all he had done was submit a letter and no more. The applicant had failed to follow up on the letter and there was nothing from the third respondent's side to indicate that they were willing to engage with him. The explanation was weak and unacceptable. In regard to prospects of success, the arbitrator recorded that there was a factual dispute as to whether the applicant had admitted to poor work performance and that on the face of it, the applicant's

prospects of success were reasonable. In regard to prejudice, the arbitrator found that the applicant's position had been filled and that the third respondent would be prejudiced to that extent. The arbitrator concluded that the applicant had failed to show good cause in that his failure to provide a reasonable and acceptable explanation for his delay rendered the prospects of success immaterial and on that basis, condonation was refused.

- [4] The test to be applied in the present instance is well-established. This court may intervene if and only if the applicant establishes that the decision to which the arbitrator came was so unreasonable that no reasonable decision-maker could come to it. As the courts have often observed, this presents a considerable hurdle to an applicant in a review application, particularly in the case of penalty reviews. The principle recognises that decision-makers, all acting reasonably, may reach different conclusions on the same facts, and that it is incumbent on the court to recognise that the task to determine the fairness or otherwise of a penalty falls primarily within the arbitrator's domain. In short, it is incumbent on an applicant to establish that an arbitrator's decision that the sanction of dismissal was too harsh in the circumstances falls outside of a band of decisions to which a reasonable decision-maker could come on the available evidence.
- [5] Where an applicant seeks to review a condonation ruling, there is an additional hurdle. Condonation is a discretionary remedy and this court has accepted that the discretion to grant or refuse condonation is assailable only on review where the commissioner did not exercise his or her discretion judiciously and fairly (see *Myburgh and Bosch Reviews in the Labour Courts* at p 148). The authors refer to the decision in *Cowley v Anglo Platinum & others* [2016] JAL35884 Musi AJ said the following at paragraph 21 of the judgment:

When a commissioner is endowed with a discretion this court would be very slow to interfere with the exercise of that discretion. The commissioner's exercise of discretion will be upset on review if the applicant shows, *inter alia*, that the

commissioner committed a misdirection or irregularity, or that he/she acted capriciously, on wrong principle, or in bad faith, or unfairly, or that in exercising their discretion the commissioner reached a decision that a reasonable decision-maker could not reach. If it is clear that the commissioner exercised such discretion judiciously and fairly after taking into consideration all the relevant facts this court will not interfere with the exercise of such discretion.

- [6] In the present instance, the arbitrator was aware of the test she was required to apply and took into account all of the relevant factors; the applicant has failed to articulate any grounds for review but for an averment to the effect that the commissioner made an 'error of fact' in finding that the third respondent stood to suffer prejudice because his position had already been filled. In this regard, the applicant contends that he was seeking an order of compensation. Secondly, the applicant contends that the arbitrator made an 'error of fact' in finding that the reasons for his late referral were not reasonable. What these averments overlook is that the test to be applied is not one that is concerned only with mistakes of fact – commissioners are allowed to be wrong. The applicant does not make out a case to establish that the arbitrator's decision was so unreasonable that it fell outside of the band of decisions to which reasonable decision-makers could come on the available evidence. The application stands to be dismissed on this basis alone.
- [7] What is of particular concern in the present instance is the fact that the ruling under review was issued more than six years ago. The review application appears to have been filed within the prescribed time limit. The notice to abide was filed by the CCMA few days after service. The record appears to have been filed on 12 June 2014. What is inexplicable is the applicant's failure to prosecute the present application with any degree of diligence. Section 145 (5) of the LRA requires a party brings an application for review to apply for a date for the matter to be heard within six months of delivery of the application and empowers this court to grant condonation for a late application on good cause shown. The six-month period expired in November 2014. The applicant has offered no

explanation for the delay of some five years and 10 months, nor has he formally sought condonation for that delay.

[8] Having regard to the applicant's failure to establish that the arbitrator's ruling does not meet the reasonableness threshold, and having regard further to the applicant's failure to comply with section 145 (5) and the failure to prosecute the present application with any degree of diligence, the application stands to be dismissed.

[9] Insofar as costs are concerned, the court was advised, at the hearing of the application, that the applicant remains unemployed. In those circumstances, it seems to me that there would be little point in ordering him to pay the costs of the application and in my view, for the purposes of section 162 of the LRA, the interests of the law and fairness are best met by there being no order as to costs.

I make the following order:

1. The application is dismissed.

André van Niekerk

Judge of the Labour Court of South Africa

APPEARANCES

For the applicant: Self

For the third respondent: Ms O Mamabolo, Mamabolo Attorneys