



**THE LABOUR COURT OF SOUTH AFRICA,
IN PORT ELIZABETH**

Of interest to other judges

CASE NO: PR 38/13

In the matter between:

INTSIKA YETHU MUNICIPALITY

First Applicant

and

**THE SOUTH AFRICAN LOCAL
GOVERNMENT BARGAINING COUNCIL**

First Respondent

M MBULI (N.O.)

Second Respondent

KAYAZAKI LUGALO

Third Respondent

Heard: 11 June 2015

Delivered: 12 June 2015

Summary: (Review and cross review – review of finding of procedural fairness possible on limited record – arbitrator’s reliance on a reason not advanced by the employee in finding procedural fairness impermissible – in any event no evidence of prejudice suffered by employee arising from non-compliance with code – cross review inordinately late without a proper explanation for the delay – review of procedural finding upheld – cross review condonation application dismissed)

JUDGMENT

LAGRANGE, J

Background

- [1] In this matter both parties have applied to review the findings of the second respondent which they are unhappy with. In the case of the cross review brought by the third respondent, Ms K Lugalo ('Lugalo') there is also a condonation application to consider. The arbitration award which is the subject matter of the reviews was issued on 6 May 2013. Lugalo had been dismissed by the applicant arising from events in which a laptop had apparently been stolen and had mysteriously reappeared the day before polygraph tests were to be conducted on possible suspects.
- [2] The arbitrator concluded that Lugalo was guilty of the theft of the laptop and that her dismissal was substantively fair. The arbitrator also found that Lugalo's dismissal was substantively unfair because the employer representative in the disciplinary enquiry was a manager at the same level as Lugalo, which was contrary to clause 6.6.4 of the disciplinary procedure and code collective agreement. Clause 6.6.4 stipulates that the employer representative "should be" at the same level as the employee.
- [3] The review application was launched on 14 June 2013. It was only on 9 January 2015 that Lugalo brought an application to remit the matter back to the bargaining Council for a fresh hearing following the inability of her representatives to reconstruct a full record of the arbitration proceedings. The municipality opposed this application on 9 February 2015, but it was only on 28 May 2015 that Lugalo finally launched her own cross review in which she seeks to overturn the arbitrator's findings on substantive fairness.

The review of the finding on procedural fairness

- [4] The applicant's grounds of review in respect of this finding are limited. Firstly it contends that the arbitrator erred in reading of clause 6.6.4 as a peremptory provision. Secondly, it contends that the arbitrator had improperly made a finding

on the basis of this provision when Lugalo had not challenged the procedural fairness of her dismissal on the basis and that, in any event, even if the provision was obligatory the mere fact it had not been complied with did not warrant any finding of procedural unfairness in the absence of evidence that Lugalo had been prejudiced by such a breach.

- [5] On the portion of the record produced by the municipality, I am satisfied that it is correct that Lugalo never relied on this provision to argue that the enquiry had been procedurally unfair. It is evident from the characterisation of the dispute in the exchange between the parties at the outset of the arbitration that the challenge of procedural unfairness rested on another basis entirely, which is not necessary to address here. Secondly, even though Lugalo contends that it is difficult to respond to this review application in the absence of the record, she makes no claim that in fact it was part of her case that her dismissal was procedurally unfair because of a breach of clause 6.6.4.
- [6] Even if it had been an issue, there is no evidence that Lugalo was prejudiced in her ability to respond to the municipality's case against her or to prepare her own defence because her opponent was a manager on the same level as herself. In this regard, see *Khula Enterprise Finance Ltd v Madinane & others*¹.
- [7] Consequently I am satisfied that the municipality ought to succeed with its application to review and set aside the findings of the arbitrator on the question of procedural fairness and the consequential relief awarded.

Condonation of the late filing of the cross review

- [8] In effect, the cross review was only properly launched more than 2 years after the arbitration award had been handed down. This is an extraordinary delay by any standard. At all material times Lugalo was legally represented. At the very latest, Lugalo and her attorneys had already contemplated the possibility of launching a cross review by mid-January 2014. Ostensibly, they felt that they needed a full record before considering whether to embark on such a course of action, and

¹ [2004] 4 BLLR 366 (LC) at 370, para [15]

started to take steps to obtain the digital recordings of the proceedings. When it became apparent in mid-2014 that it was unlikely those recordings would be obtained, they then started attempts to reconstruct the missing record. On 9 January 2015, Lugalo launched an application to remit the matter back to arbitration on the basis that the record could not be reconstructed. By 9 February 2015, the applicant had opposed this application. It was only 3 months thereafter that Lugalo decided that the proper course of action was to finally launch the long contemplated cross review. Apart from the lengthy delays prior to February 2015, this further delay of 3 months is not explained.

[9] The main difficulty Lugalo has in seeking condonation for the delay is that there is really no good explanation why she did not at least take the initial step of launching a cross review. As was pointed out in argument by the applicant's representative, Mr Le Roux, since Lugalo was able to take a view on the defects of the arbitrator's award in relation to the findings of substantive unfairness simply on the face of the award in setting out her evaluation of her prospects of success, there is no reason why this could not have formed the basis of her founding affidavit in a cross review. Had she later discovered that the record did not support those initial submissions. She would have been at liberty to substitute them or to abandon the review without a risk of facing an adverse cost award at the time she would have to consider filing a supplementary affidavit. I agree that there is no adequate explanation why the cross review was not launched at least soon after the applicant had filed its review application in June 2013, especially given the fact that Lugalo was assisted by her union and legal representatives.

[10] In my view, this is one of those instances contemplated by the LAC in *NUM v Council for Mineral Technology*² in which the extent of the delay and inadequacy of

² [1999] 3 BLLR 209 (LAC), where the court reiterated in summarising the principles governing condonation applications, at 211-212, para [10]:

"There is a further principle which is applied and that is 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 (cf Chetty v Law Society, Transvaal 1985

any reasonable explanation justifies not granting condonation for those reasons alone.

Order

- [11] The finding of the second respondent in the arbitration award issued on 4 May 2013 under case number ECPE 011307 to the effect that the third respondent's dismissal by the applicant was procedurally unfair, together with the consequential compensatory relief awarded, is reviewed and set aside and is substituted with a finding that her dismissal was procedurally fair.
- [12] The condonation application of the third respondent for the late filing of her cross review of the said arbitration award is dismissed.
- [13] No order is made as to costs.



R LAGRANGE, J

Judge of the Labour Court of South Africa

(2) 756 (A) at 765A–C; National Union of Mineworkers & others v Western Holdings Gold Mine (1994) 15 ILJ 610 (LAC) at 613E). The courts have traditionally demonstrated their reluctance to penalise a litigant on account of the conduct of his representative but have emphasised that there is a limit beyond which a litigant cannot escape the results of his representative's lack of diligence or the insufficiency of the explanation tendered (Saloojee and another NNO v Minister of Community Development 1965 (2) SA 135 (A) at 140H–141D; Buthelezi & others v Eclipse Foundries Ltd (1997) 18 ILJ 633 (A) at 638I–639A)."

Appearances:

For the Applicant: Advocate Le Roux

Instructed by Hlengiwe Skosana

For the Third Respondent: Advocate Grogan

Instructed by Messrs Wheeldon Rushmere & Cole

LABOUR COURT