IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA 86/2016

In the matter between:

G4S SECURE SOLUTIONS (SA) (PTY) LTD	**Appellant**
and	
COMMISSIONER QUEENDY GUNQUBELE NO	**First respondent**
THE COMMISSION FOR CONCILITATION, MEDIATION AND ARBITRATION	**Second respondent**
GOLI MALINGA	**Third respondent**

Heard: **01 June 2017**

Delivered: **05 September 2017**

Coram: Davis JA, Landman JA and Phatshoane AJA

Neutral citation: **G4S Secure Solutions (SA) (Pty) Ltd v G Malinga** (LAC JA68/2016)

JUDGMENT

LANDMAN JA

[1] G4S Secure Solutions (SA) (Pty) Ltd, the appellant, appeals against the whole judgment of the Labour Court (Chaane AJ) delivered on 25 January 2016. The court refused to condone the appellant's late application to review and set aside an award of a commissioner acting under the auspices of the Commission for Conciliation, Mediation and Arbitration (the CCMA), the first and second respondents respectively. The award concerned the alleged demotion of Goli Malinga, the third respondent (the "employee"). The appeal is with the leave of the court *a quo*.

The background

[2] The employee was employed by the appellant as a Supervisor grade B as from 1 June 2012. During August 2013, he was demoted to a Supervisor grade D. The circumstances that gave rise to this are in dispute. The appellant says that it was by agreement in a bid to avoid retrenchment. The employee referred a dispute to the CCMA. When conciliation failed the matter was enrolled for arbitration on 20 November 2013. The appellant did not attend the arbitration proceedings because, it alleges, it did not receive notice of the set down. An award was issued on 26 November 2013. The employee served the award on the appellant's receptionist on 13 December 2013. Shortly after this the appellant's offices closed for the year.

Application for rescission

[3] In the following year the appellant delivered an application to rescind the award. The general manager says that the application was delivered on 7 January 2014.

[4] However, there are several difficulties concerning the date of delivery which I may mention at this stage. The founding affidavit was commissioned on 6 January 2014. Mr Hutchinson, who appeared for the appellant, pointed to a handwritten note on the foot of the notice reading: "received 9/01/2014" and the name "Mabeki" handwritten on the top of the page. There is no indication of who

made the note. But the application bears the CCMA's date stamp of 19 February 2014. It also appears that the employee was not aware of the rescission application.

[5] The commissioner dismissed the rescission application on 27 March 2014. The commissioner noted that the appellant received the award on 13 December 2013 and applied for its rescission on 7 January 2014. The commissioner reasoned that the application had been made after the expiry of the 14-day period within which the application should have been brought. Consequently, as the appellant did not apply for condonation, the CCMA had no jurisdiction to entertain the application.

Application for review of the ruling

[6] The appellant was dissatisfied with the outcome and on 26 May 2014 the appellant delivered an application in terms of section 145 of the Labour Relations Act 66 of 1995 (the LRA) to review and set aside the commissioner's ruling. Subsequently, on 8 December 2014, the appellant delivered an application for the condonation of the late filing of the review application and an amendment of the notice of motion. The employee filed his answering affidavit late.

[7] The applications were heard on 14 December and judgment was delivered on 25 January 2015. The court *a quo* accepted that although the notice of motion referred to section 145 of the LRA, it was intended that the application be brought in terms of section 158(1)(h) of the LRA. The notice of motion was accordingly amended. The court relying on *Weder v MEC for Health, Western Cape*,[1] took the view that although an application should be brought within a reasonable time, an applicant should apply for condonation if the application was made after six weeks. The court *a quo* observed that the appellant had filed an application for condonation so late that counsel handed up the application in court. However, both parties urged the court *a quo* to hear the applications and the court did so.

[1] [2013] 1 BLLR 94 (LC); (2013) 34 ILJ 1315 (LC).

The court *a quo* declined to condone, what it considered to be the appellant's late application, and dismissed the application.

Issues on appeal

[8] This appeal raises the following issues:

(a) Should the appellant's failure to file the entire record be condoned and the appeal be reinstated?

(b) Should the late filing of the notice of appeal be condoned?

(c) Was the application to review the refusal of the commissioner to rescind the award brought out of time?

(d) If so, ought the court *a quo* to have condoned the late application? And in considering this, should the court *a quo* have had regard to the merits of the application for review?

(e) Should the court *a quo* have found that the commissioner ought to have rescinded the award?

Condonation for late filing in this court

[9] The appellant applies for the condonation of the late filing of the notice of appeal and for its failure to file the entire record (the application to the court *a quo* for condonation was omitted). The explanation for appellant's failure to file the notice of appeal timeously and its failure to file the entire record is satisfactory. The application for condonation and the reinstatement of the appeal thus rests on the appellant showing good prospects of success.

Time for filing a section 158(1)(h) application

[10] Following *Weder v MEC for Health, Western Cape (Weder),* the court *a quo* took the view that the appellant was remiss for not applying for condonation for the

late delivery of its review application. In the *Weder* judgment, the Labour Court considered the concept of a reasonable time and remarked:[2]

> 'What, then, is a 'reasonable time' in the context of s 158 of the LRA? It is tempting simply to assume that it should be six weeks, by analogy to the time period provided for in s 145. At the most, it cannot be more than the 180 days provided for in PAJA; in fact, given that PAJA does not apply and that the process is closely aligned to that set out in s 145 and rule 7A, I would suggest that anything more than six weeks should at least trigger an application for condonation.'

[11] It is not permissible for a court to fix a certain time which it regards as a reasonable time; nor is it permissible to insist that an application for condonation should be made after a specific time. An application for condonation must be made when the delay is unreasonable and must be made at the earliest opportunity. The correct approach is that outlined by Brand JA in *Associated Institutions Pension Fund v Van Zyl*,[3] followed by this Court *in Collet v Commission for Conciliation, Mediation and Arbitration and Others*[4] namely:

> '[46] ... It is a longstanding rule that courts have the power, as part of their inherent jurisdiction to regulate their own proceedings, to refuse a review application if the aggrieved party had been guilty of unreasonable delay in initiating the proceedings…
>
> [47] The scope and content of the rule has been the subject of investigation in two decisions of this Court. They are the *Wolgroeiers* case and *Setsokosane Busdiens (Edms) Bpk v Voorsitter, Nasionale Vervoerkommissie, en 'n ander* 1986 (2) SA 57 (A). As appears from these two cases and the numerous decisions in which they have been followed, application of the rule requires consideration of two questions:
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> (a) Was there an unreasonable delay?

[2] At para 8.
[3] 2005 (2) SA 302 (SCA).
[4] (2014) 35 ILJ 1948 (LAC).

(b) If so, should the delay in all the circumstances be condoned?

(See *Wolgroeiers* at 39C–D.)

[48] The reasonableness or unreasonableness of a delay is entirely dependent on the facts and circumstances of any particular case (see eg *Setsokosane* at 86G). The investigation into the reasonableness of the delay has nothing to do with the Court's discretion. It is an investigation into the facts of the matter in order to determine whether, in all the circumstances of that case, the delay was reasonable. Though this question does imply a value judgment it is not to be equated with the judicial discretion involved in the next question, if it arises, namely, whether a delay which has been found to be unreasonable, should be condoned (see *Setsokosane* at 86E–F).'

[12] The appellant's stance is that the application for review was made timeously and it was only being cautious when applied for condonation. Is the appellant correct? This requires a consideration of all the facts and circumstances with a view to determining whether there was any delay in launching the application and, if so, was the delay unreasonable?

[13] The application for rescission of the award was dismissed on 1 April 2014. The general manager: human resources does not say when he received the ruling but he says that it seems that the ruling was served on 1 April 2014 and that by 8 April the appellant had decided to apply for a review. This is evidenced by an e-mail sent by Mr Bokaba, a HR official, to appellant's attorneys. While the appellant waited for its attorneys, the matter received further internal consideration. This caused the appellant to ask its attorneys, by e-mail on 15 April 2014, to advise on the prospects of success and the costs involved.

[14] The attorneys responded on 29 April 2014 by e-mail and provided a founding affidavit for signature and commissioning. On 5 May 2014, the attorneys sent a reminder to the HR official. The attorneys followed this up by attempting to call the HR official. The HR official received the attorneys' message and communicated with the attorneys. He said that he would verify whether the

general manager had issued the instructions to the attorneys. It is not clear whether he did so. On 19 May, the attorneys again sent an e-mail requesting a response. The general manager responded on 21 May 2014. He says he was under the impression that the issue had already been resolved and that the HR official furnished necessary instructions because he gave the go-ahead orally to the HR official in April. The general manager says that the appellant failed to respond to the e-mail due to miscommunication between the HR official and himself because the HR official thought that the general manager had issued an instruction to the attorneys to proceed with the matter. The general manager points out that in May 2014 the appellant was involved in a retrenchment exercise in its various business units and/or regions, and that he and the HR official were part of the process. They were out of the office and were engaging with the relevant unions and affected employees and they had limited access to e-mails. The HR official has since left the employ of the appellant.

[15] The founding affidavit was signed on 21 May. As the attorney was only available on 26 May 2014, the application was delivered on that day.

Evaluation

[16] The LRA places a premium on the expeditious resolution of labour disputes. The application to review had to be brought within a reasonable time and not within any fixed period. The time taken was a few days short of two months. I do not think that this was an unreasonable delay. But if I am wrong and there was an unreasonable delay, the appellant has explained the nature of the delay and why there was a delay. To this must be added the prospects of success.

[17] The court *a quo* was not satisfied with the explanation and did not consider the prospects of success. In my view, the court *a quo* applied a too critical an approach to the delay which was, on the assumption that I have made, a slight one. This is not a case where, as it was expressed in *NUM v Council for Mineral*

Technology,[5] there is no "reasonable and acceptable explanation for the delay" so that "the prospects of success are immaterial". In my opinion, the court *a quo* was obliged to consider whether there are good prospects of success. This needs to be assessed and that depends on whether the rescission application should have been granted.

Should the commissioner have rescinded the award?

[18] The commissioner declined to rescind the award on the ground that the application for rescission was late and there was no application to condone this defect. On the commissioner's own finding that the application being delivered on 7 January 2014, the commissioner ought to have found that the application was not late. CCMA rule 3 provides that:

> '(1) For the purpose of calculating any period of time in terms of these Rules -
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> (a) day means a calendar day; and
>
> (b) the first day is excluded and the last day is included, subject to sub-rule (2).
>
> (2) The last day of any period must be excluded if it falls on a Saturday, Sunday, public holiday or on a day during the period between 16 December to 7 January.'

[19] The appellant received the award and thus became aware of it on 13 December 2013. The 14-day period specified in Rule 32 would have fallen in the period 16 December to 7 January, meaning that the last day of the period fell on 8 January 2014. The appellant's case is that the application was delivered on 7 January ie before the period expired. There is no need to examine whether the application was indeed delivered on 7 January 2014 particularly as the appellant did not receive notice of the set down for arbitration.

[20] The appellant provides a good reason for not attending the arbitration proceedings. The appellant says that it did not receive the notice of set down. The appellant points out that the fax number reflected on the default award was

[5] [1999] 3 BLLR 209 (LAC) at para 10.

incorrect. Moreover, as Mr Hutchinson pointed out, the reference in the default award to the notice of set down being sent by registered mail on 16 August 2013 cannot be correct. The conciliation hearing was only convened in September 2013 so that the notice of set down, if it was sent to the appellant could only have been sent thereafter.

[21] I have mentioned that the appellant says that the demotion was by agreement. The appellant says that it had conducted a section 189A retrenchment facilitated by the CCMA and, in order to mitigate the effects of retrenchment, the appellant offered to retain the employee at a lower grade than that on which he was initially employed. The employee accepted the offer in writing and was paid partial severance pay. In addition, the appellant asserts that the default award is not based on the employee's correct remuneration.

[22] The result is that the commissioner was not justified in her finding that the rescission application was delivered late and she should have rescinded the award. It therefore follows that there are prospects of success as regards the appeal and the applications for condonation should be granted and the appeal reinstated and upheld.

Costs

[23] Taking into account the injunction to award costs according to law and fairness, I would make no order as to costs particularly as the respondent is still employed by the appellant.

Order

[24] I make the following order:

1. The appellant's failure to file the entire record is condoned and the appeal is reinstated.

2. The late filing of the notice of appeal is condoned.

3. The order of the Labour Court is set aside and replaced with the following order:

'1. The dismissal on 27 March 2014 of the applicant's application to rescind the award of the Commissioner is reviewed and set aside and replaced with a ruling that the arbitration award is rescinded.

2. There is no order as to costs.'

4. No order is made as regards the costs of the appeal.

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A A Landman

Judge of the Labour Appeal Court

Davis JA and Phatshoane AJA concur in the Judgment of Landman JA.

APPEARANCES

FOR THE APPELLANT:	Adv W J Hutchinson
	Instructed by Moodie and Robertson
FOR THE THIRD RESPONDENT:	Adv S Saunders
	Instructed by Chiba Attorneys