



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: PR57/22

In the matter between:

GEORGE TERENCE KLAASEN

Applicant

and

**DEPARTMENT OF EDUCATION
NORTHERN CAPE PROVINCE**

First Respondent

KENNETH DLAMINI NO

Second Respondent

EDUCATION LABOUR RELATIONS COUNCIL

Third Respondent

Heard: 11 October 2023

Delivered: 29 January 2024

JUDGMENT

MAHALELO, AJ

Introduction

- [1] This is an application to review and set aside the second respondent's (Arbitrator) ruling under case number ELRC 382-21/22 NW, delivered on 11 October 2021, wherein the applicant's condonation application was dismissed.

Background facts

- [2] The applicant commenced employment with the first respondent as an educator on or about 1 January 1985. The applicant was promoted to the position of Senior Education Specialist in Mathematics on 1 July 1996. From the period April 2011 up until about 2016, the applicant and the first respondent were embroiled in various litigation. During 2016 the applicant returned to work after an award was made in his favour that the respondent should retrospectively reinstate him.
- [3] The first respondent refused to reinstate the applicant to the same position as the one which he occupied before his dismissal. The applicant was later diagnosed with major depression. On or about 23 April 2019, the first respondent informed *inter alia*, the applicant, that the application form for early retirement without penalisation of pension benefit was available and that interested employees may apply for the benefit. The applicant completed the application for early retirement which was received by the first respondent on 5 July 2019.
- [4] On 13 November 2019, the applicant received an e-mail from the first respondent which e-mail was accompanied by a letter dated 2 October 2019, wherein the applicant was informed that his services would be terminated on the grounds of continuous ill health with effect from 1 January 2020 with his last working day being 31 December 2019.
- [5] The applicant contends that he did not understand the said letter in the context of his application for retirement and he on the same day, forwarded the letter to his trade union PSA. The trade union official advised him that he was boarded and as such his benefits would be better than early retirement without the

reduction of pension benefits. The trade union official further advised that the applicant had no option but to accept the ill health retirement.

- [6] In the period from 21 January 2021 to 19 May 2021, the applicant attempted to obtain his pension benefit from the Government Employees Pension Fund (GEPF). The applicant alleges that at this stage he had been without a salary for approximately 20 months and he had severe financial constraints. It was only on 7 June 2021 that he attended the offices of the GEPF and became aware that according to their records, he was never boarded due to ill health.
- [7] The applicant states that on 11 July 2021, he received a recommendation from his doctor to obtain legal advice in respect of his employment relationship with the first respondent. On 2 August 2021, he scheduled an appointment with his attorney. It was during consultation with his attorney that he became aware that he was in fact dismissed by the first respondent due to incapacity as a result of ill health. It was then that the applicant referred an unfair dismissal dispute to the third respondent.
- [8] The applicant's referral of an unfair dismissal dispute to the third respondent was days outside of the prescribed 30-day period and the applicant sought condonation. The applicant's explanation for the delay offered in the condonation application aligns with the facts recorded above as the applicant contended that the union official might have misled him. The first respondent did not oppose the applicant's condonation application and the arbitrator adjudicated the application on the papers that were served before him, thus the evidence was presented by the applicant only. The arbitrator issued a ruling on 11 October 2021, refusing condonation to the applicant. It is this ruling which is the subject of these proceedings.
- [9] In its answering affidavit, the respondent raised two preliminary points, which I deal with below. The first preliminary point is a jurisdictional point because the review application was allegedly launched outside of the six-weeks prescribed period. The second preliminary point has much to do with the merits of the matter therefore, the respondent agreed at the hearing of the application that

she will address the second point when she deals with the merits of the application.

[10] It is accepted that if a review application is filed outside the statutory prescribed period, the Labour Court does not have jurisdiction to entertain the application until such time that condonation is sought and granted.

[11] On the applicant's version having received the arbitrator's ruling on 11 February 2021, the last day to file his review application would have been 25 March 2021. On the respondent's version, the applicant received the ruling on 2 November 2020, whereafter he ought to have filed his review application on 14 December 2020, yet he only filed it on 24 March 2021. According to the respondent the review application was 14 weeks late.

[12] In *Ellerine Holdings Ltd v Commission for Conciliation, Mediation and Arbitration and others*,¹ the court has held that:

'Where the non-compliance relates to a statutory provision, ie as set out in an Act, then failure to comply with those provisions goes to jurisdiction. In such cases (for example where time-limits relate to jurisdiction) an application must be made to court to condone the non-compliance. In circumstances where the time-limit is prescribed by the rules, this court would be prepared to entertain a matter in spite of the fact that the pleadings were not filed within the prescribed time-limits, as long as there is no objection thereto by the party who stands in opposition to the party who has failed to comply with the time-limits prescribed by the rules of this court.'

[13] The first respondent argued that the commissioner issued his ruling on 11 October 2021. However, it was delivered to the parties by the General Secretary of the ELRC (fourth respondent) on 2 November 2021. The first respondent says that a copy of the aforementioned letter together with the ruling was emailed to the applicant on the same day 2 November 2021. It was emailed to the applicant's e-mail address, namely g[...]@gmail.com. The first respondent attached a copy of the e-mail with the ruling that was sent to the applicant on 2 November 2021 by Mr Phokojoe of the ELRC as Annexure

¹ (2002) 23 ILJ 1282 (LC) at para 13.

“OGM2”. The respondent also indicates that on 11 August 2022 Mr Phokojoe confirmed via e-mail to the department's instructing attorney that the ruling was served on the parties on 2 November 2021. A copy of such confirmation is attached as Annexure “OGM3”. The first respondent alleges that the e-mail address that was used is the e-mail address that is contained in the ELRC's referral form E1, which was completed by the applicant when he referred his dispute to the ELRC. A copy of the applicant's ELRC Referral form is annexed as “OGM4”. The respondent further stated that when the applicant communicated with the department via e-mail he used the same e-mail address as contained in FA7. FA7 is an e-mail which was addressed by Ms Justin de Wee, who is employed by the Department of Education as a Human Resource Practitioner to the applicant informing the applicant of the department's decision to terminate his services on the grounds of continued ill health with effect from 1 January 2022. The respondent therefore argued that there can be no question that the ELRC sent the e-mail to the e-mail address which the applicant furnished, which is also an e-mail address ordinarily used by the applicant.

[14] On the other hand, the applicant, in his replying affidavit responded to the respondent in the following manner: *“I append as annexure RA1 the only correspondence received from the third respondent and which was received on 3 November 2021 to which no annexures were appended and more specifically, not the condonation ruling. After numerous follow-ups with my previous attorney of record and the third respondent I elected to appoint Lovius Block Inc who obtained the condonation ruling from the third respondent on 11 February 2022. A copy of the proof of receipt is appended as annexure RA2”.*

[15] It is clear from annexure “OGM2” that the arbitrator's ruling was sent to the applicant on 2 November 2021 by Mr Phokojoe from ELRC. It is also clear from annexure “RA1” that the applicant was made aware of the condonation ruling on 3 November 2021. The applicant simply alleges that he had made numerous follow-ups with his previous attorney to obtain the ruling, without attaching any proof to that effect. It is strange that the applicant could have just received “RA1” without the attached ruling. The evidence before me shows that the applicant

received the ruling at least on 3 November 2021 and had to file his review application before the expiry of six weeks from that date.

- [16] The late filing of a review application constitutes a failure to comply with a statutory provision and not a time limit prescribed by the Rules. The applicant had to apply for condonation for the late filing of the review application. The review application *in casu* was filed with the Registrar on 24 March 2021, evidently outside the prescribed six-weeks period. There is no application for condonation for the late filing of the review application.
- [17] The Labour Appeal Court (LAC) in *SA Transport and Allied Workers Union and another v Tokiso Dispute Settlement and others*,² held that when an applicant files its review application outside the statutory period, even by one day; the Labour Court cannot assist that party without first addressing the issue of condonation.
- [18] Absent an application for condonation, this court does not have jurisdiction to hear the applicant's review application.
- [19] On the issue of costs, this court acknowledges the rule that costs do not automatically follow the result in the labour court. For consideration of issues of fairness and the law, I make no order as to costs.
- [20] In the premises, I make the following order:

Order

1. The review is struck off the roll.
2. No order as to costs.

MB Mahalelo

Acting Judge of the Labour Court of South Africa

² (2015) 36 ILJ 1841 (LAC); [2015] 8 BLLR 818 (LAC).

Appearances

For the Applicant: Adv GC Steenkamp
Instructed by: Lovius Block Attorneys

For the Respondent: Adv G Appels
Instructed by: Mkhokeli Pino Incorporated