

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JR3002/2012

In the matter between:

TSHEPO EDWARD THUSI

Applicant

and

**DEPARTMENT OF PUBLIC WORKS & RURAL
DEVELOPMENT**

First Respondent

**GENERAL PUBLIC SERVICE SECTORAL
BARGAINING COUNCIL (GPSSBC)**

Second Respondent

H. HLATSHWAYO N.O.

Third Respondent

Heard: 30 January 2024

Delivered: 30 January 2024

EX TEMPORE JUDGMENT

PHEHANE, J

[1] The applicant brings this application to review and set aside the arbitration award dated 12 June 2012 and the rescission ruling dated 1 September 2012, both by the third respondent (Commissioner).

[2] The applicant avers that he received the arbitration award on 3 July 2012 and the rescission ruling on 28 September 2012.

[3] The review application was launched on 18 December 2012.

[4] The review application dates back some 12 years. In that time period, an application to reinstate the review application was launched and granted.

[5] There exists an unsigned order dated 30 May 2017 that purports to grant condonation for the late filing of the review application. There is no record of such official Court order. Mr. Louw for the applicant submitted that no such Court order could be located and that the parties that appeared in Court on that day could not confirm its existence. In the circumstance of no Court order determining condonation for the late filing of the review application, the parties are in agreement that condonation be argued before me.

Background

[6] The applicant was dismissed from the employ of the first respondent for serious acts of misconduct. He subsequently launched an unfair dismissal dispute with the second respondent. At the arbitration proceedings before the Commissioner, the first respondent failed to appear. The applicant alleges that his union representative (Mr. Greeff) impressed upon the Commissioner that he intended to argue a preliminary point on the first respondent's failure to adhere to the disciplinary code and procedure as set out in a collective agreement (Public Service Coordinating Bargaining Council Resolution 1 of 2003), in that it appointed an external chairperson to preside over the applicant's internal disciplinary hearing. On hearing this, the applicant avers that the Commissioner and Mr. Greeff, it would seem, concluded an agreement in terms of which Mr. Greeff would submit his written arguments on the point *in limine*, after which, she would make a decision. I discuss more about this "agreement" below.

[7] To the applicant's utter surprise and dismay, when the arbitration award was received, the Commissioner dealt with the merits of the referral and dismissed it on account of the applicant not making any submissions on substantive unfairness and in so far as procedural unfairness is concerned, the Commissioner found that the applicant failed to produce the aforesaid collective agreement and failed to make his written submissions under oath.

[8] The applicant avers that Mr. Greeff attempted to contact the Commissioner to discuss “*the agreement*”. When he reached her, the Commissioner advised him to bring an application to rescind the arbitration award, which he did. In considering the rescission application, the Commissioner found that the applicant did not make out a case for rescission in that he failed to indicate the grounds for rescission in terms of section 144 of the Labour Relations Act¹ (LRA). In the premises, the rescission application was dismissed.

[9] The applicant avers that Mr Greeff once again attempted to contact the Commissioner to ascertain as to whether she could rectify the rescission ruling. When he could not reach her, Mr. Greeff decided to approach this Court to review both the arbitration award and the rescission ruling.

Condonation

[10] The applicant seeks condonation for the late filing of his review application.

[11] The test to succeed on condonation is trite.²

Extent of delay and reasons therefore

[12] In his founding affidavit, the applicant avers without providing a full account for every period of delay, that upon receipt of the arbitration award, Mr. Greeff “*immediately*” attempted to contact the Commissioner, who when contacted, advised him to launch a rescission application. Having received the arbitration award on 3 July 2012, the applicant did not explain with any elaboration when he contacted the Commissioner. It is not explained when the rescission application was launched.

[13] Upon receipt of the rescission ruling, the applicant avers that Mr. Greeff, well aware, it would seem, that the *dies* within which to launch an application to review

¹ Act 66 of 1995, as amended.

² *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A); *Grootboom v National Prosecuting Authority* [2013] ZACC 37; (2014) 2 SA 68 (CC).

and set aside the rescission ruling would expire on 9 November 2012, yet again, attempted to reach the Commissioner, who he discovered had relocated and all attempts to reach her proved futile. At this point, Mr. Greeff decided to approach this Court to review and set aside the arbitration award as well as the rescission ruling.

[14] The applicant fails to set out the extent of the delay in launching the application to review and set aside the arbitration award. The review application was brought some six months after he received the arbitration award.

[15] The applicant's reason for launching the application to review and set aside the arbitration award late is due to Mr. Greeff having brought the rescission application. His reason for launching the application to review and set aside the rescission application late is due to Mr. Greeff undertaking a futile expedition to ascertain the whereabouts of the Commissioner in the hope that she could rescind her ruling "*mero muto*".³

[16] The further reasons proffered by the applicant for failing to launch the review application timely is due to him not having the necessary funds, and when obtaining the services of his current attorney of record who agreed to represent him *pro amico*, that attorney was unavailable to launch this application as he attended an 'indaba' in Durban from 5 to 8 December 2012.

[17] The applicant brings this review application in terms of the provisions of section 145(2) of the LRA.⁴ This review application was only launched on 18 December 2012. It is trite that a review application is an urgent application.⁵ Section 145(1)(a) of the LRA provides that the timeframe within which to launch a review application is 6 weeks. Section 145(1A) of the LRA states that this Court may condone the late filing of a review application on good cause shown.

[18] The delay in launching the application to review and set aside the arbitration award is inordinate and well beyond the statutorily prescribed 6-week period. The

³ See: founding affidavit at paras 3.10 to 3.12 on pp 7 to 8.

⁴ See: founding affidavit, at para 5.1 on p 11, although the reference to section 145(2) of the LRA appears to be incorrect.

⁵ See: Item 11.2. 7 of the Practice Manual of the Labour Court, effective 2 April 2013.

application to review the arbitration award is approximately six months late and the application to review the rescission ruling is approximately 5.5 weeks late.

[19] The applicant, represented by a trade union official, elected to launch a rescission application as opposed to launching a review application. Casting blame on the trade union for the delay in bringing the review application with respect to the arbitration award and the rescission ruling) is not a sound reason for the delay.⁶ Similarly, blaming the attorney of record for not being available to launch his review application is also not an acceptable reason for the delay.⁷

[20] In my view, it was improper for Mr. Greeff to make attempts to contact the Commissioner instead of simply approaching this Court to review and set aside the arbitration award in the first instance and the rescission ruling in the second instance. The applicant, after all, was represented by a trade union which ought to know the relevant provisions of the LRA and should apply them correctly in seeking the appropriate remedy on behalf of its member and complying with the time-frames for doing so.

[21] As stated above, the applicant falls short in explaining every period of delay. In *Independent Municipal and Allied Trade Union on behalf of Zungu v South African Local Government Bargaining Council and others*,⁸ this Court held as follows:

'In explaining the reason for the delay it is necessary for the party seeking condonation to fully explain the reason for the delay in order for the court to be in a proper position to assess whether or not the explanation is a good one. This in my view requires an explanation which covers the full length of the delay.'

⁶ See: *Saloojee and another v Minister of Community Development* 1965 (2) SA 135 (A).

⁷ See: *Mngomezulu and Another v Mulima NO and Others* (JR2744/12) [2017] ZALCJHB 415 (7 November 2017) with this Court stated as follows at para [12]:

'... In *National Union of Metalworkers of South Africa v Kroon Gietary and Staal*, the Court refused a condonation application wherein the deponent attributed the delay to his representative. The Court quoted in approval the case of *Regal v African Superstate (Pty) Ltd* where the court held that there is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. A litigant is not entitled to hand over his matted his attorney and washes hands of it'. [Footnotes omitted]

⁸ [2009] ZALC 137; (2010) 31 ILJ 1413 (LC) at para [13].

[22] In *eThekweni Municipality v Ingonyama Trust*,⁹ the Constitutional Court held as follows, whether an explanation furnished by the applicant did not cover the entire period of delay or part of the delay was unexplained:

‘As stated earlier, two factors assume importance in determining whether condonation should be granted in this case. They are the explanation furnished for the delay and prospects of success. In a proper case these factors may tip the scale against the granting of condonation. In a case where the delay is not a short one, the explanation given must not only be satisfactory but must also cover the entire period of the delay. Thus in *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)*, this Court stated in this regard:

“An applicant for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of delay. And, what is more, the explanation given must be reasonable. The explanation given by the applicant falls far short of these requirements. Her explanation for the inordinate delay is superficial and unconvincing.”

[23] In *casu*, the explanation proffered by the applicant is inadequate and does not constitute a good reason for the delay in the late filing of the review application.

[24] The further reason proffered by the applicant for the delay, that he was not placed in funds, is not an acceptable explanation. He was represented by a trade union and inasmuch as he was later pointed to an attorney to represent him *pro amico*, it is more likely than not that he could have been pointed to *pro bono* legal assistance earlier, as opposed to placing himself at the mercy of a trade union and its internal workings regarding the approvals for assistance from the union’s head office to pay for his review application.

[25] The applicant’s reasons for delay (where proffered) are untenable, where there is no explanation for the full account of delay, it amounts to no explanation at all.¹⁰ In the circumstances, the prospects of success are immaterial.¹¹

⁹ [2013] ZACC 7 (CC); 2013 (5) BCLR 497 (CC) at para [28].

[26] I have considered, in the interests of justice, the prospects of success and prejudice to both parties.

[27] In consideration of the prospects of success, I took into account the grounds of review.¹² The crux of the applicant's case justifying the review of the arbitration award is premised on an "agreement" concluded, it would seem, although this is not specified by the applicant, between the applicant, as represented by Mr. Greeff and the Commissioner, that the applicant submits written submissions on the preliminary point on procedure only and should such preliminary point fail, the dispute would be set down for the hearing of oral evidence.

[28] There is not an iota of evidence to substantiate the existence of any such written agreement. As such agreement would be in his knowledge, Mr. Greeff does not, in his confirmatory affidavit,¹³ make any mention of it, what the terms were and who the parties to such agreement are. The Commissioner mentions no such "agreement" in her arbitration award. On the contrary, she states that the respondent was absent and the applicant opted to submit documents as part of the evidence by way of written submissions.¹⁴ The Commissioner further records that an agreement could not be secured in the absence of the respondent permitting the filing of written submissions.. She proceeds to record that the applicant's written submissions are not under oath.¹⁵ In my view, this demonstrates that the Commissioner expressly records that there was no agreement between the parties to the dispute regarding the securing of written submissions in the absence of the respondent and the applicant's election therefore, to submit written submissions as part of the evidence is inadequate, as such written submissions are not under oath.

¹⁰ *Ntsele v Commission for Conciliation, Mediation and Arbitration* (JR1459/15) [2017] ZALCJHB 161.

¹¹ See: *National Union of Mineworkers v Council for Mineral Technology* [1998] ZALAC 22; [1999] 3 BLLR 209 (LAC).

¹² See: founding affidavit at para 5 on pp 11 to 12.

¹³ At pp 26 to 27.

¹⁴ See: para 2 of the arbitration award on p 19.

¹⁵ *Ibid* at para 8 on p 20.

[29] The first respondent denies any knowledge of such agreement and further states that the conclusion of such an agreement between the Commissioner and one party to the dispute would be improper. I agree.

[30] In the absence of the respondent, the applicant chose the manner of disposing of the referral to his own peril. In view of the afore-going, I am not persuaded that the prospects of success on review of the arbitration award are good.

[31] Instead of simply launching an application to review the arbitration award, the applicant proceeded on protracted and improper conduct of “hounding” (to borrow the words of Ms. Cassim) the Commissioner to revise her arbitration award and continued with this conduct of contacting her twice or thrice a week after she rendered her ruling on rescission.¹⁶

[32] There are similarly, no prospects of success in the rescission application. Once again, not only is there no mention of any “agreement” as alleged by the applicant, no case is made out on rescission. The Commissioner therefore, cannot be faulted for her decision to dismiss the rescission application.

[33] Insofar as prejudice is concerned, Ms. Cassim submits that the first respondent would be greatly prejudiced should condonation succeed in light of the substantial amount of time that has lapsed since the applicant was dismissed.

[34] In view of the afore-going and in consideration of the substantial amount of time that has lapsed (notwithstanding that a reinstatement application was launched, facts which the applicant did not place before this Court in a supplementary affidavit to substantiate its condonation application), the inordinate delay in launching the review application, the prejudice to the respondent and the unacceptable reasons for the delay, in the interests of justice, I exercise my discretion to refuse the grant of condonation for the late filing of the review application.

[35] In the premises, the order is as follows:

¹⁶ See: founding affidavit at para 3.11 on p 7.

Order

1. Condonation for the late filing of the review application is refused.
2. There is no order as to costs.

M. T. M. Phehane
Judge of the Labour Court of South Africa