

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR 663/2019

In the matter between:

ABRAHAM RAGOPHALA

Applicant

And

**COMMISSIONER FOR CONCILIATION, MEDIATION
and ARBITRATION**

First Respondent

COMMISSIONER LUNGISANI AMOS SITHOLE

Second Respondent

WRAPSA

Third Respondent

Heard: 17 October 2023

Delivered: 01 February 2024

JUDGMENT

MAHALELO, AJ

Introduction

[1] This is an application in terms of section 145 of the Labour Relations Act¹ (LRA), to review and set aside the Arbitrator's award handed down on 21 February 2019, by the second respondent under the auspices of the third respondent. The applicant is also applying for condonation of the late filing of the review application.

¹ Act 66 of 1995, as amended.

Background facts

[2] The applicant was employed by the third respondent at its warehouse from 13 March 2012. On 29 December 2017, the third respondent subjected the applicant to a disciplinary hearing and charged him with acts of misconduct. On 7 December 2018, the applicant was found guilty and was dismissed.

[3] Aggrieved by his dismissal the applicant referred an unfair dismissal dispute to the CCMA, challenging both the procedure and the substance of his dismissal. At the CCMA, the applicant sought reinstatement. Having heard evidence from both parties on 21 February 2019, the second respondent issued an award in terms of which he found that the dismissal of the applicant was substantively and procedurally fair. It is this award that the applicant seeks to review and set aside.

[4] The application is opposed by the third respondent who raised two points *in limine* namely, *lis pendens* and the applicant's failure to apply for condonation for the reinstatement of the review because it is deemed withdrawn. I deal with the points *in limine* below.

Lis pendens

[5] The third respondent submitted that the applicant issued proceedings in this court during 2018 under case number JR2199/ 2018, citing the same parties and seeking the same relief. The respondent therefore submitted that the actions of the applicant amount to an abuse of the court process because the applicant chose to bring this application when the same application is pending before this court.

[6] It is important to note that a court retains a discretion based on convenience and fairness to allow a case to proceed notwithstanding pending earlier proceedings. In *Loader v Dursot Bros (Pty) Ltd*², in dealing with this aspect Roper J said the following:

² 1948 (3) SA 136 (T); [1948] 2 All SA 595 (T) at 138.

'It is clear on the authorities that a plea of *lis alibi pendens* does not have the effect of an absolute bar to the proceedings in which the defence is raised. The Court intervenes to stay one or other of the proceedings, because it is *prima facie* vexatious to bring two actions in respect of the same subject-matter. The Court has a discretion which it will exercise in a proper case, but it is not bound to exercise it in every case in which a *lis alibi pendens* is proved to exist...'

[7] The applicant disputes the third respondent's allegations, and the third respondent could not produce any document relating to the pending matter. If it is true that the application was instituted it is clear that it was never proceeded with as the third respondent was never served with the application. The third respondent entered an appearance to defend the present matter and the matter is ripe for hearing. The third respondent in the present matter suffered no prejudice. I am of the view that the first point *in limine* has no basis and stands to fail.

The review application is deemed withdrawn

[8] The third respondent submitted that the applicant failed to comply with clause 11.2.7 of the Practice Manual³, which requires that all the necessary papers in a review application must be filed within twelve months of the date of the launch of the application. The registrar must be informed that the application is ready for hearing. Where this time limit is not complied with, the application will be archived and be regarded as lapsed unless good cause is shown why the application should not be archived or be removed from the archives.

[9] In order to achieve expeditious finalisation of labour disputes, the starting point is that litigants must strictly comply with the time frames prescribed in the LRA, the Rules of this Court⁴ and the Practice Manual. The litigants and other functionaries have a joint responsibility to ensure timeous compliance with the time frames and the expeditious resolution of finalization of Labour disputes. As *dominus litis*, an applicant

³ Practice Manual of the Labour Court of South Africa, effective 1 April 2013.

⁴ GN 1665 of 14 October 1996: Rules for the conduct of proceedings in the Labour Court.

has a primary responsibility, whereas the respondent has a secondary but equally important responsibility to ensure timeous compliance with time frames.

[10] Once the CCMA (or the bargaining council whichever is applicable) files the record of the proceedings with the Labour Court in terms of Rule 7A (2) and (3) the Rules of this Court, the Registrar notifies the applicant in terms of Rule 7A (5) that the record has been received. Clause 11.2.4 of the Practice Manual, then requires the applicant to uplift the record within seven days of being notified by the Registrar. Clause 11.2.2, requires the applicant to formally serve the record in terms of Rule 7A (6) within 60 days of having been informed by the Registrar that the record has been received and must be uplifted. Failure to file the record within 60 days' time limit has the consequence that the applicant will be deemed to have withdrawn the review application unless the applicant has during that period of time requested the respondent's consent for extension of the time and the consent has been given.

[11] Because of the essential requirement of expedition in employment law disputes, review applications are considered to be urgent in nature. From this, it follows that there is a further time limit that is prescribed within which review applications must be prosecuted to finality. Clause 11. 2.7 provides as follows:

'A review application is by its nature an urgent application. An applicant in a review application is therefore required to ensure that all the necessary papers in the application are filed within twelve (12) months of the date of the launch of the application (excluding Heads of Arguments) and the registrar is informed in writing that the application is ready for allocation for hearing. Where this time limit is not complied with, the application will be archived and be regarded as lapsed unless good cause is shown why the application should not be archived or be removed from archive.'

[12] It is evident that the calculation of the 60 day period for the purposes of Rule 7A (6) is calculated from the date on which the applicant is advised by the Registrar by way of Rule 7A (5) notice that the record has been received and must be collected. Turning to the present matter, there is no indication as to when the CCMA filed the record of the proceedings. There is also no indication if the Rule 7A (5) notice was ever sent out by the Registrar, thus in my view, the 60 day period within which the record had to be filed was not triggered. Furthermore, the respondent filed the

answering affidavit in 2023, despite the applicant having filed its Rule 7A (8) on 11 March 2021. It therefore does not seem to me there is merit in the second point *in limine*.

Condonation

[13] The applicant is applying for condonation for the late filing of his review application. The first question that arises is how late the review application is. To answer this question, it must first be determined when the award was served on the applicant or his representative. The six weeks' period referred to in section 145 of the LRA, starts running from the date when the award was served on the applicant and not from the date when the applicant acquired knowledge of the award. In the review and condonation application filed on 27 May 2019, under case JR663/ 2019, the applicant states in paragraph 6.1 of the founding affidavit that he first became aware of the arbitration award issued against him on 15 March 2019, when he approached the CCMA to inquire about the outcome of the arbitration hearing. He alleges that his review application is 19 days out of time.

[14] In the third respondent's answering affidavit filed with this court on 10 October 2023, the third respondent disputes that the applicant has taken the court into his confidence and contended that the applicant had not put all the facts truthfully to the court to enable this court to make a proper evaluation of the facts. The third respondent stated that the current application under case number JR663/2019 was issued on 27 May 2019 however, he disputes that the applicant became aware of the arbitration award only on 15 March 2019, as the award was served on all the parties by email. If this was accepted as a fact that the review application was launched on 27 May 2019, then the six weeks as contemplated in section 145 (1) of the LRA expires on 26 April 2019 and the application was filed some 31 days outside the prescribed period.

[15] The next step to inquire is whether the applicant has explained the delay in filing its application. In trying to explain the delay, the applicant submitted that after he received the award, he went home to Limpopo because he no longer had a place to stay in Johannesburg. When he came back from Limpopo after acquiring funds from family members to pay for accommodation he then started to seek legal advice on

how to go about filing a review application. The applicant does not allocate dates to these events that occurred over a period of more than 30 days. The third respondent challenged this explanation for lack of detail and lack of dates. The third respondent also cast doubt on the explanation that the applicant was unaware of the six week period.

[16] On the prospects of success, which are only dealt with in the heads of argument and not in the founding affidavit the applicant submitted that his dismissal was both substantively and procedurally unfair because he was dismissed on allegations of the use of a cell phone while he had knocked off duty, and as such he was permitted by the company to use his cell phone while off duty. With regard to the charge of incitement to other employees, he alleges that the employer did not provide any evidence to substantiate the charge during the arbitration proceedings.

[17] On the question of prejudice, which is again only dealt with in the heads of argument, the applicant submitted that he will be more prejudiced than the third respondent if condonation is not granted because he will not have the opportunity to defend his unfair dismissal. He contended that the rules of national justice must also be extended to him. He also submitted that since he was unfairly dismissed, he has no source of income and is still unemployed.

Analysis of the condonation application

[18] The principles to be applied in a condonation application are well established. This court is required to exercise discretion, having regard to the extent of the delay, the explanation thereof, the prospects of success, and the relative prejudice to the parties that would be occasioned by the application being granted or refused. The interest of justice will ordinarily reflect regard to all these factors.

[19] In dealing with an application for condonation, specifically where it came to the late filing of a review application the Labour Appeal Court (LAC) in *A Hardrodt (SA) (Pty) Ltd v Behardien & others*⁵ (*Hardrodt*), referred with approval to the judgment in

⁵ (2002) 23 ILJ 1229 (LAC) at para 4.

*Queenstown Fuel Distributors CC v Labuschagne NO & others*⁶ (*Queenstown Fuel Distributors*) and said:

‘[4] The principles laid down in that case included, firstly that there must be good cause for condonation in the sense that the reasons tendered for the delay had to be convincing. In other words the excuse for non-compliance with the six week time period had to be compelling. Secondly, the court held that the prospects of success of the appellant in the proceedings would need to be strong. The court qualified this by stipulating that the exclusion of the appellant’s case had to be very serious, ie of the kind that resulted in a miscarriage of justice...’

[20] It follows that the condonation requirements in the case of the late filing of a review application are applied much more stringently than normally would be the case.

[21] In *National Union of Metal Workers of SA on behalf of Thilivali v Fry’s Metal (A Division of Zimco Group) & others*⁷ (*Thilivhali*), the court held:

‘[22] What is clear from the judgment in *Hardrodt* is that general principles applicable to condonation applications are even more stringently applied where it comes to a condonation application for the late filing of a review application. In review condonation applications, the explanation that needs to be submitted must be compelling and the prospects of success need to be strong. Where it comes to the issue of prejudice, the applicant in fact has to show that a miscarriage of justice will occur if the applicant’s case is not heard. The reason for these more stringent requirements is that review applications occur after the parties have already been heard, presented their respective cases and a finding has been made. Under such circumstances, considerations of justice, fairness and expedition require that challenges of such findings must not be delayed and must be completed as soon as possible.’

[22] The court in *Thilivali* added the following considerations when evaluating condonation applications in reviews:

‘[25] It must also always be considered that the applicant for condonation actually bears the onus to prove good cause for condonation to be granted in terms of the

⁶ (2000) 21 ILJ 166 (LAC); [2000] 1 BLLR 45 (LAC).

⁷ (2015) 36 ILJ 232 (LC) at para 22.

principles set out above. There is, however, an additional consideration which applies in employment disputes in determining whether an applicant for condonation has discharged this onus. This is the fundamental requirement of expedition. The Constitutional Court has, as a matter of fundamental principle, confirmed that all employment law disputes must be expeditiously dealt with and any determination of the issue of good cause must always be conducted against the backdrop of this fundamental principle in employment law.’

[23] Finally, any application for condonation must be considered in the context of the imperative of the expeditious resolution of employment disputes. In *Food & Allied Workers Union on behalf of Gaoshubelwe v Pieman’s Pantry (Pty) Ltd*⁸, The court said:

‘... courts have on occasion, pronounced on the importance of labour disputes to be conducted with the expedition. For example, in *National Research Foundation*, the Labour Court held:

“[15] it is now trite that there exists a particular requirement of expedition where it comes to the prosecution of employment law disputes” ...’

[24] Applying all the above *in casu*, the first difficulty the applicant has is that he simply stated that the delay is 19 days. This cannot be correct. It is unclear as to how this is calculated and there is no proof in the papers as to when he received the award. In the end, the manner in which the applicant dealt with the length of the delay is not a good start when it comes to condonation application. He did not play open cards with the court.

[25] The applicant’s only explanation for the delay is that he went home to Limpopo to look for funds for accommodation from family members and when he came back he sought legal advice as to how to go about the review application. There are several difficulties with this singular explanation. First and foremost, as already stated, the applicant does not state any dates as to when he went to Limpopo and came back, when he sought legal advice and what happened from there. The upshot of this is that the entire period of time it took the applicant to bring the review application from the

⁸ (2018) 39 ILJ 1213 (CC); [2018] ZACC 7 at para 187.

date when he received the arbitration award is, in reality, unexplained. Even if one has to be generous and accept the period of delay as stated by the applicant, the fact of the matter is that the delay is not fully explained. An unexplained delay has the unfortunate consequence that the issue of prospects of success becomes irrelevant.

As stated In *NUM v Council for Mineral Technology*⁹:

'[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.'

[26] Condonation for delays in all labour disputes is not simply there for the asking. The starting point is that an applicant such as the present seeks an indulgence and bears the onus to show good cause, and a proper case should be made out before an indulgence is granted.

[27] The review application was filed late. The third respondent with justification opposes the application for condonation on the basis that the explanation lacks detail and the explanation does not cover all delays. The applicant must, in any event, deal with the prospects of success in the condonation application. His failure to do so renders the application defective. As stated, the applicant has only dealt with the prospects of success in his heads of argument.

[28] The applicant has dismally failed to give a reasonable explanation for the delay and in the absence of a reasonable explanation, there is no need to consider prospects of success. It is for that reason that the condonation application should fail.

Costs

[29] The last issue to decide is the issue of costs. In considerations of fairness and the law, I am of the view that this is not a matter where a cost order is appropriate.

[30] In the premises, I make the following order:

⁹ [1999] 3 BLLR 209 (LAC); [1998] ZALAC 22 at para 10.

Order

1. The points in *limine* are dismissed
2. The condonation application for the late filing of the review is dismissed with no order as to costs.
3. The review application is struck from the roll with no order as to costs.

M B Mahalelo

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant:
Union Official

Mr Mawashe

For the Respondent:
Instructed by:

Mr Bester
Steve Bester Attorneys