

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JR 1301/22

In the matter between

SHAI THAKANI

Applicant

And

TRANSNET FREIGHT RAIL (RME)

First Respondent

COMMISSIONER KENNETH MOSIME

Second Respondent

TRANSNET BARGAINING COUNCIL

Third Respondent

Heard: 31 January 2024

Delivered: 6 February 2024

JUDGMENT

EDWARDS, AJ

Introduction

[1] The applicant brought an application to review and set aside the arbitration award issued by the second respondent under the auspices of the third respondent.

[2] While the opposing papers refer to the third respondent as the party opposing the condonation application, it is evident that this is a typographical error due to the similarity in the names of the first and third respondents and that the condonation application was opposed by the first respondent.

Background

[3] As the arbitration award which the applicant seeks to have reviewed and set aside was received by the applicant on 17 May 2022, the review application ought to have been filed by no later than 29 June 2022. However, the founding affidavit in the application was deposed to by the applicant on 19 July 2022 (at which stage, the application was three weeks out of time), the application was served on the first respondent by email on 28 July 2022 (approximately four weeks out of time), and the application was then filed at this Court on 4 August 2022, at which point it was five weeks out of time.

[4] The applicant has furnished no explanation as to why the review application was only served on the first respondent seven days after the founding affidavit was deposed to or why the application was filed five days after it was served on the first respondent (which was 12 days after it was signed). When I raised this with the applicant who appeared in person at the hearing of the matter, he was unable to provide me with an explanation.

[5] Despite the fact that the review application was, according to the first respondent, served on it by email on 28 July 2022, there is no service affidavit deposed to by the applicant or his representatives regarding the service of the application by email as required in terms of the directive of the Judge President of this Court on 5 January 2022, regarding the requirements for service in this manner.

[6] There is also nothing in the file to suggest that the review application was served on the second or third respondent.

[7] Again, when I raised these issues with the applicant at the hearing of this matter, he was unable to provide an explanation other than that he had relied on his representatives to do what was required.

[8] The applicant has brought an application for the condonation of the late filing of the review application. This application was signed on 28 July 2022. There is again no

affidavit of service or indeed any indication of when it was served on any of the respondents, however, it is apparent that it did come to the attention of the first respondent around this time as the application was been opposed by it on 12 August 2022.

[9] The condonation application was filed at this Court on 4 August 2022.

[10] Again no explanation has been furnished as to why the condonation application was only filed five days after it was signed.

[11] In the condonation application, the explanation proffered for the late filing of the review application is that the applicant consulted a labour consultant regarding bringing the review application, however, at some stage the labour consultant became ill and was unavailable and informed him 'telepathically' (one can only assume this was telephonically) that he would attend to the review application on his return to work.

[12] The applicant also explains that, the day after he received the award, 18 May 2022, his uncle passed away in Venda and he had to attend the funeral and manage the affairs of the deceased estate there. He only returned to Gauteng on 19 July 2022, at which time the labour consultant had still not returned to work and was unavailable. As a result, he then had to seek legal advice from an attorney.

[13] The applicant submits that he was not in wilful default of the prescribed time period for the filing of the review application but that the family emergency in Venda and his consultant's unavailability were circumstances beyond his control. He also states that he relied on the consultant to file the review application but it was only on his return to Gauteng that he consulted with an attorney and the review application was drafted. Oddly, he alleges that the review application was finalized on 19 May 2022. Again, one can only assume that this is a typographical error and that this should read 19 July 2022.

[14] At the hearing of the matter, I raised various concerns with the applicant, the first being that it appeared from the notice of motion in the review application that he was represented by Umusa Legal Advisors and Employment Law Practitioners

(Umusa) and that he was no longer represented by them but represented himself in the condonation application. I asked if he was still represented by Umusa and I queried how it could be that the address for Umusa on the notice of motion in the review application was the address for himself in the condonation application. In response, the applicant indicated that the address was in fact his address and that he was no longer represented by Umusa. On further questioning, he confirmed that in fact, Umusa were not attorneys but the labour consultants that he referred to in the condonation application.

[15] I asked the applicant who the attorney was that he had consulted with when he returned to Gauteng on 19 July 2022 and established that the labour consultant had not returned to work and was still unavailable. After a fairly long exchange, it became apparent that Umusa and the attorney were in fact one and the same.

[16] The other concern with the condonation application that I raised with the applicant at the hearing was the lack of detail regarding the timing of events and the people involved as described in the application. The applicant attempted to provide further details from the bar, however, as Mr Peter, the attorney representing the first respondent, pointed out, all of the details relating to why the review application was filed late had at all times been within the applicant's knowledge, however, the applicant had, kept the full facts from this court in the application. Mr Peter argued that the applicant had simply adapted and changed his explanation as I asked him questions rather than genuinely taking this court into his confidence.

[17] I have to agree with him.

[18] In opposing the condonation application, the first respondent argued that the delay was significant and required a good explanation. It further argued that the explanation furnished by the applicant was untruthful and wholly inadequate for a variety of reasons. The first respondent argues that in the absence of a full and reasonable explanation for the delay, the prospects of success are immaterial.

[19] In *NUM v Council for Mineral Technology*¹ (*NUM*), the Labour Appeal Court confirmed that the approach set out in *Melane v Santam Insurance Co Ltd*², is the approach that should be adopted in considering condonation applications. That is, “that the court has a discretion to be exercised judicially upon a consideration of all the facts and that, in essence it is a matter of fairness to both sides”. The factors to be considered are the “degree of lateness, the explanation” for the delay, the “prospects of success” and the prejudice to both parties.

[20] The Labour Appeal Court added a further principle that is to be applied, 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.³

[21] In *Grootboom v National Prosecuting Authority and another*⁴, the Constitutional Court held that it is trite that condonation cannot be had for the mere asking and that a party seeking condonation must make out a case entitling it to the court’s indulgence. It must show sufficient cause which requires a party to give a full explanation for the non-compliance with the rules or court’s directions. The explanation must be reasonable enough to excuse the default.⁵

[22] Furthermore, it held that the granting or refusal of condonation is a matter of judicial discretion which involves a value judgment by the court seized with a matter based on the facts of that particular case.⁶

[23] Having read the papers and after having considered the submissions of the parties, I am satisfied that the explanation for the delay of five weeks in bringing the review application is entirely unreasonable and inadequate. It is replete with vague assertions and provides no real detail on the steps that were taken by the applicant to ensure that his review application was brought timeously.

¹ [1999] 3 BLLR 209 (LAC); [1998] ZALAC 22.

² 1962 (4) SA 531 (A) at 532 C – F.

³ *NUM* at para 10.

⁴ [2014] 1 BLLR 1 (CC); [2013] ZACC 37 (CC).

⁵ *Ibid* at para 23.

⁶ *Ibid* at para 35.

[24] Neither the explanation contained in the condonation application nor the further explanations offered by the applicant at the hearing of the matter made sense and as such were neither adequate nor reasonable.

[25] In *NUMSA & another v Hillside Aluminium*⁷, this court held that “*there should be an acceptable explanation tendered in respect of each period of delay*”. Parties seeking condonation for non-compliance are obliged to set out full explanations for each and every delay throughout the process. An unsatisfactory and unacceptable explanation for any of the periods of delay will normally exclude the grant of condonation, no matter what the prospects of success on the merits.⁸

[26] As I have already pointed out, the explanation given for the delay in filing the review application is not a full explanation for every period of delay, particularly for the periods between the signing of the two founding affidavits and the service of same on the first respondent and thereafter filing the papers at this court.

[27] In the circumstances, the applicant’s prospects of success are immaterial regardless of how good they may be.

[28] It is also noted that no further steps have been taken by the applicant to proceed with the review application since the application was filed on 4 August 2022. The practice manual⁹ of this court requires that the record of the arbitration proceedings must be filed within 60 days of the applicant being notified that the record has been received by this court and is ready for collection. A year and five months have passed since the review application was filed.

[29] The applicant advised me from the bar that he had been notified by the registrar and had uplifted and transcribed the record, however, there is nothing in the file to suggest that the record has been filed as required. The applicant also did not have

⁷ [2005] 6 BLLR 601 (LC); [2005] ZALC 25.

⁸ Ibid at para 12.

⁹ Practice Manual of the Labour Court of South Africa, effective 2 April 2013.

any proof that this had been done.

[30] In the premises, it is likely that the review application has in any event been deemed to have been withdrawn in terms of the provisions of the practice manual. I do not make a definitive finding in this regard, however.

[31] On the basis of the explanation furnished by the applicant for the late filing of the review application, I am of the view that the applicant has not made out a case entitling him to the indulgence he seeks. It follows that the condonation application must fail.

[32] I make the following order:

Order

1. The application for the condonation of the late-filing of the review application is dismissed.
2. There is no order as to costs.

M Edwards
Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: In person

For the Respondent: O Peter of Majang Inc Attorneys