

**THE LABOUR COURT OF SOUTH AFRICA
AT JOHANNESBURG**

Not Reportable
Case no: JR 1809/2021

In the matter between:

EMMANUEL MPHEPHU

Applicant

and

CCMA (LIMPOPO PROVINCE)

First Respondent

**COMMISSIONER NICHOLAS
MATLOGA N.O.**

Second Respondent

SAFCOL (PTY) LTD

Third Respondent

Heard: 07 February 2024

Delivered: (This judgment was handed down electronically by emailing a copy to the parties. The 20th February 2024 is deemed to be the date of delivery of this judgment).

Summary: (Condonation for late filing of review application – delay inordinately long and explanation wholly inadequate – Applicant also misrepresenting reason for delay for a period a period of at least two months – application dismissed without consideration of merits.)

JUDGMENT

LAGRANGE, J

Introduction

[1] The applicant, Mr E Mphephu ('Mphephu') worked as a truck driver for the third respondent ('Safcol') from 1 October 2013. He was dismissed on 17 June 2020 for refusing to obey the instructions of his regional manager, Mr L Tshivhidzo ('Tshivhidzo'). The first instruction was given telephonically that he should drive his truck that afternoon to Wilge plantation in Mpumulanga to load gravel. Having provided other reasons not to go the plantation, that evening, he explained that he was unable to do so because his father had been hospitalised and was seriously ill. His manager asked him to provide an explanation in writing, but Mphephu said he could not write. The conversation ended on the basis that he would be at work the next day.

[2] The next morning he went to the sawmill, not the plantation. The manager then told him to stop working and go home due to insubordination and to hand over the keys to his lorry after parking it. He did not respond verbally to this instruction, but drove off to offload the sawdust at a site at least 6 kilometers away, before returning with the truck.

[3] The arbitrator found that his dismissal was substantively and procedurally fair. In particular, he found that the applicant had given conflicting reasons for not complying with the first instruction and had not furnished a proper explanation for doing so. In relation to the second instruction, the arbitrator did not accept the applicant's reason for not parking the truck as instructed, namely that he wished to offload sawdust loaded on the vehicle before he parked the truck, in circumstances where the distance he had to travel to dump the sawdust was over 6 kilometres away. The arbitrator found that it was not his choice to prioritise what he did after he received the instruction.

[4] The arbitration award was issued on 6 September 2020, but received on 9 September. The review application was launched more than a year later, on 8 October 2021. Mphephu's attorneys notified Safcol's attorneys on 7 December 2021 that the record had been received and had been sent for transcription.

[5] In late March 2022, five months after launching the review application, the applicant applied for condonation for the late referral of his review application.

[6] On 14 July 2022, the applicant filed his supplementary affidavit, having apparently filed the record on 16 May 2022 at the Labour Court, though he appeared to have already served the record on the respondents on 22 January 2022.

[7] The respondent claims that the applicant failed to comply with the court's directive to index and paginate the court file within 5 days and thereafter file its own heads of argument. It had argued that a failure to comply with the directive means that the file should be archived, but correctly abandoned this line of argument at the hearing.

[8] At the request of both parties, the application was heard virtually using Microsoft Teams.

The condonation application

[9] Condonation is not there merely for the asking, nor are applications for condonation a mere formality (see *NUMSA & another v Hillside Aluminium*¹ and *Grootboom v National Prosecuting Authority & another*²). A party seeking condonation must make out a case for the indulgence sought and bears the onus to satisfy the court that condonation should be granted.

[10] The length of the delay in filing the review application was two weeks short of a year late. Such an extraordinarily long delay requires a comprehensive explanation for the whole period of the delay. The various periods of the delay can be briefly mentioned below.

¹ [2005] 6 BLLR 601 (LC);

² 2014 (2) SA 68 (CC)

[11] The applicant claims that he approached Legal Aid South Africa for assistance on 25 September. At that stage he was well within time.

[12] However, the next time he spoke to the legal advisor was on an unspecified date in November 2020, by which stage the six-week period for filing his review application had already expired.

[13] Thereafter, on another unidentified date, Mphephu said he received an SMS from Legal Aid confirming that his application had been approved but it was only sometime in March 2021 that he discovered that the approval for assistance had been erroneously granted on the basis that his case concerned a divorce not a labour matter. Because no dates are specified it is difficult to know what the length of time was between receiving the SMS and his follow-up in March 2021. A failure to provide clarity on this amounts to an inadequate explanation for period of delay of at least three months and cannot constitute an acceptable one. The court cannot speculate about when certain events took place.

[14] In any event, he then claims he sought legal advice from a private attorney, Somo Thabisa Attorneys, again on an unspecified date. He claims he was unable to consult with his new attorney until June 2021 owing to the COVID-19 lockdown. The period between March 2021 and a consultation on an unspecified date in June constitutes an unexplained gap of approximately three months or more.

[15] What Covid regulations were applicable then? Since Mphephu relied on the regulations, the court can take judicial notice of the applicable alert levels during 2021 which were gazetted under the Disaster Management Act 57 of 2002. From 1 March to 30 May 2021, the country was on adjusted alert level 1³. Clause 68 of the regulation notice in question limited free movement of persons during a night-time curfew. Thereafter, the country was on adjusted alert level 2 from 31 May to 15 June 2021⁴. In terms of clause 50 of the latter regulation

³ Notice No R 152, GG 44201, dd 28 February 2021

⁴ Notice No R 477, GG 44642, dd 30 May 2021.

notice, similarly to clause 68 of the previous regulation, no restriction was placed on the movement of persons except during a nighttime curfew from 22h00 until 04h00. The only other limitations concerned observance of Covid-19 safety protocols. Even the introduction of adjusted alert level 3 on 15 June 2021⁵⁵ which lasted until 12 September 2021, did not impose greater restrictions on the movement of persons. Thereafter, the regulations were relaxed further.

[16] What this demonstrates is that the applicant is trying to mislead the court in stating that he could not consult with his attorneys because of Covid lockdown regulations. There were no restrictions on the movement of persons during that time. His willingness to blatantly misrepresent the facts relating to part of the delay, casts doubt on the veracity of his other vague explanations for different periods of delay.

[17] When he did consult with his attorneys on some unspecified date in June 2021, it was then that he claimed he realised they had not even commenced with his application. He approached his current attorneys record on an unspecified date in July 2021. Why his current attorneys of record could not have identified the date on which he first consulted them is a mystery as they provided no confirmatory affidavit.

[18] No explanation is provided by him or his attorneys on why it took a further two or more months to file the application. In this regard, it is important to bear in mind that the founding affidavit in a review application can be completely amended in a supplementary affidavit and consequently does not have to be comprehensive, so there is no reason why it needed two months to draft the notice of motion and founding affidavit.

[19] In summary, there is simply insufficient detail provided for long periods of delay which might explain why it took so long before the next step was taken. Even on a generous interpretation of his explanation, allowing for a months' delay at each of the stages mentioned above to be excused, excluding the

⁵⁵ Notice No R 530, GG 44715 dd 15 June 2021 and Notice No R 4 869, GG 45156, dd 12 September 2021

period when he falsely claimed he could not consult his attorneys it would still leave a period of nine months of unexplained inactivity.

[20] In *NUM v Council for Mineral Technology*⁶, the LAC said:

“[W]ithout 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.”

[21] In *Colett v Commission for G Conciliation, Mediation & Arbitration & others*⁷, the LAC held:

‘[38] There are overwhelming precedents in this court, the Supreme Court of Appeal and the Constitutional Court for the proposition that where there is a flagrant or gross failure to comply with the rules of court condonation may be refused without considering the prospects of success. In *NUM v Council for Mineral Technology* it was pointed out that in considering whether good cause has been shown the well-known approach adopted in *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532C-D should be followed, but —

“[t]here is a further principle which is applied and that is without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without good prospects of success, no matter how good the explanation for delay, an application for condonation should be refused”.

[39] The submission that the court a quo had to consider the prospects of success irrespective of the unsatisfactory and unacceptable explanation for the gross and flagrant disregard of the rules is without merit.”

[22] In this case there is an egregious delay and inadequate explanation. To compound matters, Mphephu offered a false justification for a significant portion of the delay. In the circumstances, and bearing in mind the authorities above,

⁶ [1999] 3 BLLR 209 (LAC)

⁷ (2014) 35 ILJ 1948 (LAC);

the condonation application should be dismissed without consideration of the merits.

Order

1. The Applicant's condonation application for the late referral of his review application is dismissed, and consequently the review application is also dismissed.
2. No order is made as to costs.

RG Lagrange

Judge of the Labour Court of South Africa.

Appearances:

For the Applicant: M Mapila instructed by Ernest Rammela Attorneys

For the Respondent: KG Kemp instructed by FourieFismer Inc.