

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

**Not Reportable
Case No: JR754/20**

In the matter between:

COUNCIL FOR MEDICAL SCHEMES

Applicant

and

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

First Respondent

RICHARD BYRNE N.O.

Second Respondent

SOLIDARITY obo DE VILLIERS

Third Respondent

Heard: 29 February 2024

Delivered: 29 February 2024

EX TEMPORE JUDGMENT

PHEHANE, J

Introduction

- [1] This Court is called upon to adjudicate a condonation application for the late filing of a review application.

- [2] The applicant, legally represented, launched a review application in terms of the provisions of section 145 of the Labour Relations Act¹ (LRA) on 22 June 2020², approximately 6 weeks out of time. At the time of launching the review application, the applicant was well aware that it was launched out of time and undertook to file a separate application for condonation for its late filing. The condonation application was filed more than three years later.

Condonation

- [3] The requirements that must be satisfied to succeed in an application for condonation are well-known.³ An applicant in a condonation application must set out the degree of the delay and show good cause for the delay; further, the applicant must deal with the prospects of success on the merits and prejudice to the respondent. It is trite that condonation is not for the mere asking. An applicant for condonation seeks an indulgence from the Court and is to show sufficient cause to succeed in the grant of condonation by the Court.

Extent of delay

¹ Act 66 of 1995, as amended.

² Supplementary affidavit in the review application at para 4.2.

³ *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A). In *Grootboom v National Prosecuting Authority and another* 2013 (5) ZACC 37; (2014) 35 ILJ 121 at para [50], the Constitutional Court stated that the factors that are to be considered, in the interests of justice, in determining a condonation application include the following:

- '(a) the length of the delay;
- (b) the explanation for, or cause for, the delay;
- (c) the prospects of success for the party seeking condonation;
- (d) the importance of the issue(s) that the matter raises;
- (e) the prejudice to the other party or parties; and
- (f) the effect of the delay on the administration of justice.'

The Constitutional Court went on further to state at para [51] as follows:

'The interests of justice must be determined with reference to all relevant factors. However, some of the factors may justifiably be left out of consideration in certain circumstances. For example, where the delay is unacceptably excessive and there is no explanation for the delay, there may be no need to consider the prospects of success. If the period of delay is short and there is an unsatisfactory explanation but there are reasonable prospects of success, condonation should be granted. However, despite the presence of reasonable prospects of success, condonation may be refused where the delay is excessive, the explanation is non-existent and granting condonation would prejudice the other party. As a general proposition the various factors are not individually decisive but should all be taken into account to arrive at a conclusion as to what is in the interests of justice.' [Own emphasis]

- [4] The review application is filed 6 weeks late.
- [5] Although the applicant stated in the founding affidavit in its review that it was “*duty bound*” to file a condonation application, and as stated above, the condonation application however, was filed more than three years later and on 8 January 2024. No explanation is provided by the applicant in its condonation application as to why it took more than three years to launch this application.
- [6] In *Allround Tooling (Pty) Ltd v NUMSA and others*,⁴ the Labour Appeal Court (LAC) restated the well-established principle that a condonation application must be filed without delay and/or as soon as an applicant becomes aware of the need to do so. This did not occur in the present case. The absence of a reason for such failure is fatal to the condonation application.

Reasons for the delay

- [7] The reasons proffered in the founding affidavit for the delay in filing the review application is that there were delays in obtaining instructions from its client.⁵ No detail is provided as to when this occurred. Every period of delay is unexplained.⁶
- [8] In its replying affidavit, in an attempt to meet the third respondent’s challenge raised in the answering affidavit that the delay is unexplained, the applicant denies this and asserts that in its supplementary affidavit in the review application it stated that the delay was occasioned by it not obtaining instructions from its client as “*it is clear that the country was on lock down*”. No details are set out as to what this means and at what stages and during which period instructions could not be obtained. In any event, it is trite that an

⁴ [1998] ZALAC 8; [1998] 8 BLLR 847 (LAC) at para [8].

⁵ Founding affidavit, at para 12, on p 7.

⁶ In *Ntsele v Commission for Conciliation, Mediation and Arbitration* [2017] ZALCJHB 161 at para [9], this Court stated that a party seeking condonation must set out all the facts and circumstances of the delay and most importantly, must provide a satisfactory explanation for each period of the delay. Where the reasons proffered lack detail and no account is made for each period of the delay, the explanation amounts to none at all.

applicant is to make out or set out its case in its founding affidavit. The delay and every period of the delay remain unexplained.

- [9] In a letter dated 13 November 2023,⁷ the third respondent reminded the applicant that the review application was enrolled for hearing on 29 February 2024 and noted that the condonation application had not yet been delivered by the applicant. The third respondent invited the applicant to deliver the application by 31 December 2023, after which, it would consider whether or not to oppose it. The applicant, disingenuously states that the parties agreed that the condonation application had to be launched before the end of December 2023 and that it “*did not think that the condonation application will be opposed*”. On a reading of the third respondent’s aforesaid letter to the applicant, there was no basis for the applicant to labour under the impression that the condonation application would be unopposed. It matters not what the agreement by the parties is on condonation – the failure to file a review application timely means that this Court lacks jurisdiction to adjudicate the review application. The Court would only be clothed with jurisdiction to adjudicate a review application filed out of time if condonation is sought and it grants condonation on good cause shown.⁸
- [10] The applicant alleges that there would be no prejudice to the respondents if condonation is granted, as the respondents have already filed their opposing papers in the review application and it is in the best interests of the parties that the review application be heard.
- [11] Insofar as the prospects of success are concerned, the applicant avers that the review application “*strikes to the heart of the correct interpretation of a legislation*” and the respondents will gain clarity on who, within the applicant, has powers to employ and renew contracts of employment.⁹ The review application concerns a dispute regarding the unfair dismissal of the third respondent, who was dismissed on the basis of incompatibility. The second respondent found that the dismissal was substantively unfair and ordered

⁷ Annexure “MJVR1” to the answering affidavit on p 22.

⁸ See: Section 145(1A) of the LRA.

⁹ Founding affidavit, at para 17, p 8.

reinstatement and back pay in the amount of approximately R2.8 million. The review application did not concern the interpretation of a piece of legislation, which legislation, the applicant does not explain. No further details are pleaded in respect of the applicant's prospects of success on review. The applicant did not participate in the entire arbitration proceedings. This is not disputed.

[12] In addition to contending that the condonation application falls far short of the requirements to succeed on condonation, the third respondent further contends that the review application is deemed withdrawn for failure to file the record timely.¹⁰ It appears that consent was granted by the third respondent to the applicant to file the record and that the record had to be filed on 29 January 2021, but an incomplete record was filed on 19 March 2021.¹¹ In the absence of a notices bundle setting out when the requisite notices in terms of rule 7A were delivered, it cannot be ascertained when the applicant received the notice in terms of rule 7A(3) from the Commission for Conciliation, Mediation and Arbitration (CCMA), and when the notices in terms of rule 7A(5), (6) and (8)(a) were filed. The supplementary affidavit in the review application was delivered on 15 March 2021. No notice in terms of rule 7A(6) notice has been filed. The non-mechanical record of the arbitration proceedings is attached to the supplementary affidavit in a series of annexures. As it stands, there is no separate records bundle that has been filed by the applicant and no bundle containing the transcribed record of the arbitration proceedings is contained in the Court file. I raised this with Mr. Mpakane for the applicant and he informed me that I will not find the transcribed record in the Court file. I deal with this submission below when I deal with the costs.

[13] The applicant has failed dismally in its founding affidavit in the condonation application to make out a case for condonation and to show good cause for the delay. The applicant's reasons for the delay are unsound and amount to

¹⁰ See: para 2.12 of the answering affidavit in the condonation application.

¹¹ See: third respondent's heads of argument at para 1.12.

no reasons. It is now accepted that in the absence of any reasons for the delay, the prospects of success are immaterial.¹²

- [14] Mr. Mpakane submits from the Bar, that the prospects of success entail a legal point regarding legislation that sets out who in the applicant may renew contracts of employment and that the second respondent ought to have been aware of this legislation. Gleaning from the content of the supplementary affidavit, it would appear that this legislation is the Medical Schemes Act.¹³ I mention that the supplementary affidavit makes no referral to the transcribed record, which is in any event, not before the Court.
- [15] Ms. Janse van Rensburg for the third respondent contends that this point of law was not before the second respondent and that the evidence before him that was tendered by the third respondent was undisputed. She substantiated this by referring to the transcript of the proceedings. Again, these are not before the Court.
- [16] Mr. Mpakane emphatically submits that the applicant has good prospects of success on the merits of the review application. The difficulty is that the prospects of success are not pleaded in the condonation application. The condonation application is terse.
- [17] The applicant in my view, has paid lip service to the requirements to succeed in an application for condonation.
- [18] Review applications are urgent applications.¹⁴ The delay in launching this condonation application is excessive taking into consideration that on 6 May 2020, when the founding affidavit in the review application was deposed to, the applicant was well aware that it was required to launch an application for

¹² *National Union of Mineworkers v Council for Mineral Technology* [1998] ZALAC 22; [1999] 3 BLLR 209 (LAC).

¹³ Act 131 of 1998.

¹⁴ See: item 11.2.7 of the Practice Manual of the Labour Court of South Africa, effective 2 April 2013. In *Toyota SA Motors (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration* [2015] ZACC 40; (2016) 37 ILJ 313 (CC), the Constitutional Court stated that one of the purposes of the LRA is expeditious dispute resolution and this must be borne in mind when considering the reasonableness of delay in a condonation application.

condonation for the late filing of its review application, yet it did not launch this application soon thereafter. As I have stated, no sound reason is proffered for the delay and every period of delay is unexplained. The prejudice to the third respondent is obvious, as it is now four years down the line and the applicant has been tardy in the manner in which it has proceeded with the review application, as the pleadings are in a state of disarray.

[19] In view of the afore-going, the condonation application does not succeed.

Costs

[20] The manner in which the applicant has proceeded with this review application to this Court leaves a lot to be desired. In its founding affidavit in the review application, the applicant states that the application is brought to review and set aside an arbitration award dated 31 July 2017, which is said to be attached as annexure “DSK 1”. No attachments are annexed to the founding affidavit. The notice of motion in the review application mentions that the arbitration award is dated 25 March 2020.

[21] In its supplementary affidavit filed on 15 March 2021, the applicant clarifies that the arbitration award that it seeks to review and set aside is dated 25 March 2020. I have already stated that this condonation application was launched three years later and no explanation was proffered for this delay.

[22] The applicant contends that the condonation application is not frivolous and that there was no malice on its part in *“failing to meet the time frames within which to file the answering affidavit”*.¹⁵ While the reference to the answering appears to be an error, it is apparent from the several errors in this application that the applicant was nonchalant in progressing with this application.

[23] The pleadings are not properly indexed and paginated and are not properly bound as provided in item 11.5.3 of the Practice Manual. The transcribed record has not been placed in the Court file.

¹⁵ Founding affidavit at para 18 on p 8.

[24] For the aforesaid reasons, I exercise my discretion to make an award as to the payment of costs due to the conduct of the applicant in proceeding before this Court.

[25] In view of the afore-going, the following order is made:

Order

1. The condonation application is dismissed.
2. The applicant is to pay the costs.

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