

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

CASE NO: JR 1267/05

In the matter between:

MASENYANI MAURICE CHAUKE

First Applicant

and

MOTOR INDUSTRY BARGAINING COUNCIL

First Respondent

M TSTATISMPE N.O

Second Respondent

KEARNEY'S TRUCK & TRAILER

Third Respondent

Date of hearing: 18 August 2011

Date of judgment: 19 August 2011

JUDGMENT

LAGRANGE J

Introduction

- 1] This is an application to review and set aside a condonation ruling issued by the second respondent under the auspices of the Dispute Resolution

Centre of the Motor Industry Bargaining Council. The bargaining council was incorrectly cited as the CCMA in the pleadings in this matter, although it clearly accepted the parties' intentions that they had meant to refer to it as the first respondent. The citation corrected in the headnote to this judgement. To deal with the merits of the application a brief chronology of the matter should be provided.

The initial referral

- 2] According to the applicant, his services were terminated on 21 June 2004. His dispute was referred to the bargaining Council on 10 November 2004 making it 113 days late. Before court it was argued that the reason for the late referral was that he had mistakenly referred the matter to the CCMA previously. However, according to the arbitration award, the reason advanced for the lateness then was that he had asked his legal adviser to refer the dispute and had only recently discovered that the attorney had not done so. Nothing on the face of the award of the arbitrator suggests that the applicant sought condonation on the basis of an error made in referring the matter initially to the CCMA. I will return to this issue later.

The review application

- 3] It appears that the review application was originally filed on or about 1 June 2005 whereas it should have been filed six weeks after the applicant claimed to have received the arbitrator's ruling on 23 February 2005. Consequently the review application was filed 56 days late. To put this in perspective, this is more than twice the length of time in which it should have been filed. The reason provided for the late filing of the review application was that the applicant went back and forth between the attorneys he was using and Scorpion Legal Protection Services (his legal insurers): in what was described as 'the long journey' between them, his

application was delayed.

The striking off of the review application

- 4] After the condonation application had been filed the matter was set down for a hearing on 28 June 2006. At the hearing the matter was struck off the roll on account of a non-appearance by the applicant or his representative, according to an affidavit from one of the members of the third respondent, Kearney Truck & Trailers C.C., who attended court on that day. In the applicant's replying affidavit no attempt was made to contradict this statement nor was any explanation offered for the matter been struck off the roll.
- 5] When the matter came before me, applicant's counsel, Mr Mbongela, handed up a letter of explanation apparently written by the applicant's former attorneys, Mdlalose Attorneys, to the Law Society of the Northern Provinces in which they claimed to have attended court with the applicant on the day in question and the matter had been struck off the roll. They indicated that it was then they discovered that no condonation application had been brought for the late filing of the review application.

Although the letter does not say so in so many words, it seems as if Mdlalose attorneys were trying to suggest that the matter was struck off the roll in the absence of a condonation application being brought, but the letter carefully avoids saying this expressly. In the same letter the attorneys claim that they advised Scorpion legal protection of the prospects of the matter succeeding in the labour court were not good "despite the condonation application." As mentioned, this version of what transpired in court at the hearing on 28 June 2006 was never confirmed in an affidavit by the applicant or his attorneys. It stands to reason whether if the applicant was at court, he would have been aware at that stage of the need to file a condonation application.

Unfortunately, for the applicant, the fact that the matter had been struck off the roll apparently did not provide enough incentive to ensure that, as far as possible, the necessary condonation application was filed without further

delay: it was only filed another 18 months later in December 2007.

At the end of May 2010, the court Registrar archived the file because no further steps had been taken in the matter. Despite this and despite the fact that no affidavit had been filed requesting the re-enrolment of the matter in terms of Rule 15 of the Labour Court Rules, the matter was re-enrolled for a hearing before me on 18 August 2011. Even if the requirements of Rule 15 are ignored, the respondent pertinently placed the issue of the application being struck off the roll on record in its answering affidavit and the applicant simply avoided trying to address it in reply. His failure to do so at that juncture strongly suggests that there was no justifiable explanation for the non-attendance of him and his attorneys on the day in question. The letter subsequently produced at the hearing today which now claims that they were present, raises more doubts than it answers. If indeed the applicant and his attorney were present, it is quite extraordinary that the respondent's contentions to the contrary were not vehemently disputed in the replying affidavit. It is also noteworthy that the letter written to the Law Society does not really explain how it happened that the matter was struck off the roll in the presence of the applicant and his representative. If, as the letter implicitly tries to suggest, the reason was the absence of a condonation application, it is difficult to understand why the matter would simply not have been postponed with an appropriate order with costs to allow the condonation application to be filed. There is no evidence that the applicant's attorneys requested a postponement for this purpose which might have been expected in the circumstances.

I am satisfied that the matter ought never to have been re-enrolled, and in hearing the applicant he was extended an indulgence by the court he was not really entitled to.

The matter was first stood down in order to allow the applicant's representatives to supplement the missing portion of the pleadings, in particular the notice of motion and founding affidavit in the review application. When the matter was recalled after lunch, the missing portion had still not been provided. No explanation was given why a copy could not have been provided, but a postponement was requested in order to complete the application. As the file ought to have been in a complete state before the proceedings began and no cogent explanation was provided why the applicant had not attended to this, the application for postponement was dismissed. In any event, at least the ruling was in the matter was before the court and in so far as the merits of the application could be considered, the matter could

proceed.

Mr Mbongela was unable to explain why there had been an 18 month delay in filing the condonation application once it was known by 28 June 2006 that this had to be done. He could only speculate what the reasons might have been, but as there were no affidavits to provide a basis for his speculation, in truth there was no explanation provided at all for this very lengthy delay. It is a well-established principle that an applicant who is required to seek condonation should file such an application without unnecessary delay and that a failure to do so timeously can itself lead to the application being dismissed.¹ In my view, given the history of delays in this matter and that the applicant ought to have been mindful by June 2006 of the importance of not delaying, the condonation application can be dismissed on this ground alone.

Nevertheless, I will consider the other merits of the application on the assumption that the delay in filing the condonation application itself ought not to be the sole reason for dismissing it. As to the 56 day delay in filing the review application I am satisfied that such a delay is considerable given that the applicant took twice as long to file the matter as he should have. As mentioned, the explanation for the delay was his coming and going between his erstwhile lawyers and Scorpion legal services. The respondent correctly points out that no confirmatory affidavits about these interactions were filed by either of the other two parties involved. While I accept that there may be some difficulties obtaining an affidavit from an attorney in which he might be admitting to professional negligence, no explanation is provided why an affidavit could not have been obtained from Scorpion Legal Services. As it stands, we only have the applicant's word for the difficulties he was encountering, and it is and it is noteworthy that he does not mention the name of the attorneys he was allegedly trying to galvanise to pursue his matter on his behalf. Consequently, it must be said that the explanation for the lateness of the review application stands on a slender and vague factual foundation.

6] Moving onto the merits of the review application itself, the inadequacies of the applicant's papers in the matter become glaring. As previously mentioned, the applicant's grounds of review were, strictly speaking, not properly before the court because his founding affidavit and notice of

¹ See *SABC Ltd v CCMA & others* [2010] 3 BLLR 251 (LAC)

motion in the review application were missing. Even if a blind eye is turned to this and if I consider the applicant's attempt to review the condonation ruling on grounds of unreasonableness, which were the grounds advanced by his counsel in court, the next problem the court is confronted with is the absence of any transcript of the condonation hearing or any other record of the submissions or evidence presented to the arbitrator.

- 7] Mr Mbongela suggested that if the arbitrator had been aware of the applicant's misguided attempt to first refer his dismissal dispute to the CCMA before it was referred to the bargaining Council, he would have condoned the late referral. The obvious difficulty with this submission is that nowhere in the affidavits and record before the court is there any concrete evidence of the alleged erroneous referral to the CCMA. Secondly, if the applicant did not raise it with the arbitrator when the condonation application was considered, the arbitrator can hardly be faulted for his reasoning. No explanation is provided anywhere why this matter was not raised before the arbitrator, or is an explanation offered why the arbitrator only appeared to consider the applicant's explanation that his legal representative had failed to make the referral in time as the explanation for his lateness.
- 8] The only basis on which the applicant could argue that the arbitrator was unreasonable in such circumstances was if their evidence was placed before him and he simply did not deal with it or if he disregarded it in evaluating the reasons for the delay. There is no evidence on affidavit that this was the case. To make matters worse, because there is no record of the evidence placed before the arbitrator there is no basis at all for believing that such an explanation was raised with him in any form.

9] The length of delay the arbitrator was dealing with was nearly four times in excess of the 30 day period which the applicant had to refer his unfair dismissal dispute. The arbitrator clearly did not find that such a long delay could be solely blamed on the applicant's legal representative on the evidence before him. The only point recorded under the consideration of the prospects of success is that the applicant claimed he did not know the reason for his dismissal. There is nothing on the record to inform the court what was before the arbitrator regarding the merits of the applicant's case of unfair dismissal, and therefore there is no basis for concluding that his analysis of that issue was unreasonable. He clearly records the relative prejudice the parties claimed they would suffer if the matter did or did not proceed, and again there is no reason to find that he acted irrationally in this respect.

10]In summary, even if an extraordinarily generous allowance is made to overlook the glaring defects in the review application, there is no evidentiary basis for setting aside second respondent's condonation ruling, in any event.

11]To summarise, the review application stands to be dismissed on a number of grounds:

- a. The application is fatally defective in that there is no founding affidavit and notice of motion before the court and this deficiency was not rectified timeously by the applicant.

There is no record of the evidence presented to the arbitrator in the condonation application, nor was there any attempt made to reconstruct the same or any explanation provided why this was not done.²

The applicant failed to comply with Rule 15 of the Labour Court rules which required him to file an affidavit explaining why the matter ought to be re-enrolled despite being struck off the roll in June 2006. The re-enrolment of the matter appears to have been completely fortuitous and done in error, thereby affording the applicant a gratuitous opportunity to resurrect an application which appears to have been abandoned after 2007.

12]The defects mentioned above justify the review application being dismissed, and even if those deficiencies were overlooked, there is no basis on the evidence before the court to review and set aside the arbitrator's ruling on account of it being unreasonable.

Costs

13]The respondent asked for a punitive costs order in the light of the manner in which the applicant has conducted his protracted proceedings. I'm certainly sympathetic to that request, but believe that the applicant was entitled to be warned of the prospects of such an application being made prior to today's hearing. Nonetheless, it is clear that in the absence of a record of the proceedings, or a serious attempt to reconstruct the record, the applicant ought not to have proceeded with this matter and the respondent should not have been required to defend the matter when the application was in such an incomplete state. Accordingly, the respondent is at least entitled to ordinary wasted costs of opposing the application.

Order

² See *JDG Trading (Pty) Ltd t/a Russells v Whitcher NO & others* [\[2001\] 3 BLLR 300](#)[\[2001\] 3 BLLR 300 \(LAC\)](#)

14]In the light of the analysis above,

- a. The application to review and set aside the second respondent's condonation ruling of 5 February 2005 under case number MINT 230C is dismissed.

The applicant is ordered to pay the third respondent's costs.