



REPUBLIC OF SOUTH AFRICA

Not reportable

**THE LABOUR COURT OF SOUTH AFRICA,  
IN JOHANNESBURG  
JUDGMENT**

**CASE NO: JR 2348/06**

In the matter between:

**MONAMI BEN TAU**

**Applicant**

**and**

**COMMISSION FOR CONCILIATION,  
MEDIATION AND ARBITRATION**

**First Respondent**

**COMMISSIONER K D MATJI (N.O)**

**Second Respondent**

**TELKOM SA LTD**

**Third Respondent**

Heard: 7 September 2012

Delivered: 1 July 2014

**Summary:** (Review – Condonation – 122 day delay – only partially explained - long unexplained delay sufficient to dismiss the application – in any event, on conspectus of factors application dismissed)

---

**JUDGMENT**

---

**LAGRANGE, J**

**Introduction**

- [1] This matter concerns a review application in which the applicant only filed his application on 11 July 2007 having received the award on 23 August 2006. Consequently before the review application can be entertained, it must first be decided whether the very long delay in filing the application which should have been filed no later than 6 October 2006 should be condoned.

*The period of delay*

- [2] As mentioned above, the review application should have been filed at the latest on 6 October 2006, but was filed some nine months later. This amounts to a time period nearly six times longer than it should have been. The delay is very long and requires a very good explanation even before prospects of success of the review application can be considered. The record of the proceedings itself took another two years before it was filed, even though the first respondent had lodged the record with the registrar of the Labour Court in August 2007. The applicant filed the record of the proceedings a further seven months later
- [3] On 2 January 2007 a formal alteration was made to the arbitration award when a variation ruling was handed down. The sole purpose of the variation was to change one figure in the case number. The applicant claims this was only received by the union that was representing them at the time on 12 January 2007 at which point the matter was referred to the union's erstwhile attorneys for consideration and preparation of the review application. From correspondence attached it is evident that by late February the applicant had received an unfavourable opinion from council about the prospects of his case and by early March correspondence with the erstwhile attorneys came to an end. There was then a long unexplained delay of about three months before new attorneys of record came into the picture in early June 2007. Although the new attorneys had all the necessary documents by mid June it still took over three weeks to file the review application. At no stage during this lengthy delay of some

months was there any effort made to make the third respondent ('Telkom') aware that the applicant was intending to launch review proceedings and seeking its support for the substantial delays and to warn it that the applicant was not going to let the arbitration award lie.

- [4] The applicant and his union assumed that he was prevented from taking any steps to pursue the review application until the number of the award was changed. Nothing would have prevented him from launching the review application and correcting the citation of the award by way of an amendment. The delay between obtaining the award and waiting for the outcome of the variation application is not really satisfactorily explained by the misplaced importance attached to one digit in the arbitration case number. Be that as it may, the delay between February and mid June is not explained at all. That period alone is a period of over three months, which in relation to a six-week period for filing review applications is excessive.

#### *The prospects of success*

- [5] The applicant, who was employed as a Systems controller by Telkom, was charged and found guilty on two counts of misconduct. The first charge related to him allegedly falsely claiming the cost of transporting his household goods when he was moved from Bloemfontein to Durban in January 2003, from Durban to Cape Town in March 2004, and Cape Town to Pretoria in mid-2004. The second and related charge was for the submission of fraudulent quotations from fictitious vendors of transport services in relation to the same transportation.
- [6] The arbitrator wrote a closely considered award with a detailed summation of the evidence. He found the applicant not guilty of fraudulent claims for transportation costs from Bloemfontein to Durban and from Durban to Cape Town. When it came to the submission of fictitious quotations however the arbitrator found that the applicant had made a misrepresentation that the fictitious companies existed and that Telkom would not have accepted the tender of Power Moves (the successful contractor) if it had known the competing quotations were fictitious. The arbitrator was critical of the applicant's failure to obtain any testimony from

an employee of Power Moves to confirm that it had transported his goods, whereas she had managed to secure the attendance of witnesses to come to Pretoria from as far away as Cape Town. It had been the evidence of an investigator from the security inspection department that he had visited the applicant's accommodation in Pretoria and he had been unable to show him the goods that were transported to Pretoria and this evidence of the investigator was not challenged.

- [7] The arbitrator also noted also that the transportation company which happen to belong to the wife of a Telkom employee had been very slow to submit its claim to Telkom for payment, which the arbitrator found it strange if it had indeed transported the goods. In his evidence the applicant had claimed that his goods were in storage in Pretoria and that he told the investigator this, but this was not pertinently put to the investigator in cross-examination. Moreover, when he gave his evidence in chief, the applicant's version of what happened to the goods that were supposedly transported was opaque and vague and it is apparent that he avoided the arbitrator's questions aimed at obtaining greater clarity about his version.
- [8] The applicant raised a number of grounds of review. In assessing the prospects of success what essentially matters are the grounds of review in relation to the central pillars of the arbitrator's findings.
- [9] On the critical issue of the three quotations presented by him he claimed that the arbitrator incorrectly attributed a duty to him to verify that the quotations were genuine whereas all he had to do was to obtain the quotations and it was for Telkom to verify them. On the face of it, this claim is bizarre. It was the applicant who obtained quotes and was best placed to explain how he did so. The odds of him receiving fictitious quotes from fictitious companies in response to his bona fide enquiries, beggars belief. The probabilities of that happening are so extraordinary, they cry out for an explanation from the person who obtained them. It is disingenuous of the applicant to attempt to absolve himself of any responsibility in this regard. The only explanation he gave of how he obtained the fictitious quotes is that he got the telephone numbers of the bogus companies from

unidentified colleagues, which was not even sufficient to lay a *prima facie* explanation for the extraordinary coincidence.

- [10] The applicant also claims that the arbitrator failed to consider the investigator's alleged concession under cross-examination that he concluded that the goods had been transported from Cape Town to Pretoria and did not verify that because he trusted the applicant, whereas he placed emphasis on the fact that the investigator testified that the applicant had refused to point out the goods delivered when he wished to inspect them. This mischaracterises the evidence of the investigator. The reason he did not attempt to visit the premises where the applicant was staying in Pretoria, was that the applicant himself told him he could not show him the goods which had been moved, so there was no point in inspecting the premises.
- [11] Another ground of review relating to the arbitrator's evaluation of whether or not the applicant's goods were transported to Pretoria, concerns the allegation that he ignored the evidence of Mr S Moeketsi, a fellow employee from whom the applicant was subletting a small apartment in Pretoria, that the applicant's goods were at his flat. In emphasising the applicant's failure to call for testimony from the removal company to confirm the transport of the goods, while supposedly ignoring the evidence of Mr Moeketsi the arbitrator demonstrated clear bias towards the applicant. In fact, the arbitrator did not ignore the evidence of Mr Moeketsi, but found it implausible. In passing, it should also be mentioned that Moeketsi's evidence was not something canvassed with the investigator when he was cross-examined.
- [12] The applicant also claims that the finding of the arbitrator that there was no procedural unfairness in his disciplinary enquiry was totally unreasonable and irregular because the applicant was denied an opportunity to cross-examine Telkom's witnesses in the enquiry. It is clear from the award that the arbitrator did consider the claim but found that the applicant had not led sufficient evidence to rebut the employer's evidence that the procedure was fair. Further, a consideration of the record of the

enquiry shows that there were sufficient opportunities for the applicant and his representative to participate in cross-examination of the witnesses.

[13] The other criticisms of the award are not ones that offer much prospect of success, in my view, because they attack the arbitrator's evaluation of evidence but without demonstrating that any shortcomings in that regard necessarily rendered the arbitrator's findings ones that no reasonable arbitrator could have reached.

[14] In light of the above I am not persuaded on the centrally important findings of the arbitrator that the applicant has demonstrated reasonable prospects of those findings been set aside, bearing in mind the high threshold for setting aside an award unless the conclusions of the arbitrator are such that no reasonable arbitrator could have arrived at them.<sup>1</sup>

### *Prejudice*

[15] The applicant has already had the benefit of an extensive internal enquiry and an equally extensive arbitration hearing. If the condonation application is refused, it is not as if the applicant has never had the opportunity to place his case before an independent forum. Nothing on the record or the award suggests to me that the arbitration hearing was in any material way lacking in that respect. Given not only the delays in bringing the application, but also the long delays in finalising it so that the matter could be set down for a hearing, it would not be fair to the third respondent to have to revisit the matter after so long.

### **Conclusion**

[16] In view of the unexplained and considerable periods of delay in launching the application even if the applicant is given some leeway for the misguided delay occasioned by awaiting the variation of the CCMA case number, I believe the condonation application should be dismissed on this basis alone. However, even if I am incorrect in such a finding, on a consideration of all the above mentioned factors together, this is not a

---

<sup>1</sup>*Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 28 ILJ 2405 (CC) at 2439F

case in which condonation should be granted. Naturally it follows from my finding that, the review application falls away as it cannot be considered in the absence of condonation been granted.

[17] In view of the manner in which the applicant has conducted the review application at his own convenience, to the inconvenience of the third respondent, there is no reason why costs should not follow the result in my view.

**Order**

[18] The application for the condonation of the late filing of the applicant's review application is dismissed with costs.



---

**R LAGRANGE, J**  
**Judge of the Labour Court of South Africa**

**APPEARANCES**

APPLICANT: S B Nhlapo instructed by Medupi Lehong Inc

FIRST RESPONDENT: P Masebo of Third Respondent