



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case No: **JR 1025/12**

In the matter between:

ASAVELA NKAMISA

Applicant

And

**THE COMMISSION FOR CONCILIATION,
MEDIATION & ARBITRATION**

First Respondent

COMMISSIONER DESMOND LYNCH

Second Respondent

**AUTOMATED OUTSOURCING SERVICES (PTY)
LTD**

Third Respondent

Heard: 7 February 2017

Delivered: 9 February 2017

JUDGMENT

VAN NIEKERK J

- [1] This is an application to review and set aside an arbitration award issued by the second respondent, to whom I shall refer as 'the arbitrator'. In his award, the arbitrator upheld the applicant's dismissal by the third respondent.
- [2] The arbitrator's award was issued on 25 April 2012. The present application was filed on 8 June 2012, within the time limit prescribed by s 145 of the Labour Relations Act. The relevant notice of compliance in relation to the filing of the record was filed by the first respondent on 12 June 2012. In terms of the practice manual, the applicant was required to file a copy of the record within 60 days. The record and the applicant's supplementary affidavit were filed only on 19 August 2013, more than a year late. The applicant seeks condonation for the late filing of these documents.
- [3] Condonation is not there merely for the asking, nor are applications for condonation a mere formality (see *NUMSA v Hillside Aluminium* [2005] 6 BLLR 601 (LC)). The applicant bears the onus to satisfy the court that condonation should be granted. In *Novo Norsdisk (Pty) Ltd v CCMA & others* [2011] 10 BLLR 957 (LAC), the Labour Appeal Court recently observed, at paragraph 28 of the judgment:

It seems to me that the aforesaid requirements are equally applicable when a party seeks condonation. The party seeking condonation must satisfy the court that it has a reasonable explanation for its delay in failing to comply with the time limits applicable to that party. Its failure to put before the court a reasonable and acceptable explanation entitles a court to refuse condonation. Further, if a court takes the view, that they are little prospects of success then, in my view, a court can justifiably refuse the indulgence being sought.

- [4] This principle is subject to that established by the Labour Appeal Court in *National Union of Mineworkers v Council for Mineral Technology* [1999] 3 BLLR 209 (LAC) in which the LAC said the following:

... 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.

- [5] There is another policy consideration that I must necessarily take into account. That is the statutory purpose of expeditious dispute resolution and the various mechanisms provided for in the Rules and the practice manual to ensure that review applications are dealt with efficiently and within the specified time limits. Indeed, the practice manual requires that a review application be prosecuted with the same degree of diligence as an urgent application.
- [6] In the present instance, in terms of paragraph 11.2 of the practice manual, a failure by the applicant to file the record within the required time period had the consequence that the application was deemed to have been withdrawn on expiry of the 60-day period. Further, in terms of the same paragraph, the failure to take active steps in the matter for a period in excess of 12 months from the date of filing the application and the consequence that the application is regarded as having lapsed, and the file archived. The applicant took no steps to pursue the remedies set out in the practice manual for any inability to comply with the prescribed limits.
- [7] Be that as it may, and in relation to the merits of the application for condonation, the delay in filing the record and the supplementary affidavit is excessive. As I have indicated, the delay exceeds 12 months. The applicant's explanation for the delay is one that primarily concerns her financial circumstances. She states that in mid-July 2012, after having filed the present application, she relocated to Umthatha with her husband. On 1 September 2012, the applicant's husband managed to secure employment in Johannesburg and she returned to Johannesburg on 1 February 2013. During the course of that month, she met with an attorney to request assistance in prosecuting the application that she had filed the previous year. That attorney was not able to assist and referred to another with whom she consulted on 28 March 2013. On account of her inability to meet her financial commitments,

the applicant paid her attorney on 6 May 2013 and a quotation for the transcription was received on 13 June 2013.

[8] It is well-established that financial hardship or a lack of financial means is not in itself an acceptable explanation for the delay in the matter such as the present. Many applications for review are prosecuted by persons who are not represented and in the absence of financial means, they seek the assistance of the legal aid board, the pro bono clinic or other assistance. The applicant was no doubt well aware of her obligations after filing the present application, but took no active steps in order to ensure compliance with those obligations, or to seek any extension of the time limits. By the time the applicant sought legal advice during February 2013, she must have been aware of the consequences of her failure to file the record within the prescribed time limit. That notwithstanding, the record was filed some 4 ½ months after the consultation with her attorney on 31 March 2013. There is simply no explanation for the delay during this period. Even if one were to accept that the transcribers were instructed only during June 2013 to proceed to with the transcription of the record of the proceedings, there is no explanation for the almost 2 month period that elapsed between that date and the filing of the record. There is no explanation as to why the filing of the supplementary affidavit was delayed. To the extent that the applicant's explanation is premised on the plea of a lack of funds to obtain legal advice, this rings hollow in view of the fact that the applicant had ably represented herself during the course of the proceedings under review and that she had drafted the founding papers in the present application without legal assistance. The applicant made no effort to contact the transcribers or to obtain quotes for the transcription of the record between July 2012 and March 2013. On the contrary, during that period, the applicant appears to have been content to let the application lie dormant. The interests of expeditious dispute resolution and the third respondent's interests in certainty trump the applicant's interest in pursuing the present application.

[9] In the absence of a satisfactory explanation for an inordinate delay, the application for condonation stands to be refused. In the circumstances, the applicant's prospects of success in the main application are not relevant.

However, even if I were to have regard to those prospects, the applicant's grounds for review disclose a case more in the nature of an appeal than a review. This court is entitled to intervene if and only if the conclusion to which the arbitrator came is so unreasonable that no reasonable decision-maker could come to that decision on the available evidence. This is not the case that is made out in the founding affidavit but even so, it does not appear to me, having regard to the record, that the arbitrator committed any material misdirection that had the consequence of a decision that falls outside of a band of decisions to which reasonable people could come. As the LAC has observed more than once, the hurdle facing an applicant in a review application is set high, and it is not often that this court will interfere.

For the above reasons, I make the following order:

1. Condonation for the late filing of the record and the Rule 7A (8) affidavit is refused.
2. The review application is dismissed

VAN NIEKERK J

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: In person

For the Respondents: Adam Ketley, Bouwer Cardona Inc