



THE LABOUR COURT OF SOUTH AFRICA

JOHANNESBURG

Not Reportable

Case no: JR 2563/10

AMCU obo ML MAHOMANE

Applicant

and

**THE COMMISSION FOR CONCILIATION MEDIATION AND
ARBITRATION**

First Respondent

COMMISSIONER S RAPHELA N.O.

Second Respondent

**BHP BILLITON – MIDDELBURG MINES SERVICES (PTY)
LTD**

Third Respondent

Heard on: 8 February 2017

Delivered: 13 February 2017

JUDGMENT

VAN NIEKERK J

- [1] This is an application to review and set aside an arbitration award issued by the second respondent. The award was issued 16 August 2010. In his award, the arbitrator upheld the applicant's dismissal by the third respondent on 2 May 2010.
- [2] The present application was filed on 4 October 2010. Nothing transpired until the filing of a supplementary affidavit on 19 October 2015, the same day that the record was filed. The delay in filing the record and the supplementary affidavit is some 4 ½ years, given that the period of 60 days prescribed by the current practice directive (not in force the time) is a measure of what constitutes a reasonable period within which to find a record.
- [3] The explanation for the delay is one that concerns the applicant's previous attorney of record. The applicant states that in 2014, it terminated the services of its previous attorney of record. When the files were handed to the new attorney of record, there were numerous and ongoing matters that required priority and it was only during June 2015 that the union was able to reach the individual applicant to obtain an instruction from him. The applicant states that he had been under the belief and understanding that the matter had been referred to the union's legal representative and that the legal representative was dealing with the matter accordingly. After receiving instructions, it took approximately one month to secure the recording of the proceedings, four weeks to transcribe the record. Further delays were experienced at the court, because the file had been archived. The applicant submits that the delay in prosecuting the matter was the result of a number of 'unforeseen circumstances' and that the late filing of the record and supplementary affidavit should be condoned.
- [4] The relevant legal principles are clear. The court must exercise a discretion, taking into account factors that include the period of the delay, the explanation for the delay and the applicant's prospects of success. This approach has been tempered by the rule that in the absence of an acceptable explanation for an excessive delay, the applicant's prospects of success are not relevant.

- [5] In the present instance, the delay in filing the record and supplementary affidavit is excessive. A period of delay in excess of four years in itself militates against the granting of condonation. The third respondent has a right to certainty and to expect, where the relevant statute prescribes that a review application ought to be filed within six weeks, to assume that the arbitration award will not be subject to challenge and to arrange its affairs accordingly.
- [6] The explanation for the delay is unsatisfactory. Where a party seeks to apportion blame to a representative for failing to prosecute the matter was due diligence, the party concerned must demonstrate an interest in the proceedings and take active steps to ensure that the required attention is given to the matter. There is no explanation, throughout the period of more than four years that this matter lay dormant, of any interest by the applicant in the proceedings or any enquiry by him directed to the union or any other party as to what progress had been made in prosecuting the review. In the absence of a reasonable explanation for an inordinate delay, the application for condonation stands to be dismissed.
- [6] There is a further policy-related consideration to take into account. The practice manual makes clear that review applications are to be treated as urgent applications. This court has been reproached on a number of occasions on account of what have been described as systemic delays in the adjudication particularly of review applications. The Constitutional Court has observed more than once that this court has at its disposal the necessary tools to ensure that there is compliance with the Rules and practice directives, and that the court should advance and uphold the statutory imperative of expeditious dispute resolution. To grant condonation in the present circumstances would frustrate this key statutory objective.

For the above reasons, make the following order:

1. The application for condonation is dismissed.
2. The review application is dismissed.

ANDRÉ VAN NIEKERK

JUDGE OF THE LABOUR COURT