



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR397/16

In the matter between:

ME SHONGWE

Applicant

and

TRANSNET ENGINEERING

Respondent

10 **Heard: 16 May 2017**
 Delivered: 16 May 2017
 Edited: 15 January 2018

EX- TEMPORE JUDGMENT

SNYMAN, AJ

In this matter I give the following *ex-tempore* judgment, and the judgment reads as follows.

This matter concerns an application by the applicant to review and set aside an arbitration award made by the second respondent in

his capacity as an arbitrator of the Transnet Bargaining Council (first respondent). The application is brought in terms of section 145 of the Labour Relations Act, No 66 of 1995.

This matter arose from the dismissal of the applicant by the third respondent for misconduct involving making false statements, thus being misconduct relating to dishonesty. The applicant challenged his dismissal as an unfair dismissal to the first respondent. This dispute came before the second respondent for arbitration and the second respondent decided that the applicant's dismissal by the third
10 respondent was fair, and he thus dismissed the matter. This gave rise to the applicant's current review application.

The applicant's review application was filed on 2 June 2016. However, and on his own version the arbitration award of the second respondent was received by the applicant on 25 June 2015. The review application is thus just short of 10 months late, considering that the six weeks' time limit under section 145 of the LRA expired on 6 August 2015. The applicant thus needed to apply for condonation, and he did so along with filing his review application.

It is necessary to first consider the application for condonation
20 before turning to the merits of the review application. This is especially so, considering the material delay which took place in this case. I will start with considering this condonation application by first referring to the general principles applicable to condonation applications as set out in the case of *Melane v Santam Insurance Company Ltd*, 1962 (4) SA 531 (A) at 532C-E, where the court said the following:

“In deciding whether sufficient cause has been shown, the basic principle is that the court has a discretion to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefore, the prospects of success and the important of the case. Ordinarily, these facts are interrelated, they are not individually decisive, save, of course, that if there are no prospects of success, there will be no point in granting condonation.”

But where it comes to review applications, the condonation test
10 has been somewhat tightened. In dealing with an application for condonation for the late filing of a review application, the Labour Appeal Court in *Hardrodt (SA) (Pty) Ltd v Behardien & others*, (2002) 23 ILJ 1229 (LAC) at para 4, referred with approval to the judgment in *Queenstown Fuel Distributors CC v Labuschagne N.O. & others*, [2000] 21 ILJ 166 (LAC), and then held as follows:

“The principles laid down in that case included, firstly, that there must be a good cause for condonation in the sense that the reasons tendered for the delay had to be convincing. In other words, the excuse for non-compliance with the six weeks’ time period had to be compelling.
20 Secondly, the court held that the prospects of success of the applicant in the proceedings would need to be strong. The court qualified this by stipulating that the exclusion of the applicant’s case had to be very serious, i.e. the kind that resulted in the miscarriage of justice.”

Therefore, and in summary, in all review related condonation applications the explanation that needs to be submitted must be

compelling and the prospects of success need to be strong. Where it comes to the issue of prejudice, the applicant has to show that the miscarriage of justice will occur if the applicant's case is not heard. The reason for these more stringent requirements is that the review applications occur after the parties have already been heard, presented their respective cases and a finding has been made. Under such circumstances, considerations of justice, fairness and expedition require that challenges of such findings must not be delayed and must be completed as soon as possible.

10 The court in *Academic and Professional Staff Association v Pretorius SC NO and Others*, (2008) 29 ILJ 318 (LC) at paragraphs 17 to 18 dealt specifically with a condonation application in the context of the late filing of the review application, and said the following:

“The factors which the court takes into consideration in assessing whether or not to grant condonation are: (a) the degree of lateness or non compliance with the prescribed timeframe; (b) the explanation for the lateness or the failure to comply with timeframe; (c) prospects of success or bona fide defence in the main case; (d) the importance of the case; (e) the respondent's interest in the finality of the judgment; (f) the

20 convenience of the court; and (g) avoidance of unnecessary delay in the administration of justice. ... It is trite law that these factors are not individually decisive but are inter-related and must be weighed against each other. In weighing these facts, for instance, a good explanation for the lateness may assist the applicant in compensating for weak prospects of success. Similarly, strong prospects of success may

compensate the inadequate explanation and long delay.”

In my view, these same considerations should apply to the deciding of the applicant's condonation application in these current proceedings.

As to how the explanation for the delay must be presented by an applicant when making the application for condonation for the late filing of the review application, the court in *Independent Municipal Allied Trade Union (IMATU) obo Zungu v South African Local Government Bargaining Council and Others*, (2010) 31 ILJ 413 (LC) at paragraph 13

10 said the following:

“In explaining the reasons for the delay it is necessary for the party seeking condonation to fully explain the reasons for the delay in order for the court to be in a proper position to assess whether or not the explanation is a good one. This, in my view, requires an explanation which covers the full length of the delay. The mere listing of significant events which took place during the period in question without an explanation for the time that lapsed between those events does not place a court in a position to properly assess the explanation for the delay. This amounts to nothing more than a recordal of the dates
20 relevant to the processing of a dispute or application, as the case may be.”

The Constitutional Court has as a matter of fundamental principle confirmed that review applications must be expeditiously dealt with, and any determination of the issue of good cause must always be conducted against the backdrop of this fundamental principle in

employment law as applicable to review applications. In this regard I specifically refer to the judgments of *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile and Others*, (2010) 31 ILJ 273 (CC) at paragraph 46 and *Strategic Liquor Services v Mvumbi NO and Others*, (2009) 30 ILJ 1526 (CC) at paragraphs 12 to 13.

The question that must now be answered is whether the applicant in his condonation application, as aforesaid, has satisfied these requirements and made out a proper case for good cause as a whole to convince this court to grant him an indulgence and thus allow
10 him to proceed with his review application. This entails, firstly, that the delay must be considered. In this case, and as I have said before, the delay is close on 10 months, and this is in the context of review applications an extensive and grossly excessive delay. This is the kind of delay which in itself strongly mitigates against the granting of condonation unless an excellent explanation is provided.

I might say, and by *illustration*, that the court in *Academic and Professional Staff Association*, which I have referred to above, considered a three weeks' delay in the context of a review application to be excessive. Certainly, that pales by comparison when one comes to a
20 10 months' delay. So the next question to answer is whether the applicant has provided an excellent explanation for this grossly excessive delay.

I now turn to this issue of the explanation, and I must say from the outset that truth being told, this explanation is abysmal. The applicant was represented throughout the arbitration proceedings by his

chosen trade union, UNTU, which is part of the UTATU / SARWHU group of unions (referred to in this judgment as “the union”). The union was actually a party to the dispute before the first respondent. After the arbitration award had been handed down, the union took the award to a reputable employment law attorneys’ firm, being Fluxmans Attorneys. A consultation then took place between a director of Fluxmans, Cindy De Castro, and representatives from the union. In an email dated 25 June 2015, De Castro confirmed the view, which was accepted and agreed to by the union, that the review application will have no prospects of
10 success.

I may add that proper reasons were provided for this opinion, as can be seen from the email which is attached to the applicant’s Founding Affidavit. In the Founding Affidavit the applicant says that he debated this issue with his union, as he disagreed with the opinion, but his union insisted that they stood by the opinion from Fluxmans. In that context the applicant’s union indicated that they would not assist him any further. According to the applicant, he then went to the EFF in the Bloemfontein legislator on 22 July 2015 for assistance. According to the applicant, he was told by the EFF representative, a Mr Tshoali, that the
20 applicant’s case had been taken to the Labour Court on review by the EFF. Why and how the EFF was supposed to have done this, not being attorneys or legal representatives or a trade union, is unclear and remains unanswered. Suffice it to say that no such challenge was in fact made.

According to the applicant, he then went to the Law Clinic at the

University of the Free State and then to the Law Clinic at WITS, who both did not help him. This also, according to the applicant, took place in July 2015. Then, and on 17 September 2015, the applicant went to Legal Aid, who did not help him because he was told by them that they did not do labour matters. I have my doubts about the truth of this explanation, considering the many cases brought by Legal Aid SA before this court specifically relating to labour disputes.

On 25 September 2015 the applicant went to the Justice Centre in Bloemfontein and was told to first finish at the Bargaining Council. I
10 find this explanation unsubstantiated and unlikely. One has to ask what was the applicant supposed to have finished in the Bargaining Council, especially considering the arbitration had already been completed and an award had already been handed down, of which award the applicant was fully familiar with. The Bargaining Council proceedings had been completed months before this, so I do not understand what was supposed to have been finished in the Bargaining Council. The applicant then stated that he was advised to apply for condonation, but once again it is unclear as to what condonation pending what process should have been applied for. I therefore once again must express my
20 doubts as to the truth of this explanation.

On 30 September 2015 the applicant says he went to the CCMA. Similarly it is inexplicable why he would go to the CCMA, as the CCMA clearly has nothing to do with this matter and never did. The applicant then explains that on 2 October 2015 he went back to the University of Free State Law Clinic, which on his own version had

already turned him away, and this time he was advised to go to the UJ Law Clinic in Johannesburg. It however does not appear that the applicant ever went to the UJ Law Clinic, considering that is contained in the Founding Affidavit.

The next part off the applicant's explanation is even more difficult to understand. He refers to a letter received from the Free State Law Society acknowledging his request, but it is not indicated that this request was even for. The letter itself has not been discovered. The applicant explains that in this letter his application, and I point out that at
10 this time there was not even an application in existence, would be sent to an attorney for a "merit award". I have no idea what the "merit award" would even be. Then in January 2016 the applicant is told by the Free State Law Society that they cannot help him further.

The next event is 1 March 2016, where the applicant explains that he applied for condonation and sent it to the Bargaining Council. Yet again this is another one of those incomprehensible explanations, considering that the Bargaining Council proceedings had long since been concluded. Suffice to say the Bargaining Council refused to accept the process and told the applicant on 3 March 2016 that he must
20 apply to the Labour Court for review. He was thus pertinently told on his own explanation to do so. The applicant says he then went to the Labour Court on 3 March and obtained a case number, which was given to him along with a pro forma review application form to complete. He explained that the Labour Court would not help him to complete this document.

He then went to the Vereeniging Justice Centre on 8 March 2016 but they could not help him. He then went back to the Labour Court on 9 March 2016 and was apparently advised by one "Mabaso" at the court that he could not be helped because he had a union and he must sue the union for gross negligence. We are not told who this Mabaso is, and certainly there are no confirmatory affidavits attached to the founding affidavit. Then finally in April 2016 the applicant goes to the Department of Labour, who reads his award and then tells him he has a proper case for review and proper review
10 grounds. This review application then follows two months later, without any explanation for this final period.

Considering the above summary of the explanation submitted by the applicant, it is clear to me that this explanation is, in fact, no explanation at all. As I have said, I doubt the bulk of it is even true. The fact of the matter is that the applicant was specifically advised from the outset that his review application had no merit. He was given this advice by his chosen union who represented him throughout. This advice was supported by proper legal opinion. On the applicant's own version he actually debated the matter with his union to change its mind
20 but they did not agree with him. What must follow from this explanation is that the applicant must have known the time limits relating to review applications and where and in what forum the review application had to be brought.

The manner in which the applicant therefore conducted himself thereafter is simply completely inexplicable and smacks of being

fabricated. I am fortified in my conclusion, as set out above, by the fact that the applicant has discovered no supporting documents or correspondence of any kind or any supporting confirmatory affidavit to substantiate this purported explanation. It seems to me that what the applicant was doing was simply to regurgitate dates to show he was doing something about his case and then used these purported actions on alleged dates as a basis for providing a proper explanation for the delay.

This is exactly the kind of conduct this court was critical of in
10 the judgment of *Zungu* I have referred to above, and the *ratio* in that judgment equally complies to the conduct of the applicant in this case. Further, and considering the applicant's explanation as it stands, the two months from the applicant finally being told in April 2016 to bring the review application, and then June 2016, when it is ultimately brought, remains completely unexplained. Similarly, virtually the entire October and November 2015 and then February and March 2016 is completely unexplained. This leaves a total period of about five months as being completely unexplained. This lack of explanation has to be fatal to any condonation application, especially in the context of review proceedings.

20 The applicant's explanation of going from one institution to another, all of whom did not help him, rings untrue, and especially the explanation that Legal Aid does not assist with labour disputes is patently untrue. In any event, the explanation of the applicant going to various institutions, being turned away and then in effect doing nothing for weeks before going to the next institution is grossly remiss. Further,

why the applicant would seek to bring an application for condonation to the Bargaining Council or seek to resurrect the dispute in that forum, in respect of a process that had already been completed, boggles the mind.

I have little doubt that the applicant's explanation is mostly a fabricated one to hide his own conduct of simply being grossly remiss in filing his review application timeously. That being the case, the consequence has to be that as set out in *National Union of Metalworkers of SA on behalf of Nkuna & others v Wilson Drills-Bore*
10 *(Pty) Ltd t/a A & G Electrical*, (2007) 28 ILJ 2030 (LC), where the court said the following:

"The court held that good cause is shown by the applicant during an explanation that shows how and why the default occurred. It was further held in this case that the court should decline the granting of condonation if it appears that the default was wilful or due to gross negligence on the part of the applicant, in fact, the court could on this ground alone decline to grant an indulgence to the applicant."

In the end the applicant has thus provided no explanation for what is a material and grossly excessive delay. This should be the end
20 of the matter for the applicant without even considering the requirements of prospects of success. It was said in *Mziya v Putco Limited*, (1999) BLLR 103 (LAC) that:

"There is a further principle which is applied and that is, without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial."

This sentiment was repeated in *National Union of Mineworkers v Council for Mineral Technology*, [1999] 3 BLLR 209 (LAC). Finally I refer to *National Education Health & Allied Workers Union on behalf of Mofokeng & others v Charlotte Theron Children's Home*, (2004) 25 ILJ 2195 (LAC), where the Labour Appeal Court again said:

“This court has previously confirmed the principle that without a reasonable and acceptable explanation for a delay, the prospects of success are immaterial.”

In my view, the approach of the applicant in this case and in the
10 condonation application is that condonation was simply there for the asking. That is simply not so. In this regard I can do little better than refer to what was said in *Seatlolo and Others v Entertainment Logistics Service (A division of Gallo Africa Ltd)*; (2011) 32 ILJ 2206 (LC) at paragraph 7, where the court said:

“It is trite law that condonation should only be granted where the legal requirements have been met and is not a default option. It remains an indulgence granted by a court exercising its discretion whilst being cognisant of the criticism emanating from the Constitutional Court and the SCA and bearing in mind the primary objective of the expeditious
20 resolution of disputes articulated in the LRA. On the facts and law as set out above this is not an instance where condonation can be granted.”

Finally, and even if one may believe that the applicant may have a case, considering all the grounds as set out in his Founding Affidavit, this still cannot save the applicant. In this case, the following

dictum from the judgment in *Ferreira v Die Burger*, (2008) 29 ILJ 1704 (LAC) at paragraph 8 it is pertinent, where the court said:

“I am sympathetic to the fact that the applicant may have a case, but were we to grant this application, this court would subvert a crucial principle in matters which deal with personal relationship, namely labour relations, that these disputes have to be dealt with expeditiously and finalized as quickly as possible. Where in a case such as this there has been so flagrant a violation of the rules, then, as Myburg JP correctly decided, a lack of any explanation at all shrugs off all other
10 considerations.”

This *ratio*, in my view, must find direct and equal application in the current matter. I am thus not satisfied that the applicant has made out a proper case for condonation. There is no explanation for what is a material and grossly excessive delay. This lengthy delay and lack of any explanation trumps all else. It is thus not necessary to even consider the issue of prospects of success and prejudice. The applicant’s review application must thus fail because condonation must be refused. Because there is no opposition in this matter, no costs issue arises. Consequently I make the following order:

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ORDER

1. The applicant’s condonation application is dismissed.
2. The applicant’s review application is therefore dismissed.
3. There is no order as to costs.

S Snyman
Acting Judge of the Labour Court