



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

CASE NO: JR1384/09

In the matter between:

SIBAHLE CYPRIAN NDABA

Applicant

and

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

First

Respondent

ADVOCATE MOLETSANE N.O.

Second

Respondent

PUTCO LIMITED

Third

Respondent

Application heard: 12 March 2018

Judgment delivered: 14 March 2018

JUDGMENT

VAN NIEKERK J

- [1] This is an application to review and set aside an arbitration award issued by the second respondent on 26 July 2006. The review application was filed on 19 May 2009. The applicant has filed an application to condone the late filing of the review application, and it is this application that serves before the court.
- [2] This matter has a sorry history. The applicant was dismissed by the third respondent in November 2005, on charges of misconduct relating to the issuing of bus tickets. The applicant clearly has a long-standing grievance against his employer, and at the hearing of this application, he sought the court's intervention in that grievance, and requested that the court afford him substantive redress. I attempted to explain to the applicant that the only question for decision is whether the late filing of his review application should be condoned and that the court has no general jurisdiction to address his grievance.
- [3] The referral to arbitration in the present instance was preceded by a dispute between the applicant and the union of which he was a member. The applicant goes so far as to assert that his union acted in collaboration with the third respondent, to his prejudice. The applicant has also, over the years, engaged in correspondence with the office of the President of the Republic of South Africa, Ministry of Justice and Constitutional Development, the Ministry of Labour, and the Ministry of Safety and Security, as well as the Offices of the National Director of Public Prosecutions and the Public Protector. Most of the correspondence concerns complaints made to these persons and offices against the applicant's union and the bargaining council.
- [4] Be that as it may, what the court has before it, as I have indicated, is an application to condone the late filing of the review application.

- [5] In his affidavit in support of the application for condonation, the applicant records that the application was filed some three years and four months late. By my calculation, the application would appear to have been filed some two and a half years late, filed as it was on 19 May 2009, the award having been issued on 26 July 2006.
- [6] The reasons for the late filing of the review relate primarily to the applicant's dispute with his union and his efforts to seek assistance from the offices referred to above. In regard to his prospects of success, the applicant states simply that the third respondent was 'trying all the efforts to get rid of me', and that he did not commit the misconduct for which he was ultimately dismissed. In regard to any possible prejudice if condonation is not granted, the applicant avers that he worked for the third respondent for 11 years, that he was the sole breadwinner, and that he was dismissed for an act that he did not commit.
- [7] It is incumbent on the applicant to satisfy the court that the late filing of his review application should be condoned. The relevant principles are those set out in *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A), where the matrix of factors including the degree of lateness, the explanation for the delay, the prospects of success and the importance of the case, was established.
- [8] This matrix has been the subject of some modification by this court, especially in relation to review applications. These modifications were recently summarised by Myburgh AJ in *Makuse v Commission for Conciliation Mediation & Arbitration and others* (2016) 37 ILJ 163 (LC), where the court emphasised the statutory purpose of expeditious dispute resolution and the 'strict scrutiny' to which applications for condonation in review applications especially in the context of individual dismissals, ought to be subjected. Myburgh AJ concluded:

The corrective steps taken by the Labour Courts as an institution and the legislature to ensure the expeditious prosecution and determination of review applications outlined above underscore the statutory imperative that labour disputes must be effectively (and thus expeditiously) resolved. And the strict

scrutiny of combination applications relating to the late launching of s 145 review applications is very much part of this overall scheme of things.

- [9] The delay in the present instance is inordinate, by any measure. The applicant's explanation for the delay is less than complete and satisfactory. The applicant does no more than refer to all of his efforts to seek assistance from all and sundry in relation to his dispute with the union. I pause to note that the court file indicates that when this matter came before Thlotlhlalema J on 8 August 2017, the application was removed from the roll and the applicant was directed to approach the *pro bono* office for assistance and to amend his papers within 30 days. It does not appear that the applicant has amended his papers as directed. In any event, when the matter came before Gush J on 17 November 2017, the applicant was again afforded the opportunity to seek legal advice.
- [10] There is a record of the applicant having made an attempt to locate the award under review and the record of the proceedings. The court file contains a letter from the chief executive officer of the dispute resolution agency Tokiso, which indicates that the applicant attended Tokiso's offices in September 2017 to request a record of the arbitration hearing. The letter records further that the case file was retrieved from Metrofile and that Tokiso has no record of receiving a review application and has no arbitration recordings, nor does the arbitrator have any notes on file.
- [12] But the fact of the matter is that 12 years after the filing of the review application, the applicant has failed (as he is obliged to do) to file either the award under review or the record, or take any of the steps established by the practice manual to secure a record where none can be found.
- [13] In regard to the applicant's prospects of success, the affidavit in support of the application for condonation discloses nothing but bald averments to the effect that the applicant disputes having committed the act of misconduct alleged and that his employer was attempting to secure his dismissal. Even if that were to be the case, the applicant's prospects of success must necessarily be determined in relation to the review application. What the applicant has failed to do in that

application is to set out a single ground for review or make any averment to the effect that the decision to which the arbitrator came was so unreasonable that a reasonable decision maker could not come to it. The applicant (or the attorneys who filed the application on his behalf) appeared to be under the erroneous impression that the merits of the review concerned the merits of the applicant's disciplinary hearing and the outcome of that hearing. As I have indicated, nothing is said about the award which the applicant seeks to review and why that award fails to meet the reasonableness threshold. In short, the application for review has no merit, if only on the basis that it fails to make out a case for review at the most basic level.

[14] To the extent that the court is required to consider the relative prejudice to the parties that the granting of condonation would occasion, the third respondent has an interest in finality which in my view, in the present instance, overrides any prejudice that the refusal of condonation may have formed the applicant. The fact of the matter remains that the applicant was dismissed in 2005, some 12 ½ years ago, and that the review application is not yet at a stage where a supplementary and answering affidavit can be filed. To grant condonation would be to frustrate the statutory purpose of expeditious dispute resolution.

[15] For all of the above reasons, in my view, the application for condonation stands to be dismissed.

I make the following order:

1. Condonation for the late filing of the review application is refused.
2. The review application is dismissed.

André van Niekerk
Judge

REPRESENTATION

For the applicant: In person

For the respondent: None

Labour Court