



Not reportable

**THE LABOUR COURT OF SOUTH AFRICA,
HELD AT JOHANNESBURG**

Case no: JR 2589/17

In the matter between:

DERICK MABASO

Applicant

and

**MOTOR INDUSTRY BARGAINING
COUNCIL**

First Respondent

COMMISSIONER Y NAGDEE (N.O.)

Second Respondent

LOMBARD TYRES (PTY) LTD

Third Respondent

Heard: 15 May 2018

Delivered: 22 May 2018

Summary: (review-condonation ruling-explanation for delay seriously incomplete- -delay considerable- allegations on merits made by respondent not contested - ruling not unreasonable on the evidence before the arbitrator)

JUDGMENT

LAGRANGE J

Background

- [1] This is an application to review a condonation ruling. The application was belatedly opposed, but the employer's representative agreed to argue the application without filing an answering affidavit.
- [2] The applicant was dismissed on 21 March 2017 and only referred his dispute on 6 July 2017. As a result, his referral was nearly two and a half months' late or, to put it differently, it took him 3.5 months to refer his dispute. The referral application was allegedly made on 15 May 2017, but there was no proof of it being filed at the bargaining council. It was only on 6 July 2017 that it was properly filed together with a condonation application. The third respondent ('Lombard') alleged in its answering affidavit that it never received a copy of the referral itself and pointed out that the applicant never indicated what the incorrect email address was that he had used, nor did he provide any proof that he had referred the document to an incorrect address and it had not been received. Lombard also alleged that the applicant had been legally represented but his legal representatives had not provided any explanation for the delay. Lombard also alleged that the applicant had been dismissed after being found guilty of dishonesty and unauthorised possession of company property and moreover that he had conceded to the allegations against him at his disciplinary hearing. As the applicant did not file any replying affidavit in the condonation application, none of these allegations were disputed in the evidence before the arbitrator.
- [3] As this is a review application, the court cannot take account of any evidence that was not already placed before the arbitrator. Thus, during the hearing of the application, the applicant gave extensive details of his interaction with various lawyers who assisted him in the dispute referral process to the bargaining council. However, none of these interactions were mentioned in his founding affidavit in support of his condonation application to the bargaining council. As a result, any possible impact the applicant's account of those interactions might have had on the arbitrator's ruling if the applicant had placed them before the arbitrator, cannot be considered. The court must decide whether the arbitrator's decision is one

that no reasonable arbitrator could have reached on the evidence before him at the time he made his ruling. Further evidence mentioned in court was never part of the evidence before the arbitrator and must be ignored for the purposes of this application.

The ruling

- [4] The arbitrator accepted that he referred the dispute on 15 May 2017 and was directed to file a condonation application which he did on 6 July. However, the arbitrator found that the explanation for the delay was incomplete and that his prospects of success were non-existent.

Grounds of review:

- [5] The applicant advanced three grounds of review, namely:
- 5.1 the arbitrator failed to consider 'crucial' evidence that he called the bargaining council on 19 April to enquire about the process of referring his dispute;
 - 5.2 the arbitrator failed to take into account the bargaining council's contribution to the delay caused by giving him the wrong contact details, and
 - 5.3 the arbitrator was unreasonable in concluding that the delay was excessive and that a proper explanation was not provided.

Analysis:

- [6] The first point to make is that, the applicant never alleged in his founding affidavit in support of the condonation application that he had made enquiries at the bargaining council about the referral process on 19 April 2017. Secondly, on the face of the documentation, which he did not refer to, his attorneys at the time emailed a document to Lombard on the same date. Furthermore, it appears that attorneys referred his case to the bargaining council on 28 June 2017. This tends to corroborate the allegation made by Lombard that the applicant was represented during the period when all these delays took place, but the role of those representatives in the delay is not dealt with at all in the applicant founding

affidavit. The affidavit is woefully short on details explaining the whole period of the delay, which was considerable. Just a few things which are missing from the explanation can be mentioned to illustrate the shortfall in his justification for the delay. There is no indication in his affidavit when or how he learned that he had allegedly referred the dispute to the wrong email address of the DRC. As a result, there was no indication how quickly he rectified the situation once he learned of this. He is also silent on the role of attorneys who clearly played a role in the whole referral process from April until the end of June.

- [7] In consequence of this, I cannot say that the arbitrator was unreasonable in concluding that there was not a satisfactory explanation for the delay on the evidence that was placed before him. I must emphasise again, it may be that there was a good explanation, which the applicant could have provided, but he simply did not place the details of such an explanation before the arbitrator to consider. Accordingly, the arbitrator cannot be criticised for his findings when he was presented with extremely limited material to explain the delay.
- [8] Secondly, in relation to the arbitrator's findings on the prospects of success, it is important to note that on the evidence of Lombard's answering affidavit in the condonation application, the applicant had agreed to the allegations against him in the disciplinary enquiry. This is because the applicant did not file a replying affidavit disputing that claim by Lombard. On what was placed before him in the affidavits, it is difficult to find fault with the arbitrator's finding that the applicant's prospects of success were very poor.
- [9] In conclusion, the two main findings of the arbitrator that the significant delay was not satisfactorily explained and the prospects of success were poor were not ones that no reasonable arbitrator could have reached on the evidence before him. Accordingly, the applicants review application cannot succeed.

Order

- [1] The review application is dismissed.

[2] No order is made as to costs.

Lagrange J
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:

In person

THIRD RESPONDENT:

M Losos