

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable/Not Reportable

Case no: JR1386/17

In the matter between:

LESALA MATLAMA

Applicant

and

TRANSNET BARGAINING COUNCIL

First Respondent

COMMISSIONER EBRAHIM PATELIA

Second Respondent

TRANSNET SOC LTD TRADING AS

TRANSNET CAPITAL PROJECTS

Third Respondent

Heard: 16 July 2019

Delivered: 31 July 2019

Summary: Application to review and set aside arbitration award – condonation ruling – condonation granted in the interests of justice and to bring finality – reviewed the merits of the application – the condonation ruling is upheld.

JUDGMENT

DEANE AJ

Introduction

[1] The Applicant, who is representing himself, seeks to review and set aside a ruling made by the Second Respondent under the auspices of the First Respondent (Transnet Bargaining Council). The Second Respondent

dismissed the Applicant's application for condonation of the late referral of an unfair dismissal dispute to the Transnet Bargaining Council. The unfair dismissal referral was late. The date of dismissal was 14 October 2016 and the referral to the First Respondent was made on 18 January 2017. The Second Respondent refused condonation because of the delay, the poor explanation for the delay and the prospects of success taking into account that the Applicant had admitted guilt to the charge of theft.

- [2] The Applicant's principal grounds in this review are that the Commissioner committed a reviewable irregularity in deciding the condonation application in that the Commissioner – *"exceeded his powers, acted unreasonably and did not consider all the issues before him and therefore the conclusion reached by the Commissioner is one that a reasonable decision maker could not have made based on the evidence properly placed before him."*
- [3] The Applicant has launched a review application in terms of s145 of the Labour Relations Act,¹ (LRA), but did so out of time and now seeks condonation. The Second Respondent made his ruling dismissing condonation on 27 February 2017. Accepting the date of 27 February 2017 as being the date when the applicant became aware of the ruling, the review application had to be filed within 6(six) weeks of that date,² which was on or before 10 April 2017. The review application was made on 28 August 2017, some four and a half months late. Before this Court can consider the review application, the Applicant's condonation application for the late service and filing of the review must be considered.
- [4] The application for condonation and review is opposed only by the Third Respondent.
- [5] Considering whether to grant condonation, I first considered the delay, which is not unduly excessive, to the extent of itself mitigating against the granting of condonation. As to the explanation for the delay, the applicant explained that he made attempts to gain assistance from both the *pro bono* offices at the Labour Court and the Wits Law Clinic, wherein he remained unsuccessful in

¹ Act 55 of 1995.

² See Section 145(1).

procuring *pro bono* services for his case. The Applicant further explained that he did not understand the legal timeframes and the processes that must be followed when making his review application. A third explanation given by the Applicant for the delay was related to the so-called illegal procedures that was followed by the Second Respondent, which explanation in my opinion holds no credibility in so far as this condonation application applies and is rejected. With regards to the Applicant's first two reasons, it is not explained why it then took until 28 August 2017 to file the application. I have my concerns with the Applicant's explanation. In simple terms, it is rather weak.

[6] It is not disputed that after receipt of the condonation ruling dated 27 February 2017, the Applicant sought assistance from the *pro bono* offices at the Labour Court, and through the Wits Law Clinic. He, however, did not qualify for assistance. It is clear then that the Applicant did make some attempts towards getting assistance in the review application after receiving the condonation ruling of 27 February 2017. I am, therefore, inclined to accept that the Applicant intended to review the condonation ruling but could not find the necessary assistance. Moreover, taking into account that the Applicant remains unrepresented and despite the poor explanation being proffered, there is at least some explanation, and in my view, if considered with the relatively short delay, the explanation is not lacking to the extent of excluding the necessity of considering the prospects of success in the review application. Very importantly in my opinion is that the Labour Court is a court of fairness and equity, I therefore found it just and equitable to grant condonation for the purposes of properly considering the prospects of success and to bring finality to this matter.

[7] I will now proceed to consider the applicant's review application on the merits thereof, starting with the setting out of the relevant factual background.

Material Background Facts:

[8] The Applicant was employed by Transnet Capital Group (the Third Respondent) on 1 November 2012 as an ICT Infrastructure Specialist, entrusted with managing the company's ICT assets such as laptops and coordinating the use and legal disposal of the assets.

- [9] The Applicant was dismissed on 14 October 2016 after a disciplinary enquiry wherein he pleaded guilty to two charges of misconduct; the theft of assets and gross misconduct; charges that emanated from the theft of five laptops. The Applicant was also the subject of a criminal investigation and was subsequently criminally charged and found guilty of the theft of five laptops by the Johannesburg Magistrate's Court wherein he received a suspended sentence.
- [10] The Applicant argues that the theft incident happened in May 2017. He further argues that because he was allowed to continue to work for five months thereafter without any consequences to this action meant that there was no breakdown of trust in the employer/employee relationship.
- [11] Upon dismissal, a copy of the dismissal notice dated 14 October 2016, wherein his right to refer the matter to the Transnet Bargaining Council within 30 days, was handed to the Applicant. The Third Respondent argues that the Applicant was also verbally informed of this right by the deponent of the application, one Mr Gerhardus Johannes Wilhelmus Van Niekerk.
- [12] On 18 January 2017, the Applicant referred an unfair dismissal dispute to the First Respondent. The Applicant thereafter submitted an application for condonation on 21 January 2017.
- [13] In the Applicant's referral form, he argues that he was unfairly dismissed. The Applicant argues further that the dismissal was procedurally unfair because he was denied the right to representation and that his request for a postponement was denied. The Applicant argued further that his dismissal was substantively unfair because employee's who had committed a similar misconduct were not dismissed. The Third Respondent denies that the Applicant was dismissed both procedurally and substantively unfairly. The Third Respondent argues that the Applicant made no reference to his current claim of inconsistent application of discipline during the internal disciplinary proceedings.
- [14] The reasons given for the late referral were that he did not understand the referral process and that when he approached the Union for assistance, he was refused assistance due to him being a non-member of the Union. A further reason given for the delay was attributed to the fact that his wife had passed

away on 16 November 2016 and it was a difficult time in his life. He further argues that he did not have the finances to pursue the application. That is the extent of his explanations and no proof of the reasons that he gave in support of his late referral, were attached to his referral application.

- [15] In relation to the Applicants prospects of success, the Applicant reiterated the procedural and substantive issues he had raised in his referral form.

Grounds for Review:

- [16] The Applicant argues that the Commissioner committed misconduct in relation to his duties as an arbitrator. In his condonation ruling, the Second Respondent was clearly critical of the explanation provided for by the applicant for the delay in this matter, and the manner in which prospects of success were addressed by him. In short, the Second Respondent considered this to be completely lacking in the requisite particularity. The Applicant takes issue with this reasoning of the Second Respondent. According to the Applicant, the approach adopted by the Second Respondent in this regard, in deciding his condonation application, constituted misconduct.
- [17] The Applicant further argues that the Commissioner committed dishonesty and exceeded his powers because the Commissioner failed to properly apply his mind to all relevant evidence presented during the arbitration, specifically that the parity principle for disciplinary consistency was not considered.
- [18] The Applicant further argues that the arbitration award was improperly awarded and that the commissioner failed to consider, alternatively, properly consider the relevant evidence regarding the explanation for the delay. The Applicant argues that he did not understand the referral process, that even after approaching the Union he could not get assistance, that he lost his wife and that the company withheld his pension. He was also being subject to a criminal case for the charge of theft against him.

Legal Considerations and Analysis:

Condonation

[19] This Court accepts that when considering applications for condonation, Commissioners enjoy a wide discretion,³ and the Courts should be cautious when interfering with the decision arrived at by Commissioners in the light of that wide discretion.⁴

[20] The principles applicable to applications for condonation are trite and as enunciated in *Melane v Santam Insurance Co Ltd*.⁵ The following was said about the factors that will be taken into account when considering a condonation application:

‘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 therefor, the prospects of success and the importance 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 would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate prospects which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interests in finality must not be overlooked.’⁶

[21] The Supreme Court of Appeal in *Mulaudzi v Old Mutual Life Assurance Company (South Africa) Limited*⁷ reiterated the applicable principles as follows:

‘A full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility. Factors which usually weigh with this court in considering an application for condonation include the degree of non-compliance, the explanation therefor, the importance of the case, a respondent's interest in the finality of the judgment of the court below, the

³ *Motloi v SA Local Government Association* (2006) 3 BLLR 264 (LAC) para 16.

⁴ *NUMSA v Fibre Flair cc t/a Kango Canopies* (2000) 21 ILJ 1079 (LAC) 1081 at G-1082A.

⁵ 1962 (4) SA 531 (A).

⁶ At 532B-E.

⁷ 2017 (6) SA 90 (SCA).

convenience of this court and the avoidance of unnecessary delay in the administration of justice.’⁸

- [22] In this case, there is no doubt that the delay by the Applicant in referring his dispute to the First Respondent was considered “significant” by the Second Respondent. The Applicant therefore had a greater burden to set out all the facts and circumstances relating to the delay, and most importantly, to provide a satisfactory explanation for each period of the delay.⁹ Any period of delay that was unaccounted for would ordinarily result in condonation being refused.¹⁰
- [23] In his explanation for the delay, the Applicant indicates that one of his reasons for the late filing of his referral papers was due to a lack of understanding around the timeframes for the referral process and the referral processes itself. He also indicates that he had approached the Union for assistance with the referral but that he was denied assistance due to his non-membership in the Union.
- [24] The Applicant’s bare denial of knowledge of the referral process, after having received written notice of the dismissal, is hereby rejected by this Court based on the dismissal notice dated 14 October 2016, which clearly specifies that the Applicant has “*the right to refer this matter to the Transnet Bargaining Council within 30 days*”. The Commissioner indicates in his award that the Applicant was furthermore personally informed of the process by the deponent. No statement by the Applicant refuting this was made. Due to this, the Commissioner stated in his award that “*the applicant bears the responsibility of referring this matter to the bargaining council within the stipulated period of 30 days from the date the unfair dismissal*”. The Commissioner further provides that “*and where he has failed to do so he has to provide adequate reasons to justify granting the application for condonation*”.

⁸ At para 26.

⁹ *Government Pensions Administration Agency v General Public Service Sectoral Bargaining Council and Others* (JR797/17) (2019) ZALCJHB 98 (15 May 2019).

¹⁰ See *NUMSA and Another v Hillside Aluminium* (2005) 6 BLLR 601 (LC).

[25] The second reason provided for the late referral was that the Applicant suffered the loss of his wife soon after his dismissal. This is, as indicated by the Commissioner, “*sufficient reason for lateness*”.

[26] The Commissioner made reference to *NUM v Council for Mineral Technology*,¹¹ where it was pointed out that in considering whether good cause has been shown, the well-known approach adopted in *Melane v Santam Insurance Co Ltd* should be followed, but cautions that —

“[t]here is a further principle which is applied and that is that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without good prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused.”¹²

[27] Whilst this Court and anyone who has suffered the loss of a loved one can sympathise with the Applicant herein, the issue is that the Applicant was specifically made aware of the 30-day period and because of this it is the Applicant who bears the responsibility of referring this matter to the Bargaining Council within the stipulated period of 30 days from the date of the unfair dismissal. Where he has failed to do so he has to provide adequate reasons to justify granting the application for condonation. The Commissioner correctly states that this reason for the late referral “*would have been better supported if the applicant attached his wife’s death certificate to his condonation application and provided specific information of how this contributed to the period of lateness. The Applicant did not make any statement in relation to this*”. The Commissioner further argues that “*.....the applicant has not provided any reasonable and justifiable explanation for the delay in referring the matter*”.

[28] I find that the explanations for the delay proffered by the Applicant amounts to no explanation at all.¹³ Even though an attempt was made to give an account

¹¹ (1999) 3 BLLR 209 (LAC).

¹² At para 10 532C-D.

¹³ *Moila v Shai N.O and Others* (2007) 5 BLLR 432 (LAC); (2007) 28 ILJ 1028 (LAC) at para 34 where it was held that: “I do not have the slightest hesitation in concluding that this is a case where the period of delay is excessive and the appellant’s purported explanation for the delay is no explanation at all. I accept that the case is very important to the appellant. However, the weight to be attached to this factor is too limited to count for anything where the period of delay is as excessive as is the case in this matter and the explanation advanced is no explanation at all. If ever there was a case in which one can

for the delay no full account for the delay between 14 October 2016, when he was dismissed, and 21 January 2017, when he ultimately filed his application for condonation, was given; the referral being filed on 18 January 2017. The explanation says nothing, other than to state that he had suffered a loss and did not understand the proceedings.¹⁴ It is, therefore, not unreasonable for the Second Respondent to find that a 'reasonable and justifiable' explanation for the delay was not proffered in that regard.

[29] In *Vodacom (Pty) Ltd v Byrne NO and Others*,¹⁵ Van Niekerk J canvassed the applicable law pertaining to reviews of commissioners' awards and concluded: that:

'In short: a commissioner is obliged to arrive at a result that is reasonable in the sense that it falls within a band of decisions to which reasonable decision makers could come on the available evidence. In doing so, the commissioner must act as a reasonable decision maker would, and in particular, must conduct him or herself in a manner that a reasonable commissioner would, so that the award is reasonable. This requires a commissioner to have regard to all of the relevant and material evidence, and to make a decision that can be reasonably justified having regard to the evidence. In relation to sanction, a commissioner may not substitute what he or she considers to be an appropriate sanction for that imposed by the employer. The commissioner must consider a catalogue of factors, intended to achieve a balance between employer and employee interests, and to which a commissioner must give impartial consideration.'¹⁶

conclude that good cause has not been shown for condonation without even considering the prospects of success, then this is it. Where, in an application for condonation, the delay is excessive and no explanation has been given for that delay or an "explanation" has been given but such "explanation" amounts to no explanation at all, I do not think that it is necessary to consider the prospects of success."

¹⁴ *Zungu v SA Local Government Bargaining Council and Others* (2010) 31 ILJ 1413 (LC) at para 13, where it was stated that: 'In explaining the reason for the delay it is necessary for the party seeking condonation to fully explain the reason 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 these events does not place a court in a position properly to assess the explanation for the delay. This amounts to nothing more than a recordal of the dates relevant to the processing of a dispute or application, as the case may be.'

¹⁵ (2012) 33 ILJ 2705 (LC) at pages 2709ff.

¹⁶ At para 12.

- [30] The Commissioner herein clearly understood the task at hand and took into account all relevant considerations including the length of delay and the reasons for the delay.
- [31] Accordingly, I agree with the Commissioner that the explanation for the delay proffered by the Applicant is unreasonable and unacceptable and as such the prospects of success are immaterial. Still, I have had regard to the prospects of success.

Prospects of Success

- [32] Our courts have placed persistent emphasis on the honesty and integrity of employees. Theft is so pernicious that it would annihilate the sustainability of the employment relationship.¹⁷
- [33] In *Sappi Novoboord (Pty) Ltd v Bolleurs*,¹⁸ the LAC held that "...In employment law a premium is placed on honesty because conduct involving moral turpitude by employees damages the trust relationship on which the contract is founded".
- [34] The Applicant admitted guilt at an internal disciplinary enquiry that led to his dismissal. He furthermore pleaded guilty to the theft at a criminal trial, wherein he was found guilty and given a suspended sentence.
- [35] Having regard to the Applicants job description wherein he was employed to manage the company's ICT assets such as laptops and coordinating the use and legal disposal of the assets, by its very nature the job demands a relationship of trust. The Applicant avers that because it took the Third Respondent five months after the theft incident to implement disciplinary measures that led to his dismissal it meant that there was no breakdown in the trust relationship. This averment is rejected. For whatever reason that it did take five months to institute the disciplinary measures, this does not in any way detract from the fact that by its very nature theft is dishonest conduct by the employee.¹⁹ Taking into account the Applicant's job description and his plea of

¹⁷ See *Threewaterskloof Municipality v SA Local Government Bargaining Council (Western Cape Division)* (2010) 31 ILJ 2475 (LC) at para 21.

¹⁸ (1998) 19 ILJ 784 (LAC).

¹⁹ *Compass Group Southern Africa (Pty) Ltd v van der Merwe N.O & Others* (JR633-16, 9 February 2018).

guilt, it cannot be expected from an employer to continue to employ an employee who has broken the trust relationship or engaged in conduct which has negatively impacted on that relationship.

[36] Regarding the Applicant's prospects of success, the Commissioner stated that *"the Applicant indicated that he has good prospects of success because the hearing was not conducted in a fair manner, in that he was refused representation and the hearing took place under duress. The respondent denies this and attached the applicant's notice to attend a disciplinary enquiry which indicates the Applicant's rights in relation to representation, documentary evidence, witnesses, cross-examination and the opportunity of the applicant to state his case at the hearing"*. Having had regard to the Notice to Attend a Disciplinary Enquiry dated 10 October 2016, wherein the rights of the Applicant is clearly indicated, the Applicant's version is, therefore, rejected as it is clear that he had received written notice of his rights in terms of the disciplinary notice. In this case, it is apparent that the Applicant was made aware of his rights both orally and in written form.

[37] Regarding the Applicant's arguments of inconsistent disciplinary action against members of staff involved in the same or similar offences; barring any evidence to the contrary, this Court cannot decide on whether or not the Applicant was or was not treated unfairly having regards to the parity principle for the fact that no relevant evidence was placed before it. Suffice to say that since the Applicant was dismissed for theft then the Third Respondent would have acted inconsistently by failing to take any disciplinary action against other employees who had participated or was involved in the theft of these assets. Based on the facts of this matter, I am not able to draw that conclusion with confidence.

[38] Taking the above into account in the analysis of the Applicant's prospects of success, there is none.

Conclusion:

[39] In this case, there is no basis for reviewing or setting aside the condonation ruling of the Second Respondent. In essence, the Applicant's application for condonation had not established good cause as to why the late referral ought

to have been condoned. In the light of the factors considered and conclusion reached in that regard, the review application ought to be dismissed.

[50] Having regard to these principles and evidence the Second Respondent acted as a reasonable decision-maker in applying his mind to both the Applicant and Third Respondent's submissions on paper.

Order:

In the premises, I make the following order:

- 1 Condonation for the late referral of the review application is granted.
- 2 The review application is dismissed.
- 3 There is no order as to costs.

T Deane

Acting Judge of the Labour Court

APPEARANCES:

For the Applicant: In Person

For the Third Respondent: Dawn Norton Attorney's