



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: JR499/2017

In the matter between:

LINDELWA CLEMENTINE MATUTU

Applicant

and

**BARGAINING COUNCIL FOR THE MEAT
AND TRADE (GAUTENG)**

First Respondent

COMMISSIONER DAISY MANZANA N.O.

Second Respondent

PICK 'N PAY RETAILERS (PTY) LTD

Third Respondent

Heard: 31 October 2019

Judgment: 29 January 2020

Summary: Review application in terms of section 145 and 158(1)(g) of the LRA –
Condonation application due to late filing of review application –
Principles applicable to condonation applications restated – Failure to
provide reasonable and acceptable explanation for excessive delay is
fatal – Prospects of success also considered and found to be lacking –

Condonation application refused and consequently review application dismissed.

JUDGMENT

MGAGA, AJ

Introduction

[1] This is a review application brought in terms of section 145 and/or 158(1)(g) of the Labour Relations Act¹ (LRA)² wherein the applicant seeks an order to review and set aside the ruling made by the second respondent on 19 February 2016 and to refer the matter back to the first respondent to be heard by a commissioner other than the second respondent. The ruling made by the second respondent (arbitrator) reads as follows:

- “1. Mr Figlan is not allowed to represent the applicant in the absence of proof that he is a union official (Shosholoza Workers Union).
2. The case is dismissed.”

The effect of the arbitrator's ruling was that the applicant's unfair dismissal dispute was dismissed without the merits thereof being ventilated. It is for this reason that the applicant is seeking remittal of the matter to the second respondent to be heard *de novo*.

[2] The review application was filed out of time and the applicant has applied for condonation thereof. Both the review and condonation applications are opposed by the third respondent, the former employer of the applicant.

¹ Act 66 of 1995 as amended.

² See founding affidavit para 11 which refers to both s145 and s158(1)(g) of the LRA. Strictly speaking, a review of this nature (review of a ruling, as opposed to arbitration award) ought to be brought in terms of s158(1)(g) of the LRA.

Material facts

- [3] The applicant was employed by the third respondent as a Butchery Manager. She had been in the employ of the third respondent since 2004.
- [4] On or about August 2015 the applicant was summoned to a disciplinary hearing where she had to answer to allegations of misconduct. In essence, it was alleged that the applicant had reduced the price of burger patties without authorization and she had wrongfully priced burger patties as braai grillers, and this had misled customers. The applicant was found guilty of misconduct and dismissed with effect from 10 July 2015.
- [5] Unhappy with her dismissal, the applicant referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) in terms of section 191(5) of the LRA. The dispute was later transferred to the first respondent for adjudication. The arbitrator was duly appointed to arbitrate the dismissal dispute.
- [6] The applicant's numerous defences to the misconduct allegations set out in her founding affidavit, including the alleged retaliation by the Area Manager because of the sexual harassment complaint laid by the applicant against him, are not relevant to the determination of this application. This is so because the merits of the dismissal were not considered by the arbitrator.
- [7] The first sitting of arbitration was on 10 December 2015. The applicant appeared in person and the third respondent was represented by Mr Coenie Du Toit, its Senior Case Manager (Mr Du Toit). Due to time constraints and to allow the applicant an opportunity to submit documents the arbitration was postponed to 13 January 2016. Apparently no evidence was led at the first sitting on 10 December 2015.
- [8] On 13 January 2016 the applicant did not attend arbitration as she was medically incapacitated. Instead, a shop steward from SACCAWU appeared on behalf of the applicant. Mr Du Toit, representing the third respondent,

questioned the status of the SACCAWU shop steward and produced documents which showed that the applicant belonged to a union called JAMAFO. The shopsteward insisted that the applicant was a member of SACCAWU.

- [9] Due to the applicant's illness, supported by a medical certificate, the arbitrator postponed the arbitration to 9 February 2016. The arbitrator also directed that at the next hearing SACCAWU had to submit proof that the applicant was its member and a copy of SACCAWU's constitution.
- [10] On 9 February 2016 the applicant attended the arbitration together with Mr Xolani Figlan (Mr Figlan) from Shosholozu Workers Union of South Africa (SHOWUSA), as her representative. Mr Du Toit objected to Mr Figlan representing the applicant on the basis that at the last hearing a shopsteward from SACCAWU represented the applicant and the arbitrator directed that at the next hearing proof of the applicant's union membership had to be produced.
- [11] Mr Figlan submitted documentary proof that the applicant was a member of SHOWUSA. He also submitted a letter indicating that he was an official of SHOWUSA. The receipts proving the applicant's payment of subscriptions to SHOWUSA covered the period of the applicant's alleged membership to SACCAWU. The letter about Mr Figlan's status as an official of SHOWUSA was not an original copy.
- [12] Applying Rule 25(2)(3) of the CCMA rules, the arbitrator sought to verify the status of Mr Figlan as an official of SHOWUSA. After telephonic enquiries at the SHOWUSA's head office and its Johannesburg Branch it was established that Mr Figlan was not an official of SHOWUSA. On this basis the arbitrator ruled that Mr Figlan was not allowed to represent the applicant.
- [13] The arbitrator informed the applicant that the arbitration would proceed as scheduled in the absence of Mr Figlan. Mr Figlan indicated that the applicant would not proceed with the arbitration in his absence. The arbitrator warned

the applicant that if she were to walk away her case would be dismissed. When the applicant was asked by the arbitrator if she was going to participate in the arbitration hearing she replied that she was not going to participate in the absence of Mr Figlan. The applicant then left together with Mr Figlan.

[14] The applicant brought a rescission application in terms of section 144 of the LRA³. On 24 March 2016 the arbitrator issued a ruling stating that the second respondent does not have jurisdiction as the rescission application does not fall within the ambit of section 144, and she advised the applicant to refer the matter to this Court. For the sake of convenience, in this judgment I will refer to this ruling as the rescission ruling, and the ruling which is the subject of this review application will be referred to as the impugned ruling.

[15] On 27 March 2017 the applicant brought this review application against the impugned ruling, together with an application to condone the late filing thereof.

Condonation application

[16] It is prudent that the condonation application be dealt with first. This is so because the applicant's failure to overcome the condonation hurdle will be fatal to the review application.

Extent of delay

[17] The applicant received the impugned ruling on 30 March 2016⁴. In terms of section 145(1)(a) of the LRA the review application had to be brought by no later than 11 May 2016 (six weeks from 30 March 2016). It has been

³ It appears that the rescission application was brought by the applicant even before receiving the impugned ruling. I say so because the applicant alleges that the impugned ruling was received by her on or about 30 March 2016, but the rescission application was filed on 16 March 2016 and the rescission ruling was delivered on 24 March 2016 – see first page of rescission ruling – Pleadings page 53. This is possible because at the hearing on 9 February 2016 the applicant was verbally informed by the arbitrator that Mr Figlan was disqualified from representing her and that her application would be dismissed if she were to leave the proceedings without participating in the arbitration.

⁴ Founding affidavit para 54 – Pleadings page 14.

suggested that six week period is also a reasonable period within which review applications under section 158(1)(g) must be brought⁵. This review application was filed on or about 27 March 2017, some ten months out of time.

[18] Mr *Mahlangu*, who appeared for the applicant, readily conceded that the delay is excessive. The concession was correctly made in the circumstances.

Explanation for the delay

[19] The applicant's explanation for this inordinate delay is set out at paragraphs 57 to 73 of her founding affidavit⁶. This explanation has been aptly summarized in the third respondent's heads of argument as consisting of four parts, as follows:

- "31.1 the delay was caused in part by the Commissioner's ill-advice to pursue the rescission application;
- 31.2 despite approaching Shosholozha Union on '*numerous occasions*', its refusal to take the matter any further;
- 31.3 no progress being made in over a month by her initial legal representatives; and
- 31.4 the attorneys alleged lack of capacity to finalise her review application."

[20] During oral argument Mr *Mahlangu* was constrained to concede that there is no reasonable explanation for large portions of this delay. For example, the applicant alleges that she was referred to Wits Law Clinic at the end of June 2016. The first draft of the review application was completed at the end of August 2016. The supervising attorney Mr *Dakalo Singo* (Mr *Singo*) made comments on the first draft for the student counsellors working on the matter

⁵ See: *Weder v Member of Executive Council for the Department of Health, Western Cape* [2013] 1 BLLR 94 (LC) para [8]. However, this approach of fixing 6 week period for s158 review applications was criticized by the LAC in *G4S Secure Solutions (SA) (Pty) Ltd v Gungubele NO and others* [2017] 12 BLLR 1181 (LAC) paras [10] to [11]. In this case it matters not whether a yardstick of '6 week period' or 'within a reasonable period' is used because a period of more than 9 months is unreasonable and requires condonation application.

⁶ Pleadings pages 15 to 19.

to attend to. The second draft was finalized by student counsellors and handed over to Mr Singo on or about 16 September 2016. However, the review papers were only settled by Mr Singo in March 2017 and the review application was filed on 27 March 2017. The delay from September 2016 to March 2017 is attributed mainly to Mr Singo's hectic workload and lack of capacity.

Prospects of success

- [21] With reference to the grounds of review foreshadowed in the founding affidavit⁷, the applicant submitted that she has “*very good prospects of success*” in the review application.
- [22] The two grounds of review that can be distilled from the founding affidavit are that in dismissing the applicant's dismissal dispute the arbitrator failed to properly exercise her discretion in terms section 138(5)(a) of the LRA, and the arbitrator wrongly advised the applicant to pursue a still-born rescission application. The applicant submits that the arbitrator ought to have proceeded with the arbitration hearing in her absence and allowed the third respondent an opportunity to discharge its onus of proving that the applicant's dismissal was fair. The applicant further submits that if the arbitration had proceeded in her absence there was a strong likelihood that the arbitrator would have found that her dismissal was substantively and procedurally unfair.
- [23] For reasons that will become apparent later in this judgment, it is important to emphasize that nothing is said in the founding and supplementary affidavits to impugn the arbitrator's decision to disqualify Mr Figlan from representing her at arbitration.

Law on condonation applications

⁷ Paragraphs 81.1. and 81.2 of the founding affidavit – Pleadings pages 20 to 21.

- [24] The seminal case on condonation applications is *Melane v Santam Insurance Co Ltd*⁸ where the following authoritative statement was made:

“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, explanation therefor, the prospects of success, and the importance of the case. Ordinarily the facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, 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 for prospects of success 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 interest in finality must not be overlooked.”

- [25] *Melane* has been followed; amplified and modified in a number of judgments over the years, but remains the leading case in condonation applications. In *Grootboom v National Prosecuting Authority & Another*⁹ the Constitutional Court had the following to say:

“[23] It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause. This requires a party to give a full explanation for the noncompliance with the rules or court's directions. Of great importance, the explanation must be reasonable to excuse the fault.

...

- [51] The interests of justice must be determined with reference to all relevant factors. However, some of the factors may justifiably be left out of consideration in certain circumstances. For example, where the

⁸ 1962 (4) SA 531 (A) at 532 A-E

⁹ (2014) 35 ILJ 121 (CC)

delay is unacceptably excessive and there is no explanation for the delay, there may be no need to consider the prospects of success. If the period of delay is short and there is an unsatisfactory explanation but there are reasonable prospects of success, condonation should be granted. However, despite the presence of reasonable prospects of success, condonation may be refused where the delay is excessive, the explanation is non-existent and granting condonation would prejudice the other party. As a general proposition the various factors are not individually decisive but should be taken into account to arrive at a conclusion as to what is in the interest of justice.”

- [26] What is clear from *Melane* and *Grootboom* is that an excessive delay requires a good and acceptable explanation. In the absence of a good and acceptable explanation for an excessive delay, there may be no need to consider prospects of success. Good prospects of success may cure lack of good explanation for a short delay. Interests of justice is an overarching consideration.
- [27] A further consideration in this case is that review applications are inherently urgent applications and expeditious resolution of labour disputes is of cardinal importance¹⁰. This requires stricter scrutiny of condonation applications in review applications, particularly, in respect of dismissal cases. The longer the delay to launch a review application the less likely will the Court exercise its discretion in favour of granting condonation.

Evaluation and analysis

- [28] In this case it is common cause that a delay of about ten months in launching the review application is excessive. Therefore, a good and compelling explanation is indispensable. The explanation must be reasonable to excuse the fault.

¹⁰ Practice Manual, para 11.2.7: “A review application is by its nature an urgent application.” See also *Queenstown Fuel Distributors CC v Labuschagne NO & others* (2000) 21 ILJ 166 (LAC) at para 25 and *NUMSA & Another v Hillside Aluminium* [2005] 6 BLLR 601 (LAC) at para 12.

- [29] The applicant avers that one of the reasons for the delay is the ill-conceived rescission application she had to bring as per the advice of the arbitrator and SHOWUSA¹¹. This averment is misplaced because the ruling in respect of the rescission application was rendered on or about 24 March 2016¹², whereas the deadline for bringing the review application against the impugned ruling was 11 May 2016¹³. Although the impugned ruling is dated 19 February 2016, it was received by the applicant on 30 March 2016, hence the six-week period is calculated from that date. It is obvious that the wrong turn taken by the applicant by bringing a rescission application did not contribute to the delay.
- [30] Between April and end of May 2016 the applicant claims to have approached SHOWUSA and Joshua Apfel Attorneys (“JAA”) for assistance. SHOWUSA did not provide any assistance and it informed the applicant that it could not take her matter any further. JAA apparently worked on the applicant’s matter for about a month but no progress was made and the applicant terminated their mandate at the end of May 2016. There are no confirmatory affidavits from SHOWUSA and JAA in this regard. There is also no indication of the actual work done by JAA for a month and there is no elaboration as to why progress could not be made. The information provided by the applicant is too scanty to excuse the fault.
- [31] The applicant was then referred to Wits Law Clinic at the end of June 2016¹⁴. There is no detailed explanation as to what the applicant did to pursue this matter from the end of May 2016 when she terminated JAA’s mandate to the end of June 2016 when she was referred to Wits Law Clinic.
- [32] In July 2016 Wits Law Clinic opened the file in the applicant’s name and undertook to conduct a merit assessment to determine whether the applicant could be assisted. The applicant states that the initial merit assessment could not be done because of some essential documents that were required. Such essential documents are not identified in the applicant’s affidavit and there is

¹¹ Founding affidavit paras 57-58 – Pleadings page 15.

¹² Founding affidavit para 59 - Pleadings page 15.

¹³ Founding affidavit para 55 – Pleadings page 14.

¹⁴ Founding affidavit para 66 – Pleadings page 16

no explanation why they were not provided to Wits Law Clinic at the first instance. By this time (July 2016) the filing of the review application was already out of time by more than a month. This ought to have been apparent to the Wits Law Clinic. Urgency was called for.

- [33] On 27 July 2016 the applicant was informed that the Wits Law Clinic would assist her with the review application. As alluded to above, the first draft of the review application was completed at the end of August 2016, and the second draft was completed by the week ending on 9 September 2016. Then it was up to Mr Singo to settle the review papers, but he only managed to do so in March 2017. This long delay is mainly attributed to Mr Singo's busy practice and lack of capacity.
- [34] The above explanation for such an inordinate delay is woefully inadequate to pardon the fault. In respect of certain periods there is no explanation as to what steps were taken by the applicant to pursue the review application. Where an explanation is offered, it lacks particularity and specificity. There are no confirmatory affidavits in respect of implicated third parties and there is no explanation as to why confirmatory affidavits could not be obtained.
- [35] Much of the delay is attributed to Wits Law Clinic's excessive workload and lack of capacity. Put differently, the blame is shifted to the applicant's legal representative's lack of capacity to attend to her matter timeously. In *Allround Tooling (Pty) Ltd v NUMSA and others*¹⁵ the following was stated:

"[10] What Mr Tanner failed to do was to allocate time for the preparation of the heads of argument. Instead work on the heads of argument competed – unsuccessfully – with the other demands of his practice. The respondents' interests were ranked below those of other clients. It is not an acceptable explanation for delay that a practitioner is too busy. If the nature or size of a practitioner's practice renders it impossible for him to render a professional service and to comply with

¹⁵ [1998] 8 BLLR 847 (LAC).

the provisions of the Labour Appeal Court's rules he must not take on the work..." (Emphasis is mine)

Although the above passage was stated in the context of failure to timeously submit heads of argument in a Labour Appeal Court matter, there is no reason why it should not be equally apposite in this case¹⁶.

[36] Further, with regard to the negligence or lack of diligence on the part of a litigant's legal representative, in *Saloojee and another NNO v Minister of Community and Development*¹⁷, the following was stated:

"There is a limit beyond which a litigant cannot escape the result of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the rules of this court... In fact this court has lately been burdened with an undue and increasing number of applications for condonation in which the failure to comply with the rules of this court was due to neglect on the part of the attorney. The attorney, after all, is the representative the litigant has chosen for himself, and there is little reason why, in regard to condonation of or failure to comply with a rule of court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are...If, as here, the stage is reached where it must be become obvious also to a layman that there is a protracted delay, he cannot sit passively by, without so much as directing any reminder or enquiry to his attorney ... and expect to be exonerated of all blame; and if, as here, the explanation offered to this court is patently insufficient, he cannot be heard to claim that the insufficiency should be overlooked merely because he has left the matter entirely in the hands of his attorney. If he relies upon the ineptitude or remissness of his attorney, he should at least explain that none of it is to be imputed to himself..." (My emphasis)

The criticism levelled at the litigant in *Saloojee* is equally applicable to the applicant in this case. For example, there is no indication that the applicant ever galvanized or reminded the Wits Law Clinic to attend to her matter

¹⁶ See also: *SAMWU obo Nobhuzana v South African Local Government and Others* (JR2640/2013) [2016] ZALCJHB 517 (15 December 2016) at paras 30 – 31.

¹⁷ 1965 (2) SA 135 (A).

between July 2016 (when she submitted the additional unidentified documents) and March 2017 (when the review papers were eventually finalized). There was inactivity on the part of the applicant for more than six months.

- [37] In conclusion, the applicant has failed to provide a reasonable and acceptable explanation for an unacceptably excessive delay. The applicant's failure to bring the review application within six weeks or within a reasonable period is unpardonable.
- [38] As it was pronounced in *Allround Tooling* above, the Wits Law Clinic's hectic schedule and lack of capacity is not an acceptable explanation for the excessive delay.
- [39] The free legal service that is provided by organisations and institutions like Wits Law Clinic (whom, for lack of a better word, I will refer to as 'Pro Bono service providers') is highly commendable and should be encouraged as it enhances access to justice for many indigent litigants who cannot afford legal fees. However, the rules of the game are the same for everyone. The Pro Bono service providers are also equally bound by the rules of this Court and the time frames imposed by the LRA. Just like other practitioners who charge for their legal services, the Pro Bono service providers must not bite more than they can chew. They must accept only those cases they can diligently and professionally attend to given their limited resources and capacity. It is up to the Pro Bono service providers to demystify the myth that their service is not up to the required standard because it is free of charge.

Prospects of success

- [40] Strictly speaking, having concluded that the applicant has failed to provide a reasonable and acceptable explanation for an excessive delay, it is not necessary to consider the prospects of success. However, for the sake of completeness, I will proceed to consider the prospects of success as I am of the view that the fate of this application will not change.

- [41] In this regard the relevant question is whether the applicant has demonstrated that she has good prospects of success in having the arbitrator's impugned ruling reviewed and set aside.
- [42] As alluded to above, the impugned ruling has two components, i.e. disqualification of Mr Figlan to represent the applicant because of his failure to prove that he was an official of SHOWUSA, and the dismissal of the applicant's dismissal dispute due to her refusal to participate further in the arbitration after the disqualification of Mr Figlan.
- [43] As I indicated at paragraph 24 above, the arbitrator's decision to disqualify Mr Figlan from representing the applicant has not been attacked at all¹⁸. The decisions that are said to be reviewable are the dismissal of the dismissal dispute and the arbitrator's advice to the applicant to bring a rescission application¹⁹.
- [44] During oral argument there was an attempt by Mr *Mahlangu* to challenge the arbitrator's decision to disqualify Mr Figlan. When it was pointed out to him that in the applicant's papers the decision to disqualify Mr Figlan has not been challenged, Mr *Mahlangu* submitted that the applicant's omission has been cured by the third respondent's attempt to justify and defend the disqualification of Mr Figlan in its answering affidavit. I do not agree.
- [45] It is trite that an applicant must make out its case in the founding affidavit, including supplementary affidavit filed in terms of Rule 7A(8)(a). In *Netherburn Engineering CC t/a Netherburn Ceramics v Mudau NO and Others*²⁰ Zondo JP, as he then was, put it thus:

¹⁸ Even the applicant's written heads of argument do not contain any challenge to the arbitrator's decision to disqualify Mr Figlan.

¹⁹ Founding affidavit paras 81 and 82 – Pleadings pages 20 to 22, and Supplementary affidavit paras 6 to 11 – Pleadings pages 82 to 84.

²⁰ (2009) 30 ILJ 269 (LAC) at [26].

“[26] When you are a party to a dispute or when you were the arbitrator or presiding officer in some proceedings and one of the parties brings a review application, you, of course, read the papers to understand what the applicant’s case is and to decide whether to oppose or to consent to the order sought or to abide the decision of the court. What you do will depend partly upon the view you take of the applicant’s case as disclosed in the papers. If, after reading the applicant’s papers, you conclude that there is absolutely no case for you to answer in the light of the contentions or the grounds of the applications as disclosed in the founding affidavit and you decide to abide the decision of the court, you would feel legitimately aggrieved if you subsequently learned that the award was set aside by the court not on the grounds contained in the founding affidavit but on grounds that were advanced in oral argument which were not foreshadowed in the founding affidavit and without you being afforded an opportunity to oppose the new case. On my understanding the rule that in motion proceedings the applicant must make his case in his founding affidavit and that you stand or fall by your papers has not been abolished and still applies. It served a very useful purpose in terms of fairness.” (My emphasis)

And at para [30] the following was said:

“[30]...Accordingly, a party which brings a review application is bound by the grounds of review set out in his founding papers. He cannot in oral argument argue on the basis of different grounds of review except if such ground can be said to be apparent from the review application. In this case the applicant does not pursue the grounds of review contained in the founding affidavit but seeks to argue the case on the basis of grounds which are nowhere to be found in the review application. The grounds it seeks to pursue are not grounds of review that can be said to be apparent from its review application. That cannot be allowed.”

Advice provided by the arbitrator

[46] It is convenient to start with the applicant’s second ground of review, i.e. an allegation that the arbitrator committed misconduct or gross irregularity by

advising the applicant to bring a rescission application in circumstances where she ought to have foreseen that such advice was wrong in law.

- [47] The so-called advice is not included in the arbitrator's impugned ruling. It is clear that the applicant is referring to the comments made by the arbitrator on 9 February 2016 when she verbally communicated her ruling to the applicant. There are only two comments that I could find in the record which the applicant is probably referring to. After the arbitrator informed the applicant that if she were to walk away from arbitration proceedings she would dismiss her case, she (the arbitrator) said the following:

"COMMISSIONER: But I am not sure maybe at some stage you would have an opportunity to rescind if you find that there is proof that I was wrong."²¹

Later, the arbitrator said the following:

"COMMISSIONER: You will get the Ruling you can, it can be taken on review but there is easiest (inaudible) ways to apply for rescission first because it is quicker. When I say rescission so that it is done internally, but you have got the right to take it to Labour Court it takes long."²²

- [48] It is clear from the two passages referred to above that the applicant was given two options, i.e. review application in this Court or rescission application before the first respondent. It is also clear that, although the rescission was the preferred option, the arbitrator was not certain about its appropriateness. It is possible that the applicant opted for rescission because it was also suggested by her trade union, SHOWUSA²³.

- [49] The applicant's main complaint about the arbitrator's advice is that it prejudiced her as it contributed to the delay in filing the review application and as a result she had to bring the condonation application²⁴. As indicated

²¹ Record page 11 lines 4 to 5

²² Record page 13 lines 19 to 22

²³ Founding affidavit paras 57 to 58 – Pleadings page 15.

²⁴ Founding affidavit para 81.2.3 – Pleadings page 22

elsewhere, this complaint has no merit. The rescission application did not contribute to the delay at all. The rescission ruling was delivered on 24 March 2016. The impugned ruling was received by the applicant on 30 March 2016. The period within which the review application had to be brought is calculated from 30 March 2016, as prescribed by section 145(1)(a) of the LRA.

- [50] In any event, I do not think that a verbal advice *per se* provided by an arbitrator to a party is reviewable either under section 145 or 158(1)(g). An advice is not a binding ruling or directive. A party has a choice to accept or not to accept gratuitous advice provided by an arbitrator. It is also not part of the duties or functions of arbitrators and commissioners to provide legal advice to the parties during arbitration, unless it is an advisory award issued in terms of section 135(3)(c) of the LRA.

Arbitrator's decision to dismiss applicant's case

- [51] Section 138(5) of the LRA provides as follows:

- “(5) If a party to the dispute fails to appear in person or to be represented at the arbitration proceedings, and that party –
- (a) had referred the dispute to the Commission, the commissioner **may** dismiss the matter; or
 - (b) had not referred the dispute to the Commission, the commissioner may –
 - (i) continue with the arbitration proceedings in the absence of that party; or
 - (ii) adjourn the arbitration proceedings to a later date.” (My emphasis)

- [52] It is clear that if a party that has referred a dispute to the CCMA or bargaining council (like the applicant in this case) does not attend arbitration proceedings the arbitrator or commissioner has a discretion to dismiss the dispute without further ado. The options to proceed with or adjourn arbitration proceedings to

a later date are available in respect of the absence of a party who did not refer the dispute to the CCMA or bargaining council.

- [53] Obviously, the discretion referred to in section 138(5) has to be exercised judicially. It is trite that the powers of a reviewing court to interfere with an exercise of a discretion are circumscribed. The reviewing court can interfere only on narrow grounds that the arbitrator has exercised his/her discretion capriciously or upon wrong principle/approach or with bias or without reason. The reviewing court cannot interfere simply because it would have come to a different decision.
- [54] The arbitrator cannot be faulted for relying on section 138(5) of the LRA in dismissing the applicant's case after she walked out of the arbitration proceedings. The applicant was forewarned by the arbitrator that if she were to walk out her case would be dismissed. Despite this clear warning, the applicant walked out with Mr Figlan. She did not even request that the proceedings be postponed so that she could secure another representative. The applicant's conduct manifested a clear intention to abandon the arbitration process or waive her right to participate in the arbitration process.²⁵ She is the author of her own misfortune.
- [55] The applicant's technical submission that section 138(5) is not applicable because she was present at arbitration is not appealing to me. The applicant's mere physical presence at arbitration proceedings up to the point when she walked out is of no moment. After walking out with her representative the applicant was no longer appearing in person or represented at the arbitration proceedings.
- [56] The applicant contends that after she walked out the arbitrator ought to have proceeded with the arbitration and allowed the third respondent to discharge its onus of proving that her dismissal was fair. In my view this would have been a futile exercise. In the absence of the applicant to rebut the third

²⁵ See: *Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews and Another* 2009 (6) BCLR 527 (CC) at para [80]

respondent's case, it is highly unlikely that the arbitrator would have found in favour of the applicant. In any event, the option to proceed with an arbitration is open in respect of the absence of a party that did not refer the dispute to the CCMA or bargaining council (section 138(5)(b)).

[57] All in all, I am not persuaded that the applicant has demonstrated good prospects of success in the review application. For this reason also, the condonation application cannot succeed.

Conclusion

[58] Since the applicant has failed to provide a reasonable and acceptable explanation for excessive delay, and the prospects of success in the review are lacking, the late filing of the review application cannot be condoned. It follows that the review application has to be dismissed.

[59] In accordance with the principle of finality²⁶, after a year had lapsed without the applicant challenging the arbitrator's decision to dismiss her case, the third respondent was entitled to assume that the matter had reached finality and moved on with its life.

[60] Finally, on the issue of costs, I am of the view that it is not in accordance with requirements of law and fairness to order the applicant to pay costs.

[61] In the result I make the following order:

Order

1. The application to condone the late filing of the review application is refused.
2. Consequently, the review application is dismissed.
3. There is no order as to costs.

²⁶ *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as amicus curiae)* 2008 (2) SA 472 (CC) at para [31].

S.B. Mgaga
Acting Judge of the Labour Court of South Africa

Appearances:

For the applicant: Mr S. Mahlangu of Wits Law Clinic.

For the third respondent: Mr K. Naidoo of Kapdi Twala Inc. t/a Dentons