



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable
Case no: JR 759/18

In the matter between:

ARCELORMITTAL SOUTH AFRICA LTD

Applicant

and

ABRAM RANGELANI THUBAKGALE

First Respondent

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION

Second Respondent

KHOKHORI CATHERINE THEMA N.O

Third Respondent

Enrolled: 10 June 2020

Delivered: 18 June 2020

In view of the measures implemented as a result of the Covid-19 outbreak, this judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be on 18 June 2020.

JUDGMENT

PRINSLOO, J

Introduction

- [1] The Applicant filed an application to review and set aside a 'condonation and rescission ruling' dated 20 March 2018 and issued under case number METS 5277. The Third Respondent (arbitrator) refused to grant condonation for the late filing of the Applicant's rescission application.
- [2] The First Respondent (Respondent) opposed the application.
- [3] The matter was enrolled for hearing on 10 June 2020. In accordance with the provisions of the 'Urgent directive in respect of access to the Labour Court' dated 28 April 2020, which is applicable with effect from 4 May 2020 until the end of the July 2020 recess, the parties agreed that this matter be disposed of without oral argument. I have considered the papers filed as well as the written heads of argument submitted by the parties.

Material background facts

- [4] The Respondent was employed by the Applicant in February 2017 before he was dismissed in September 2017 for misconduct involving theft or unauthorised possession of company property.
- [5] The Respondent referred an unfair dismissal dispute to the Second Respondent on 13 November 2017 wherein he challenged the substantive fairness of his dismissal. The referral was accompanied by an application for condonation as the dispute was referred out of time.
- [6] Condonation for the late referral of the unfair dismissal dispute was granted and the Respondent was afforded an opportunity to refer his dispute for arbitration.
- [7] The matter was set down for arbitration on 25 January 2018 when the Applicant was absent and the Respondent was represented by his attorney. The arbitrator proceeded with the arbitration in the absence of the Applicant.
- [8] The issue to be decided was whether the Respondent's dismissal was fair and after hearing the Respondent's version, the arbitrator found his dismissal substantively and procedurally unfair. The arbitrator ordered that the Respondent be reinstated retrospectively.

- [9] A copy of the arbitration award was served on the Applicant on 30 January 2018. The Applicant applied for rescission of the default arbitration award. Such application was filed late and was accompanied by an application for condonation.
- [10] The arbitrator issued a ruling dated 20 March 2018 wherein she refused to grant condonation for the late filing of the Applicant's rescission application. In view of her refusal to grant condonation, the arbitrator held that there was no need to deal with the rescission application.
- [11] The Applicant seeks the review and setting aside of the aforesaid ruling.

The condonation application

- [12] In order to assess the arbitrator's findings and the ruling that she ultimately issued, it is necessary to consider the evidence placed before her.
- [13] In the condonation application that served before the arbitrator, the Applicant provided a background to the alleged misconduct that the Respondent was dismissed for, as well as a detailed account of the disciplinary proceedings and the evidence adduced.
- [14] The rescission application had to be filed by 13 February 2018, but was only filed on 21 February 2018, thus 8 days late.
- [15] The Applicant's explanation for the late filing of the rescission application was as follows: Mr Mahlangu, the Applicant's legal counsel, was informed about the default award on 30 January 2018 but in the days following that, he had been involved in three different arbitrations in separate locations. Those were 8 February 2018 in Newcastle, 15 February 2018 in Johannesburg and 16 February 2018 in Vereeniging. He considered the default award on 15 February 2018 and instructed the Applicant's attorneys to prepare the rescission application. The draft application was sent to Mr Mahlangu the following day and it was anticipated that the application would be finalised by 19 February 2018.

- [16] On the prospects of success, the Applicant submitted that it had good prospects of success in defending the unfair dismissal dispute and reference was made to the facts set out in detail in the affidavit, dealing with the merits of the case.
- [17] On the issue of prejudice, the Applicant submitted that the Respondent would not suffer prejudice due to the late filing of the rescission application as he could still present his case at the arbitration. If condonation was not granted the Applicant would suffer severe prejudice because it would be precluded from defending the unfair dismissal dispute, which is without merit.
- [18] The Applicant addressed the issues regarding rescission of the default arbitration award in the same application as it ultimately sought the rescission of the default arbitration award, but had to overcome the hurdle of condonation being granted first.

The test for the grant of condonation

- [19] The relevant legal principles to be applied in an application for condonation, are well established.
- [20] The court or relevant tribunal has a discretion, which must be exercised judicially on a consideration of the facts of each case and in essence it is a matter of fairness to both sides¹.
- [21] Condonation for delays in all labour law litigation is not simply there for the taking. The starting point is that an applicant in an application for condonation seeks an indulgence and bears the onus to show good cause.
- [22] In *Melane v Sanlam Insurance Co Ltd*² it was held that:

‘.... Among the facts usually relevant, are the degree of lateness, the explanation therefore, the prospects of success and the importance of the case. Ordinarily these facts are interrelated, they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion,

¹ ‘Civil Procedure in the Superior Court, Harms at B27.6.

² 1962 (4) SA 531 (A) at 532 C - F.

save of course that if there are no prospects of success there will be no point in granting condonation. What is needed is an objective conspectus of all the facts.'

[23] In *NUM v Council for Mineral Technology*³, the LAC restated the position again follows:

'The approach 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. These facts are interrelated: they are not individually decisive. What is needed is an objective conspectus of all the facts. A slight delay and a good explanation may help to compensate for prospects of success which are not strong. The importance of the issue and strong prospects of success may tend to compensate for a long delay.'

[24] In *NUMSA and Another v Voltex (Pty) Ltd t/a Electric Centre and Others*⁴ the Court held that:

'As was pointed out in the leading case of *Melane v Santam Insurance Co Ltd*, if there are no prospects of success there would of course never be a point in granting condonation. However, the prospect of success is not decisive in circumstances where it is not apparent that there are no prospects of success. If the applicant can show that he has some prospect of success and the delay is not excessive, then, within the context of an application for condonation in terms of s 191(2) of the Act, condonation should not easily be refused.'

[25] In *Ferris and Another v FirstRand Bank Ltd and Another*⁵ the Constitutional Court held that:

'In *Bertie Van Zyl*⁶ this Court held that lateness is not the only consideration in determining whether condonation may be granted. It held further that the test

³ [1999] 3 BLLR 209 (LAC) at 211-213.

⁴ (2000) 21 ILJ 1173 (LC).

⁵ 2014 (3) SA 39 (CC) at para 10.

for condonation is whether it is in the interests of justice to grant it. As the interests-of-justice test is a requirement for condonation and granting leave to appeal, there is an overlap between these enquiries. For both enquiries, an applicant's prospects of success and the importance of the issue to be determined are relevant factors.'

[26] It is within this context that an application for condonation stands to be determined.

The condonation ruling

[27] The issue to be decided by the arbitrator was whether condonation should be granted for the late filing of the Applicant's rescission application and if condonation was granted, whether the default award that was issued on 25 January 2018 should be rescinded.

[28] In her analysis of the submissions and arguments, the arbitrator recorded that the factors to be considered in an application for condonation are interrelated and that what is needed, is an objective conspectus of all the facts.

[29] The arbitrator found that the degree of lateness was not excessive.

[30] On the explanation for the delay, the arbitrator found that the reasons provided are neither reasonable nor justifiable and she could not accept them. This is so because if Mr Mahlangu was not entrusted with the obligation to draft the rescission application, but had to only instruct an attorney to do that, there is no reason why the application was filed late. Mr Mahlangu could have instructed the attorneys immediately on 30 January 2018, when he became aware of the need to file the rescission application.

⁶See: *Bertie Van Zyl (Pty) Ltd and Another v Minister for Safety and Security and Others* [2009] ZACC 11; 2010 (2) SA 181 (CC); 2009 (10) BCLR 978 (CC) (Bertie Van Zyl) at para 14. See also *Grootboom v National Prosecuting Authority and Another* [2013] ZACC 37 at para 22; *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)* [2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC) at para 20; and *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others* [2000] ZACC 3; 2000 (2) SA 837 (CC); 2000 (5) BCLR 465 (CC) at para 3.

- [31] On prospects of success, the arbitrator found that the Applicant has good prospects of success in this matter. She found that the Respondent will be prejudiced as his only witness moved to Limpopo.
- [32] The arbitrator placed reliance on *NUMSA and Another v Hillside Aluminium*⁷ (*Hillside*) where it was held that condonation is not for the asking and that there should be an acceptable explanation tendered for each period of the delay. This requires a full, acceptable and reasonable explanation.
- [33] The arbitrator concluded that a full explanation has to be set out for every period of the delay and an unsatisfactory and unacceptable explanation for any of the period of the delay, will exclude the grant of condonation, no matter what the prospects of success are.
- [34] The arbitrator found that there was no good cause and she refused the application for condonation and found that there was no need to deal with the rescission application.

The test on review

- [35] I have to deal with the merits of the review application within the context of the test that this Court must apply in deciding whether the arbitrator's decision is reviewable. The test has been set out in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*⁸ as whether the decision reached by the commissioner is one that a reasonable decision maker could not reach. The Constitutional Court very clearly held that the arbitrator's conclusion must fall within a range of decisions that a reasonable decision maker could make.
- [36] The review test is a stringent and conservative test of reasonableness. The Applicant has to show that the arbitrator arrived at an unreasonable result.
- [37] In *Bestel v Astral Operations Ltd and Others*⁹ the Labour Appeal Court (LAC) considered the limited scope possessed by this Court to review an arbitration award and accepted that an arbitrator's finding will be unreasonable if the

⁷ [2005] 6 BLLR 601 (LC).

⁸ 2007 28 ILJ 2405 (CC) at para 110.

⁹ [2011] 2 BLLR 129 (LAC) at para 18.

finding is unsupported by any evidence, if it is based on speculation by the arbitrator, if it is disconnected from the evidence, if it is supported by evidence that is insufficiently reasonable to justify the decision or if it was made in ignorance of the evidence that was not contradicted.

- [38] The LAC in *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA and Others*¹⁰ affirmed the test to be applied in review proceedings and held that:

‘In short: A reviewing court must ascertain whether the arbitrator considered the principal issue before him/her; evaluated the facts presented at the hearing and came to a conclusion that is reasonable.’

- [39] The review Court must consider the totality of the evidence and then decide whether the decision made by the arbitrator is one that a reasonable decision maker could make based on the facts placed before him / her.

- [40] In *Parliament of the Republic of South Africa v CCMA and Others*¹¹ it was held that:

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

[14] The applicable test before the Court can interfere with a Commissioner’s discretionary decision is whether or not it can be said that the discretion was exercised “capriciously, or upon a wrong principle, or in a biased manner, or for insubstantial reasons. Thus, the test is whether the Commissioner committed a misdirection, an irregularity, or failed to exercise his or her discretion, or exercised it improperly or unfairly.’

- [41] In *Cowley v Anglo Platinum and Others*¹², where it was held that;

‘When a Commissioner is endowed with a discretion this court will be very slow to interfere with the exercise of that discretion. The commissioner’s

¹⁰ (2014) 35 ILJ 943 (LAC) at para 16

¹¹ Unreported judgment (C646/16) [2018] ZALCCT 12 (24 April 2018).

¹² JR 2219/2007; [2016] JOL 35884 (LC) at para 21.

exercise of discretion would be upset on the review if the applicant shows, inter alia, that the Commissioner committed a misdirection or irregularity, or that he or she acted capriciously, or on the wrong principle or in bad faith or unfairly or that the exercise seeing the discretion the Commissioner reached a decision that a reasonable decision-maker could not reach. If it is clear that the commissioner exercised such discretion judiciously and fairly after taking into consideration all the relevant facts, this court will not interfere with the exercise of such discretion.'

- [42] The ultimate question is whether holistically viewed, the decision taken by the arbitrator was reasonable based on the evidence placed before her. I have to consider this question taking into account the evidence contained in the condonation application and opposition thereto that was placed before the arbitrator, the ruling she had issued and the grounds for review raised by the Applicant.

Grounds for review and analysis

- [43] In its opposing affidavit, the Respondent raised a point *in limine* regarding the filing of the Applicant's Rule 7A (8) of the Labour Court Rules notice and the transcribed record.
- [44] The point *in limine* lacks merit to the extent that I do not intend to spend any material portion of this judgment dealing with it. It shows nothing but a lack of understanding of the application of the Rules of this Court, read with the Practice Manual for the Labour Court¹³.
- [45] It is evident from her ruling that the arbitrator was well aware of the fact that the Applicant had to show good cause and that the factors to be considered were interrelated and that an objective conspectus of all the facts was required.
- [46] In considering whether or not to grant condonation, the arbitrator had to consider the relevant factors, thus the legal requirements or the law, the facts placed before her and exercise her discretion on an objective conspectus of the law, applied to the facts.

¹³ April 2013.

- [47] The essence of the Applicant's grounds for review is that the arbitrator had not exercised her discretion judicially and that she had been influenced by the wrong principles, which led her to adopt an unbalanced and inflexible approach in which she did not apply the interest of justice test. Ultimately the arbitrator reached an unreasonable decision which could not have been made by an arbitrator properly considering the relevant facts and applying the relevant principles.
- [48] In my view, there is merit in the Applicant's grounds for review.
- [49] It is evident that the arbitrator considered four relevant factors and that she found that the degree of lateness was not excessive and that the Applicant has good prospects of success. In considering the other two factors, she found that the explanation for the delay was not reasonable and justifiable and that the Respondent would be prejudiced because his only witness had moved to Limpopo.
- [50] Essentially, the application for condonation was dismissed based on the explanation for the delay and the Respondent's prejudice.
- [51] The relevant period for which the Applicant had to tender an explanation is from 13 February 2018, when the period within which a rescission application had to be filed, expired, and 21 February 2018, when the application was filed, thus eight days. The Applicant explained that Mr Mahlangu had different arbitrations to attend to in Newcastle, Johannesburg and Vereeniging. He did not instruct the Applicant's attorneys to prepare the rescission application earlier due to his workload. The draft application was sent to Mr Mahlangu on 16 February 2018 and it was anticipated that the application would be finalised by 19 February 2018, but he fell sick and it was only signed on 21 February 2018.
- [52] Although the explanation may not be the best or the most convincing, sight should not be lost of the fact that the delay is minimal and that the arbitrator found that the Applicant has good prospects of success.

[53] In *Grootboom v National Prosecuting Authority and Another*¹⁴ the Constitutional Court held that:

‘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 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 all be taken into account to arrive at a conclusion as to what is in the interests of justice.’ (My emphasis)

[54] The arbitrator in relying on *High Tech Transformers (Pty) Ltd v Lombard (High Tech)*¹⁵ and *Hillside* to find that the Applicant’s explanation was not acceptable and rejecting it because there are days between 8 and 15 February 2018 that were not accounted for, misdirected herself.

[55] If she had proper regard to the facts of *High Tech*¹⁶, she should have known that it is a case where the Court was faced with a rescission application where there was no application for condonation filed. The facts before the arbitrator were patently different and the application of the *dictum* in *High Tech* incorrect. The arbitrator’s reliance on this authority constituted a material error.

[56] Furthermore, if she had regard to the facts and principles set out in *Hillside*, she should have known that *Hillside* involved a case where a statement of case was filed one year after the applicant’s dismissal and many periods, some to the extent of months, were not explained. Once again, the facts

¹⁴ (2014) 35 ILJ 121 (CC), 2014 (2) SA 68 (CC) at para 50.

¹⁵ [2012] JOL 28631 (LC).

¹⁶ *Id*

before the arbitrator were patently different as the principles set out in *Hillside*, clearly related to a lengthy delay. *In casu*, the arbitrator found that the delay was not excessive. In *Hillside*¹⁷ the Court held that:

‘The court has a discretion to be exercised judicially upon a consideration of all the facts, and essentially it is a matter of fairness to both sides. Ordinarily the considerations, which are taken into account, are seen as interrelated. No single consideration is individually decisive. Where, as in this case, one is dealing with a lengthy delay, the applicant for condonation is obliged to give a full and extensive account of the delay to assist the court determine whether the explanation for it is reasonable or not. The explanation must be sufficient to enable the court to determine how the delay came about and to allow an assessment of the applicant’s motives and conduct for the purpose of making a finding of reasonableness.’ (My emphasis)

- [57] The arbitrator’s reliance on the aforesaid authorities was misplaced and her application of the principles showed a lack of understanding of the law as it applied to the condonation application which she had to decide.
- [58] Having found that the delay was not excessive and that the Applicant had good prospects of success, it was unreasonable to refuse condonation, even on the basis that the explanation was not acceptable and the Respondent’s witness had moved to Limpopo.
- [59] The arbitrator dismally failed to exercise her discretion judicially upon a consideration of all the facts. She had no regard for the interest of justice and she made no assessment of whether it would be in the interest of justice to grant or refuse condonation. She came to a conclusion that is not only unreasonable, but that is also at odds with the applicable authorities and established principles.
- [60] This is a case where the arbitrator, on an objective conspectus of the facts, should have granted condonation for the late filing of the Applicant’s rescission application.

¹⁷ *Supra* n 7 at para 6.

- [61] The arbitrator made reference to the primary purpose of the LRA namely the expeditious resolution of labour disputes, especially dismissal disputes. The arbitrator's refusal of condonation in circumstances where it should have been granted, and her failure to deal with the rescission application, undermined this very objective of the LRA.
- [62] In summary: On a consideration of all the facts before the arbitrator at the time, it is evident that the most reasonable outcome upon a consideration of the overall interests of justice would have been to grant condonation. In exercising her discretion to refuse condonation, the arbitrator committed a misdirection of such a nature that her discretion was exercised not only improperly, unfairly and unreasonably, but also upon wrong principles and for insubstantial reasons.
- [63] In the circumstances, it follows that the condonation ruling ought to be set aside, as it does not pass muster considering the test this Court has to apply on review.

Relief

- [64] This leaves the issue of relief.
- [65] The Applicant seeks for the condonation ruling to be reviewed and set aside and to be substituted with a ruling that condonation is granted. I am inclined to grant this relief.
- [66] I am satisfied that upon the material that was placed before the arbitrator, this Court is in a position to substitute that ruling. No purpose would be served by remitting the condonation application back to the Second Respondent for reconsideration. It is also in the interest of justice to determine the condonation application finally and not to order a re-hearing thereof as any further delay in this matter would undermine one of the key objects of the LRA namely expeditious dispute resolution.
- [67] The arbitrator did not at all consider the merits of the rescission application and it is not for this Court, sitting as a review Court, to consider the rescission

application in circumstances where it was not first considered by the tribunal that had to consider it in the first place.

Costs

[68] This Court has a wide discretion in respect of costs.

[69] This is a matter where ultimately the arbitrator got it wrong and the Respondent was entitled to defend a ruling issued in his favour by opposing the application. In my view, considering the facts placed before me, the interest of justice will be best served by making no order as to cost.

[70] In the premises, I make the following order:

Order

1. The condonation ruling dated 20 March 2018 and issued under case number METS 5277 is reviewed and set aside;
2. The condonation ruling is substituted with the following:

‘The late filing of the rescission application is condoned.’
3. The Second Respondent is ordered to enroll the rescission application for hearing before a commissioner other than the Third Respondent;
4. There is no order as to costs.

Connie Prinsloo

Judge of the Labour Court of South Africa

Representatives:

Applicant:

Cliffe Dekker Hofmeyr Inc Attorneys

First Respondent:

NUMSA

LABOUR COURT