

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JR2415/18

In the matter between:

NUMSA obo ISAAC MAPHOTO

Applicant

and

DIALE NTSOANE N.O.

First Respondent

MOTOR INDUSTRIES BARGAINING COUNCIL

Second Respondent

OTRACO SOUTHERN AFRICA (PTY) LTD

Third Respondent

Heard: 25 June 2024

Delivered: 10 February 2025 (This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing-down is deemed to be 11h00 on 10 February 2025).

JUDGMENT

ZWANE, AJ

Introduction

[1] On 12 October 2018, the first respondent commissioner acting under the auspices of the second respondent found that the dismissal of the applicant was substantively fair.¹

[2] Dissatisfied with the arbitration result, on 8 February 2019, the applicant filed this application for review in terms of Section 145 of the Labour Relations Act, 66 of 1995 (LRA).² The applicant seeks an order reviewing and setting aside the commissioner's arbitration award (award) which was in favour of the third respondent (employer). The review application is opposed.

The relevant background

[3] At the time of his dismissal, the applicant was employed by the third respondent as a Tyre Service Man. The applicant was also NUMSA's shop steward at the time of his dismissal.

[4] The applicant was dismissed for calling the third respondent's Regional Manager, Mr Frederick Christoffel Louw (Louw), a liar via a WhatsApp text.³ The genesis of the dispute is this: Louw approached the applicant concerning an issue pertaining to a safety officer. In this meeting, Louw assured the applicant that his presence was not required as this was not going to be a disciplinary process but an informal discussion.

[5] It is common cause that Louw had a meeting with the safety officer, and upshot of that discussion was a verbal warning. A few days after the said discussion, the applicant received a call from the safety officer advising that he received a verbal warning from the third respondent. The applicant was not happy with this. He sent Louw a text message on WhatsApp in which he accused him of being a liar.

[6] In his testimony at arbitration, the applicant stated that he felt disappointed in Louw in that the latter reneged on his word. The applicant indicated that he intended

¹ Pleadings: arbitration award, page 8.

² Pleadings: condonation - founding affidavit, pages 26 to 27.

³ Pleadings, founding affidavit, pages 11 to 12.

to represent the safety officer in that discussion, but Louw assured the applicant that the safety officer would not be subjected to a disciplinary process.

[7] Louw's testimony was that he enquired from human resources if he could issue the safety officer with a verbal warning without involving the applicant. According to Louw, human resources gave him the go ahead.

[8] It is further common cause that on 7 July 2017, the applicant was charged with misconduct for calling Louw a liar. The charge against the applicant was phrased as follows:

'4.2.2 Serious misconduct in that on 20.02.2017 your (sic) behaved in disrespectful manner toward your Regional Manager by falsely accusing him of lying rendering working relationship irreparable.'⁴

[9] The applicant was dismissed for misconduct on 11 July 2017 after the conclusion of the disciplinary hearing, which he did not attend for reasons best known to him.⁵ Aggrieved by his dismissal, the applicant referred an alleged unfair dismissal dispute to the second respondent. It is common cause that the commissioner found against the applicant.

The review application

[10] The substratum of the applicant's attack of the award on review is that the commissioner committed a gross irregularity, failed to properly apply his mind to the evidence presented before him and in doing so, the commissioner reached an unreasonable conclusion and result.⁶

[11] The applicant avers further that the commissioner did not appreciate or otherwise failed to have regard to the context in which the applicant called Louw a liar, and that the prescribed sanction for the misconduct the applicant was found guilty of is a written warning. According to the applicant, there was also no evidence

⁴ Record, bundle: notice to attend disciplinary hearing, page 147.

⁵ Record, bundle: termination of service letter, page 159.

⁶ Pleadings, founding affidavit, page 14, at para 22.

led to the effect that the employment relationship between himself and the third respondent was beyond salvation.⁷

[12] For the sum of the above reasons, the applicant contends that the commissioner ought to have found that he had no intention of disrespecting Louw and that if the commissioner found against him in this regard, the latter should have found that a written warning instead of dismissal was an appropriate sanction.⁸

[13] In opposing the applicant's review, the third respondent submits that the commissioner arrived at a reasonable conclusion. According to the third respondent, the applicant is guilty of misconduct, and that dismissal was an appropriate sanction as found by the commissioner.

Condonation application

[14] *Extent of the delay.* The application for review is two months' late. According to the applicant, he received the award on 19 October 2018. The review application was thus due for filing by no later than 30 November 2018. However, the application was only filed on 11 February 2019.⁹

[15] The condonation application is not opposed. However, it is trite law that condonation is not for the taking. This Court is required to consider, *inter alia*, the explanation for the delay, the reasons for the delay, the degree of the delay and other relevant factors.

[16] *Reason and explanation for the delay.* The applicant's representative, Mr Vivani Shezi (Shezi) admitted that the failure to file the review on time was an oversight on his part. He submitted that he has 4 other matters he was seized with at the time that this review was due for filing with this Court. This review fell through the cracks as it were.¹⁰

⁷ Pleadings, founding affidavit, page 15, at paras 27 to 28.

⁸ Pleadings, founding affidavit, page 14, at para 25.

⁹ Pleadings, application for condonation, page 26, at paras 9 to 10.

¹⁰ Pleadings, condonation application, para 11, page 26, and pages 27 and 28.

[17] *Prospects of success*. The applicant argues that the employee is not guilty of misconduct for calling his superior a liar. To the extent that the applicant is guilty of misconduct, the third respondent's disciplinary code and procedure prescribes a written warning as a sanction.¹¹

[18] It is common cause that at the time of his dismissal, the applicant was sitting on a valid final written warning. In considering the condonation application in this case, the question of whether the applicant has reasonable prospects of success becomes paramount.

Evaluation

[19] In *Nair v Telkom SOC Ltd and Others*¹² stated that:

'[14] Without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused. In this regard, in *National Union of Mineworkers v Council for Mineral Technology* [1998] ZALAC 22 at para 10, the court held as follows: "The approach is that the court has a discretion, to be exercised judicially upon a consideration of all facts, and in essence, it is a matter of fairness to both parties. Among the facts usually relevant are the degrees of lateness, the explanation therefore, 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. There 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 prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused".'

¹¹ Pleadings, review application, at paras 16 and 17, page 13.

¹² [2021] ZALCJHB 449 (7 December 2021).

[20] In *NUMSA obo Thilivali v Fry's Metals (A division of Zimco Group) and Others*¹³ (*Thilivali*), the Court held that:

‘... general principles applicable to condonation applications are even more stringently applied where it comes to a condonation application for the late filing of a review application. In review condonation applications, the explanation that needs to be submitted must be compelling and the prospects of success need to be strong. Where it comes to the issue of prejudice, the applicant in fact has to show that a miscarriage of justice will occur if the applicant's case is not heard. The reason for these more stringent requirements is that review applications occur after the parties have already been heard, presented their respective cases and a finding has been made. Under such circumstances, considerations of justice, fairness and expedition require that challenges of such findings must not be delayed and must be completed as soon as possible.’

[21] As already stated, the applicant was sitting on a valid final written warning at the time of the commission of the misconduct in question. It follows that there is no room for the implementation of progressive discipline in this instance. Accordingly, and there being no prospects of success, the condonation application should be refused.

Costs

[22] In terms of Section 162 of the LRA, this Court has a broad discretion to make appropriate cost orders in accordance with the requirements of law and fairness.

[23] In my view, this is one of those cases where the interests of justice will be best served by each party bearing its own costs.

[24] In the result, I make the following order:

Order

¹³ [2014] ZALCJHB 115; (2015) 36 ILJ 232 (LC) at para 22.

1. The application for condonation for the late filing of the application for review is refused.
2. The application for review is dismissed.
3. No order as to costs.

N.I. Zwane

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant: Mr Vivani Shezi of NUMSA

For the Third Respondent: Advocate Malcolm Lennox

Instructed by: Harrington Johnson Wands Attorneys