



**THE LABOUR COURT OF SOUTH AFRICA
AT CAPE TOWN**

Of interest to other judges

Case no: C 170/2022

In the matter between:

**ASSOCIATION OF MINeworkERS
AND CONSTRUCTION WORKERS
UNION ("AMCU")**

First Applicant

and

**THE BARGAINING COUNCIL FOR
THE CIVIL ENGINEERING
INDUSTRY ("BCCEI")**

First Respondent

ELVISO ADAMS (N.O.)

Second Respondent

**POWER CONSTRUCTION (PTY)
LTD**

Third Respondent

Heard: 28 March 2024

Delivered: 8 January 2025

Summary: (Condonation application for late filing of review application – delay excessive – Applicant proceeding at its own pace without any regard being had to the need to expedite the application until right at the end of the process - Explanation not justifying delay – Sufficient reason to dismiss the

application on that basis alone – Condonation is not a means to license prolonged internal decision making processes - Even if prospects of success considered – no basis for believing that the fundamental reason for the applicant's dismissal would be set aside or the sanction of dismissal altered)

JUDGMENT

LAGRANGE, J

Introduction

- [1] This is an application to review and set aside an arbitration award in which the arbitrator upheld the fairness of arbitrator found that the individual applicant's dismissal by the third respondent, Power Construction (Pty) Ltd ('Power Construction') was substantively and procedurally fair.
- [2] The review application was filed outside the six-week time period following the issuing of the award and the applicant has applied for condonation for the late filing as well.

Condonation

Delay and explanation

- [3] The award was issued on 14 December 2022 and the review application was served on 14 April 2022, about 11 weeks late. It should have been filed on 25 January 2022. The review took more than three times the permissible time to be launched and this is not a 'slight time delay' as stated in the founding affidavit. It is excessive.
- [4] The explanation provided for the delay may be summarised thus:
 - 4.1 The arbitration award was received by the union's regional organiser, Mr M Mashologu ('Mahsologu'), on 15 December 2021 but only came to his attention on 17 January 2022 when he returned from leave;

- 4.2 Mashologu contacted Simayile about the award on 18 January 2022;
- 4.3 Mashologu arranged to see him on 28 January 2022. This was the earliest opportunity for them to meet as Mashologu had other CCMA arbitrations and meetings he had to attend to on his return to work. Simayile was advised that the consent of the National Executive Committee ("the NEC") was required to take the matter on review, if the union's legal department was of the view there were prospects of success;
- 4.4 On 31 January 2022 it was referred to an 'extremely busy practitioner' for an opinion, who delivered his opinion around 11 February, which effectively said that a review application had prospects of success
- 4.5 The NEC was "involved in a number of high profile litigation matters" and the next meeting after 11 February 2022 was in the middle of March 2022;
- 4.6 The NEC which convened in March also had a number of cases to discuss and wanted a more comprehensive opinion on the prospects of success;
- 4.7 A further detailed opinion was required and made available to the NEC on 24 March 2022, but could only be considered at the next meeting in April;
- 4.8 The NEC met again in the first week of April and the General Secretary finally instructed that the review could proceed. The final instruction was issued on 11 April and AMCU's attorneys of record then drafted the application "*as a matter of urgency*", serving the application on 14 April 2022.

[5] Ignoring the initial delay when the union offices were closed, the rest of the delay is attributed to internal decision making processes of the union and the delays of a busy legal practice. The explanation may be paraphrased as follows "*We filed the application when we were ready to, and it took us longer than it should have because all these internal steps were necessary*"

*and the lawyer involved was very busy on other important matters.”. Not once in the explanation is there any evidence that anyone involved gave a moment’s thought to the six-week time frame, except when the instruction to proceed with the review had been issued on 11 April 2022. Only then, at the last step, did urgency enter the picture. Yet, all of those involved, except perhaps Simayile, must have been aware of the six-week time frame and would have realised the matter was out of time. Even so, it is inexplicable why Mashologu would not have explained to him the need for urgency when they met on 28 January. It is apposite to cite what this court said in *Independent Municipal & Allied Trade Union on behalf of Zungu v SA Local Government Bargaining Council & others*¹:*

“(T)he 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”.²

- [6] The only reasonable inference to draw from the narrative is that the need to file the application by the end of the six-week period was simply disregarded as an issue until the very last stage. It is well established that a party seeking condonation must explain the whole delay. However, merely because the union can point out the steps that were taken before it was in a position to launch the application that does not, in and of itself, provide a justification for being late. The explanation is unsatisfactory because it does not make clear why there was absolutely no attempt made to expedite matters until a couple of days before the application was launched. It is well established that unions and employers cannot rely on

¹ (2010) 31 ILJ 1413 (LC) at paragraph 13.

² At paragraph 7

their own internal procedures as a justification for delay³. Employers and unions need to ensure their internal decision making procedures are adapted so they can act within the six-week time-frame of s 145(1). Parties must adapt their decision making procedures to the statute: it is not for them to refashion the time periods set down in law, to suit their own time tables by abusing the condonation process. It is important also to remember that when filing the founding papers in a review application an applicant party is not constrained by the grounds of review pleaded there, because those grounds can completely altered when they file their supplementary affidavit. Consequently, an applicant is not taking any risk, which could prejudice their case, when pleading the preliminary grounds of review in the founding application. Nothing prevents a party from deciding to provisionally file a review application because they are free to abandon or modify it. In this instance it is interesting to note that it took only one day to file the application after authorisation to proceed was given.

- [7] I note also that there was no attempt made to approach the employer to agree to an extension of time for filing the application late and not to oppose the condonation application.
- [8] I believe that the failure to provide a justifiable reason for being so dilatory in prosecuting the review, is sufficient reason to dismiss the condonation application. Notwithstanding this, is there any reason, why it should nonetheless be allowed to proceed? In this regard, I will consider if the prospects of success in the review might redeem the provisional view that the condonation application should be dismissed.

Prospects of success

³ *Steenkamp & others v Edcon Ltd* (2019) 40 ILJ 1731 (CC) at paragraph 41. See also *National Union of Metalworkers of SA on behalf of Thilivali v Fry's Metals (A Division of Zimco Group) & others* (2015) 36 ILJ 232 (LC) at paragraphs [29] to [31] and the cases cited thereat.

- [9] In October 2020 the applicant, Mr E Simayile ('Simayile') was subjected to a disciplinary enquiry and found to have committed the following misconduct, which led to his dismissal:

"Allegation 1: "Incitement – the action of provoking unlawful behaviour or urging someone to behave unlawfully. On the 1st of October 2020, you approached the CLO (Andile Dlali) and instructed him that the site (Farm 694) will be downing tools. Subsequently, your action / instruction caused disruption on the site and resulted in the entire workforce not commencing work";

Allegation 3: "Negligence – failure to comply with the standard of care that would be exercised by a reasonable person. You reported to (on 1st October 2020) site Farm 694 and sparked employees with misleading facts (such as making demands that were previously addressed in a meeting you were present in at Martin Naude's site), thus committing gross negligence of information shared to you on the 30th of September 2020".

- [10] Simayile was employed during October 1999. At the time of his dismissal, he was employed as an L2 tractor driver / machine operator. Owing to the nature of his job he was not permanently attached to a particular site but moved from one site to another according to the company's needs.
- [11] On 07 September 2020, Power Construction was granted an exemption by the Civil Engineering Bargaining Council in respect of increases and bonuses due for 2020. The employees were informed of the exemption on 14 September 2020. Power Construction maintained that the union had agreed to the exemption in the course of retrenchment consultations as a way of saving about 30 jobs. This caused dissatisfaction amongst the affected workers and at two sites they demanded explanations why they were being deprived of part of what was due to them. The task of

providing an explanation fell to Mr P Zwanga ('Zwanga'), an HR officer, who had to address workers at different sites who were demanding clarity. He had to do this at three different sites on 29 and 30 September and 30 October.

- [12] One such meeting took place on 30 September 2020. Employees at its Faure Drive site were querying the non-payment of increases and bonuses. Subsequently, a meeting was held at the site the same day. Zwanga addressed employees. Simayile was among the employees present in that meeting.
- [13] At the meeting, workers demanded to see a document signed by the union in which it had confirmed it had consented to the exemption. It appears that there was no such document available. Simayile admitted he had participated in the meeting and had asked Zangwa to call his supervisor because he could not provide a satisfactory explanation. The arbitrator found that Simayile sought to distance himself from what transpired at that meeting because it meant he already knew of the explanation for bonuses and salary increases not being paid before he attended the meeting the following day at the Faure Drive site.
- [14] It is evident from the transcript that the reason for Zwanga having to address employees at the meeting on 30 September 2020, was to address their dissatisfaction with the forfeiture of increases and bonuses in consequence of the exemption flowing from the retrenchment consultations and their unhappiness with management's inability to produce a document confirming that the union had agreed to the exemption. Simayile admitted to participating in the meeting and suggested Zangwa ought to have brought other more senior staff with him to explain the issue in detail because he was not able to do so. Although he agreed that Zwanga had said the union was still busy handling the matter, he did not agree that Zwanga had told workers that they must use their union representatives if they wanted to raise any issues. He claimed that the meeting was chaotic and nothing was resolved. Although it was not put to management's witnesses, when Simayile testified he denied that

Zwanga had explained that bonuses and increments were being withheld because of the exemption. The arbitrator found that he tried to distance himself from what had transpired at that meeting because it meant he already knew of the explanation for bonuses and salary increases not being paid before he attended the meeting at the other site on 1 October 2020.

- [15] It was common cause that Simayile came to the Farm 694 site ('the farm site') on 1 October, before work was due to commence at 07h30. It is also common cause that he entered the office of the local community liaison officers ('CLOs') and addressed, Mr A Dlali ('Dlali'), the CLO of African workers. What Simayile told him is in dispute. Dlali said that Simayile told him there was a meeting outside that he wanted the local workers to attend. Simayile explained to him that there would be no work that day and it would be 'tools down' at all Power Construction sites that day because of the salary and bonus issue. His evidence was corroborated by Mr S Zonke, who was present in the CLO office when Simayile spoke to Dlali. Local workers were contract workers employed from the surrounding community. Dlali believed that Simayile had approached him because the CLOs oversaw the local employees and he wanted the go ahead from himself to get the local employees co-operation.
- [16] Simayile's version was that when he arrived shortly before 07h30 he saw workers standing around and he approached them because he did not know what was happening. As soon as he appeared somebody "screamed" and asked him to go and call the CLO because they wanted him to be present at the meeting. Under cross-examination he said that it was a group of people at the front of the gathering who asked him to do this. Because he was asked he went to summons the CLO, even though he did not know the reason why workers wanted the CLO. He claimed he conveyed this to Dlali, and told him that he also did not know what was going to be said but he was also going there to listen. He claimed it was only after he spoke to Dlali and went to the gathering that he learnt that the workers had gathered because of the bonus and salary increases.

- [17] However, Dlali denied Simayile had claimed to be merely conveying a message, and because he said that tools would be downed at all Power Construction sites, he understood what Simayile said was not a request but an instruction to him that the local workers should join the meeting.
- [18] It was not in contention that after Simayile spoke to Dlali, Dlali went to the office of the site manager, Mr J Van Zyl ('Van Zyl') to report what Simayile had told him. Dlali said he only went to Van Zyl because Simayile spoke of there being a 'tools down'. Van Zyl had testified that Dlali came and told him that Simayile had said that workers were downing tools because of the bonus and salary issue. He testified that Van Zyl instructed him to go and tell the local workers to leave the meeting, while he was busy phoning head office. Then Van Zyl followed him to where the local employees were gathered and addressed them himself. He told them they were not involved in the issue of the bonuses and increases and they should go back to work and they would not be threatened by anyone. The local employees then left the meeting. Van Zyl then addressed the permanent employees who remained behind, telling them that what they were doing was illegal and that Simayile was aware that the discussions on the issue were still in progress. Their response was they were not 'toyi toying', to which Van Zyl responded that if they not on strike why were they still gathered at 07h45 when they should have started work at 07h30. The permanent workers then left the meeting leaving only Simayile, Van Zyl and Dlali. This version was not seriously challenged but when Simayile testified he gave the impression that Van Zyl left after workers refused to disperse and, at that point, they spoke with each other and decided to go back to work and that one of them should go and tell Van Zyl that they were going to work. This was not put to Power Construction's witnesses.

Arbitrator's main findings

- [19] The arbitrator's main findings are set out in summary below.
- [20] The essence of incitement entailed attempting to influence another to commit a crime or misconduct, which could be done in a variety of ways from a mere suggestion to an exhortation.

- [21] Simayile was wrong to contend that there were no issues dealt with at the meeting on 30 September 2020. Rather, the issues plainly related to the exemption flowing from the agreement during the s 189A process and inability of management to show a document that the union had agreed to the exemption, which entailed forfeiture of bonuses and salary increases. Simayile admitted to participating in the meeting and asking Zangwa to call his supervisor because he could not give sufficient explanation. The arbitrator found that Simayile sought to distance himself from what transpired at that meeting because his knowledge of that meeting meant he already knew of the explanation for bonuses and salary increases not being paid before he attended the meeting at the farm site the following day.
- [22] On 1 October the workers at the farm site, some of whom including Simayile had also been at the meeting at the Faure Drive site, were still unhappy because they had not heard what they had wanted to hear from Zangwa. It was unlikely Simayile did not know why they had gathered that day. It was also improbable he would simply have allowed himself to be ordered to go and call the CLO when he was not a regular employee on the site and was a long serving employee. He found that it was “... *improbable that the applicant was just an uninformed late arrival who was asked by nameless employee to go and call the CLO whose name he did not even know. He was fully aware of the issues underlying the gathering of unhappy workers du to the salary increase and bonus issues being discussed in the previous day’s meeting.*”
- [23] On the question of incitement, Dlali and Zonke were clear that he wanted local workers to join the meeting and reasons why there would be a tools down. At the very least he said there would be no work because it would be tools down at all Power sites. In relation to the conflicting version of what transpired in the CLO’s office, the arbitrator found Dlali’s evidence to be more credible than Simayile’s.
- [24] Simayile’s aim was to draw in the support of local labour for the permanent workers’ cause. The local labour force was a substantial part of the

workforce and the permanent workers could not work if they were not and vice-versa. Work did not start at 07h30 when it should have.

- [25] Simayile was not a passive onlooker at the meeting, but it could not be said he incited the permanent workers because he answered Zwanga's questions in the meeting. His interaction with the CLO showed there were enough indications he played a bigger role than that of a mere interpreter at the second meeting. He found that, given Simayile's standing based on his long service, his statements about 'tools down' in the CLO's office was tantamount to intimidation.
- [26] Simayile did not act in the best interest of the company, by not clarifying the situation based on what he already knew from the previous day about the reasons for the lack of bonuses and increases. Although this was insufficient to justify his dismissal his failure to act in the employer's best interest was problematic for the employment relationship.
- [27] The arbitrator concluded that Simayile had at least incited local workers to engage in an 'attempted tools-down' Whether there actually was a 'tools down' did not matter because his action amounted to incitement of fellow employees to commit misconduct through such intimidating tactics of targeting vulnerable local contract workers. He acted contrary to the employer's best interests due to his *"failure to inform employees about the true state of affairs as one would have expected from a loyal employee."*
- [28] In determining if the sanction of dismissal was appropriate, he considered the ramifications of the stoppage such as penalties the Power Construction could incur for failing to meet its commitments. He noted that his intervention had prompted one CLO to write a letter of complaint to the local ward counsellor. Simayile was unaccountable and his actions negatively impacted, or could have, on the firm's relationship with the community. As a long serving employee his conduct was irresponsible. The misconduct was gross and dismissal as a sanction accorded with the disciplinary code.
- [29] On procedural fairness he found that it was Simayile's responsibility to arrange for his representation in the disciplinary enquiry and he did not.

Nor did he seek a postponement of the enquiry if he felt he had insufficient time to prepare for it. There was no evidence of bias on the chairperson's part.

- [30] It was unlikely he would simply have allowed himself to be ordered to go and call the CLO when he was not a regular employee on the site and was a long serving employee. In respect of what happened at the CLO's office Simayile was not uninformed employee who was merely asked to call the CLO to the gathering.
- [31] On the question of incitement, Dlali and Zonke were clear that he wanted local workers to join the meeting and gave the reasons why there would be a tools down (which incidentally also shows he knew exactly what the meeting was about?). At the very least he said there would be no work because it would be tools down at all Power sites.
- [32] The arbitrator found Dlali's evidence to be more credible than Simayile's.
- [33] Simayile's aim was to draw support of local labour in the permanent workers' cause. They were a substantial part of the workforce and the permanent workers could not work if they weren't and *vice-versa*. Workers did not commence work at 07h30.
- [34] He was not a passive onlooker at the meeting but it could not be said he incited the permanent workers because he answered Van Zyl's questions. His role with the CLO showed there were enough indications he was playing a bigger role than that of a mere interpreter. He found that given his long service standing, his statements about tools down in the CLO's office amounted to intimidation.
- [35] Simayile did not act in the best interest of the company by not rectifying the situation based on what he learnt the previous day about the reasons for the lack of bonuses and increases. Although this was insufficient to justify his dismissal his failure to act in the employer's best interest was problematic for the employment relationship.
- [36] On the question of an appropriate sanction, he considered that the potential ramifications of the stoppage made Simayile's misconduct gross and disciplinary code listed dismissal as a sanction for incitement. He was

unaccountable and his actions negatively impacted or could have on the firm's relationship with the community. As a long-serving employee he had behaved irresponsibly.

- [37] On the question of procedural fairness he found that it was Simayile's responsibility to arrange for his representation and he did not. In any event, he did not ask for a postponement. The arbitrator found there was no evidence of bias.

Grounds of review

- [38] AMCU, on behalf of Simayile, raised a number of grounds or review essentially attacking the rationality of the arbitrator's reasoning and findings. In essence it was argued that there was no reasonable basis on which the arbitrator could have found him guilty of either charge and none of the conduct that could be established implied he was guilty of any misconduct.
- [39] More particularly, it argued that there was no evidence to contradict his version that he was asked by some of the workers assembled before work at the Faure road site to call the CLO to attend the meeting and that was the only role he played apart from acting as an interpreter for one of the employee representatives when Van Zyl addressed them.
- [40] There was no basis in law for imputing a duty on him to inform workers at the second meeting, that the issues they were raising had already been dealt with at the meeting on 30 September.
- [41] The arbitrator unjustifiably ignored the fact that Simayile had been treated most unfairly in that other employees who had been present at the meeting on 30 September had not been charged with negligence for not trying to persuade other employees not participate in a stoppage on 1 October.
- [42] The arbitrator failed to appreciate that it was common cause that local workers could not work if permanent workers were not working and *vice versa*. Accordingly, there could be no reason to incite local workers not to work if permanent workers had downed tools.

- [43] The arbitrator failed to appreciate that the sanction of dismissal was unjustifiably severe, given that the misconduct was not serious because the work disruption would not have amounted to more than 30 minutes and workers were not paid for the time they did not work. Moreover, Van Zyl's ultimatum to the permanent workers to return to work was heeded. Insofar as the second charge was formulated as a charge of negligence, the arbitrator also failed to consider that the disciplinary code did not recommend dismissal for a first offence, but instead recommended that a final warning should be issued.
- [44] The arbitrator's finding that Simayile's conduct had been intimidatory was unwarranted and did not form part of the misconduct he was charged with.
- [45] The arbitrator could not have reasonably concluded that it was Simayile's responsibility to arrange for representation and it should have arranged for his shop steward based in Sutherland to appear at the disciplinary enquiry.

Evaluation of prospects

- [46] I have outlined the main issues and grounds of review probably in more detail than required for the assessment of the prospects. On a broad assessment it might be found that some of the arbitrator's findings might prove to have been tendentious, such as his conclusion that Simayile's conduct was intimidatory or that he had directly incited the local contract employees to support the permanent workers by downing tools. It is also unlikely that the second charge of negligence would be found to be justifiable in the sense that it implied Simayile had a positive duty to have informed the local contract employees what had transpired at the meeting on 30 September. Ultimately, it might also be difficult to sustain the charge that he was guilty of negligence even if on 1 October, he had repeated demands that were already expressed on 30 September. There was also no evidence of him having made any misrepresentations about what had transpired in the meeting of 30 September.
- [47] Nonetheless, the gravamen of the complaint against Simayile was that he had played an active role in trying to recruit support for a work stoppage from the local contract workers by telling their CLO that tools would be

downed at all Power Construction sites on 1 October. The arbitrator's conclusion that the evidence of Power Construction's witnesses of what he said to Diyali was to be preferred over Simayile's blander version, on the face of it, appears to have been perfectly sustainable on a balance of probabilities, especially given the undisputed fact that Diyali went immediately to the site manager to report the interaction with Simayile.

[48] Simayile argued that it was not a crime to incite someone to participate in an unprotected strike, but that is something of a red herring. It is still misconduct to encourage someone to engage in unprotected strike action and such action is plainly contrary to the employer's best interests. It seems that whatever limitations some of the arbitrator's findings had, no basis has been laid by Simayile for believing he has a reasonable prospect of setting aside the finding that he was guilty of incitement, and that his role in trying to promote unprotected industrial action was serious misconduct which warranted his dismissal.

[49] Accordingly, even if prospects of success on review are considered, I am not persuaded that that would warrant condoning the unjustifiably late launch of the review. There is no additional reason in the interests of justice to condone the late filing of the application.

Order

1. The application to condone the late application to review the arbitration award of the Second Respondent issued on 14 December 2021 under the auspices of the First Respondent under case number CCEI 353-20 is dismissed.
2. The aforementioned review application is dismissed
3. No order is made as to costs.



R Lagrange
Judge of the Labour Court of South Africa.

For the Applicant

For the Third Respondent

A L Cook instructed by LDA Attorneys

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LABOUR COURT