



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

Not Reportable/Of interest to other judges

Case no: C 442/2022

In the matter between:

NONTSHA VIWE QHOLOMASHE

Applicant

and

**EDUCATION LABOUR RELATIONS
COUNCIL**

First Respondent

MATHEWS RAMOTSHELA (N.O.)

Second Respondent

**WESTERN CAPE EDUCATION
DEPARTMENT**

Third Respondent

Heard: 23 January 2025

Delivered: 24 January 2025

Summary: (Review of condonation ruling – late referral of dismissal dispute – excessive delay of 145 days - explanation of delay placed before arbitrator inadequate – arbitrator could not have dismissed prospects of success on material before him – Condonation ruling reviewable as the applicant was denied a fair hearing of her application - application remitted for rehearing)

JUDGMENT

LAGRANGE, J

Introduction

Nature of the application

- [1] This is an application to review a condonation ruling by the second respondent ('the arbitrator'). The applicant, Ms Qholomashe, had applied for condonation for the late referral of an unfair dismissal dispute, but the arbitrator dismissed her application. His main findings are set out below.
- [2] The arbitrator concluded that the delay of 145 days was excessive and such a long delay required a compelling justification for taking so long. He found that the applicant failed to advance any plausible explanation for taking so long. In his view, it was unacceptable that she could have still being attempting to obtain the reason she was not employed from the third respondent ('the department') for more than three months without having regard to the time periods. The arbitrator also noted that the applicant claimed to have entered into a fixed term contract of employment, but did not attach a copy of the alleged contract to her condonation application. For this reason, he decided that she did not have a good chance of success.

Joinder application

- [3] The applicant had not joined the department as a party to the review application, so the department itself applied to be joined as a respondent. This application was not opposed.

Evaluation of the review application

- [4] A review application based on criticising the reasoning of an arbitrator, is based on the material that was placed before the arbitrator. The condonation application was decided on the affidavits of the parties and any documents which they attached to their affidavits. According to what the applicant said in court, she had a number of documents supporting her condonation application, but these were not attached to her founding affidavit so the arbitrator did not have them before him when he made his decision. There was no oral hearing of the condonation application which was decided on the applicant's founding affidavit and the department's opposing affidavit.
- [5] To justify the long delay, this is what the applicant stated in her founding affidavit in her condonation application:

"My application is late because I went to the circuit manager's office immediately after the dismissal. I spoke to Mr. Sonamzi, who is also the circuit manager. He told me Mr. Clinton Spencer is on leave and gave me the contact details. On the 25th of January, I sent the email to him and Mr. Gershwin. Callander. I was advised by Mr. Sonamzi to also send him the email. He did not respond. I sent another one in May. And I have been trying to contact him. No one answers. And he's always not in his office. My lawyer has also been trying to resolve this, but the school doesn't want to work with him at all. I have all the proof needed."

- [6] Further, in her affidavit she referred to having signed a *"three month employment contract with the school"*, but this was also not attached to her affidavit under the heading "General" in the pro-forma condonation affidavit, she also stated:

"Any other relevant information:

I have all the proof of what I have written here. I have the emails I sent to the Circuit manager, I have Chats with Mr Sonamzi that shows that I have been trying to resolve this. I have the proof of my Contract I signed with the school and I also have the proof of the response they sent to my lawyer.”

(sic)

- [7] It should be mentioned that the department’s answering affidavit to the condonation application was not filed as part of the record. Both parties were contacted by the judge’s secretary before the court hearing, but neither party could produce the missing document. However, the department’s answering affidavit in the review application contained a summary of the main averments in the missing answering affidavit. It appears that it mostly consisted of criticisms about the merits of the condonation application, rather than adding additional factual information. In any event, the arbitrator stated that he decided the condonation application based solely on the applicant’s affidavit.
- [8] Considering the above, it seems correct that there was little supporting documentation before the arbitrator. If the arbitrator relied on the applicant’s affidavit, then he had no basis for assuming that she had not been employed for three months. Accordingly, there was no reasonable basis on which he could have come to the conclusion that the prospects of success were poor. Even if he had been provided with the school’s letter of 14 February 2022 explaining why the applicant was not teaching, that letter is capable of different interpretations.
- [9] I appreciate that the applicant is not legally trained and accordingly did not frame her review application properly. However, and that the department has, correctly in my view, not sought to take advantage of the limitations of the drafting of her grounds of review.
- [10] The overriding question this case raises is whether the arbitrator ought to have decided the application simply on the affidavit before him. The applicant explicitly mentioned that she had supporting documents to prove

why her explanation was justifiable and which had a bearing on the prospects of success. Two things should have been obvious to the arbitrator if he did not ask her to provide the same. Firstly, he would be deciding her application without any reference to documents, which were plainly relevant to the issue at hand. Secondly, there was no reason for him to believe that she would have been aware he would do so or that she knew she would not be afforded an opportunity to submit the documents after filing her application. It should have been obvious to him that she had unwittingly prejudiced her case by not attaching all those documents.

[11] This is one of those situations, where the court cannot ignore the fact that the applicant was denied a fair opportunity to present her case, irrespective of how strong or weak it might ultimately turn out to be. In my view this was a gross irregularity in the conduct of the proceedings within the meaning of s 145(2)(b)(ii) of the Labour Relations Act, 66 of 1995.¹ At the very least he should have called upon her to provide the documents and asked the parties to make further submissions if necessary. Alternatively, he could have scheduled an oral hearing with both parties present to provide an opportunity for the documents to be tabled and to hear any supplementary representations from the parties arising therefrom. In the circumstances, there is no alternative but to review the ruling and remit the condonation application for reconsideration.

Order

1. The condonation ruling of the Second Respondent dated 20 July 2022 issued under case number ELRC 173-22/23 is reviewed and set aside.
2. Within thirty (30) days of receipt of this judgment, the First Respondent must re-enrol the Applicant's condonation application for an oral hearing before an arbitrator other than the Second

¹ See *Nkomati Joint Venture v Commission for Conciliation, Mediation & Arbitration & others* (2019) 40 ILJ 819 (LAC) at paragraphs [4] and [5].

Respondent, at which the parties may provide additional evidence and submissions for and against granting condonation.

3. No order is made as to costs.

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R Lagrange

Judge of the Labour Court of South Africa.

Appearances

For the Applicant: In Person

For the Third Respondent : Adv F Rodriques instructed by State Attorney