



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

Of interest to other judges

Case no: C 312/2021

In the matter between:

CHARLES LANDRY BOUMBAYI

Applicant

And

**THE COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

First Respondent

COMMISSIONER RICHARD HEATH (N.O.)

Second Respondent

TARSUS DISTRIBUTION (PTY) LTD

Third Respondent

Heard: 25 February 2025

Delivered: 3 March 2025

Summary: (Review application – condonation ruling – late referral of unfair dismissal claim - very excessive delay – Explanation lacking any material detail – arbitrator not unreasonable in dismissing condonation application without considering merits)

JUDGMENT

LAGRANGE, JNature of the application

- [1] This is an opposed application to review a condonation ruling by a CCMA arbitrator, refusing to condone the late referral of the Mr C L Boumbeyi's unfair dismissal dispute. Boumbeyi was retrenched by the respondent ('Tarsus') on 19 June 2020.
- [2] The review application was previously enrolled for hearing on 5 October 2023 but neither party appeared at court, so it was struck off the roll. It was re-enrolled on 25 February 2025. As the second matter on the roll was more substantial and would take more time, this application was heard first and the hearing lasted approximately 30 minutes. Tarsus's legal representative was not present at that time, so only Boumbeyi presented argument. Tarsus's legal representative arrived around 11h00 after the matter had been heard. He advised the court his flight had been delayed and the court had been phoned but the message had not reached the court in session. Be that as it may, the court could not re-open the matter in the absence of Boumbeyi, but Tarsus does have the opportunity to apply for rescission of the judgment if it wishes to.
- [3] Boumbeyi claims he referred his dispute to the CCMA on 21 October 2021, but Tarsus denies receiving such a referral and also states that there is no evidence in the CCMA file of the referral of the dispute to the CCMA at that time. A second referral form signed on 2 March 2021 was received by Tarsus.

The condonation ruling

- [4] The arbitrator found that there was no proof of the referral being made in October 2020. Consequently, the only referrals he could consider was the one made on 2 March 2021. In the circumstances, he had to consider whether he should excuse a delay of 211 days, following the expiry of the 30-day period in which Boumbeyi should have referred his claim. The arbitrator correctly described the delay as 'very substantial'.

- [5] He accepted that Boumbeyi had summarised in some detail the way he was retrenched, but did not make it clear why he claimed his dismissal was unfair. He noted that Boumbeyi claimed to have difficulty recovering his provident fund contributions. Tarsus, on the other hand, denied that the retrenchment was unfair as it was preceded by a fair consultation process and there were genuine operational reasons for the retrenchment.
- [6] The arbitrator found that, apart from claiming he did refer the matter in October 2020, for which no proof of submission was provided, no explanation was provided for the delay. In the absence of any details explaining the very lengthy delay, the arbitrator decided that it was not necessary to consider the prospects of success in the unfair dismissal claim and dismissed the condonation application.
- [7] When Boumbeyi filed his application to review the ruling, he also sought a costs order against the CCMA and the arbitrator. In the light of this unusual relief, the arbitrator filed an explanatory affidavit supplementing his reasons for the award, as he was entitled to do. In that affidavit, he repeats the absence of proof of any referral in October and also explains the legal authority for his decision to dismiss the application without considering the prospects of success.

The review application

Basic principles of review proceedings.

- [8] Before discussing the review application, the nature of the procedure needs to be emphasised.
- [9] The Labour Court rules prescribe that a notice of motion and founding affidavit must be filed. Once the record has been received an applicant should file a supplementary affidavit, adding to or amending grounds of review set out in their founding affidavit. The respondent, in this case

Tarsus, must file an answering affidavit and the applicant has an opportunity to file a replying affidavit¹.

[10] In this case, Tarsus filed an answering affidavit without waiting for a supplementary affidavit from Boumbeyi. Boumbeyi still had the option of filing a supplementary affidavit if he wished to add to his grounds of review, or he could have just filed a replying affidavit to Tarsus's answering affidavit. He did neither. As a result the only affidavits before the court in the review application are Boumbeyi's founding affidavit and the answering affidavit of Ms H Liebenberg on behalf of the company.

[11] In assessing factual disputes in a motion proceeding such as this one the court is bound to follow this principle:

*“ It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order.”*²

[12] Accordingly, if Tarsus in its answering affidavit disputed an allegation made by Boumbeyi then Tarsus's version of that fact will be accepted, unless it is a bald denial or wholly implausible³. Boumbeyi could have disputed any of the new issues raised in Tarsus's answering affidavit, but did not, so new issues in the answering affidavit remain undisputed by him. I note also that in the original condonation application, Boumbeyi also did not file a replying affidavit.

[13] A second principle which applies to review applications needs to be emphasised. In a review application the court is not sitting as a court of appeal but is simply deciding if the arbitrator's decision was a completely unreasonable one. This means, it is possible even if the court might have

¹ The procedure is set out in more detail in Rule 37 of the recently updated Labour Court Rules, but the previous Rules contained almost identical provisions.

² *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634H

³ *Plascon-Evans* at 635C-D.

taken a different view if it was deciding the matter afresh, that does not matter, provided the arbitrator's decision was one that a reasonable arbitrator could have made. Another important issue to emphasise is that when the court reviews the arbitrator's decision, it assesses how reasonable the arbitrator was only with reference to the evidence that the parties placed before the arbitrator. The court cannot take into account any evidence that was not contained in the affidavits and the annexures. Accordingly, any additional evidence offered up to the court in the review application hearing cannot play a part in the court's assessment of the application. This was explained to Boubeyi when he argued his review application.

- [14] In particular, it was explained that additional details he wished to add about the reason for his long delay in referring his dispute were not ones the court could consider when it decides his review application.

Merits of the review

- [15] In his founding affidavit to set aside the condonation ruling, he raises only one complaint, namely that he contends the arbitrator was wrong in saying he referred his case to the CCMA only on 2 March 2021. In support of this he appears to state he sent the case on the same day his friend or colleague, Bojce Mhalangabezi Sani, sent a case, with case number WEPT 17286/20. Of course this somewhat vague statement was not even before the arbitrator, so the court cannot blame the arbitrator for not considering it. Even if this could be considered as a ground of review rather than a ground of appeal, it does not shed any more light on why there was no record in the CCMA file of the referral being served on Tarsus, so the first recorded referral was only made in March 2021, meaning that the delay he needed to explain was from 31 July 2020 until then.
- [16] In the circumstances, can the arbitrator be found to have made a ruling no reasonable arbitrator could have made? In his explanatory affidavit, the arbitrator mentioned the legal authority for not considering Boubeyi's prospect of success in his unfair dismissal claim. He relied on a summary

of the principles governing condonation applications in the judgment of this court in *McCann Worldgroup SA (Pty) Ltd v Landman and Others*⁴, this court summarised the legal principles applicable to condonation applications:

[34] 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.

[35] In Melane v Sanlam Insurance Co Ltd 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, 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.'

[36] In this Court however, the principles have long been qualified by the rule that where there is an inordinate delay that is not satisfactorily explained, the applicant's prospects of success are immaterial.

[37] The approach that in the absence of a satisfactory explanation for a delay, the applicant's prospects of success are ordinarily irrelevant, has been conventionally applied and was confirmed in National Education Health and Allied Workers Union on behalf of Mofokeng and Others v Charlotte Theron Children's

⁴ (JR 48/19) [2020] ZALCJHB 194 (19 June 2020)

Home where the Labour Appeal Court (LAC) held that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial.

[38] In *Collett v Commission for Conciliation, Mediation and Arbitration* the LAC held that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial and without good prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused.

[39] An applicant in an application for condonation bears the onus to satisfy the court or tribunal that condonation should be granted and it is incumbent upon such applicant to provide a full explanation for every period of the delay. The explanation for the delay must be both comprehensive and persuasive and should cover every period of the delay.

[40] In *IMATU obo Zungu v SALGBC and Others* the principle was confirmed that it is not sufficient simply to list significant events that occurred during the period in question as that does not assist the court properly to assess the reasonableness of the explanation.

[41] In summary: The Courts have endorsed the principle that where there is a delay with no reasonable, satisfactory and acceptable explanation for such delay, condonation may be refused without considering prospects of success and to grant condonation where the delay is not explained, may not serve the interests of justice. The expeditious resolution of labour disputes is another fundamental consideration."

Order

1. The review application is dismissed.
2. No order is made as to costs



R Lagrange
Judge of the Labour Court of South Africa.

Appearances

For the Applicant:

In person

For the Respondent

No appearance