

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT DURBAN**

CASE NO: D 264/99

In the matter between:

W MBATHA

Applicant

and

R LYSTER N.O.

First Respondent

INDEPENDENT MEDIATION SERVICES OF S.A.

Second Respondent

DURBAN METRO COUNCIL

Third Respondent

JUDGMENT

BASSON, J

[1] This is an application for the review of an arbitration award issued under the auspices of the Independent Mediation Services of South Africa (“IMSSA”) and conducted in terms of the Arbitration Act, 42 of 1965 (“the Arbitration Act”).

[2] In terms of section 157(3) of the Labour Relations Act, 66 of 1995 (“the LRA”) any reference to a Court in the Arbitration Act, must be interpreted as referring to the Labour Court when an arbitration is conducted under that Act, in respect of any dispute that may be referred to arbitration in terms of the LRA.

[3] It was conceded eventually by the legal representative for the applicant that this application should have been brought in terms of section 33 of the Arbitration Act and not in terms of section 145 of the

LRA, as it was originally indicated in terms of the notice of motion, especially in view of these provisions contained in section 157(3) of the LRA.

[4] It also has to be noted at the outset that the provisions of section 33 of the Arbitration Act, to a large extent, mirror the provisions of section 145 of the LRA. Both section 33 as well as section 145 clearly state that a review of an arbitration award must be brought within a specified period of six weeks after the publication thereof.

[5] This is in keeping with the general principle that the result of arbitration should lead to finality and that an arbitration should be an expeditious process, as it is also set out in terms of section 1(d)(iv) of the LRA, that is, it is the purpose of the LRA to promote the effective resolution of labour disputes.

[6] It was thus common cause that the dispute which was before the arbitrator (the first respondent) under the auspices of IMSSA (the second respondent) was a dispute as is described in terms of section 157(3) of the LRA (*supra*), that is, it was an unfair dismissal dispute.

[7] In the present matter the arbitration award was published on 25 February 1999 and three weeks later on 17 March 1999 the application for review was filed with the Labour Court.

[8] However, the application for review was only served on the third respondent by hand on 21 April 1999, some eight weeks after 25 February 1999.

[9] I quote from section 33(1) and section 33(2) of the Arbitration Act, dealing with the setting aside of an arbitration award on review:

"(1) Where -

a) any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire; or

b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers; or

c) an award has been improperly obtained,

the court may, on the application of any party to the reference after due notice to the other party or parties, make an order setting the award aside.

(2) An application pursuant to this section shall be made within six weeks after the publication of the award to the parties ...” (emphasis supplied).

[10] It was argued on behalf of the applicant that the application in the present matter was made within the required six weeks period when the application was filed with the Labour Court on 17 March 1999.

[11] However, the respondents' legal representative argued that the application was only made when it was brought on notice to the third respondent. The application was served on the third respondent on 21 April 1999, and that is, of course, outside the six weeks prescription period contained in section 33(2) of the Arbitration Act (*supra*).

[12] In this regard, I was referred to the wording of section 33(1) and (2) of the Arbitration Act (*supra*), that is, that the Court may on the application of a party, after due notice to the other party or parties, make an order setting the award aside. It was argued that it was only after it was served that such application was made “on notice to” the other party.

[13] Applicants approaching the Labour Court in terms of the above quoted provisions of section 31(1) and (2) of the Arbitration Act (read together with the above quoted provisions of section 157(3) of the LRA) must comply in bringing applications to this Court with the requirements of Rule 7 of the Rules of the Labour Court, especially with the provisions of Rule 7(1) and Rule 7(2).

[14] The provisions of Rule 7(1) and Rule 7(2) are applicable and I quote:

“(1) An application must be brought on notice to all persons who have an

interest in the application.

(2) The notice of application must substantially comply with form 4 and must be signed by the party bringing the application. The application must be delivered and must contain the following information ..." (emphasis supplied).

[15] Of crucial importance here is also the definition of "deliver" as contained in Rule 1 of the Rules of the Labour Court, where "deliver" is defined to mean:

"serve on other parties and file with the Registrar" (emphasis supplied).

[16] In my view it is clear that both the provisions of section 33 of the Arbitration Act as well as the provisions of Rule 7(1) require that an application must be brought on notice to the other parties to the application.

[17] In my view, the application *in casu* was not brought or made "on notice to all persons who have an interest in the application" unless it was served on the respondents *in casu*, including the third respondent. This is made abundantly clear by rule 7(2) which states that the application must be "delivered", and delivered meaning "filed and served" (in terms of Rule 1 quoted above).

[18] In other words, an application is inherently defective if it is not brought on notice, as is required in terms of both the provisions of section 33 of the Arbitration Act, as well as the requirements of rule 7(1) and (2) of the Rules of the Labour Court. In order to be brought on notice it must clearly be served on the other parties as required in terms of the Rules. And, of course, it must be filed with the Registrar.

[19] If the application is not duly filed with the Registrar and is merely served, such an application is inherently defective. The same principle has to apply where an application is merely filed but not served on the other parties. An application is for the same reason inherently

defective as it is not "delivered" as is required in terms of the Rules. Furthermore, it is clear that such application is not brought "on notice" as is required in terms of the provisions of section 33(1) of the Arbitration Act and, more importantly, Rule 7(1) of the Rules of this Court.

[20] The logic behind these rules and statutory provisions, it must be reiterated, is to bring finality to and to expedite arbitration proceedings. Therefore, the legislature in its wisdom has decided to introduce a prescriptive period of six weeks within which the application for a review of an arbitration award must be brought or made (two words which I accept to be synonyms).

[21] As an aside, and because this was addressed during argument, the question is whether the Labour Court on good cause shown may condone any delay outside of the six weeks period prescribed by section 33(2) of the Arbitration Act and section 145(1) of the LRA, especially because these statutory provisions do not state that the Court may condone on good cause shown.

[22] This matter was dealt with comprehensively in the Labour Appeal Court judgment of Queenstown Fuel Distributors CC v J Labuschagne n.o. and Others, (Case No PA 3/1999) a judgment by CONRADIE JA. I quote from paragraph [24]:

"In principle, therefore, it is possible to condone non-compliance with a time limit. It follows, however, from what I have said above, that condonation in the cases of disputes over individual dismissals will not readily be granted. The excuse for non-compliance would have to be compelling. The case for attacking a defect in the proceedings would have to be cogent and the defect would have to be of a kind which would result in a miscarriage of justice if it were allowed to stand" (emphasis supplied).

[23] There is, therefore, the possibility of condoning the lateness of bringing

an application for review in terms of section 33 of the Arbitration Act. I say this to address the argument put forward by the legal representative of the applicant, when he argued that, if for whatever reason, the applicant fails to serve in terms of the Rules, such service would always be fatal to its case. Provided there is a very cogent and compelling explanation why service could not have take place within the prescribed six week period, then (and only then) there is the possibility of an application for condonation being brought and for the explanation to be properly considered (see the Queenstown Fuel Distributors judgment quoted at paragraph [22] above).

[24] The further argument put forward by the legal representative for the applicant was that it is easy for the applicant in an application for review to file because it is known where to file the document. However, it is sometimes difficult to get hold of the respondent(s) to serve the application.

[25] I believe that the policy behind Rule 4 of the Rules of the Labour Court is to protect the interests of applicants, as long as they serve in terms of Rule 4. Rule 4(2) applies and states clearly that proof of service, for instance, where service is effected by way of registered post or fax number, is proven in Court merely by filing an affidavit stating that the application was either posted by registered post and affixing the necessary certificate or that it was faxed by telephone and affixing the necessary fax certificate to such affidavit.

[26] If there is no response by the respondent(s) for whatever reason, such matter can then, of course, proceed by default. As long as the application was served on the correct address or faxed to the correct telephone number, the matter can be taken care of by default.

[27] It is only if the respondent later comes into the picture, for instance, even after an order has been granted and an application for rescission is made, that such application can then be considered. In all other circumstances a judgment by default will go ahead.

- [28] I do not want to be too discursive on these issues save to state that I believe that the Rules of Court are fair where they deal with service and that they are not inherently unjust. In my view, the Rules of Court are not unjust as far as the interests of both applicants and respondents are concerned.
- [29] In the facts which present themselves in the present matter, the applicant clearly knew where to find the respondent as the application papers were hand delivered on 21 April 1999, and this is then clearly not a matter where the papers were not received by the respondent (and, as I said, receipt of the documents is in any event not the operative requirement). Further, the applicant has sought to file on 17 March 1999. However, without any explanation, even up to today, the applicant did not serve the application within the six weeks' requirement as set out in section 33(1) of the Arbitration Act.
- [30] In the event, a substantive application for condonation was called for which could then have been addressed in terms of the very strict test for condonation set out in the Queenstown Fuel Distributors judgment (referred to at paragraph [22] above), where especially the "excuse for non-compliance would have to be compelling".
- [31] However, at this stage no application for condonation has even been made although the third respondent already in filing its answering affidavit almost a year ago (on 28 May 1999) alerted the applicant to the need to apply for condonation. Neither has any explanation at all been offered for this failure.
- [32] It is my ruling that a substantive application for condonation was required *in casu*.

In the event, in view of what was stated above, especially the strict test for condonation in reviews of arbitration awards (*supra*) and in the complete absence of an explanation for the failure *in casu* as well as the fact that no application was made for condonation at all, it follows that the application

stands to be dismissed.

[33] The only question that remains is the question of costs.

[34] It would appear to me that the applicant was already alerted to the fact that there should be an application for condonation as early as May 1999. Nevertheless, the applicant, to his own detriment, decided not to make an application for condonation in this matter, having hereby occasioned the dismissal of the application for the reasons set out above.

[35] In the event, I regard it as fair to make an order that the applicant is to pay the respondent's costs.

[36] I make the following order:

The application is dismissed with costs.

Basson, J

10 February 2000

10 February 2000 (*ex tempore*)