THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR2418/21

In the matter between:

MATOME DAN MAILA **Applicant**

and

METAL AND ENGINEERING INDUSTRIES BARGAINING COUNCIL **First Respondent**

MONICE ROODT *N.O.* **Second Respondent**

CGIS REFRIGERATION GROUP (PTY) LTD **Third Respondent**

Heard: **20 August 2024**

Order: **20 August 2024**

Reasons: These reasons for the order are handed down electronically by circulation to the applicant by email. The date of hand-down is deemed to be 6 November 2024.

REASONS

MAKHURA, J

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[1] This review application, accompanied by an application for condonation for its late delivery, was enrolled for hearing on an unopposed motion roll on 20 August 2024. After hearing arguments from Mr Bheki Zwane from the trade union BIFAWU on behalf of the applicant, this Court issued an order in terms of which the application for condonation was dismissed and consequently dismissing the review application.

[2] On 11 September 2024, the applicant filed a written request for the reasons for the order. These are the reasons for the order.

[3] The applicant was dismissed on 27 May 2020. He referred an unfair dismissal dispute to the first respondent on 12 June 2020. The 30-day period lapsed on 12 July 2020. He requested arbitration on 2 December 2020. His request for arbitration was accompanied by a condonation application.

[4] The matter was set down for hearing on 26 January 2021. The parties presented oral submissions in support of and against the application for condonation. The commissioner issued a handwritten ruling the same day, 26 January 2021, refusing the application. Although the ruling was issued on the same day, the applicant alleges however that after the submissions, the commissioner informed the parties that the ruling would be issued within fourteen days.

[5] In her analysis of the application, the commissioner noted that the applicant referred the dispute for conciliation on 12 June 2020, that the dispute was not conciliated and that the 30 days from the date of the referral of the dispute expired on 12 July 2020. The commissioner calculated the 90 days after the expiry of the 30 days and found that the request for arbitration should have been made on 10 October 2020. The applicant requested arbitration on 2 December 2020, more than seven weeks outside the prescribed period. The commissioner continued:

> ‘The applicant submits that the reason for the lateness is that various follow ups were made on a date for conciliation, but no feedback was received. The respondent submits that an email was sent to their office on 1 October 2020 informing them of the need for a conciliation application, but the email went

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> unnoticed. No further explanation is offered for the application only being filed on 02/12/2020.'

[6] The commissioner concluded that the applicant and his trade union failed to take reasonable steps to enforce his right to pursue the dispute, that the applicant failed to show good cause for the indulgence he sought and dismissed the application.

[7] The review application, which incorporated a condonation application, was served on 10 December 2021 and filed on 23 December 2021. The applicant states in his affidavit that after the commissioner advised the parties that the ruling would be issued within fourteen days, he allegedly made several enquiries regarding the issuing of the ruling. He then allegedly approached his "legal advisors" and subsequently received the ruling. He contends further that he always intended to pursue the dispute, that the delay was caused by the first respondent and that he "*only learnt about this ruling*" on 4 November 2021. He concluded that:

> 'I therefore submit that the matter was referred to the Labour Court within [the] prescribed time and that it is clear to see that the Applicant did not abandon the matter and that it was his intention of persisting with the Application to the appropriate forum.'

[8] After stating that the review application was filed timeously, he pleaded that should the Court find that the matter was referred outside the prescribed period, the period for the delay is five months. He contends that five months is not excessive. It is unclear on what basis he contends that the delay would be five months.

[9] The application is devoid of any explanation between 27 January 2021 and 4 November 2021, the date when he allegedly learned of the ruling. The upshot of the applicant's explanation is this: after the oral arguments on 26 January 2021, the parties were informed that the ruling would be issued within 14 days; he made several attempts to enquire about the ruling; he approached his legal advisors; he only learned about the ruling on 4 November 2021.

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[10] There are no details of when and how he made these alleged several enquiries. He has not referred to any specific date when these enquiries or attempts were made, when and how he spoke to the first respondent or his trade union, who he spoke to at the first respondent or trade union and their response. The approach to the "legal advisors" is unsubstantiated. The "legal advisors" have no names and their involvement in the matter is unknown. The date on which he approached them was also not pleaded. Further, the applicant did not state how he "learned" about the ruling.

[11] The applicant's affidavit contains bald and unsubstantiated allegations which cannot be regarded as adequate or sufficient. His allegation that he learned of the ruling on 4 November 2021 is therefore rejected. The applicant was aware of the ruling on the date of its issue, alternatively should have been aware of it at least within the 14 days that he alleged the commissioner informed the parties that it would be issued.

[12] On the prospects of success, the applicant submitted that he had good prospects in that his request for arbitration was never late. The applicant seeks to upset the ruling on two grounds. First, he contends that the commissioner committed a gross irregularity, failed to apply her mind and misconstrued the evidence because his referral was made within the 90-day period. The second ground is that the commissioner erred in finding that the referral was late. It is evident that both grounds of review are directed at the commissioner's finding that the referral of the dispute to arbitration was late. The applicant disputes that his referral of the dispute to arbitration was late.

[13] Section 191 of the Labour Relations Act[1] deals with the referral of unfair dismissal disputes for conciliation and arbitration. The current matter concerns a referral of the dispute to arbitration. Section 191(5) of the LRA regulates this issue. It provides that the unfair dismissal dispute may be referred to arbitration at the request of the employee after a certificate of non-resolution was issued pursuant to conciliation

[1] Act 66 of 1995, as amended.

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or if a period of 30 days has expired since the employee referred the dispute to conciliation.

[14] The unfair dismissal dispute was not conciliated after it was referred on 12 June 2020. The commissioner correctly calculated that the 30 days after the referral of the dispute for conciliation expired on 12 July 2020 and that the 90 days after the expiry of the 30-day period expired on 10 October 2020. The request for arbitration was only made on 2 December 2020. Therefore, the applicant's view that his referral of the dispute to arbitration was not late is misguided.

[15] Insofar as the merits of his unfair dismissal dispute are concerned, in his application for condonation before the first respondent, the applicant alleged that he was "*dismissed for social distancing as [he] was looking for [his] payslip and enquiring about the amounts*". He contended that he was not aware that he was not observing social distancing and that the charge did not warrant dismissal. No further particulars of the charge are set out. He did not state whether the dismissal was preceded by a hearing or not. This Court is not placed in a position to know or understand the reason for the applicant's dismissal and the grounds for challenging his dismissal.

[16] The six weeks within which the applicant should have brought this review application is calculated from date of the ruling is 26 January 2021. That period lapsed on 9 March 2021. The delay is therefore approximately 9 months. This is excessive. Even if the alternative argument advanced by the applicant that the delay is five months is to be accepted, this period remains unexplained and is excessive.

[17] It is not possible to glean from the papers the reason for his dismissal and his challenge thereto. The applicant has not pleaded any prejudice. The applicant has therefore failed to show good cause why the Court should condone the late

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delivery of his review application. Having considered the above factors, I concluded that it is not in the interest of justice to grant condonation application.[2]

[18] For the above reasons, I proceeded to issue the order as set out above.

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M. Makhura

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr B. Zwane (BIFAWU Official)

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[2] *Grootboom v National Prosecuting Authority and Another* 2014 (2) SA 68 (CC); [2014] 1 BLLR 1 (CC) at paras 22 – 23; *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others* 2000 (2) SA 837 (CC); 2000 (5) BCLR 465 (CC) at para 3; *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)* 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC) at para 20.