THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Not of interest to other judges

Case No: JR 2309/2017

In the matter between:

OTHUSITSE ISOP SELEKE **Applicant**

and

COMMISSION FOR CONCILIATION EDIATION AND ARBITRATION **First Respondent**

MATANE VICTOR SEHUNANE N O **Second Respondent**

LITTLE GREEN BEVERAGES (PTY) LIMITED **Third Respondent**

Heard: **25 August 2021**

Delivered: **This judgment was handed down electronically by circulation to the parties' representatives by email and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 30 August 2021.**

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Summary: Condonation application – no reasonable explanation for late review application – no reasonable explanation why record served 8 months late – condonation refused – matter deemed withdrawn in any event

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JUDGMENT

COETZEE AJ

[1] The applicant approaches this Court to review and set aside an arbitration award dated 26 March 2017 under reference GAEK9209-16 in which the second respondent held the dismissal of the applicant to be fair. The procedure was not in dispute.

[2] The third respondent asks the Court to bar the applicant from any relief as the applicant did not comply with the registrar's directive to file heads. The applicant in replying heads tendered an explanation which is accepted.

[3] The review application was served late, and the applicant first seeks condonation.

The application to condone the late filing of the review application

The degree of lateness

[4] The applicant in its founding affidavit supporting the review application sets out his case in support of the condonation application.

[5] The application for review was served on 19 October 2017. That is approximately five and a half months late. The applicant alleges that it was 21 weeks late.

[6] The delay is excessive.

The explanation for the delay

[7] The applicant was represented by a union official in the arbitration. The union (FAWU) received the award by fax on 28 March 2017.

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[8] On an unspecified date the union informed the applicant that:

> " … they took instructions to review the matter and I (the applicant) was under the impression that they had referred the matter to the Labour Court".

[9] It is not clear from whom the union took instructions. It is also not clear what made the applicant believe that the matter had been referred to the Labour Court as the union only conveyed to him that it "took instructions".

[10] The applicant explained further that a month after the award was issued, he made enquiries to establish that the union had not yet referred the matter to the Labour Court. That must have been towards the end of April 2017. According to the applicant the union also explained that the union was unable to get hold of their attorney that would handle the matter.

[11] This prompted the applicant on an unspecified date to approach the insurance company that covered his costs in an eventuality such as this, who then appointed an attorney to represent the applicant. When the applicant consulted with the attorney it was the first time, according to the applicant, that he learned that there was a time constraint.

[12] The applicant does not allocate dates to these events that occurred over a period of 6 months between the end of April 2017 and October 2017.

[13] The third respondent challenged this explanation for the lack of detail and lack of dates. The third respondent also cast doubt on the explanation that the applicant was unaware of the six-week period as he was represented by FAWU, an experienced union, during the arbitration and when the award was issued.

Prejudice

[14] The applicant submitted that he would suffer more prejudice than the third respondent as the third respondent still had the relevant documentation available to proceed with the matter.

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The prospects of success

[15] The applicant makes the bald statement that he has good prospects of success on the merits as the dismissal was both substantively and procedurally unfair. He does not say in what respect.

[16] It is incumbent upon the applicant to go further than making a bold statement[1]:

> "[5] The applicant is required to show good cause for the late filing of her statement of case. The court must necessarily take into account the degree of lateness, the reason for lateness, the applicant's prospects of success, any prejudice to the respondent and any other relevant factors. In regard to prospects of success, it is not necessary for an applicant to prove that he or she will succeed when the merits of the matter considered; it is necessary only to provide a basis to establish that the applicant has a good chance of succeeding when the matter is heard. This requires an elucidation of the prospects of success beyond a broad and sweeping statement to the effect that the applicant has good prospects – the averment must be substantiated." (own emphasis)

Analysis of the condonation application for the late filing of the review

The principles applicable to the granting of condonation

[17] The relevant legal principles to be applied in an application for condonation are well established. This Court is required to exercise a discretion, having regard to the extent of the delay, the explanation for that delay, the prospects of success and the relative prejudice to the parties that would be occasioned by the application being granted or refused. The interest of justice will ordinarily reflect regard to all these factors.

[18] The Labour Appeal Court in *NUM v Council for Mineral Technology*[2] said the following:

> " The approach is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness

[1] Public Servants Association v GPSSBC case JR 1354-2018 (unreported)
[2] [1999] 3 BLLR 209 (LAC) at para 10

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to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefore, the prospects of success and the importance of the case. These facts are interrelated: they are not individually decisive. What is needed is an objective conspectus of all the facts. A slight delay and a good explanation may help to compensate for prospects of success which are not strong. The importance of the issue and strong prospects of success may tend to compensate for a long delay. There is a further principle which is applied and that is that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused."(own emphasis)

[19] In *Melane v Sanlam Insurance Co Ltd*[3] 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."

[20] In *A Hardrodt (SA) (Pty) Ltd v Behardien and others*[4] (Behardien) the Labour Appeal Court (LAC) restated the guidelines laid down in *Queenstown Fuel Distributors CC v Labuschagne NO and others*[5] inter alia that there must be good cause for condonation in the sense that the reasons tendered for the delay have to be convincing. In other words, the excuse for non-compliance with the six-week time period must be compelling. The onus is on the applicant for condonation to satisfy the Court that condonation should be granted.

[21] In this Court 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.

[3] 1962 (4) SA 531 (A) at 532 C - F.
[4] (2002) 23 ILJ 1229 (LAC).
[5] (2000) 21 ILJ 166 (LAC).

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[22] The general principles applicable to deciding applications for condonation apply even more stringently where it comes to review applications. In *National Union of Metalworkers of SA on behalf of Thilivali v Fry's Metals (A Division of Zimco Group) and others*[6] the Court held that:

> 'What is clear from the judgment in *Hardrodt* is that general principles applicable to condonation applications are even more stringently applied where it comes to a condonation application for the late filing of a review application. In review condonation applications, the explanation that needs to be submitted must be compelling and the prospects of success need to be strong. Where it comes to the issue of prejudice, the applicant in fact has to show that a miscarriage of justice will occur if the applicant's case is not heard. The reason for these more stringent requirements is that review applications occur after the parties have already been heard, presented their respective cases and a finding has been made. Under such circumstances, considerations of justice, fairness and expedition require that challenges of such findings must not be delayed and must be completed as soon as possible.'

[23] The court in *Thilivali* added the following consideration when evaluating condonation applications in reviews:

> 'It must also always be considered that the applicant for condonation actually bears the onus to prove good cause for condonation to be granted in terms of the principles set out above. There is, however, an additional consideration which applies in employment disputes in determining whether an applicant for condonation has discharged this onus. This is the fundamental requirement of expedition. The Constitutional Court has, as a matter of fundamental principle, confirmed that all employment law disputes must be expeditiously dealt with and any determination of the issue of good cause must always be conducted against the back drop of this fundamental principle in employment law.'

[24] The courts have held and emphasised that in applications to review and set aside arbitration awards, an applicant must act with the necessary degree of diligence required by the Rules of this Court and the Practice Manual, thus giving effect to the statutory imperative of expeditious dispute resolution.

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[6] (2015) 36 ILJ 232 (LC).

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[25] In *Toyota SA Motors (Pty) Ltd v CCMA and others*[7] the Constitutional Court emphasised that one of the fundamental purposes of the Labour Relations Act[8] (LRA) was to establish a system for the simple, quick, cheap and informal adjudication of labour disputes. When it assesses the reasonableness of a delay, the Court must not lose sight of this purpose.

[26] 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 such as the present, seeks an indulgence and bears the onus to show good cause and a proper case should be made out before the indulgence could be granted.

[27] It is in this context that the application for condonation stands to be determined.

[28] The review application was filed excessively late.

[29] The third respondent with justification opposes the application for condonation on the basis that the explanation lacks any detail, and the explanation does not cover all the delays. Especially those between April and October 2017.

[30] In the absence of a reasonable explanation for the delay there is no need to consider the prospects of success.

[31] The applicant must in any event deal with the prospects of success in the condonation application. His failure to do so renders the application defective. The applicant made the bland statement that his dismissal was unfair. He does not refer to the arbitration award or indicate why it was unfair. He had to deal with the prospects of success in having the award set aside.

<u>Application to condone the late filing of the record and the supplementary affidavit</u>

[32] The applicant filed the transcribed record and the supplementary affidavit late. He also seeks condonation which again is opposed. He filed a separate affidavit in support of this application. The Practice Manual provides that if the record is filed outside the 60-day period, the review application is deemed

[7] (2016) 37 ILJ 313 (CC).
[8] Act 66 of 1995 as amended.

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withdrawn. It was incumbent upon the applicant to apply for the re-instatement of the review.

[33] The applicant submitted that as the third respondent did not object against the late filing of the affidavit, it was unnecessary for the applicant to apply for condonation. This applies to the affidavit itself but not to the filing of the record.

[34] The late filing of the record resulted in the application having been deemed withdrawn and thus dismissed.

[35] I am considering the condonation application as an application to re-instate the review as the same considerations apply.

The delay

[36] The applicant explained that the Registrar informed the applicant on 8 November 2017 that the record was available for collection.

[37] The applicant does not say when he served the record and supplementary affidavit.

[38] The respondent, however, stated that it was common cause that the applicant only served the supplementary affidavit on 22 January 2019, more than a year late.

[39] The proof of service provided by the applicant shows that the supplementary affidavit was served on 30 November 2018.

[40] According to the papers the registrar received a copy of the transcribed record on 30 November 2018.

[41] The transcript was served almost 8 months late and the supplementary affidavit at least so much.

[42] The lateness is excessive.

[43] There was no application for an extension of time or to obtain the consent of the third respondent.

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The explanation for the lateness

[44] The applicant explains that he collected the record on 4 December 2017 and submitted same to the transcribers, presumably on the same date.

[45] The transcribers on an undisclosed date requested the applicant to obtain from the CCMA the rest of the audio recording.

[46] The applicant on 6 March 2018 enquired from the CCMA as to the rest of the audio recording. There is no explanation as to why it took until 6 March before the request was submitted.

[47] Thereafter on 24 April 2018 the CCMA informed the applicant that the audio recording had been submitted to the Labour Court for collection.

[48] The only further explanation is that once the transcription was done, the applicant's attorneys had to submit a quotation to the insurer to procure payment.

Prospects of success

[49] The applicant made the same allegations as to his prospects of success as in the application to condone the late filing of the review application. He is silent on any prospects of success in reviewing the arbitration award.

Prejudice

[50] The applicant blandly stated that he would suffer more prejudice than the third respondent if condonation is refused.

Analysis of the application for condonation for the late filing of the transcription of the record and the supplementary affidavit

[51] The third respondent correctly points out that there is no explanation why the applicant waited from 8 November 2017 to 4 December 2017 to collect the audio recording from the Labour Court. Further, the certificate of veracity was signed by the transcribers on 20 August 2018, but the record was only served on 30 November 2018 without any explanation for this delay.

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[52] After collecting the record on 4 December 2017, a further 3 months expired to 6 March 2018 before the applicant took a further step. There is no reasonable explanation for this period of delay either apart from saying that the transcribers informed the applicant of the inadequacy of the recording.

[53] There is also no reasonable explanation for the period from 24 April 2018 until 14 December 2018 when the affidavit was served.

[54] The explanation for the delay in serving the record and the supplementary affidavit is hopelessly inadequate.

[55] The decision in *NUM v Council for Mineral Technology* is relevant.

[56] In this matter the applicant has failed dismally to give a reasonable explanation for the delay in serving the transcript and the supplementary affidavit.

[57] For that reason, it is not necessary to visit the prospects of success. The applicant in any event failed to address the prospects of success in reviewing the award.

[58] The applicant has failed to reasonably explain his delay in launching the review application and in serving the transcribed record and the supplementary affidavit. The applicant has failed to show why the review application should be re-instated.

[59] Both applications for condonation stand to be dismissed.

Costs

[60] Although the review application was doomed from the start I am of the view that it is not a matter where a cost order is appropriate.

Order

[61] I make the following order:

1. The application for condonation for the late filing of the review is dismissed with no order as to costs.

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2. The review application is in any event deemed to have been withdrawn and the application to re-instate (or condone) the review application is dismissed with no order as to costs.

3. The Court does not have jurisdiction to entertain the review application and the application is struck from the roll.

F. Coetzee

Acting Judge of the Labour Court of South Africa

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Appearances

For the applicant:	Mr T Graham of Graham Attorneys
For the Third Respondent:	Adv S Mahantola
Instructed by:	Ronelda van Staden Attorneys

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