IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR 2459/21

In the matter between:

LEKGOTHO PHILLIP **Applicant**

and

MAMBA SECURITY SERVICES **First Respondent**

RENANI EWART MUTUMBA N.O. **Second Respondent**

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **Third Respondent**

Heard: **8 October 2024**

Delivered: **27 February 2025**

This judgment was handed down electronically by consent of the parties' representatives by circulation to them via email. The date for hand-down is deemed to be on 27 February 2025.

JUDGMENT

MILO, AJ

[1] This is an unopposed application to review and set aside a ruling made by the second respondent (the commissioner) dated 21 September 2021 under the auspices of the third respondent.

[2] The impugned ruling (the ruling) refused to condone the applicant's late request for the arbitration of a dismissal dispute.

Background facts

[3] The applicant was dismissed from the first respondent's employ in December 2020 on account of various allegations of misconduct.

[4] Thereafter, the applicant's trade union, the Transport and Allied Workers Union (TAWUSA) referred an unfair dismissal dispute to the third respondent on the applicant's behalf.

[5] After a certificate of outcome was issued, the applicant did not refer the dispute for arbitration within the 90-day time period required by section 136(1)(b) of the Labour Relations Act (LRA)[1]. It is common cause that the request for arbitration was served on the first respondent on 6 May 2021, some 17 days later than required. It was therefore necessary that the applicant apply for, and obtain, condonation for the belated request for arbitration, before the third respondent would have jurisdiction to arbitrate the dispute.

[6] A condonation application was brought by TAWUSA on behalf of the applicant. The deponent to the founding affidavit in that condonation application was Mr Ngoepe, an official of TAWUSA.

[7] The primary reason advanced for the late request for arbitration was that an office bearer of TAWUSA had forgotten to make the request timeously and that it was only when Mr Ngoepe made an enquiry with the third respondent a day earlier,

[1] Act 66 of 1995, as amended.

that it emerged that the request had not been made by the office bearer. Mr Ngoepe also submitted that the late request was not willful. He contended that the mistake was that of TAWUSA and not that of the applicant himself.

[8] The first respondent opposed the condonation application.

[9] The submissions of the parties and the commissioner's reasoning are captured in the ruling.

[10] Dealing firstly with the period of delay, the commissioner accepted that the request for arbitration was served upon the first respondent on 6 May 2021, however, it was found that the request was filed with the third respondent later, such that the request was actually 118 days late.

[11] Turning to the explanation for the delay, the commissioner referred to the decision of the Labour Appeal Court (LAC) in *PPWAWU and Others v AF Dreyer and Co (Pty) Ltd* [2] as authority for the principle that where delays are occasioned by the negligence of a representative, there are limits to which a party can rely on such negligence as justification for condonation, even where they are personally innocent of such tardiness.

[12] The commissioner went on to find *in casu* that:

> 'It must be borne in mind that the 90-day time period is the time limit prescribed by law cannot be simply ignore [sic] because it was not the applicant's fault but the trade union representative. I believe that both the applicant and the trade union representative had equal responsibility to ensure that the referral was filed timeously.'

[13] The commissioner found that the delay was extremely excessive and that no satisfactory explanation had been provided to justify this delay.

[2] [1997] 9 BLLR 1131 (LAC).

Grounds of review

[14] The applicant's grounds for review are set out in paragraphs 17 to 20 of his founding affidavit. The applicant did not file a supplementary founding affidavit. He instead filed a notice in terms of former rule 7A(8)(b) of the Labour Court rules[3] stating that he stands by his notice of motion.

[15] It is trite that an applicant is bound by the grounds for review contained in the review application, subject to the qualification that the Court is obliged to deal with a point of law apparent from the papers.[4] No point of law is apparent on the papers.

[16] The applicant *in casu* is thus confined to the grounds of review contained in his review application and it is those grounds that shall be considered in this judgment.

[17] The sum total of the applicant's grounds for review are that he had been misled by the union into believing that the request for arbitration had been made, with the result that he was, during the period in question, merely awaiting a date for arbitration. He contends that it was only when he had attended the offices of the third respondent with his union on an unrelated matter and insisted that his union official make enquiries about the status of his matter, that he discovered, much to his surprise, that it had never been referred by his union for arbitration. The applicant thus contends that the commissioner erred in finding that the applicant should have made the necessary enquiries.

[3] GN 1665 of 1996: Rules for the Conduct of Proceedings in the Labour Court, repealed with effect from July 2024.

[4] *Commercial Workers Union of SA v Tao Ying Metal Industries and Others* (2008) 29 ILJ 2461 (CC); [2008] ZACC 15. See also the recent case of *IPP Mining and Materials handling (Pty) Ltd v The Commission for Conciliation, Mediation and Arbitration and Others* [2024] ZALCJHB 294 at paras 12 and 13 where it was stated that: "*In short: it is critical that the factual foundation of the review application, including the relevant evidence or reference thereto, be canvassed in the founding or supplementary affidavit and that it be linked to the applicant's grounds for review… Grounds for review cannot be formulated for the first time in heads of argument*…".

Evaluation

[18] The commissioner's ruling may be reviewed and set aside only if there are cognizable grounds to justify such intervention. The mere fact that the present review application is not opposed does not, in itself, entitle the applicant to relief as a matter of course. The applicant retains the duty to establish that the ruling is reviewable on recognised legal grounds.[5]

[19] For the ruling to be reviewed and set aside, the applicant was required to establish that the commissioner's decision was unreasonable. It bears emphasis that this Court's powers of intervention in review proceedings are narrowly circumscribed. This Court may only review and set aside an arbitration award or ruling if it is shown to contain a defect as contemplated by section 145 of the LRA which renders the award or ruling so unreasonable that no reasonable decision-maker could have reached the same conclusion. This standard of reasonableness, established in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[6], places a high threshold on applicants seeking to challenge an arbitration outcome or a ruling.

[20] Given the nature of this test, it is not often that this Court will interfere with arbitration awards or rulings.[7]

[21] Apt to this review application, it should be emphasised that the review process is not concerned with whether the commissioner's decision was correct, nor does it involve an assessment of whether this Court, had it been tasked with exercising discretion in the first instance, might have reached a different conclusion. The proper enquiry is whether the commissioner's decision falls within the range of reasonable outcomes that a reasonable decision-maker could reach, based on the evidence that was before him or her.

[5] *MEC - Public Works and Infrastructure Free State Provincial Government v GPSSBC and others* [2019] JOL 43374 (LC).
[6] [2007] 12 BLLR 1097 (CC); (2007) 28 ILJ 2405 (CC).
[7] *Buta v CCMA Pretoria and Other* [2019] ZALCJHB 233.

[22] I have already pointed out that, in his founding affidavit in the review application, the applicant contends that the commissioner erred in finding that he ought to have made enquiries regarding the status of his matter, "*despite the fact that I was misled by the Union*" into believing that the unfair dismissal claim had already been referred to arbitration. However, this specific allegation, namely, that the applicant was misled by his union, is not one that was advanced in the applicant's condonation application. Instead, in his condonation application, it was merely stated that the union "*forgot*" to deliver the request timeously and that his union only discovered the omission upon making enquiries with the CCMA. The assertion that the applicant himself was actively misled, or that it was the applicant himself who personally initiated relevant enquiries being made, appears for the first time in the present review application.

[23] As pointed out, the reasonableness of the condonation ruling must be assessed based on the evidentiary material that was before the commissioner at the time the decision was made by him.[8]

[24] During argument, the applicant's legal representative appeared to appreciate this difficulty and submitted that, particularly on account of the poor drafting of the founding affidavit in the condonation application, it would be appropriate for the Court to *"read into"* that affidavit the meaning as now contended for by the applicant. This Court was referred to averments in the condonation application which, it was argued, support the applicant's present contention, in particular those (i) when setting out an explanation for the late referral, it was explained that the union office bearer *"forgot*" to deliver the request timeously. The deponent (being Mr Ngoepe) alleged that it was only when he (Mr Ngoepe) made enquiries with the CCMA that he discovered that the request had not been made, and (ii) it was maintained that the late request was not willful, asserting that the "*the mistake*" was committed by the union rather than by the applicant.

[8] *Malatlhela v Maxi Security and others* [2020] JOL 46931 (LC) at para 6, and the authorities cited therein.

[25] The Court was referred to the recent decision of the Labour Appeal Court (LAC) in *Cape Peninsula University of Technology v Kabengele and others*[9] *(CPUT)* in support of the submission that a *"reading into"* the affidavit *in casu* is permitted and warranted.

[26] This Court must determine whether the applicant's new contention can be reasonably inferred from his original averments that featured in his condonation application or whether it constitutes an entirely new factual averment. In *CPUT*, the LAC held that although pleadings must be precise, an applicant should not be non-suited merely due to a lack of explicit formulation where the substance of the ground can be discerned from the papers. However, *CPUT* also makes it clear that raising a new review ground of substance at the hearing of a matter is impermissible.

[27] In the present case, the applicant's condonation application makes no mention of being misled by the union or that the applicant instigated the initiation of a follow-up enquiry. His current assertions, for example, that he was misled, go beyond a mere refinement of his original explanation and instead introduce a new factual basis for the delay, which was not before the commissioner. Unlike the litigant in *CPUT*, who merely relied on a legal positioning that was not correctly explicitly advanced, but the substance of which was contained in his pleadings, the applicant *in casu* advances an entirely new factual basis that was not present before the commissioner.

[28] It is so that the approach adopted in *CPUT* cautions against reliance on technical defences that do not serve the interests of justice in labour disputes. However, in this instance, the issue at hand is not a mere technicality but rather a significant departure from the case presented in the condonation application. The applicant cannot seek to circumvent the requirement that a condonation application must contain a full and proper explanation for the delay by introducing a new explanation at the review stage.

[9] (2024) 45 ILJ 1973 (LAC); [2024] 6 BLLR 553 (LAC).

[29] In these circumstances, in my view *CPUT* does not assist the applicant. To permit a party to introduce a new factual basis for review in this manner would offend the principle that a review application, in the circumstances of the present case, must be determined on the evidence that was before the commissioner at the time that he was taking the decision.

[30] It should also be observed that in advancing this ground of review, the applicant, in my view, appears to approach this review application on the premise that the commissioner's ruling was wrong in substance. The applicant misconstrues the nature of a review and has approached the matter as if this is an appeal.

[31] There are clear distinctions to be drawn between a review and an appeal. An appeal concerns itself with the correctness of the decision, allowing an appellate body to substitute its own findings for those of the original decision-maker. A review, by contrast, is far more limited in scope and concerns itself with the process and reasonableness of the decision rather than its correctness.

[32] In this case, my view is that the commissioner properly considered the evidence presented to him, appreciated the nature of the enquiry before him and applied the correct legal test. In exercising his discretion, he took into account the relevant factors and arrived at a decision that was reasonable in the circumstances. The commissioner accepted that the applicant's union erred in not delivering the request for arbitration timeously, however, he also found that this notwithstanding, the applicant also bore responsibility to ensure the expeditious pursuit of the dispute resolution mechanisms provided for in the LRA, and that the applicant was thus also blameworthy. Based upon the facts and evidence before the commissioner, I do not consider the commissioner to have arrived at an irrational view.

[33] Accordingly, in my view, the applicant has failed to demonstrate that the commissioner's ruling was irrational or otherwise unreasonable to the extent that it justifies judicial interference. To the extent that the applicant's union may have

mishandled the applicant's case (and I make no finding that it did), the applicant was entitled to pursue a claim against his union.[10]

[34] However, there is no basis upon which this Court can interfere with the commissioner's ruling, and the application for review must fail.

[1] In the premises, I make the following order.

Order

1. The application is dismissed.

2. There is no order as to costs.

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S. Milo
Acting Judge of the Labour Court of South Africa.

[10] See for example *Food and Allied Workers Union v Ngcobo N.O. and Another* [2013] ZASCA 45; (2013) 34 ILJ 3061 (CC).

Appearances:

For the Applicant:	Galaletsang Phakedi, Legal Aid South Africa
For the First Respondent:	No appearance
For the Second Respondent:	No appearance
For the Third Respondent:	No appearance