

SOUTH AFRICA / JUDGMENT

Khumalo v Commission for Conciliation, Mediation and Arbitration (JR2680/22) [2025] ZALCJHB 245 (25 June 2025)

[2025] ZALCJHB 245

COURT

Labour Court Johannesburg

BEFORE

N Tshisevhe

CASE / FILE NUMBER

JR2680/22

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THE LABOUR COURT OF
SOUTH AFRICA, JOHANNESBURG

Not Reportable
case

No: JR2680/22

In

the matter between:

NOMFUNDO
KHUMALO
Applicant
and
COMMISSION
FOR CONCILIATION MEDIATION
AND
ARBITRATION ('CCMA')
First Respondent
COMMISSIONER
THANDIWE TSHAYAN N.O
Second Respondent
STANDARD
BANK OF SOUTH AFRICA
Third Respondent

Heard: 4 February 2025

Delivered: 25 June 2025

JUDGMENT

TSHISEVHE, AJ

Introduction

- [1] An application for review is regulated in terms of Section 145(1)(a) of the Labour Relations Act[1] (LRA).
- [2] The Applicant herein (Ms Nomfundo Khumalo) filed a review application within the required time frames.
- [3] As per the Applicant's submission, the review application was not properly before the court as the founding affidavit could not be found in the Court file.
- [4] The Applicant established the issue of a missing founding affidavit on the 23rd of November 2023 when she uplifted the court file and was, as a result, advised to file a condonation application.
- [5] The condonation application is not opposed.

Material background facts

- [6] The Applicant was employed by the Third Respondent on 8 November 2017 as a Universal Cash Consultant (Teller).
- [7] The Applicant's responsibilities included, amongst others, balancing cash daily, reporting differences, as well as maintaining effective security controls, including maintaining a high level of honesty, integrity and ethical standards.
- [8] At the time of the commission of misconduct, the Applicant had been off duty for some two weeks as her mother who also works for the same company took ill and she only returned to work on 20 December 2021.
- [9] That on the day she returned to work she was assigned till 41 and at the end of the day her till reflected as balanced.
- [10] That the following day on 21 December 2021, during a monthly surprise check of Applicant's cash balance in her till, her supervisor (Alleta Mukosi) discovered a bag of R20 in R1.00 coins in the Applicant's till tray which was not accounted for.
- [11] That she ought to have reported the said money and same should be investigated as it violates banking rules and procedures.

- [12] That upon investigations, it was discovered that on 20 December 2021, the Applicant attempted to balance her till four times where she consistently reflected an amount of R11 in a form of R1.00 coins which was contrary to the R31 in R1.00 coins that was discovered during the surprise check.
- [13] That during further investigation, it was discovered in the CCTV footage that the Applicant's attempts to balance her till on 20 December 2021 had a discrepancy of R0.50c in her balancing till, which was in the following manner:
- 13.1 On her first balancing attempt, records showed an amount of R22,50 in R0,50c coins and as a result, a difference in the amount of R20.50 was recorded;
- 13.2 On her second attempt, the records showed an amount of R2.50 in R0,50c coins with a difference of R0,50c being recorded.
- 13.3 On the last attempt, records showed an amount of R2.00 in R0,50c coins and ultimately, no difference was recorded. The till was balanced.
- [14] That on the CCTV footage the Applicant was seen removing the R0,50c coin from the till.
- [15] That the Applicant was trained in her duties as she attended courses and she was well aware of what was expected of her in line with Bank's Code of Ethics.
- [16] That in terms of Bank's Disciplinary code, falsification of bank records is a dismissible offence as it destroys trust relationship.
- [17] The Applicant was suspended on 22 December 2021 and appeared before a disciplinary enquiry on 4 March 2022 facing charges of misconduct relating to dishonesty as a result of falsification of balancing records and failure to follow company procedures in that she failed to notify her line manager of the discrepancy during her till balancing process.
- [18] The third charge was that of dishonesty owing to her misappropriation of funds from her till.
- [19] The Applicant was acquitted of charge two and found guilty of charge one and three which led to her dismissal on 11 March 2022.
- [20] The Applicant referred her dismissal case to the First Respondent with the Second Respondent as an arbitrator.
- [21] The Second Respondent dismissed her application hence she filed for review of such award citing several grounds of irregularities.
- [22] The Applicant filed a review application outside the prescribed time lines and as a result, the review application will be preceded by the application for condonation.

Condonation for the late filing of the review application

- [23] The facts are recorded in the papers, and there is no need to burden this judgment with a repetition.
- [24] However, it is sufficient to state that it is common cause that the notice of motion of the review application was filed timeously, however, the founding affidavit went missing from the Court file.
- [25] It is trite that if condonation is not granted, this Court lacks the necessary jurisdiction to consider the review application, and if the condonation is granted, it is only then that I will turn to consider the review application.
- [26] One of the purposes of the LRA is the speedy resolution of disputes. Therefore, when a party is dilatory in instituting or referring a dispute to this Court, they are sort of defeating the purpose of the LRA, which in the end frustrates the opponent in the matter.
- [27] However, it is not all the time where the delay in finalising or filing for a review is deliberate or wilful.

Reason for the delay

- [28] The Applicant argued that she filed the review application within the required time lines, however, the founding affidavit went missing from the Court file.
- [29] Therefore, without any opposition of such application, this Court is inclined to accept the averred reason as it seem reasonable.

Length of delay

- [30] The founding affidavit replacing the missing founding affidavit was filed on 4 April 2023, some period of around four months after the original documents were filed.
- [31] The length of delay is excessive.

Prospects of success

- [32] The Applicant's prospects of success can be well gleaned in the founding affidavit.
- [33] The law does not require that prospects of success be excellent but reasonable.
- [34] It is trite that a satisfactory explanation of delay may compensate the prospects of success.
- [35] I should state outright that in my view, the period of delay is excessive but given the explanation herein such delay is not unreasonable as it is apparent from the application.

Prejudice

- [36] It is trite that the Applicant stands to suffer prejudice should this condonation application be refused.

Analysis

of condonation application

[37] Turning to the substance of the Applicant's Condonation Application, it is important to first identify the legal principles applicable to condonation applications.

[38] In accordance with the provisions of section 145 (1)A of the LRA, this Court may on good cause shown condone the late filing of a review application.

[39] It is well accepted that condonation cannot be had for the mere asking. This notion was emphasised in *Grootboom v National Prosecuting Authority and Another*,^[2] where the Constitutional Court, per the majority judgement, stated that:

[22] ...[T]he standard for considering an application for condonation is the interests of justice. However, the concept "interests of justice" is so elastic that it is not capable of precise definition. As the two cases demonstrate, it includes: the nature of the relief sought; the extent and cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the importance of the issue to be raised in the intended appeal; and the prospects of success. It is crucial to reiterate that both Brummer and Van Wyk emphasise that the ultimate determination of what is in the interests of justice must reflect due regard to all the relevant factors but it is not necessarily limited to those mentioned above. The particular circumstances of each case will determine which of these factors are relevant.

[23] It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or court's directions. Of great significance, the explanation must be reasonable enough to excuse the default.'

[40] The well-established legal principles are set out in *Melane v Santam Insurance Co. Ltd*^[3] (*Melane*). The approach which the Labour Court and the Labour Appeal Court (LAC) have followed in determining whether good cause has been shown is the often-referred-to passage enunciated by Holmes JA in *Melane*:

'In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, 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...'

[41] In applying the ratio in *Melane*, the Court in *Academic & Professional Staff Association v Pretorius NO & others*,^[4] summarised the principles for consideration as follows:

[17] The factors which the court takes into consideration in assessing whether or not to grant condonation are:

- (a) the degree of lateness or non-compliance with the prescribed time frame; (b) the explanation for the lateness or the failure to comply with time frame; (c) prospects of success or bona fide defence in the main case; (d) the importance of the case; (e) the respondent's interest in the finality of the judgment;
- (f) the convenience of the court; and (g) avoidance of unnecessary delay in the administration of justice...

[18] It is trite law that these factors are not individually decisive but are interrelated and must be weighed against each other. In weighing these factors for instance, a good explanation for the lateness may assist the applicant in compensating for weak prospects of success. Similarly, strong prospects of success may compensate the inadequate explanation and long delay.[5]

[42] In this Court, the principles have long been qualified by the rule that where the period of delay is satisfactorily explained, the applicant's prospects of success are compensated.

[43] I therefore see no reason why the application for condonation for the late filing of the review application should not succeed.

[44] I now turn to consider the review application.

Arbitration proceedings

[45] The Second Respondent found that the dismissal of the Applicant was substantively fair on the following grounds:

45.1 That the Applicant in her statement seems to be in agreement that she had differences in her till, however, same was caused by seizures that be fell her.

45.2 That she had a clean record and the sanction of dismissal was therefore inappropriate.

45.3 That the extra R20 that was found in her bag of coins was never miraculous because when the money was counted by her supervisor, it was done in her presence.

45.4 That the Applicant failed to produce any proof to support her allegations that someone might have placed the extra coins in her bag.

45.5 However, the Applicant's defence is contrary to what she wrote in her statement that she wrote when asked to explain what happened where she stated that: "I thought I had balanced properly the previous day but to my surprise I had mistakenly omitted a tray of R1.00 which amounted to R20 and this happened because I had seizures about four times the previous day and I forced myself to come to work..."

45.6 That the Applicant argues that when she wrote the above statement she did not have any legal representative to guide her. However, the above statement debilitate her case, let alone being deleterious to her defence.

45.7 That the Applicant was aware of the rules as per her concession during cross-examination.

45.8 That the Applicant could be seen from the CCTV footage taking the R0.50c from the till and putting it in her pocket in order to manipulate the system. This she did after several attempts to balance with no success.

45.9 That the Applicant's submission that she did not put anything in her pocket is rejected as her hand became free after that, and her till then balanced.

45.10 That it is common cause that the Applicant's conduct attracts a penalty of dismissal in terms of the Third Respondent's code.

Grounds for review

[46] The Applicant raised several grounds of review and the salient one are summarised below as follows:

46.1 That the award is unreasonable based on the totality of evidence before the arbitrator. More especially considering that she never had differences or surpluses in her till for a period of a year.

46.2 That she had seizures and had to be transported to the hospital with an ambulance.

46.3 There is no evidence that she took the R0.50c, even though the Second Respondent said during the hearing that she cannot see anything.

46.4 That her physician recommended that she be removed from stressful duties or cash space.

46.5 That she was dismissed without considering her health in general.

46.6 That in the morning of the incident, she forced herself to attend to work, whereas she had seizures five times and her health was capricious.

The Issue to be decided

[47] I am required to determine whether the finding of the Second Respondent that the dismissal of the Applicant was substantively fair based on the totality of evidence before her.

[48] If I find that it was unreasonable, I am required to interfere with such a decision and substitute it with an appropriate one.

Test for review

[49] The test that the Labour Court is required to apply in a review of an arbitrator's award is to determine whether the decision reached by the commissioner is one that a reasonable decision maker could not reach within the totality of evidence at his disposal.

[50] The Constitutional Court settled the issue of the test for review of an arbitration award in the case of *Sidumo & another v Rustenburg Platinum Mines Ltd & others (Sidumo)*. [6] The Court at paragraph 110 held that the test for review is whether the decision reached by the Commissioner is one that a reasonable

decision maker could not reach in relation to the totality of evidence before him or her. [7]

[51] This Court is entitled to intervene if and only if the arbitrator's decision is one that falls outside of a band of decisions to which a reasonable decision-maker could come to on the available material evidence before her.

[52] The LAC in *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration & others* [8] affirmed the test to be applied in review proceedings and held that:

'[16] In short: A reviewing court must ascertain whether the arbitrator considered the principal issue before him/her; evaluated the facts presented at the hearing and came to a conclusion that is reasonable.

...

[18] ... the reviewing court is not required to take into account every factor individually, consider how the arbitrator treated and dealt with each of those factors and then determine whether a failure by the arbitrator to deal with one or some of the factors amounts to process related irregularity sufficient to set aside the award. This piecemeal approach of dealing with the arbitrator's award is improper as the reviewing court must necessarily consider the totality of the evidence and then decide whether the decision made by the arbitrator is one that a reasonable decision maker could make.'

Analysis of

submissions

[53] The law justifies setting aside an award on review if the decision is "entirely disconnected with the evidence" or is "unsupported by any evidence" and involves speculation by the commissioner.

[54] The Applicant tenaciously argued that she did not have surplus before, however, in her statement she indicated otherwise as the Second Respondent found.

[55] The Applicant in buttressing her case submitted that the surplus found in her till bag might have been placed there by someone else without supporting same with evidence.

[56] The Second Respondent's finding that the Applicant can be seen from the CCTV footage placing something in her pocket and thereafter her till balanced cannot be ignored as they both enervate her case flagrantly so.

- [57] In this regard, I am not convinced that the Applicant has demonstrated material errors in the award of the Second Respondent. On the other hand, the Applicant's serendipity should be praised.
- [58] In determining whether the result of an arbitrator's award is unreasonable, the Labour Court must broadly evaluate the merits of the dispute and consider whether the arbitrator's reasoning is found to be unreasonable, the result is nevertheless capable of justification for reasons other than those given by the arbitrator.[9]
- [59] The result will, however, be unreasonable if it is entirely disconnected from the evidence, unsupported by any evidence and involves speculation by the arbitrator.
- [60] I do not see any reason to excoriate the findings of the Second Respondent, as her finding is pithily or succinctly addressed.
- [61] I am not convinced that the award is entirely disconnected from the evidence before the arbitrator.
- [62] The epiphany of the surplus money found in the till bag of the Applicant resonates well with the decision of the arbitrator.

Conclusion

- [63] Having considered the evidence adduced at the arbitration proceedings, the findings made by the arbitrator and the grounds for review as raised by the Applicant, I find that the arbitrator's award is reasonable under the circumstances.
- [64] Therefore, there is no reason for me to interfere with her decision as it is a reasonable one.
- [65] The award of the Second Respondent seems to be sagaciously arrived at, and the reasons provided therein are, in my view, legally sound, factually correct, and highly substantiated by the transcript.
- [66] Pursuant to the above, the arbitrator's decision does pass the Sidumo test.

Costs

- [67] I have had regard to the requirements of law and fairness in considering costs and am of the view that costs should only be awarded where it is warranted.
- [68] I am of the view that a cost order is not warranted in this matter.
- [69] In the premises, I make the following orders:

Order

1. Condonation for the late filing of the review application is hereby granted.
2. The review application is hereby dismissed.

3. No order is made as to costs.

N Tshisevhe

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant: Ms N Khumalo

Instructed by: Self Representing

For the Respondent: Mr Doctor Cithi

Instructed by: Taback Attorneys Inc

[1] Act 66 of 1995, as amended.

[2] 2014 (2) SA 68 (CC); [2014] 1 BLLR 1 (CC) (Grootboom).

[3] 1962 (4) SA 531 (A); [1962] 4 All SA 442 (A) at 532C - E.

[4]

(2008) 29 ILJ 318 (LC); [2008] 1 BLLR 1 (LC) at paras 17 - 18.

[5] See also: Minister of Public Works and Infrastructure v GPSSBC and others [2024] JOL 65513 (LC).

[6]

(2007) 28 ILJ 2405 (CC) (Sidumo) at para 110.

[7] In CUSA v Tao Ying Metal Industries and others [2008] ZACC 15; [2009] 1 BLLR 1 (CC); 2009 (1) BCLR 1 (CC) at paras 76 and 134 the Constitutional Court held that it is now axiomatic that a commissioner of the CCMA (or an arbitrator of a bargaining council) is required to apply his or her mind to the issues before him or her and that failure to do so may result in the ensuing award being reviewed and set aside. The irregularity must, however, result in an unreasonable outcome or misconception of the true enquiry, resulting in no fair trial of the issues. See also Sidumo.

[8]

(2014) 35 ILJ 943 (LAC) at paras 16 and 18.

[9] See: National Union of Mineworkers & another v Samancor Ltd (Tubatse Ferrochrome) & others

(2011) 32 ILJ 1618 (SCA); [2011] 11 BLLR 1041 (SCA).

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