

SOUTH AFRICA / JUDGMENT

Maake v Commission for Conciliation, Mediation and Arbitration and Others (JR2313/16) [2024] ZALCJHB 481 (25 November 2024)

[2024] ZALCJHB 481

COURT

Labour Court Johannesburg

BEFORE

Connie Prinsloo

CASE / FILE NUMBER

JR2313/16

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THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

reportable

Case

no: JR 2313/16

In

the matter between:

MAHLOKWE
JACKSON MAAKE
Applicant
and
COMMISSION
FOR CONCILIATION,
MEDIATION
AND ARBITRATION
First
Respondent
EVA
NGOBENI N.O
Second
Respondent
HERNIC
FERROCHROME (PTY) LTD
Third
Respondent

Heard: 14 November 2024

Delivered: 25 November 2024

This judgment was handed down electronically by consent of the parties' legal representatives by circulation to them via email.

The date for hand-down is deemed to be 25 November 2024.

JUDGMENT

PRINSLOO, J

Introduction

- [1] The Applicant was employed by the Third Respondent (Respondent) in August 2004 as a storeman and he was dismissed in February 2014 following a disciplinary hearing where he was found guilty of misconduct. The charges related to acts of gross negligence.
- [2] The Applicant subsequently referred an unfair dismissal dispute to the First Respondent, challenging the substantive fairness of his dismissal. The arbitrator had to consider whether the sanction of dismissal was appropriate. The Second Respondent (arbitrator) found that the Applicant was indeed negligent, but it was not so gross that it warranted dismissal. The arbitrator concluded that the sanction imposed was too harsh, but due to the strained relationship between the Applicant and his supervisor, she found that the circumstances surrounding his dismissal were such that a continued employment relationship would be intolerable.
- [3] An arbitration award was issued on 24 June 2015 wherein the arbitrator ordered the Respondent to pay the Applicant compensation equivalent to eight months' salary.
- [4] On 27 October 2016 the Applicant filed an application to review and set aside the arbitration award dated 24 June 2015 in terms of the provisions of section 145 of the Labour Relations Act[1] (LRA). The relief sought was for the arbitration award to be reviewed and set aside and to be substituted with a finding that the Applicant's dismissal was substantively unfair and that he be reinstated retrospectively.
- [5] On 23 April 2019 the Applicant filed a supplementary affidavit.
- [6] On 5 June 2020 the Applicant filed an application for an order to reinstate the review application filed under case number JR 3213/2016 and for condonation for the late filing of the record in the review application.

[7] On 26 July 2021 the Applicant filed an application for condonation for the late filing of his supplementary affidavit.

[8] The Respondent opposed all the aforesaid applications.

[9] The following applications are before this Court: a review application and an application to re-instate the review application

and to condone the late filing of the record and the Applicant's supplementary affidavit.

[10] Before I deal with the merits of any of the applications pending before this Court, there is an important issue that calls for consideration namely the question of jurisdiction. It is obvious that the Court must have jurisdiction to adjudicate the pending applications before the merits of those applications could be considered.

Jurisdiction

[11] Section 145(1)(a) of the LRA provides that a review application should be filed within six weeks of the date the award was served on the applicant. Section 145(1A) provides that the Labour Court may condone the late filing of a review application on good cause shown.

[12] The arbitration award was received by the Applicant on 24 June 2015 and calculating the prescribed six week period, the review application should have been filed by 5 August 2015. The review application was only filed with the Registrar of the Labour Court on 27 October 2016, which was more than one year and two months late.

[13] Whether a review application was filed within the prescribed six week period, is a fact or element which goes to establishing the jurisdiction of this Court to adjudicate and hear the application.

[14] In *Ellerine Holdings Ltd v Commission for Conciliation, Mediation and Arbitration and others*[2] the Court has held that:

'Where the non-compliance relates to a statutory provision, ie as set out in an Act, then failure to comply with those provisions goes to jurisdiction. In such cases (for example where time-limits relate to jurisdiction) an application must be made to court to condone the non-compliance. In circumstances where the time-limit is prescribed by the rules, this court would be prepared to entertain a matter in spite of the fact that the pleadings were not filed within the prescribed time-limits, as long as there is no objection thereto by the party who stands in opposition to the party who has failed to comply with the time-limits prescribed by the rules of this court.

[15] The late filing of a review application constitutes a failure to comply with a statutory provision and not a time limit prescribed by the rules.

[16] In casu the review application was filed outside the prescribed six week period and the Applicant had to apply for condonation. There is no application for condonation for the late filing of the review application.

- [17] The Applicant filed a supplementary affidavit on 23 April 2019, more than two and a half years after the filing of his review application. At the end of the supplementary affidavit the Applicant dealt with the reason for lateness, the degree of lateness, prospect of success and prejudice. Although this purports to address the factors to be considered in an application for condonation, there are several difficulties with the approach taken by the Applicant.
- [18] First, there is no relief sought in the notice of motion in respect of the condonation for the late filing of the review application. The Applicant did not at any stage file an amended notice of motion to include a prayer for condonation for the late filing of his review application to be granted. Technically condonation is not sought or prayed for and it is unclear how the Applicant expects that relief not prayed for could be granted.
- [19] Second, condonation is to be applied for as soon as it becomes evident that a condonation application is necessary. It should have been clear to the Applicant when he filed his review application more than one year late, that condonation had to be applied for. No condonation was sought when the review application was filed and the need to ask for condonation was obvious. There is no explanation as to why the issue of condonation was raised for the first time more than two years later and that in a supplementary affidavit.
- [20] Third, affidavits filed in review applications serve two primary purposes: to define the issues between the parties and to place the essential averments and evidence before the other parties and the court. Rule 7A of the Labour Court Rules (the Rules) in terms of which this application was brought, provided for the delivery of four sets of affidavits in review applications namely a founding, supplementary, answering and replying affidavit.
- [21] In recognition of the fact that the record obtained by an applicant in a review application may reveal that averments made in the founding affidavit were erroneously made or necessary averments were omitted or need elaboration, Rule 7A(8)(a) permitted the applicant to deliver a supplementary affidavit within 10 days after the record is made available. This afforded the applicant the opportunity to supplement and/or amend the factual and legal grounds upon which he or she relies in light of the record.[3] As a general principle, the applicant in a review application must make out his or her case in the founding affidavit, as may be supplemented by a supplementary affidavit, if necessary, after the review record became available.
- [22] The purpose of a supplementary affidavit is to amend or supplement the grounds for review raised in a founding affidavit after the record of the proceedings was made available. The purpose is not to introduce averments, purporting to be related to a condonation application, when no relief in respect of condonation was sought in the first place.

- [23] Fourth, the Applicant concluded by stating that “there are proper grounds established in the founding affidavit to put the court in apposition (sic) to grant condonation for the late filing of the statement of case.” This statement is misleading. No facts were set out in the founding affidavit relating to the issue of condonation and there was no statement of case filed.
- [24] The Applicant’s review application was filed late and an application for condonation was necessary. Absent such an application, there is no case before this Court.
- [25] In *SA Transport and Allied Workers Union v Tokiso Dispute Settlement and others*[4] the LAC confirmed that where a party is out of time (even where an application is filed one day late) and has to take the jurisdictional step to apply for condonation but failed to do so, a court cannot come to the party’s assistance. The LAC held that in the absence of an application for condonation, the Court cannot assist the party.
- [26] The same principle applies in casu where the reality is that the Applicant had to apply for condonation for his failure to comply with a statutory time period and he failed to do that. It follows that absent an application for condonation this Court has no jurisdiction and cannot come to the Applicant’s assistance.
- [27] Even if I were to take a lenient approach and consider the averments in the Applicant’s supplementary affidavit, the Applicant’s difficulties remain and his case cannot be rescued. This is so for the reasons set out infra.
- [28] 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 the 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.
- [29] In *A Hardrodt (SA) (Pty) Ltd v Behardien and others*[5] (Behardien), the Labour Appeal Court (LAC) restated the guidelines laid down in *Queenstown Fuel Distributors CC v Labuschagne NO and others*[6] as 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 period must be compelling. The onus is on the applicant to satisfy the court that condonation should be granted
- [30] In this Court, however, 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.

[31] The general principles applicable to deciding applications for condonation apply even more stringently when 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*[7] (Thilivali), 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.’

[32] The court in *Thilivali* added the following consideration when evaluating condonation applications in reviews[8]:

‘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.’

[33] The courts have held and emphasised that in applications for review, an applicant must necessarily act with the degree of diligence required by the Rules of this Court[9] and the Practice Manual[10], thus giving effect to the statutory imperative of expeditious dispute resolution.

[34] In *Colett v Commission for Conciliation, Mediation and Arbitration and others*,[11] the LAC confirmed that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial and without good prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused.

[35] The first issue to be considered is the degree of lateness. In *casu*, the review application was filed more than twelve months late. A delay of more than a year is material, given the fact that a review application has to be filed within six weeks and considering the context within which labour litigation takes place and the system

that is designed to ensure the effective and expeditious resolution of labour disputes. The Practice Manual (now repealed but applicable

at the time of the filing of this application) expressly stated that a review application is by its nature an urgent application.

- [36] Section 145(5) of the LRA provides that an applicant for review must apply for a date for the matter to be heard within six months of the delivery of the application. In this context a delay more than 12 months is not insignificant, but is excessive and material.
- [37] As the Applicant seeks an indulgence from the Court and bears the onus to satisfy the Court that condonation should be granted, it is incumbent on him to provide the Court with a full explanation for every period of the delay. It is not sufficient simply to list significant events that occurred during the period in question as that does not assist the court to properly assess the reasonableness of the explanation.[12] In short: the explanation for the delay must be comprehensive, convincing and compelling and should cover every period of the delay.
- [38] The explanation tendered for the delay, as it appears from the Applicant's supplementary affidavit, is that after he had received the arbitration award, he instructed his attorney to review the award, but it was delayed due to a conflict of interest. In October 2015 he contacted his insurer, Legal Wise for assistance and cover was only given in September 2016. A consultation with his attorney was scheduled for 13 September 2016 and in mid-October 2016 it was decided to proceed with the review application.
- [39] This is the explanation provided. The question is whether it constitutes a comprehensive, convincing and compelling explanation.

In my view, it does not at all. The Applicant should provide a full and detailed explanation for every period of the delay and it is not sufficient to simply list significant events that occurred during the period of the delay. Instead of providing an explanation that would assist this Court to understand the reasons for the delay, the Applicant provided a sketchy account of events with reference to only a few dates during a lengthy period of delay.

- [40] In fact, what had been presented to Court, is not an explanation but rather a vague statement of facts, bereft of any substance and wholly inadequate. There is no detailed account of or explanation as to material periods of the delay and this Court is in no position to understand or assess the reasonableness of the delay. The Applicant bears the onus to show that there is good reason for condonation to be granted, but he failed dismally in this regard.
- [41] In casu there is a further delay that cannot be ignored and that is the fact that condonation was only raised in a supplementary affidavit filed on 23 April 2019, more than two and a half years after the filing of his review application and more than three years after the review application was supposed to be filed. It is trite that an application for condonation must be brought as soon as it was

discovered that it would be necessary to bring such application, and this fact should have been clear to the Applicant by September 2016, when he consulted with his attorneys. There is no explanation tendered for the late introduction of the issue of condonation.

[42] The delay in filing the review application and in raising the issue of condonation is excessive and not minimal or insignificant. The degree of lateness is material considering the fact that the dispute arose as far back as 2014 and more than ten years later, the matter is not closer to finality.

[43] The Applicant dismally failed to tender a convincing, reasonable and acceptable explanation for the delay. Instead, he tendered a flimsy and sketchy explanation which did not cover significant periods of the delay and for other periods no explanation at all is tendered. The Applicant failed to discharge the onus to show good cause as to why the indulgence of condonation should be granted.

[44] Having considered that the period of the delay in the filing of the review application is material and the explanation tendered wholly inadequate, it leaves the issue of prospects of success.

[45] In the authorities referred to supra, the courts have endorsed the position that the failure to provide a reasonable and acceptable explanation for the delay renders prospects of success immaterial. This was also confirmed in *Grootboom v National Prosecuting Authority and another*,^[13] where the Constitutional Court has held that:

‘The interests of justice must be determined with reference to all relevant factors. However, some of the factors may justifiably be left out of consideration in certain circumstances. For example, where the delay is unacceptably excessive and there is no explanation

for the delay, there may be no need to consider the prospects of success. If the period of delay is short and there is an unsatisfactory explanation but there are reasonable prospects of success, condonation should be granted. However, despite the presence of reasonable prospects of success, condonation may be refused where the delay is excessive, the explanation is non-existent and granting condonation would prejudice the other party.’

[46] In view of the authorities referred to supra and my finding that the delay is material and the explanation tendered not satisfactory, the Applicant’s prospects of success are immaterial and thus need not be considered.

[47] Even if I were to consider the prospects of success, a perusal of the averments made by the Applicant in respect of the issue of prospects of success does not assist this Court in assessing the Applicant’s prospects of success. In his supplementary affidavit the Applicant did no more than to state that he has prospects of success “as set out above and which I incorporate herein as of specifically averred and set out hereinabove.” The Applicant did not deal with his ‘prospects of success’ ‘hereinabove’, but instead he dealt with his grounds for review. Effectively, the Applicant stated that his prospects of success are his grounds for review.

- [48] This is wholly inadequate and is of no assistance to this Court. The Applicant seeks an indulgence and must make out a case for the indulgence he seeks. A vague averment to the effect that the prospects of success appear from the grounds for review does not assist this Court at all. This is so for the following reasons. First, the review application sets out the facts of the case and the grounds of review. It does not deal with prospects of success and such prospects are not automatically evident from the grounds for review. Second, the application is opposed and the averments made in respect of the grounds for review, are disputed by the Respondent. It follows that this Court cannot simply have regard to the contents of the review application, as filed by the Applicant, and conclude that there are prospects of success on review. More is required.
- [49] The Applicant submitted that he would suffer prejudice should condonation not be granted. This Court is not told what his prejudice would be, apart from the fact that his grounds for review would not be considered if his application is not heard. He stated that the Respondent would suffer no prejudice. This is disputed by the Respondent. The Respondent submitted that it would be prejudiced because the matter was delayed for an extensive period and the evidence is lost. Furthermore, the Applicant was paid the eight months' compensation he was awarded and if the relief he seeks namely reinstatement is granted, it would severely prejudice the Respondent.
- [50] The result of the refusal to condone the late filing of the review application will be that the Applicant will be denied the opportunity to pursue this case before Court. However, it is evident that the Applicant did not pursue his case diligently. He filed the review application more than one year late and only filed a supplementary affidavit, and not a proper application for condonation, another two and a half years later. This is not indicative of a litigant who was serious to pursue his matter and who diligently complied with time frames and applicable rules.
- [51] The notion that litigants will be denied access to a court to ventilate their case cannot be examined within a paradigm that ignores the interests of the adversary, nor of the ordinary dynamics of litigation, more especially, because the reality is that litigation is a process in which adversaries make choices. If the consequences of choices that are made, or the consequences of inaction and tardiness are that opportunities to pursue the matter are forfeited, it does follow that there is a failure of justice. The litigation system affords litigants a process within which they must navigate their own routes and it is no failure of justice if their journey culminates in a dead end.[14]
- [52] The Constitutional Court, in the opening paragraph of *Toyota SA Motors (Pty) Ltd v CCMA and Others*[15] held that:
- 'Time periods in the context of labour disputes are generally essential to bring about timely resolution of the disputes. The dispute resolution dispensation of the old Labour Relations Act was uncertain, costly, inefficient and ineffective. The new Labour Relations Act (LRA) introduced a new approach to the adjudication of labour disputes. This alternative process was intended to

bring about the expeditious resolution of labour disputes which, by their nature, require speedy resolution. Any delay in the resolution of labour disputes undermines the primary object of the LRA. It is detrimental not only to the workers who may be without a source of income pending the resolution of the dispute but, ultimately, also to an employer who may have to reinstate workers after many years.'

[53] This Court has a discretion, which must be exercised judicially on a consideration of the facts of each case and in essence, it is a matter of fairness to both sides. While the refusal to condone the late filing of the review application will result in the Applicant being denied the opportunity to pursue his case before this Court, the Respondent's prejudice outweighs the Applicant's prejudice.

[54] Most importantly, I have to endorse the aim of the LRA, namely to resolve labour disputes speedily and without delay. Granting condonation in a case like this would not be in the interest of justice as it would undermine the statutory purpose of expeditious dispute resolution.

[55] There is however a further difficulty in the Applicant's case. This is the fact that the Applicant was paid in accordance with the terms of the arbitration award and he had kept the money so paid without any tender to pay it back.

[56] The doctrine of peremption is well established in our law and was explained in *Hlatshwayo v Mare and Deas*[16] as follows:

'[A]t bottom the doctrine is based upon the application of the principle that no person can be allowed to take up two positions inconsistent with one another, or as it is commonly expressed to blow hot and cold, to approbate and reprobate.'

[57] The concept of peremption is based on the general notion that a litigant has an election to make: either to accept or to reject the outcome of the judgment or the arbitration award. As a general rule a party that perempts the arbitration award would not be

entitled subsequently to challenge that arbitration award. The basic requirement, however, to sustain a claim of peremption entails having to show that the acceptance of the outcome of the arbitration award expressly or by conduct was unequivocal.

[58] In casu the Applicant accepted and kept the compensation paid to him, he did not object to it, he attached no condition to it and he communicated no intention whatsoever to the Respondent that he would launch an application for review, nor did he reject the money or tendered to pay it back. The Applicant's intention was clearly to accept and keep the money paid to him as compensation, as awarded in the arbitration award. Only in October 2016, more than a year after he had received the arbitration award and after he had received and accepted the payment, the Applicant filed a review application.

- [59] This conduct of the Applicant when he accepted and retained the money paid as compensation, does not support an objective intention to challenge the award and is inconsistent with such intention. The money he kept was compensation payable in terms of the arbitration award and by accepting and retaining it, he accepted it to be the outcome of the arbitration.
- [60] Considering all the facts placed before this Court, I am not inclined to condone the late filing of the Applicant's review application and therefore this Court has no jurisdiction to adjudicate the review application. It follows that if the Court does not have jurisdiction to adjudicate the review application, it has no jurisdiction to adjudicate an application to reinstate the same review application, over which it has no jurisdiction

Costs

- [61] The last issue to be decided is the issue of costs.
- [62] In so far as costs are concerned, this Court has a broad discretion in terms of section 162 of the LRA to make orders for costs according to the requirements of the law and fairness.
- [63] The requirement of law has been interpreted to mean that the costs would follow the result. In considering fairness, the conduct of the parties should be taken into account and mala fides, unreasonableness and frivolousness are factors justifying the imposition of a costs order.
- [64] In *Zungu v Premier of Kwa Zulu-Natal and Others*[17] the Constitutional Court confirmed that the rule that costs follow the result does not apply in labour matters. The Court should seek to strike a fair balance between unduly discouraging parties from approaching the Labour Court to have their disputes dealt with and, on the other hand allowing those parties to bring to this Court (or oppose) cases that should not have been brought to Court (or opposed) in the first place.
- [65] This is a matter where this Court has to strike a balance.
- [66] Mr Wissing for the Respondent submitted that a cost order should be made in favour of the Respondent. He submitted that this is an old matter where the arbitration award was issued eight years ago and not a single time frame had been complied with. The Applicant should have withdrawn the application, yet he persisted with a meritless application. There is no ongoing relationship between the parties and the Respondent had to incur unnecessary costs in defending this matter. The Applicant has a legal insurer who could assist him in paying the costs.
- [67] Mr Bucksteg for the Applicant submitted that the Applicant is an unemployed layperson and that the cover from his legal insurer had been depleted and he is paying from his own pocket.

[68] In my view, this is a case where a cost order is warranted. This is more so as the Applicant was legally represented and did not approach this Court as an unrepresented layperson.

[69] Although this is a case where a cost order would be justified, more so where the Applicant instructed lawyers to act on his behalf and where a meritless application was persisted with, I am mindful of the fact that the Applicant is unemployed and even if a cost order is granted, he would in all probability not be able to pay the Respondent's costs. Having said that, it should not be understood to mean that being unemployed is a license to pursue meritless applications without any consequences. More so when lawyers are instructed to act.

[70] In the premises I make the following order:

Order

1. The review application is struck off the roll for lack of jurisdiction;
2. There is no order as to costs.

Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances:

On behalf of the Applicant: Advocate H Bucksteg

Instructed by: Kietzmann and Weideman Attorneys

On behalf of the Third Respondent: Mr H Wissing from Henk Wissing Inc Attorneys

- [1] Act 66 of 1995, as amended.
- [2] (2002) 23 ILJ 1282 (LC) at para 13.
- [3] Reviews in the Labour Courts, Myburg and Bosch, Lexis Nexis, 2016 at p 438 – 441.
- [4] (2015) 36 ILJ 1841 (LAC).
- [5] (2002) 23 ILJ 1229 (LAC) at para 3.
- [6] (2000) 21 ILJ 166 (LAC).
- [7] (2015) 36 ILJ 232 (LC) at para 22.
- [8] Thilivali (Ibid) at para 25.
- [9] GN 1665 in GG 17495 of 14 October 1996 [with effect from 11 November 1996].
- [10] Practice Manual of the Labour Court of South Africa, effective 2 April 2013.
- [11] [2014] 6 BLLR 523 (LAC).

[12] See: Independent Municipal and Allied Trade Union on behalf of Zungu v SA Local Government Bargaining Council and others

(2010) 31 ILJ 1413 (LC).

[13] (2014) 35 ILJ 121 (CC) at para 51.

[14] See: Edcon Ltd v Steenkamp and others

[2017] ZALAC 81; (2018) 39 ILJ 531 (LAC) at para 34. [15] (2016) 37 ILJ 313 (CC) at para 1.

[14] See: Edcon Ltd v Steenkamp and others

[2017] ZALAC 81; (2018) 39 ILJ 531 (LAC) at para 34.

[15] (2016) 37 ILJ 313 (CC) at para 1.

[16] 1912 AD 242.

[17] (2018) 39 ILJ 523 (CC) at para 24.

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