

SOUTH AFRICA / JUDGMENT

Mabhaso v Astron Energy (Pty) Ltd and Others (C594/2023) [2024] ZALCCT 41 (20 September 2024)

[2024] ZALCCT 41

COURT

Labour Court Cape Town

BEFORE

De Wet

CASE / FILE NUMBER

C594/2023

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FLYNOTES:

LABOUR – Dismissal –
Misappropriated funds –
Payment by company for university
course – Applicant only paying portion to university –
Senior employee where
conduct breached trust relationship –
Commissioner finding dismissal fair – Substantial delay in
review blamed
on legal representative – Applicant took no
responsibility for his matter – No prospects of success –
Condonation
application dismissed.
THE
LABOUR COURT OF SOUTH AFRICA
HELD
AT CAPE TOWN
CASE
NO: C 594/2023
In

the matter between:

THEMBILE
MABHASO
Applicant
and
ASTRON
ENERGY (PTY) LTD
First
Respondent
NATIONAL
BARGAINING COUNCIL
FOR
THE CHEMICAL INDUSTRY
Second
Respondent
COMMISSIONER
LM TAYLOR N.O.
Third
Respondent
Date
of Hearing: 26 June 2024
Date
of Judgment: 20 September 2024

Summary:

This is an opposed application to condone the significantly late delivery of the applicant's review application due to inter alia the alleged fraudulent conduct of his legal representative. In the review application, the applicant seeks an order in terms of ss 145 and 158(1)(g) of the Labour Relations Act (the "LRA") that the arbitration award be set aside and substituted with an order that his dismissal was unfair; that he be reinstated retrospectively and issued with a final written warning.

JUDGMENT

DE WET AJ:

Introduction:

1. The applicant seeks condonation for the late delivery of the review application and an order reviewing and setting aside the arbitration award issued by the third respondent on 28 August 2020 under case number CHEM 295-19/20 (the "arbitration award"). He further requests that this Court substitute the arbitration award with an order that the dismissal of the applicant by the first respondent was substantively unfair, and that the first respondent be directed to retrospectively reinstate the applicant, subject to a final written warning, valid for 12 months. In the alternative, the applicant requests that the unfair dismissal dispute be referred back to the second respondent for determination by a different commissioner.

2. It is the applicant's case in the review application that the third respondent committed a gross irregularity in the conduct of the arbitration proceedings as he failed to properly consider, and simply ignored, material facts placed before him and in doing so, he reached a decision that is not reasonable. He further contends that the third respondent's refusal to allow him legal representation was unfair and caused him prejudice.

Common cause background facts:

3. The facts underlying the dispute (and the time periods referred to in the condonation application) are mostly common cause. I therefore only set out the most relevant facts. This does not mean all the facts were not considered.
4. The applicant commenced employment at the first respondent during
2012. He was employed as an Operating Standards Specialist at the date of his dismissal on 29 January 2020 and earning a salary of R 83,500.00 a month.
5. During November 2018 the applicant applied for a bursary from the first respondent in terms of an Extra Mural Study Assistance

Programme ("EMSAP") to enable him to further his studies by doing a Master of Science in Project Management at the University of Cape Town ("UCT"). The application was approved and 2019 was the applicant's first year of studies.

6. In terms of the application form signed by the applicant and the first respondent, the first respondent agreed to pay the fees on the applicant's behalf in respect of registration, tuition and examination fees connected with the course of study, subject to certain further conditions which are not relevant to this matter, to the applicable institution. I will return to the relevance of this application form later.
7. The initial payment required by UCT to enable the applicant to register for the course was R 25,500.00 payable on or before 1 February 2019.
8. The first respondent paid the initial amount of R 25,500.00 into the applicant's bank account on 4 February 2019.
9. At the time the amount was paid into the applicant's bank account, his account was overdrawn.
10. The applicant paid UCT the amount of R 10,000.00 on 5 February 2019. According to the applicant he had decided (regardless of when he became aware of the payment by the first respondent into his account) that he would pay the difference payable in respect of the initial amount from his bonus during December 2019, as he needed to rearrange his affairs to meet certain personal family expenses with the remainder of the funds.

11. It was the applicant's case that the first respondent should not have paid the fees earmarked for UCT into his account and that there was no set timeline as to when payment had to be made to UCT.[1]
12. The applicant did not advise the first respondent that he had not paid the full amount paid to him in terms of the bursary over to UCT.
13. On 29 November 2019 the applicant requested the first respondent to make payment to UCT of the fees still outstanding for the 2019 year to enable him to register for the 2020 academic year. He provided the first respondent with a statement from UCT which reflected his payment of R 10,000.00 on 5 February 2019 and it reflected an outstanding amount of R 37,461.75 payable. This amount included interest on the outstanding initial payment.
14. On 2 December 2019 the first respondent requested proof that the applicant had paid the amount of R 25,500.00, which was paid to him to pay the initial fees to UCT, as the statement only reflected a payment of R 10,000.00. In response, and on the same day, the applicant advised that as the first respondent paid him the amount of R 25,500.00 on 4 February 2019, it only had to pay UCT the amount of R 22,961.00 and that he would pay an amount of R 15,000.00 to UCT.
15. In reply the first respondent's HR manager advised the applicant that the amount due by the first respondent to UCT was only R 20,120.00 as the non-payment of the full amount had caused interest to be charged. The applicant was requested to pay UCT the amount of R 15,000.00.
16. On 3 December 2019 the first respondent advised the applicant that it would not pay the difference owing to UCT prior to the applicant paying the balance of the R 25,500.00 paid to him in February 2019. The applicant was also advised that the matter would be escalated to his manager.
17. After receipt of this communication the applicant undertook to pay R 15,000.00 to UCT by 15 December 2019.
18. On 5 December 2019 the applicant met with Mr. Wilson, he's manager. Mr. Wilson sends an e-mail to the applicant on the same day recording what was conveyed and discussed during this meeting. The correctness of the recordal by Mr. Wilson was confirmed by the applicant. The email's contents are significant, and states as follows:

"Hi Thembile,

Outlining our discussion earlier today (around 15h30).

I advised you that HR informed me of an issue in the payment of funds relating to your studies for 2019 and I requested your feedback as to what occurred. I gave you the option of providing your feedback either in writing or in person and you in the end opted for feedback at the time.

Your feedback to me today was as follows:

- A prepayment was required to UCT of R 25,500.00 for your studies at the beginning of the year;
- Because of a delay by Astron Energy in making the payment to you for R 25,500.00 you paid R 10,000.00 to UCT from your own funds;
- This created a deficit on your personal account and when Astron Energy paid the R 25,500.00 you settled your son's school fees as this took priority for you. Your intention was to settle the UCT fees due with your bonus in December this year. Also, your preference is to wait for Lindiwe to return to office so that you can clarify further as she heads up L&D in HR”

19. The applicant was charged with misconduct on 10 December 2020.
20. The applicant paid the amount of R 15,000.00 on 15 December 2020 to UCT and provided proof of payment thereof. The payment was R 500.00 short of the amount due. According to the applicant this was an error.
21. After a disciplinary hearing the applicant was dismissed on 29 January 2021 for “Misappropriation or unauthorized use of Company funds provided to you for your studies. The Company approved funding through the Employee Extra Mural Study Programme for your MSc Project Management studies in 2019, and paid over to you an initial amount of R 25,500.00 in February 2019. Following payment to you, you failed to pay the full amount to the required institution as expected

of you and you used some of the funding for your own personal use”.

22. The applicant appealed the internal decision claiming that his dismissal was both procedurally and substantively unfair. His appeal was dismissed on 6 March 2020. On the issue of sanction, the chairperson had the following to say:

“While this is a first offense of this nature, I have also considered the seriousness of the offense, the employees lack of distinction between what is right and what is wrong in terms of company spend and the employees lack of remorse.

In this case the sanction matches the offence and hence I uphold the sanction of dismissal. In coming to this conclusion, I have taken the following factors into account:

The nature of the allegation. The offence relates to the employee’s honesty. He applied for and was advanced funds to pay to the institution in order to study, but he used those funds for his personal use.

He had ample opportunity to inform HR or his supervisor that he could not pay the full funds to the institution, but he did not do so.

He also had an opportunity to pay the funds to the institution much earlier than he did but he failed to do so, and only offered to pay when his plan to have the company pay the full outstanding fees in November was discovered.

The employee does not comprehend the nature of his conduct and because of the relatively senior position that he holds in the company, he cannot be trusted that he will not commit a similar offense again.

One of the grounds of appeal by the employee was that the disciplinary chairperson did not consider his mitigating factors. I have taken those into account and I do not think that they outweigh the factors I mentioned above.”

23. The applicant then referred a dispute to the second respondent. He only challenged the substantive fairness of his dismissal.

24. The third respondent issued the arbitration award on 24 August 2020 and found that the applicant’s dismissal was fair. In paragraphs 38 and 39 he had the following to say:

“[38] In relation to the charge levelled against him, the evidence is overwhelming that the applicant is indeed guilty of misappropriation

or unauthorized use of company funds as outlined in the charge. The applicant’s overdraft is a personal facility provided to him by his bank. The funds deposited into his account were for the express purpose of an initial payment for his studies. The monies deposited into his banking account services overdraft and he wilfully did not pay the full amount over to the institution in order to diminish the overdrawn amount hence the respondent’s contention is “you used some of the funding for your own personal use”. Accordingly, I find the applicant guilty of the allegation levelled against him.

[39] Throughout the process, the applicant’s demeanour was one of entitlement and he showed no remorse or acknowledgement of the error of his ways. I have found the applicant guilty of a serious allegation which goes to the core of the employment relationship he is a senior employee and is not unsophisticated. The applicant’s actions have caused an irretrievable breakdown of the trust relationship and the courts have endorsed that where the actions of an employee are of such a nature that the trust relationship is broken the employer does not have to present evidence in relation to the trust aspect.”

25. The applicant received the arbitration award on 28 August 2020 and the condonation and review applications was delivered on 17 January 2024.[2]

26. The applicant admits that 3 years is a significant delay and that he was aware that a review application had to be launched within 6 weeks of receipt of an arbitration award.

27. The reasons advanced by the applicant for the significant delay can be summarised as:

27.1 Upon receipt of the arbitration award on 28 August 2020, he instructed Mr. Tshaka (a legal representative), to launch an application to review and set aside the award[3];

27.2 Mr. Tshaka told him that the application was filed but that proceedings was delayed due to Covid 19;

27.3 From August 2020 to 23 January 2023 “every time [he] would follow up”, Mr. Tshaka would tell him that the review application was pending and judgment awaited;

27.4 On 23 January 2023, when he followed up, Mr. Tshaka sent him a judgment in the review application delivered by La Grange J, wherein his dismissal was found to have been substantially and procedurally fair. He was also provided with written submissions which had allegedly been filed in the application[4];

27.5 On 23 February 2023 Mr Tshaka sent the applicant a notice of application for leave to appeal;

27.6 On 6 June 2023 he was advised the outcome of the leave to appeal application would be on 15 June 2023. He was then told that one of the judges had “an acting stint” in the Supreme Court of Appeal and the order could not be issued;

27.7 He followed up on 2 and 11 July respectively 2023 but was met with excuses;

27.8 On 21 July 2023 he raised some discrepancies regarding the judgment (it was not signed) with Mr. Tshaka upon which he was provided with a Saflii link but he could not find the judgment and was then told that leave to appeal was granted;

27.9 On 23 July 2023 he started to question whether a review application was indeed launched and after he was sent the notice of application for leave to appeal again, he attended at the Labour Court on 25 August 2023 to make enquiries and found out on 1 September 2023 that no review application had been filed and no judgment had been granted by La Grange J;

27.10 On 4 October 2023 the applicant filed a complaint at the Legal Practice Council against Mr Tshaka for his failure to properly deal with his instructions;

27.11 He filed the condonation and review application on 17 January 2024;

27.12 Mr Tshaka responded to the complaint against him by stating that he did not assist the applicant as a legal representative.

The arguments advanced at the hearing of the review application:

28. The applicant argued that the second respondent failed to consider the fact that first respondent made payment into his personal, overdrawn bank account, which should not have happened due to the state of his bank account and that the full amount was not available to him upon payment. He further argued that given his financial affairs he naively and regrettably succumbed to the pressures of his financial woes and the temptation to rearrange his affairs to meet bona fide needs at the time, which include school fees for his child.
29. The applicant admitted that a sanction was merited for the conduct on his part but argued that the sanction of dismissal was not appropriate and that the third respondent erred in finding that he had shown no remorse or acknowledgement of error during the arbitration.

30. According to the applicant, the third respondent had no regard to the totality of the evidence and facts that were placed before him and had a lopsided approach which favoured the first respondent and prejudiced him. He further argued that there was no evidence that the trust relationship had broken down irretrievably.
31. The final complaint was that the third respondent erred by not allowing him legal representation at the hearing.

Condonation:

32. It is trite that the court has a discretion to grant condonation based on fairness to both sides and that the following factors need to be considered: the decree of lateness, the explanation for the delay, the prospects of success, the importance of the case, the respondent's interest in finality, convenience of the court and avoidance of unnecessary delay.[5] Condonation is not merely for the asking and an applicant is expected to bring an application for condonation without delay and as soon as possible once they realise that there has been non-compliance with the Rules of Court.[6]
33. In the matter of *Mulaudzi v Old Mutual Life Assurance Company (South Africa) Limited* 2017 (6) SA 90 (SCA) the court reiterated that a full detailed, and accurate account of the causes or delay must be furnished to enable the court to understand the reasons and assess responsibility.
34. It has further been held that even if any non-compliance was entirely due to the neglect of an applicant's attorney, it does not follow that condonation would automatically be granted[7] and, given the reasons advanced by the applicant for the significant delay as already set out, I was referred to the matter of *Saloojee & Another v Minister of Community Development* 1965 (2) SA 135 (A) at 141 C-E where Steyn CJ had the following to say:

"I should point out, however, that it has not at any time been held that condonation will not in any circumstances be withheld if the blame lies with the attorney. There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence, or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the rules of this Court. Considerations ad misericordiam (and appeal to pity) should not be allowed to become an invitation to laxity. In fact, this Court has lately been burdened with an undue and increasing number of applications for condonation in which the failure to comply with the rules of this Court are due to neglect on the part of the attorney. The attorney, after all, is the representative whom the litigant has chosen for himself, and there are little reasons why, regarding condonation of a failure to comply with rule of court, a litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are."

35. The applicant in my view has failed to provide compelling, comprehensive and convincing reasons for the period August 2020 to 23 January 2023 (more than 2 years) that justifies the significant delay in this matter. The highwater mark of his explanation is that he thought a review application had been lodged (within the 6- week period) since his legal representative told him so.
36. This explanation, for an educated and sophisticated individual, simply amount to no explanation in my view. What is glaringly missing from the applicant's account is when he was told that an application was launched; when and how often he had made enquiries as alleged; why he never requested or saw a copy of the application to ascertain the grounds upon which the review was lodged; what financial arrangements had existed between him and his legal representative in respect of the review application and when he consulted with his legal representative. He also offers no explanation as to why he never enquired how the review process works and failed to attach any correspondence between himself and his attorney in respect of this period. The applicant, based on his own version, took no responsibility for his matter.
37. Even if I accept the serious allegations made by the applicant regarding Mr Tshaka's conduct after 23 January 2023 to 24 August 2023, but do not have to decide but find very disturbing, it does not assist him in respect of the explanation tendered for the delay and lack of action in respect of the previous period.
38. For the period 1 September 2023 to 17 January 2024 (more than 3 months), the applicant again failed to provide any compelling, comprehensive and convincing reasons for not immediately taking steps to file a review application on the standard forms available at the Labour Court to minimize and prevent any further delay. He simply stated that it took him a considerable time to start the process afresh. His further delay is not explained.
39. In the matter of Toyota SA Motors (Pty) Ltd v Commission of Conciliation, Mediation and Arbitration and Others (2026) 37 ILJ 313 (CC) at para 37 it was held that: "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 the employer who may have to reinstate workers after many years." This approach has been endorsed by the courts on many occasions based on the fundamental principle that labour disputes should be adjudicated quickly.
40. Ordinarily, if there is no satisfactory explanation for the delay, prospects of success become irrelevant. Conversely, without good prospects of success, no matter how good the explanation for the delay, an application for condonation should not be granted.[8]

41. Even though I am of the view that the applicant has failed to provide a thorough and acceptable explanation for the inordinate delay in launching the review application, and that for this reason alone the review application should be dismissed, I briefly deal with the applicant's prospects of success.

Prospects of success:

42. The applicant in the review application admits that he had erred in not utilizing the funds as intended, though he persists in blaming the first respondent for paying the initial funds into his personal account contrary to the terms of the signed application agreement. He appealed to the Court to order a lesser sanction than dismissal based on his personal circumstances and naïve decision at the time. It was the evidence of Mr Wilson at the arbitration hearing that it was the practice at the first respondent to pay employees the study funds who in turn would pay the applicable institution. His evidence accords with the EMSAP policy which requires that invoices and receipts must be submitted by employees to their immediate supervisors. Even if I am wrong in this regard, the applicant's failure to pay UCT the amount due at the time does not exonerate him. He was aware that the funds were to be paid to UCT and was not for his personal use.
43. In the arbitration hearing the applicant argued that because there was no specific timeline in the policy to pay UCT, he was entitled to use the funds for personal expenses and to pay the rest at a later stage. Contrary to this argument, the application form signed by the applicant states that the full amount of R 25,500.00 had to be paid to UCT on or before 1 February 2019. The statement from UCT also shows that there was indeed a requirement on the applicant to pay over the funds to UCT based on a timeline and hence penalties and interest were charged. The argument that there was no timeline for payment was consequently not supported by the facts. In the review application he admits that he made a mistake to not pay over the full initial amount to UCT.
44. The payment on 4 February 2020 to the applicant by the first respondent was specifically earmarked to pay the initial fees at UCT to the applicant's knowledge. It was not paid to him to pay personal expenses or rearrange his debt. Consequently, the applicant's conduct amounted to misappropriation of funds.
45. More concerning however: the applicant initially told Mr Wilson that he used his personal funds to pay UCT as the first respondent had not timeously paid the initial funds to him, whilst his bank account statement showed that he only paid the R

10, 000.00 after the funds were paid into his account. He further initially asked the first respondent on 29 November 2020 to pay the full outstanding amount of R 37,37 461.75 whilst knowing that he had not paid the difference of R 15,500.00 (and the interest accrued thereon) over to UCT. The above conduct of the applicant explains why the first respondent was of the view that the trust relationship was breached.

46. The applicant now admits that he was wrong in utilizing the funds earmarked for his studies for personal use, but argues that this misconduct did not justify the sanction of dismissal.
47. Misappropriation of funds constitutes a serious offence and it was the first respondent's case throughout that the applicant's conduct caused a breach of the trust relationship, particularly in light of the applicant's senior position at the first respondent.
48. On the issue of the third respondent's refusal to allow legal representation which was not pursued during argument, it appears from the record and the applicable rules of the second respondent, that the third respondent carefully considered the application to allow legal representation and refused it. He adopted an inquisitorial approach and the applicant had a full opportunity to state his case. I cannot find anything that points to any prejudice to the applicant and the third respondent exercised his discretion judicially.
49. The question for purposes of this review application is not whether the arbitration award is wrong or whether I hold a different view to that of the second respondent, but rather whether the award is justifiable in relation to the material that was available and before the third respondent.
50. Based on the facts, I am of the view that the applicant does not have any prospects of success.
51. In the circumstances the following order is granted:
 1. The condonation application is dismissed.
 2. There shall be no order as to costs.

De Wet AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

On behalf of the Applicant: Mr Thembile Mabhaso (in person) Email: tmabhaso@gmail.com and thembile@khwaza.com On behalf of the First Respondent: Adv B Josephs SC Instructed by: Werksmans Email: jvanwyk@werksmans.com

- [1] In the referral to the NBCCI during March 2020 the applicant stated: "In terms of the agreement concluded with the Employer, the Employer was supposed to pay the fees directly to the institution. However, for one or the other reason, the fees were paid into the Employee's bank account. There was no set deadline on when the Employee was supposed to pay the institution". In the review application he stated "If anything, what existed was a contractual arrangement between myself and the First Respondent, in the form of the Bursary Agreement, in terms of which the First Respondent was required to pay the funds directly to UCT. Had the First Respondent complied with its contractual arrangements in this regard, the whole matter would not have arisen."

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- [2] The applicant did make an attempt to file the application during December 2023 but it did not comply with the Rules of Court.
- [3] Mr Tshaka attended the arbitration proceedings in his capacity as an attorney but the third respondent did not allow him to represent the applicant.
- [4] The unsigned judgment and submissions, to which the first respondent did not object, were attached to a further supplementary affidavit filed by the applicant during June 2024.
- [5] *United Plant Hire (Pty) Ltd v Hills* 1990 (1) SA 717 (A at 720 E-G).
- [6] See for example *Erasmus v Absa Bank Ltd and Other* (Case no A 982/13), Gauteng Provincial Division, Pretoria para 11.
- [7] See *Darries v Sheriff, Magistrate's Court, Wynberg and Another* 1998 (3) SA 34 (SCA) at 40I to 41D
- [8] See *National Education Health and Allied Workers' Union on behalf of Mofokeng v Charlotte Theron Children's Home* (2004) 25 ILJ 2195 (LAC) at para 23 and *Collette v Commissioner for Conciliation, Mediation and Arbitration* 2014 (6) BLLR 523 (LAC).
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