

SOUTH AFRICA / JUDGMENT

Mguni v Transnet Freight Rail and Others (PR142/16) [2022] ZALCPE 4 (8 March 2022)

[2022] ZALCPE 4

COURT

Labour Court Port Elizabeth

BEFORE

Lallie

CASE / FILE NUMBER

PR142/16

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IN

THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

Not

Reportable

CASE

NO: PR142/16

In

the matter between:

SIPHOSETHU
MNGUNI Applicant
and
TRANSNET
FREIGHT RAIL First
Respondent
TRANSNET
BARGAINING COUNCIL Second
Respondent
COMMISISONER
C OOSTHUIZEN Third
Respondent
SOUTH
AFRICAN TRANSPORT AND ALLIED
WORKERS
UNION (SATAWU) Fourth
Respondent
HONEST
SINAMA Fifth
Respondent

Heard:

9 September 2021

Delivered: This judgment was handed down electronically by circulation to the Applicant's and First Respondent's Legal Representative by email, publication on the Labour Court website and release to SAFLII. The date and time for handing - down is deemed to be 15h00 on 8 March 2022.

JUDGMENT

LALLIE J

[1] Section 145(1) of the Labour Relations Act[1] (the LRA) enables this court to review and set aside arbitration awards of the Commission for Conciliation, Mediation and Arbitration (the CCMA) and bargaining councils when the allegations that the awards have a defect have been proved. The applicant filed this

application in an effort to assert his right to have an award granted by the third respondent (the arbitrator) against him reviewed and set aside. The applicant was required, in terms of section 145(1)(a) of the LRA to have filed this application within 6 weeks of the service of the award. He missed the prescribed time and filed an application to have the delay condoned. The first respondent opposed both the review and condonation applications. The condonation application will be considered first as the review application can only be property before court after its late filing has been condoned.

Condonation

[2] The applicant was employed by the first respondent until his dismissal for misconduct on 25 October 2013. He challenged the fairness of his dismissal at the second respondent (the bargaining council) where the arbitrator issued, on 7 April 2014, an arbitration award dismissing the applicant's claim on the basis that his dismissal was substantively and procedurally fair. The award was served on the applicant on the same day. A number of principles that govern condonation applications are confirmed in *Grootboom v National Prosecuting Authority* [2] where the following was held:

‘[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.’

[3] Other factors which play a vital role in determining whether the applicant has shown good cause to have the delay condoned are the extent of the delay, the applicant's prospects of success in the principal litigation and prejudice to the other parties. Condonation is granted when it is in the interest of justice to have the delay excused. The review application was filed on 16 September 2016, two years and four months out of time. The delay is excessive. As all the relevant factors for determining condonation have to be considered collectively

with strong ones balancing the weak ones, an excessive delay on its own does not justify the refusal of condonation. A full and reasonable explanation tips the scales in favour of an applicant whose delay in filing an application is excessive.

- [4] The explanation given by the applicant was that immediately after receiving the award he was of the view that justice was not served and approached a firm of attorneys to file a the review application on his behalf. As he had been dismissed, he was unemployed and could not afford to fund the litigation. He relocated to Johannesburg on 16 June 2014 and started looking for a job. He was appointed as a train driver on a 2 year contract of employment in April 2016 and enlisted the services of a firm of attorneys to file the review application 2 months thereafter. The application was filed on 16 September 2016.
- [5] The applicant also relied on personal circumstances which allegedly affected him shortly after his dismissal. The death of his grandmother who had raised him, the admission of his mother to in psychiatry hospital and an unhealthy relationship with his partner. The strain of the incidents resulted in him attending a number of psychological counselling sessions in 2014. He attended the last on 8 August 2016.
- [6] The first respondent's grounds for opposing condonation are that the explanation proffered for the long delay is inadequate and unreasonable in that it does not cover the entire lateness. The applicant's omission to attach proof that the delay was occasioned by his health condition was also relied upon by the first respondent.
- [7] In explaining the reason for the delay the applicant was required to present sufficient facts on which the decision to grant condonation could be based. The applicant submitted that one of the causes of the delay was his inability to fund the review application. He received the outcome of the arbitration proceedings on 7 April 2014, obtained alternative employment in April 2016 and file his review application on 16 September 2016. It is trite that in considering condonation applications the right of the respondent to have the dispute and finalized within reasonable time must be taken into account. The first respondent received the award under review on 7 April 2014. As it was in its favour it had the right to move on with its operations including taking decisions on the position which was left open by the applicant's dismissal. I am of the view that it is not reasonable to expect the first respondent to keep the position the applicant held for over 2 years while he was looking for alternative employment in order to finance his review application. When the 6 weeks' period which is referred to in section 145(1) of the LRA is considered as a reasonable period within which review applications have to be brought, the first respondent reasonably expected that the applicant had accept the outcome of the arbitration proceedings when the review application was eventually filed. It would be unreasonable to expect the first respondent to wait for 2 years for the filing of the review application without an inkling of the applicant's intentions. The explanation that the delay was caused by lack of funds is, in the circumstances unreasonable. The applicant did not reply to the first respondent's submission that nothing precluded him from approaching institutions like the Legal Aid of South Africa which render assistance to the indigent.

- [8] The applicant's attempts to rely on ill-health cannot succeed. The reasons are that he attended psychological counselling sessions in 2014. He submitted that the last session was on 8 August 2016. He relied on a report of a clinical psychology dated 13 August 2016. According to the report the applicant was seen on 6, 12 and 17 June
2013. He was again seen on 4 July 2013. At the time, he already had the personal problems he sought to rely on. The following applicant's visit to the psychologist was on 8 August 2016 when the applicant requested her to furnish the report dated 13 August 2016. The report does not address the 2 year delay, it can therefore not be relied upon in support of a decision to condone the late filing of the review application.
- [9] The applicant did not address his prospects of success in his review application. He submitted that there were gross irregularities in the arbitration proceedings as clearly set out in his review application. The first respondent submitted that the applicant failed to address other vital aspects of the condonation application. The omission, so it was submitted, resulted in the applicant's failure to prove that it is in the interest of justice that his delay be condoned. The applicant did not establish that he has prospects of success in that he made no averments which, if proved, would result in the success of his review application. Alleging that there was gross irregularity in the arbitration proceedings is insufficient. The applicant should have identified the gross irregularity he was relying on so that the first respondent could have an opportunity of dealing with it in the answering affidavit.
- [10] Section 1(d) of the LRA provides that one of the purposes of the LRA is to promote the effective resolution of labour disputes. The purpose has been interpreted to include expeditious resolution of disputes. Labour disputes have therefore to be finalized within reasonable time. The applicant has not shown good cause to have the delay condoned. He waited for an unreasonably extended period before filing his review application. The applicant failed to give a reasonable and adequate explanation for the delay. He failed to show that he has prospects of success in the main application. He did not succeed in establishing that the interest of justice justifies condonation of the delay. His application, can, in the circumstances, not succeed.
- [11] I have considered the arguments on costs and I was given no valid grounds based on fairness for granting a costs order against the applicant. As the condonation application has not been granted, the review application is not properly before court.

[12] In the premises, the following order is made:

Order:

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

Z. Lallie

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate

Nzuzo

Instructed by Mabheshwana

& Associates

For the First Respondent: Mr Cokile of Siya Cokile Inc

[1] Act 66 of 1995, as amended.

[2] Grootboom v National Prosecuting Authority (2014) 2 SA 68 (CC).

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