

SOUTH AFRICA / JUDGMENT

Mkhize v Commission for Conciliation Mediation and Arbitration and Others (D95/2011) [2013] ZALCD 13 (13 June 2013)

[2013] ZALCD 13

COURT
Labour Court Durban

BEFORE
D H Gush

CASE / FILE NUMBER
D95/2011

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REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

case no: D95/2011

In the matter between:

Michael Mkhize Applicant

And

CCMA 1st Respondent

Vino Subramoney 2nd Respondent

Snackworks 3rd Respondent

Date of hearing: 11 June 2013

Date of judgment: 13 June 2013

Summary: Application for review of an arbitration award. Application filed at least 5 weeks late. Affidavit in support of condonation failing to set out reasonable explanation for delay Prospects of success not sufficient to overcome poor explanation for late filing

GUSH J

This is an application by to review, set aside and refer back to the 1st respondent the award handed down the 2nd respondent in which award the 2nd respondent concluded at the conclusion of the arbitration hearing that the applicant's dismissal by the 3rd respondent was fair and dismissed the applicant's application.

The applicant, having filed the review application at least 5 weeks late applied for the late filing of his review to be condoned.

The applicant had been dismissed by the 3rd respondent after he had been charged with and had been found guilty of "facilitating a bribe and attempting to extort money from one Mr Magwaza". The background to the charge of misconduct was essentially that the applicant, a shop steward, was

accused of being party to seeking to force Magwaza to pay to a colleague an amount of R500 as some form of compensation for a

rumour which Magwaza had allegedly spread regarding the colleagues HIV status. Magwaza was told that unless he paid the money the incident would be reported to the employer and that he, Magwaza would be dismissed.

The applicant, dissatisfied with his dismissal, referred a dispute concerning his dismissal to the first respondent who in turn appointed the third respondent to arbitrate the dispute after it had been unsuccessfully conciliated.

The arbitration commenced on 27 May 2010 and continued on 15 July 2010, 1 and 2 September 2010 and was finalised on 4 October 2010. The applicant was represented at the arbitration by an official of his trade union, FAWU. The third respondent issued his award on 25 October 2010 and it was faxed to and received by the applicant's

trade union representative on the 17 November 2010.

The applicant avers in his founding affidavit that he received the award that he received the award on the 24 November 2010.

The rules of this court require an applicant who wishes to review an award of a CCMA Commissioner to file such application within six weeks of the date upon which the award comes to the applicant's attention. In this matter the applicant, having received the award on 24 November 2010 was required to file his review application on 5 January 2011. The applicant only filed his review application 10 February 2011, some 5 weeks after the date upon which it should have been filed.

The applicant, despite the absence of a prayer in his notice of motion for the condonation of the late filing of the application, in his founding affidavit under the heading "Application for Condonation" sets out the reasons for the late filing of the application and "prays to the honourable court to grant ... relief as the notice of motion prefixed hereto".

The applicant's application including the application for condonation was opposed by the second respondent.

In considering the merits of the applicant's application for condonation it is necessary to first consider the principles which the courts have applied in determining whether or not to condone the late filing of an application.

These principles have been set out by this court on many occasions. It is necessary to reiterate these principles against which the applicant's application for condonation must be considered before considering the merits of the applicant's application.

In *Melane v Santam Insurance Co Ltd*¹ it was held:

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 it 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.²

In the recent and as yet unreported matter of *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd & others*³ the Supreme Court of Appeals referred to the judgement of Holmes JA in *Federated Employers Fire & General Insurance Co Ltd & another v McKenzie*⁴ in support of the proposition that:

Factors which usually weigh with this court in considering an application for condonation include the degree of non-compliance, the explanation therefor, the importance of the case, a respondent's interest in the finality of the judgment of the court below, the convenience of this court and the avoidance of unnecessary delay in the administration of justice.

In the judgement the court also referred to the matter of *Uitenhage Transitional Local Council v South African Revenue Service*⁵ where the court held:

One would have hoped that the many admonitions concerning what is required of an applicant in a condonation application would be trite knowledge among practitioners ...: condonation is not to be had merely for the asking; a full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility. It must be obvious that, if the non-compliance is time-related then the date, duration and extent of any obstacle on which reliance is placed must be spelled out.

In the also as yet unreported judgment by the Constitutional Court in the matter of *eThekweni Municipality and Ingonyama Trust*⁶ the court said the following:

As stated earlier, two factors assume importance in determining whether condonation should be granted in this case. They are the explanation furnished for the delay and prospects of success. In a proper case these factors may tip the scale against the granting of condonation. In a case where the delay is not a short one, the explanation given must not only be satisfactory but must also cover the entire period of the delay. Thus in *Van Wyk v Unitas Hospital and another (Open Democratic Advice Centre as Amicus Curiae)*, this Court said in this regard:

“An applicant for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of delay. And, what is more, the explanation given must be reasonable. The explanation given by the applicant falls far short of these requirements. Her explanation for the inordinate delay is superficial and unconvincing.”

The Labour Court and the Labour Appeal Court have both in similar vein dealt with the requirements and principles applicable to an application for condonation. In *High Tech Transformers (Pty) Ltd v Lombard*⁷ the Honourable Basson J dealt with an application for condonation as follows:

Condonation is not merely for the asking as was duly pointed out by the court in *NUMSA & another v Hillside Aluminium* [2005] ZALC 25; [2005] 6 BLLR 601 (LC): Additionally, there should be an acceptable explanation tendered in respect of each period of delay. Condonation is not there simply for the asking. Applications for condonation are not a mere formality. The onus rests on the applicant to satisfy the court of the existence of good cause and this requires a full, acceptable and ultimately reasonable explanation. One of the primary purposes of the Labour Relations Act is to ensure that disputes are resolved expeditiously, especially dismissal disputes. ... to do justice to the aims of the legislation, parties seeking condonation for non-compliance are obliged to set out full explanations for each and every delay throughout the process. An unsatisfactory and unacceptable explanation for any of the periods of delay will normally exclude the grant of condonation, no matter what the prospects of success on the merits. The latter principle was stated by Myburgh, JP in *NUM v Council for Mineral Technology* [1999] 3 BLLR 209 (LAC) at 211G-H:

There is a further principle which is applied and that is that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without prospects of success, no matter how good the explanation for delay, an application for condonation should be refused.

This principle was followed in the matter of *Moila v Shai NO & others*⁸ in which the then Honourable Judge President Zondo held:

Indeed, it is clear from *P E Bosman Transport Works Committee v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 794 (T) at 799D; (1980) 1 ILJ 66 (T) that in a case such as this one, it is not necessary to consider the prospects of success and that condonation could be refused no matter how strong the prospects of success are in a case such as the present one. *P E Bosman* was a case where the appellant had failed to note the appeal and deliver the appeal record timeously and there were periods of delay for which there was either no acceptable explanation or no explanation at all ...”⁹

In this matter the applicant attempts to explain the late filing of his application. The applicant confines the reasons for the late filing of his application to the following:

I humbly request the honourable court to condone the late filing of this review application as I have good prospects of success of this review application.

On about 24 November 2010 I received a copy of an arbitration award which was faxed to my union on about 17 November 2010.

Mr Silongwe of Food and Allied Workers Union then told me that he would take the same award to Mr Vusi Landu for a legal opinion on becoming down to Durban from Cape Town.

As I was still waiting to hear from him, Mr Silongwe then told me he would take it to another legal officer union in Free State Mr Sondiyazi.

In about the beginning of December Mr Silongwe told me that Mr Sondiyazi said to him I do not have prospects of success in the matter.

I was not happy with the opinion of Mr Sondiyazi because he did not consult with us to hear side of the story on this review application.

I then went to Ponoane Attorneys in about 13 December 2010 and I left the award with the secretary for the attention of Mr Ponoane.

When I phoned in the second week of January 2011, I was told Mr Ponoane is in hospital since October 2010 would only be in the office on 1 February 2011.

I was only able to consult with anyone for February 2011 and whereby help me with this application.¹⁰

The applicant does not disclose the extent of the delay, and does not explain the delay in dropping off the award and his contacting the attorney in January. In particular the averment that he simply left the award with a secretary when the attorney whose services he wished to engage was not in office and had not been for some two months and apparently was not going to be in office for some time, which cries out for some explanation, is not explained.

In response to and in opposing the applicants application for condonation the 3rd respondent in addition to challenging the reasons advanced by the applicant for the delay, referred to the applicants lack of confirmatory affidavits.

The applicant's response to this was to simply indicate that it would not be a problem to obtain confirmatory affidavits and attached an affidavit from Mr Ponoane that simply confirmed the applicants affidavits "in so far as they relate to me"

In the matter of Chetty v Law Society, Transvaal¹¹ the court, dealing with an application for condonation held

An ordered judicial process would be negated if, on the other hand, a party who could offer no explanation of his default other than his disdain of the Rules was nevertheless permitted to have a judgment against him rescinded on the ground that he had reasonable prospects of success on the merits.¹²

In matters of this nature is not only the negation of an ordered judicial process that is of concern but the late filing of applications to review arbitration awards goes to one of the fundamental principles underpinning the Labour Relations Act, namely the expeditious resolution of labour disputes.

I am of the view that a delay of five weeks, which is nearly twice the time allowed by the Labour Relations Act, is a substantial and excessive delay. The applicant's somewhat cavalier and disdainful approach to his condonation application the delay, which is reflected in his failure to record the extent of the delay and to provide some credible explanation, renders his "purported explanation for the delay ... no explanation at all"¹³.

I am of the view that the applicants application for condonation is so devoid of detail and reasonable explanation for the delay that, as has been held repeatedly by this court, that is that "without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial"

Counsel for the applicant, however, sought to persuade the court that despite the obvious failure by the applicant to properly explain the delay, that the applicants prospects of success were such that they outweighed the applicant's wholly inadequate explanation.

On the merits and in support of the averment that the applicant had "some prospects of proving that he was unfairly dismissed", the applicant in essence submitted that the 2nd respondent's decision was unreasonable in that she did not have regard for the evidence before her.

The applicants grounds of review essentially suggest that the second respondents award was reviewable on the basis of the test the Constitution Court determined should be applied in determining whether an award is reviewable viz:

Whether the award is one that a reasonable decision maker could arrive at considering the material placed before him.¹⁴

Even taking into account the applicants grounds of review I am not satisfied that the applicant has established or has reasonable prospects of establishing that the award of the third respondent is reviewable. The second respondents award has in detail analysed the evidence, the demeanour and credibility of the witnesses and importantly the probabilities of the two versions presented to her, before concluding that the applicant's dismissal was fair.

In the circumstances even taking the applicant's prospects of success into account, there is nothing to suggest that the conclusion reached by the 2nd respondent that the applicant's dismissal was fair, for the reasons set out in the award that the award, is one which a reasonable decision maker could not have arrived at taking into account the evidence or material placed before her.

In the absence of any basis why costs should not follow the result I make the following order:

The applicants' application for condonation for the late filing of the review is dismissed with costs.

D H Gush

Judge of the Labour Court

Appearances:

For the Applicant: M J Ponoane; Ponoane Attorneys

For the Third Respondent: S Bosi; Norton Rose Fulbright.

1 1962

(4) SA 531 (A)

2at page 532

3(619/12)

[2013] ZASCA 5 (11 March 2013)

4 1969

(3) SA 360 (A) at 362F-G)

5 2004

(1) SA 292 (SCA) para 6

6Case Number[2013] ZACC 7

7(2012) 33 ILJ 919 (LC) 2012 ILJ at page 919

8(2007) 28 ILJ 1028 (LAC)

9At page 1038 paragraph 36

10Founding affidavit pages 11 and 12

11 1985

(2) SA 756 (A)

12At 765D-E

13(2007) 28 ILJ 1028 (LAC) at page 1037 paragraph 34

14Edcon Ltd v Pillemer NO & others[2010] 1 BLLR 1 (SCA) at p9 Para 15

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Prepared on 13 October 2026 · Esheria