

SOUTH AFRICA / JUDGMENT

Mohamed v Commission for Conciliation, Mediation and Arbitration and Another (JR1889/2020) [2023] ZALCJHB 296 (24 October 2023)

[2023] ZALCJHB 296

COURT

Labour Court Johannesburg

BEFORE

F.I. Baloyi

CASE / FILE NUMBER

JR1889/2020

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IN THE LABOUR COURT OF
SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR1889/2020

In

the matter between:

MOHAMMAD
AFZAL MOHAMED
Applicant
And
COMMISSION
FOR CONCILIATION
MEDIATION
AND ARBITRATION
First
Respondent
COMMISSIONER
PAUL BOTHA N.O
Second
Respondent
ELECTRONIC
TOLL COLLECTION (PTY)LTD
Third
Respondent

Heard:

29 June 2021

Delivered:	24 October 2023
Summary:	Application for condonation and review, the explanation provided is poor and unreasonable and the review application lacked prospects of success.

JUDGMENT

BALOYI, AJ

Introduction

- [1] In this application, the applicant seeks an order reviewing and setting aside the award issued by the second respondent (Commissioner) under case number GAJB7970-20 dated 23 August 2020. In his award, the Commissioner ruled that the Applicant was not unfairly dismissed by the third respondent and that the applicant did not have a reasonable expectation of renewal of a fixed term contract of employment.
- [2] The applicant also seeks condonation for the late filing of the review application. The third respondent is the only respondent opposing both the review and the condonation application.

Condonation application

- [3] The applicant asserts that he became aware of the award on the 25th of August 2020. From the 26th of August 2020, the Applicant began to search for a law firm which deals with labour law matters. The applicant asserts that Ismail and Dahya Attorneys were recommended to him on 15th of October 2020. He contacted the attorneys on the 16th of October 2020. A consultation with the attorneys took place on the 20th of October 2020. The applicant attributes the delay in setting up the consultation to the attorneys' busy schedule.
- [4] The applicant contends in his application that he only confirmed the instruction with the attorneys on the 13th of November 2020 and again, due to the attorney's schedule, the affidavit was prepared on the 18th of November 2020. The review application was filed in court on the 20th of November 2020. The application is accordingly 43 days late.
- [5] At the outset, I must state that I am not convinced that the applicant has made out a case for condonation. The explanation made in the founding affidavit lacks substance. I find it completely unreasonable that the applicant stayed for a period of over a month still searching for an attorney to assist him with filing a review application or to seek legal advice.
- [6] Furthermore, the explanation that he had to source funds for almost a month before confirming the instruction is untenable. Lack of funds or manpower cannot constitute explanation for the delay.[1]

[7] In *A Hardrodt (SA) (Pty) Ltd v Behardien & others*[2] (*Behardien*) the Labour Appeal Court (LAC) restated the guidelines laid down in *Queenstown Fuel Distributors CC v Labuschagne NO & others*[3] *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 time period must be compelling. The onus is on the applicant to satisfy the Court that condonation should be granted.

[8] 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.

[9] 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) & others*,[4] the Court said:

'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. The reason for these more stringent requirements is that review applications occur after the parties have already been heard, presented their respective cases and a finding has been made. Under such circumstances, considerations of justice, fairness and expedition require that challenges of such findings must not be delayed and must be completed as soon as possible.'

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

'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.'

[11] The courts have held and emphasised that in applications to review and set aside arbitration awards, an applicant must necessarily act with the degree of diligence required by the Rules of this Court[6] and the Practice Manual[7], thus giving effect to the statutory imperative of expeditious dispute resolution.

[12] In *Toyota SA Motors (Pty) Ltd v CCMA and Others*[8] the Constitutional Court emphasised that one of the fundamental purposes of the Labour Relations Act[9] (LRA) was to establish a system for the simple, quick, cheap, and informal adjudication of labour disputes. When it assesses the

reasonableness of a delay, the court must not lose sight of this purpose.

[13] Condonation for delays in all labour law litigation is not simply there for the taking. The starting point is that an applicant in an application such as the present seeks an indulgence and bears the onus to show good cause and a proper case should be made out before the indulgence could be granted.

[14] This Court takes a view that the applicant lacks the prospect of success in the review application. The facts of this case are set out in the award and I do not intend to repeat the facts in this judgment.

[15] What is clear is that the applicant was not performing well in the position in which he was employed in terms of a fixed term contract. The issue of performance was discussed with the applicant resulting in the Applicant being transferred to a different department. The applicant's manager in the department he was transferred to had similar complaints of poor performance by the applicant.

[16] The third respondent had a contract with SANRAL, it appears that most of the employees' contracts of employment depended on SANRAL renewing its contract with the third respondent. On the 9th of March 2020, the third respondent sent out a notice to the effect that the operations service with SANRAL has been extended until December 2020.

[17] The applicant was employed in terms of fixed term contract on the 1st of July 2019 and his contract was to end on the 31st of May

2020. On the 30th of April 2020, the applicant was notified in writing that his contract of employment would terminate on the 31st of May 2020. Basically, the applicant was informed that his contract would not be renewed.

[18] In this Court, the applicant contends that the notice of the 9th of March 2020 extended his contract. I do not agree with this contention. It is clear from the record that the applicant was not performing well and the issue was discussed with him. Two of his managers complained about his performance. In my view the Commissioner's finding that the Applicant could not expect a further extension of his contract when the third respondent was not satisfied by his performance is correct. The notice of the 9th of March 2020 is not related to the non-extension of the applicant's contract of employment.

[19] In the result the following order is made:

Order

1. The application for condonation is refused.

2. The review application is dismissed.

3. There is no order as to costs.

F.I. Baloyi

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant:

Mr S Khanya of Ismail & Dahya Attorneys

For the Respondent:

Adv Chris Gibson

Instructed by:

Cowan Harper Madikizela Inc.

[1] Transport and Allied Workers Union of SA v Algoa Bus Company (Pty) Ltd

(2019) 40 ILJ 827 (LAC); [2018] ZALAC 54 at para 23.

[2]

(2002) 23 ILJ 1229 (LAC).

[3]

(2000) 21 ILJ 166(LAC); [2000] 1 BLLR 45 (LAC).

[4]

(2015) 36 ILJ 232 (LC); [2014] ZALCJHB 115 at para 22.

[5] Ibid at para 25.

[6] GN 1665 of 14 October 1996: Rules for the conduct of proceedings in the Labour Court.

[7] Practice Manual of the Labour Court of South Africa, effective 1 April 2013.

[8]

[2015] ZACC 40; (2016) 37 ILJ 313(CC).

[9] Act 66 of 1995, as amended.

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Prepared on 11 October 2026 · Esheria