

SOUTH AFRICA / JUDGMENT

San Parks v Hospersa obo Nkwinika and Others (JR812/22) [2024] ZALCJHB 279 (12 July 2024)

[2024] ZALCJHB 279

COURT

Labour Court Johannesburg

BEFORE

Nxumalo

CASE / FILE NUMBER

JR812/22

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THE LABOUR COURT OF
SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case

no: JR812/22

In

the matter between:

SAN
PARKS
Applicant
and
HOSPERSA
obo S NKWINIKA
First Respondent
COMMISSION
FOR CONCILIATION, MEDIATION
AND
ARBITRATION
Second Respondent
COMMISSIONER
SERETSE MASETSE
Third Respondent

Heard:

10 January 2024

Delivered: 12 July 2024 (This judgment was handed down electronically by emailing a copy to the parties. The 12 July 2024 is deemed to be the date of delivery of this judgment).

JUDGMENT

NXUMALO, AJ

Introduction

- [1] The applicant has brought an application, in terms of section 145 of the Labour Relations Act[1] (LRA), to review and set aside the arbitration award, dated 15 November 2021, issued by the third respondent. In the arbitration award, the third respondent found that the first respondent's dismissal was substantively unfair.
- [2] The applicant also seeks condonation for the late filing of the review application as well as for the late filing of the supplementary founding affidavit.
- [3] The first respondent, Health & Other Services Personnel Trade Union of South Africa on behalf of Mr Sakhile Nkwinika (Mr Nkwinika), opposes condonation for the late filing of the review application as well as for the late filing of the supplementary affidavit. The first respondent also opposes the review application.
- [4] In casu, it is necessary to first deal with the application for condonation - without a successful application for condonation, this Court would not have jurisdiction to deal with the applicant's review application.

Condonation principles

- [5] Section 145(1)(a) of the LRA provides that a review application must be filed within six weeks of the date that the arbitration award was served on the applicant.
- [6] Section 145(1A) of the LRA provides that this Court may on good cause condone the late filing of an application in terms of section 145(1) of the LRA.
- [7] The requirements that must be addressed by an applicant seeking condonation are trite – they are the length of the delay,

explanation for the delay, importance of the case (prejudice) and prospects of success.[2]

- [8] The prospects of success are immaterial without a reasonable and acceptable explanation for the delay. Also, even if the explanation

for the delay is good, it is of no consequence if there are no prospects of success. This position was accepted in *National Union of Mineworkers v Council for Mineral Technology*[3] where the Labour Appeal Court (LAC) held as follows:

‘The approach is that the Court has a discretion, to be exercised judicially upon a consideration of all facts, and in essence it is a matter of fairness to both parties. Among the facts usually relevant are the degree of lateness, the explanation therefore, the prospects of success and the importance of the case. These facts are interrelated: they are not individually decisive. What is needed is an objective conspectus of all the facts. A slight delay and a good explanation may help to compensate for prospects of success which are not strong. The importance of the issue and strong prospects of success may tend to compensate for a long delay. 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 the delay, an application for condonation should be refused.’

[9] In NUMSA and another v Hillside Aluminium[4], the Labour Court held that:

‘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.’

[10] It is therefore apparent (and trite) that condonation is not for the mere asking – a party must make out a case which entitles it to be indulged by this Court by showing good cause which entails giving a full, detailed and accurate account of the causes of the delay. This explanation must be reasonable in order to excuse the party's failure to adhere to the time periods.

[11] The applicant in addition to, inter alia, having to explain the delay in launching the review application, would also have to satisfy this Court that it has prospects of

success in the review application. In this regard on prospects of success in the review application, it is necessary to bear in mind that the test on review is stringent and a conservative test of reasonableness. The LAC in Makuleni v Standard Bank of South Africa Ltd and others[5] held as follows:

‘The court asked to review a decision of commissioner must not yield to the seductive power of a lucid argument that the result could be different... At the heart of the exercise is a fair reading of the award, in the context of the body of evidence adduced and an even-handed assessment of whether such conclusions are untenable...’

[12] Furthermore, in this regard, the LAC in Head of the Department of Education v Mofokeng and others[6], clarified the test/legal position with respect to the setting aside of arbitration awards. The LAC held that:

‘[32] However, sight may not be lost of the intention of the legislature to restrict the scope of review when it enacted section 145 of the LRA, confining review to “defects” as defined in section 145(2) being misconduct, gross irregularity, exceeding powers and improperly obtaining the award. Review is not permissible on the same grounds that apply under PAJA. Mere errors of fact or law may not be enough to vitiate the award. Something more is required. To repeat: flaws in the reasoning of the arbitrator, evidenced in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material factors etc must be assessed with the purpose of

establishing whether the arbitrator has undertaken the wrong enquiry, undertaken the enquiry in the wrong manner or arrived at an unreasonable result. Lapses in lawfulness, latent or patent irregularities and instances of dialectical unreasonableness should be of such an order (singularly or cumulatively) as to result in a misconceived inquiry or a decision which no reasonable decision-maker could reach on all the material that was before him or her.

[33] Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the inquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the inquiry, the delimitation of the issues to be determined and the ultimate outcome...'

[13] In *Steenkamp and others v Edcon Limited*[7] the Constitutional Court reiterated (and referred with approval) its earlier decision in *Grootboom v National Prosecuting Authority and another*[8], and held that :

'[36] Granting condonation must be in the interests of justice. This Court in *Grootboom* set out the factors that must be considered in determining whether or not it is in the interests of justice to grant condonation:

"[T]he standard for considering an application for condonation is the interests of justice. However, the concept 'interests of justice' is so elastic that it is not capable of precise definition. As the two cases demonstrate, it includes: the nature of the relief sought; the extent and cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the importance of the issue to be raised in the intended appeal; and the prospects of success. It is crucial to reiterate that both Brummer and Van Wyk emphasise that the ultimate determination of what is in the interests of justice must reflect due regard to all the relevant factors, but it is not necessarily limited to those mentioned above. The particular circumstances of each case will determine which of these

factors are relevant.

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.

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. As a general proposition the various factors are not individually decisive but should all be taken into account to arrive at a conclusion as to what is in the interests of justice.”

[37] All factors should therefore be taken into account when assessing whether it is in the interests of justice to grant or refuse condonation.’

Length of the delay/lateness and explanation thereof

[14] Whilst the arbitration award is dated 15 November 2021, it appears to have been issued on or about 18 November 2021. The effect of this is that the review application ought to have been instituted on or by 30 December 2021.

[15] Seemingly, the review application was only filed with this Court on 14 April 2022. This was approximately fourteen (14) weeks or over three (3) months after the review application was due (i.e. over and above the required six-week period).

[16] This is an inordinate delay that must be properly explained in order for this court to condone the late filing of the review application.

[17] Put differently into context, since the issuing of the arbitration award, the applicant waited some twenty (20) weeks or over four (4) months, before launching the review application.

[18] The applicant avers the following:

18.1 Its Labour Relations Practitioner, Ms Gayl Mbembela (Ms Mbembela), fell ill at the end of January 2022 - unbeknownst to the deponent of the founding affidavit and was booked off until October 2022.

18.2 Ms Mbembela was responsible for providing legal services with the necessary information regarding this dispute.

18.3 As a result of Ms Mbembela's illness and absence from work, the deponent, Ms Tula, was tasked to find the information and provide same to the applicant's relevant attorneys. The deponent, Ms Tula, asserts that it was challenging as her office was not in the same area as that of Ms Mbembela and thus, she had to wait for responses and conduct research.

[19] The third respondent avers the following:

19.1 The delay/lateness is excessive and there is no good nor substantiated explanation thereof. The applicant did not [and failed] to produce either a confirmatory affidavit, sick note or relevant leave records of [and/or from] Ms Mbembela, to support and substantiate the allegations and averments relating to her.

19.2 Furthermore, that applicant has failed and not explained (at all) certain periods. That is, no explanation for why the review application was not launched before the due date of December 2021 or shortly thereafter before the end of January 2022 – in that the applicant alleges that Ms Mbembela only fell ill at the end of January 2022.

19.3 The deponent to the founding affidavit, Ms Tula, is the superior to Ms Mbembela and was therefore in an even better position to advice the applicant.

[20] I am inclined to agree with the third respondent. The applicant has not explained what it was doing and/or why the review application was not launched in the period between and before the due date of December 2021 or shortly thereafter before the end of January 2022 – as Ms Mbembela, on the applicant's version, only fell ill at the end of January 2022. The applicant in reply still did not and could not explain this period. Moreover, when the matter was heard and argued before this Court, the applicant, conceded that it could not explain and there was no explanation for this period. There are accordingly unexplained periods by the applicant.

[21] Secondly, the applicant has not produced either a confirmatory affidavit, sick note or relevant leave records of/from Ms Mbembela, or anything at all, to support and substantiate the allegations and averments relating to her. These points were taken and raised by the third respondent in the opposing affidavit, long before the matter was heard by this Court. The applicant, at the very least, could have submitted a confirmatory affidavit of/from Ms Mbembela. The applicant failed to do so nor to produce anything to substantiate the allegations relating to Ms Mbembela. The applicant had an opportunity to do so in the founding papers, the reply or before the matter was heard by this Court – it; however, did not do so.

[22] Furthermore, the review application was approximately over three (3) months or some fourteen (14) weeks late (i.e. over and above the required six (6)-week period). The deponent, Ms Tula, explains that Ms Mbembela, who was responsible for the matter, became ill and could not provide the necessary information and as such the deponent had to conduct his own searches for the information. The deponent alleges that this task took long as they had to wait for answers from Ms Mbembela. It is, however, difficult (more so without it being substantiated by anything at all) to accept that it took over three (3) months for the deponent to source the relevant information in order to institute this review application.

[23] In the circumstances, the length of the delay, explanation thereof and those periods which cannot be explained, do not assist the applicant in obtaining condonation for the late filing of the review application.

[24] The applicant in its heads of argument and oral argument, implored on this Court to grant condonation in the interests of justice. The interests of justice point, during the hearing of the matter, appeared to be the main submission point of the applicant on condonation and was linked to the consideration of prospects of success. The applicant's condonation papers were silent on prejudice.

[25] I will consider and address these further below. However, I am of the view, that, before doing so, it is worthy to first/also turn to the late filing of the supplementary affidavit – as it may be necessary to the consideration of prospects of success in relation to the late filing of the review application. The applicant seeks condonation for the late filing of the supplementary affidavit - the first respondent opposes such condonation.

Late filing of the supplementary affidavit

[26] The applicant's explanation for the late filing of its supplementary affidavit is that the counsel briefed for the supplementary affidavit got ill (during the period when the record was dispatched and filed, i.e. around or between May 2022 and June 2022) as a result of "long Covid after she contracted Covid as far back as 2020". The illness caused her fatigue, flu and body pains – which ultimately created a backlog in her work.

[27] The applicant contends that the delay was not because of it and that the delay is and was minimal.

[28] The record was filed on or about 20 June 2022. Consequently, the supplementary affidavit ought to have been filed within ten (10) court days of the filing of the record, i.e. by 4 July 2022. The applicant, however, only filed the supplementary affidavit on 16 September 2022 i.e. approximately fifty-three (53) days later.

[29] It is difficult to accept the reasons provided by the applicant as being reasonable. Firstly, there is no averment that the applicant made any request for an indulgence from the first respondent.

[30] Secondly, these averments were also not substantiated by anything at all by the applicant nor has there been an attempt to substantiate them - even after the first respondent disputed the applicant's version and raised this as a point in its opposing affidavit to the condonation of the late filing of the supplementary affidavit. The applicant in reply appears not to have dealt with this.

[31] It should also not be that the filing of processes before this Court are delayed merely because the counsel was ill and/or ultimately had a backlog. The applicant had instructing attorneys on brief who could have dealt with the matter in the absence of counsel or could have ultimately sought the assistance of another counsel.

[32] In the circumstances, I am of the view that the applicant has not furnished a reasonable (and/or a substantiated) explanation for the late filing of the supplementary affidavit – which would warrant the granting of condonation for the late filing of the supplementary affidavit.

Prospects of success and interests of justice

- [33] Mr Kwinika, it appears, was employed by the applicant in 2013 as an intern and rose to the rank of Project Manager, which position he held at the time of his dismissal.
- [34] The applicant engaged independent contractors to conduct various services. The contractors engaged by the applicant included EME Cash and Projects, which was run by Ms Lerato Malatji (Ms Malatji).
- [35] On or about 17 July 2020, there were contractors, including EME Cash and Projects, that were overpaid by the applicant and a request was made for those contractors to return the overpaid amounts. EME Cash and Projects were overpaid approximately R26 065.50. All the contractors that were overpaid returned the overpaid amount, except for EME Cash and Projects.
- [36] Ms Malatji, for EME Cash and Projects, alleged that Mr Kwinika informed her to pay and/or transfer the overpaid amount to him directly – to his bank account or cell phone (i.e. cash send). Ms Malatji further alleged she did do so, i.e. transferred and paid the overpaid amount to Mr Kwinika. She, however, also alleged that she only paid a total amount of R19 000. She further alleged that she paid the money using/from different bank accounts, and some of these accounts did not belong to her but belonged to her husband. Ms Malatji also alleged that her mother had reached out to Mr Kwinika, through WhatsApp and Mr Kwinika seemingly made concessions and/or did not dispute these allegations to her mother.
- [37] Mr Kwinika denied the allegations against him. He was, however, found guilty and dismissed on these allegations as well as additional unrelated allegations of misconduct from prior years relating to alleged misuse of the applicant's petrol card. Mr Kwinika thereafter referred a dispute to the second respondent. The third respondent, in the arbitration award, found in favour of Mr Kwinika (i.e. that his dismissal was substantively unfair and reinstated him). The applicant challenges the arbitration award through the review application.
- [38] The applicant, however, has not challenged the third respondent's arbitration award and findings in respect of and around the misuse of the petrol card. The review application is limited, by the applicant, to the findings relating to the alleged payments from Ms Malatji to Mr Kwinika.
- [39] Ultimately, the third respondent found that the applicant failed to prove that the money was transferred and deposited into Mr Kwinika's bank account or through cash send (cell phone). The third respondent also took the view that the WhatsApp messages between Ms Malatji's mother and Mr Kwinika did not prove that Ms Malatji paid any money to Mr Kwinika.
- [40] On the second charge which, as mentioned above, the applicant has not challenged, the third respondent found that the applicant could not link Mr Kwinika to the personal use of the fuel card.

- [41] The applicant's review application (or first ground) is largely premised on the transcript of the internal disciplinary proceedings – which the applicant attached to its review application founding papers. The applicant, on review, contends that the transcript of the disciplinary hearing allegedly shows contradictory versions of Mr Kwinika. However, this transcript was not before the third respondent, i.e. it was not submitted and used during the arbitration proceedings. Be that as it may, during the hearing of this matter before this Court, the applicant seemingly appears to have abandoned reliance on (and/or did not pursue) this ground. However, even if not, the transcript of the internal disciplinary proceedings was not before the third respondent, i.e. it was not submitted and used during the arbitration proceedings.
- [42] On the alleged payments to Mr Kwinika, the third respondent, on the face of it, appears to have dealt with this. The documents (which were purporting to be bank statements) were disputed and challenged by Mr Kwinika, and it was for the applicant to prove the authenticity thereof. The applicant appears to have failed to do so. The conclusion by the third respondent that the documents could have been drawn up by any person is, on the face of it, not unreasonable. Ex facie, some of these documents do appear as excerpts which have been placed/affixed on a Word document. The third respondent therefore rejected the documents (with Mr Kwinika having disputed them) which the applicant and Ms Malatji purported to be bank statements.
- [43] The applicant could or should have (at the least, when the documents were being challenged) produced reliable or authentic and/or certified/stamped bank statements (and redact any sensitive information) to sustain the alleged sum of R19 000 and dispel any doubts or uncertainties. The applicant appears not to have done so. The applicant also could and/or should have called Ms Malatji's mother and husband as witnesses or even subpoenaed them. The applicant still appears to have not done so.
- [44] The third respondent appears, on the face of it, to have gone further and accepted that whilst there was one bank statement which appeared authentic or reliable, was certified/stamped and showed an amount of R5 000 being paid to Mr Kwinika's cell phone number, that same amount/money was immediately reversed by the sender (i.e. within seconds of it being sent, it was reversed). The third respondent also found [and the applicant and/or Ms Malatji appear to have seemingly accepted and/or could not dispute/gainsay] that in relation to the documents depicting amounts of R5 000, these were, in actual fact, a duplication of only one amount (i.e. only the one R5 000, mentioned above, which was immediately, within seconds, reversed by the sender).
- [45] The third respondent therefore concluded that there was no evidence to sustain the alleged payments and sum of R19 000 which Ms Malatji allegedly paid to Mr Kwinika – and Ms Malatji seemingly appears to have conceded or could not dispute/gainsay this under cross-examination. The applicant, as mentioned above, also did not call nor subpoena Ms Malatji's husband and mother as witnesses. The applicant also appears not to have produced reliable or authentic and/or stamped/certified bank statements when the documents were

challenged. As further mentioned above, the applicant could or should have (at the least, when the documents were being challenged) produced reliable or authentic and/or certified/ stamped bank statements (and redact any sensitive information) to sustain the alleged sum of R19 000 and dispel any doubts or uncertainties.

[46] The applicant also contends that the third respondent committed an irregularity by finding that the applicant did not prove which rule was contravened.

[47] The applicant, in my view, appears to misunderstand the finding of the third respondent. It does not appear, to me, that the third respondent was dismissing the existence of a rule – in my view, the third respondent was simply stating that the applicant could not prove that Mr Kwinika contravened the relevant rules. Of course, there was a rule – any suggestion that there was no rule against dishonesty would be misplaced. An act of dishonesty does not need to be set out in a policy in order for there to be a breach of such rule. Honesty is a rule that is inferred from common law and needs not be spelt out meticulously in a policy. It is one of those rules that are well established that they need not be communicated - it is the foundation of the working relationship.

[48] In the circumstances, in my view and on the face of it, the applicant's prospect of success on review are not strong. The review test, as mentioned above, is a stringent and conservative test of reasonableness.[9] Even if I am wrong about the applicant's prospects of success on review, there was an inordinate delay (of some fourteen

(14) weeks or over three (3) months) in launching the review application. The delay includes periods which the applicant could not (and conceded it cannot) explain. For the reasons mentioned above, the overall length of the delay and explanation thereof do not assist the applicant in obtaining condonation for the late filing of the review application.

[49] In casu, and based on the above, I am of the view that it is not in the interests of justice to grant condonation of a review application:-

which was launched inordinately late; with an explanation which was unsubstantiated nor reasonable; with certain periods being

unexplained and which the applicant cannot explain; and (in any event) one whose prospects of success are, on the face of it, in my view, not strong.[10]

[50] In the result, the following order is made:

Order

1. Condonation for the late filing of the review application is not granted.
2. Condonation for the late filing of the supplementary affidavit is not granted.
3. There is no order on costs.

M. Nxumalo

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate P Kirstein

Instructed by:

Weavind & Weavind Inc

For the First Respondent: Advocate KA Tema

Instructed by:

Sehoana Motsepe Attorneys

[1] Act 66 of 1995, as amended.

[2] *Melane v Santam Insurance Co. Ltd* 1962

(4) SA 531 (A) at 532 C – F; *Academic and Professional Staff Association v Pretorius NO and others*

(2008) 29 ILJ 318 (LC);

[2008] 1 BLLR (LC) at paras 17 – 18.

[3] [1998] ZALAC 22 at para 10.

[4] [2005] 6 BLLR 601 (LC); [2005] ZALC 25 at para 6.

[5]

[2023] ZALAC 4; [2023] 4 BLLR 283 (LAC) at para 4.

[6]

[2014] ZALAC 50; [2015] 1 BLLR 50 (LAC) at paras 32 - 33. Also see *Makuleni v Standard Bank of South Africa Ltd and others*

[2023] 4 BLLR 283 (LAC) at paras 2 to 4. See also *Herholdt v Nedbank Ltd* (Congress of South African Trade Unions as amicus curiae) [2013] 11 BLLR 1074 (SCA) at para 25. See also *Sidumo and another v Rustenburg Platinum Mines Ltd and others* (2007) 28 ILJ 2405 (CC) at para 110.

[7]

[2019] 11 BLLR 1189 (CC);

[2019] ZACC 17.

[8] 2014 (1) BCLR 65 (CC);

[2013] ZACC 37.

- [9] See footnotes 5 and 6 above: *Head of the Department of Education v Mofokeng and others* [2015] 1 BLLR 50 (LAC) at paras 32 – 33; *Makuleni v Standard Bank of South Africa Ltd and others*
- [2023] 4 BLLR 283 (LAC) at paras 2 to 4; *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curiae)* [2013] 11 BLLR 1074 (SCA) at para 25; *Sidumo and another v Rustenburg Platinum Mines Ltd and others* (2007) 28 ILJ 2405 (CC) at para 110.
- [10] See footnotes 7 and 8 above: *Steenkamp and others v Edcon Limited*
- [2019] 11 BLLR 1189 (CC); [2019] ZACC 17; *Grootboom v National Prosecuting Authority and another*
- [2014] 1 BLLR 1 (CC); [2013] ZACC 37.

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