
SOUTH AFRICA / JUDGMENT

Thejane v Rustenburg Platinum Mine and Others (JR1998/11) [2013] ZALCJHB 351 (21 November 2013) [2013] ZALCJHB 351

COURT

Labour Court Johannesburg

BEFORE

Van Niekerk

CASE / FILE NUMBER

JR1998/11

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REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

CASE NO: JR 1998/11

In the matter between:

FRANCIS TSOABISO THEJANE

APPLICANT

and

RUSTENBURG PLATINUM MINE

1ST RESPONDENT

CCMA

2ND RESPONDENT

COLLINS LENKWASI MAKAMA NO

3RD RESPONDENT

Ruling

delivered: 21 November 2013

RULING:

APPLICATION FOR LEAVE TO APPEAL

VAN NIEKERK J

[1] On 1 November 2013, the applicant filed an application for leave to appeal against a judgment delivered by this court on 12 February

2013. The applicant's attorney was advised that the application would not be considered without an application for condonation. The application for condonation was served and filed yesterday, 20 November 2013.

[2] The judgment that is the subject of the application for leave to appeal concerns an application to review and set aside an arbitration

award made by the third respondent. In its judgment, the court found that the conduct of the third respondent could not be called into question and that the arbitrator's decision was reasonable having regard to the material placed before him. The third

respondent's award was accordingly upheld.

[3] I deal first with the application for condonation. The application comprises an affidavit deposed to by Mr Parsons, the applicant's

attorney of record. In his affidavit, Parsons acknowledges receiving the judgment on 13 February 2013. He acknowledges too the requirement that any application for leave to appeal be filed within 15 days of the date of the judgment. On this basis, the application for leave to appeal had to be filed before 5 March 2013. The stamp on the application for leave to appeal indicates that the application was filed on 1 November 2013, just short of eight months out of time.

[4] The explanation for the delay, briefly stated, is the following. A copy of the judgment was sent to the applicant only on 6 June 2013, "due to his unavailability". On 26 June 2013 Parsons held a consultation with the applicant, who on 13 August 2013 provided him with instructions to file the application for leave to appeal. Counsel was briefed on 15 August 2013, and supplementary

instructions, in the form of documents requested by counsel, were sent to counsel's chambers on 27 September 2013. These documents apparently only reached counsel's Chambers on 26 October 2013. On 30 October 2013 the application for leave to appeal was received from counsel and the application was thereafter served and filed.

[5] The test to be applied in an application for condonation is well established. It is incumbent on applicant seeking condonation to establish sufficient cause for the indulgence sought. Ordinarily, this requires the court to consider the degree of lateness, the explanation therefor, the prospects of success and the importance of the case. These factors are not individually decisive, and a piecemeal approach is to be avoided. The court is required to have regard to a conspectus of all the facts, and also to the respondent's interests in finality (*Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A)). In this court, a further principle is applied. In *NUM v Council for Mineral Technology* [1999] 3 BLLR 2309 (LAC), the Labour Appeal Court added the following codicil to the Melane test:

'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, the matter how good the explanation for the delay, an application for condonation should be refused.'

[6] In the present instance, despite Parsons' averments to the contrary, the period of delay is significant. I fail to appreciate on what basis it can be averred that the degree of lateness is not excessive – as I have indicated above, the

application was filed almost 8 months late. The degree of lateness must necessarily be evaluated in the light of the statutory

imperative of expeditious dispute resolution and the interest of the respondent in finality in these proceedings. In my view, the degree of lateness is excessive and calls for an explanation.

[7] It is well established that an applicant seeking condonation is required to proffer an explanation for the full period of the delay. In the present instance, Parsons received the judgment the day after it was delivered. There is no evidence of any attempt between that date and 6 June 2013, when Parsons avers that a copy of the judgment was sent to the applicant, to pursue any possible application for leave to appeal. The founding affidavit tersely states that the applicant is a citizen of Lesotho and that he was unavailable until 6 June. The nature and circumstances of his "unavailability" are simply not explained, nor is there an affidavit filed by the applicant explaining why he was only able to receive a copy of the judgment more than three months after it was delivered. Why a consultation could be held only at the end of June 2013 is also not explained. At this point, Parsons must have been aware that any application for leave to appeal was already almost 4 months out of time, and he must have advised his client of the fact that any application for leave to appeal was already out of time. Despite this, the applicant provided Parsons with instructions to file the application only on 13 August 2013, some six weeks after the consultation was held. Similarly, the applicant would have the court believe that it took from 13 August 2013 to 30 October 2013, some 2 ½ months, to draft the application for leave to appeal, again in circumstances where both Parsons and counsel were aware that the time limit had long expired and where both appear to have been content to deal with the matter at their leisure.

- [8] The explanation for the delay in filing the application for leave to appeal is woefully inadequate. The overriding impression gained from the papers is that the applicant and his legal advisers considered the applicable time limit to be entirely academic and considered themselves entitled to file the application at their leisure. In these circumstances, given the inordinate delay in filing the application for leave to appeal and given the inadequacy of the explanation for that delay, the application for condonation stands to be dismissed.
- [9] Even if it were necessary for the court to have regard to the applicant's prospects of success (which on the basis of the Mintek judgement it is not) whatever prospects the applicant may have had on the merits have been considerably diminished by developments since the judgment in the present instance was delivered. In particular, the judgments by the Supreme Court of Appeal in *Herholt v Nedank Ltd* (701/2012, delivered 5 September 2013) and the Labour Appeal Court in *Goldfields Mining South Africa v CCMA* (JA 2/2012, 4 November 2012) confirm that the threshold for interference by a reviewing court in CCMA arbitration awards is set high. The latter judgement, in particular, emphasises that it is not for this court to evaluate how the arbitrator treated and dealt with each factor that is raised in the course of the review application and then, on a piecemeal basis, to consider whether any failure by the arbitrator to deal with one or more of the relevant factors constitutes a process-related irregularity. The proper approach is for the reviewing court to consider, on a totality of the evidence, whether the decision made by the arbitrator is one that a reasonable decision-maker could not make. The application of this test will render fewer awards reviewable.

For the above reasons, I make the following order:

1. The application for condonation for the late filing of the application for leave to appeal is dismissed.

ANDRE VAN NIEKERK

JUDGE OF THE LABOUR COURT

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Prepared on 14 October 2026 · Esheria