
SOUTH AFRICA / JUDGMENT

UTI South Africa v Pilusa and Others (JR1732/12) [2016] ZALCJHB 270 (21 July 2016) [2016] ZALCJHB 270

COURT

Labour Court Johannesburg

BEFORE

Mahosi

CASE / FILE NUMBER

JR1732/12

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THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case No: JR1732/12

In the matter between:

UTI SOUTH AFRICA Applicant

and

PILUSA, J First

Respondent

THOBEJANE, H Second

Respondent

MASHIKA, JOHN, N.O Third

Respondent

NATIONAL BARGAINING COUNCIL

FOR THE ROAD FREIGHT INDUSTRY Fourth

Respondent

Heard: 20 February 2016

Delivered: 21 July 2016

MAHOSI AJ

Introduction

- [1] This is an application to review, in terms of section 145 of the Labour Relations Act[1] ('the Act'), of the arbitration award issued by the third respondent ('the commissioner') in the matter under case number GPRFBC 19771 dated 21 May 2012.
- [2] The applicant also made an application in terms of Rule 12(1) for condonation of the late filing of the review application. The said condonation application is opposed.
- [3] The first and the second Respondents made an application in terms of Rule 11 for the dismissal of the review application.

Background

- [4] The first and the second respondents were both employed by the applicant. The first respondent started working for the applicant on 4 January 2006 as a driver and he was earning a monthly salary of R6 711.00. The second respondent started working for the applicant on 1 January 2005 and was earning a monthly salary of R7 281.20. The first and second respondents (respondents) were both charged with misconduct relating to an unauthorised use of company property, deviation from the route, gross dishonesty and non-compliance with standard operating procedures. On 3 February 2012, both respondents were dismissed after a disciplinary hearing was conducted.
- [5] As a result, the respondents referred the dispute to the National Bargaining Council for the Road Freight and Logistic Industry (NBCRFLI) challenging the substantive fairness of their dismissal. The matter was conciliated unsuccessfully and it proceeded to arbitration. On 21 May 2012, the arbitrator, third respondent issued an arbitration award and found the respondents' dismissal to be substantively unfair. The third respondent ordered the applicant to reinstate the respondents and to pay their back pay that is equivalent to their four months' salary. The award was received by the parties on 06 July 2012. It is against this decision that the applicant applied for review.
- [6] The applicant, through its former attorneys of record, Spangenberg, Boshoff Incorporated, applied to review the arbitration award of the third respondent on 17 September 2012 and neglected to simultaneously apply for condonation. In their answering affidavit, the respondents raised a point in limine challenging the Court's jurisdiction to hear the matter as the applicant failed to apply for condonation. On 04 September 2013, the respondents filed an application in terms of Rule 11(1) as the applicant failed to deliver the arbitration's records in terms of Rule 7A(6) and further failed to apply for condonation of the late filing of the review application. On 27 September 2013, the current applicant's attorneys of record filed and served a notice of substitution of attorneys of record. The attorneys of record

proceeded to address correspondence to the fourth respondent requesting confirmation that the records have been dispatched

alternatively requesting proof that same have been delivered. It was only on 13 December 2013 that the fourth respondent responded by requesting the applicant's attorneys for a copy of the review application which was sent on 2 January 2014. The applicant obtained the record of proceedings and proceeded to have same transcribed. The record of proceedings was served and filed on the first, second and third respondents on 19 February 2014. The applicant received the respondents' answering affidavit on 27 February 2014 and proceeded to serve and file their replying affidavit. The arbitration record was filed one year six months out of the prescribed period. The condonation application for the late filing of the review application was only filed on 14 March 2014.

Arbitration award

- [7] In the arbitration proceedings, the respondents challenged the substantive fairness of their dismissal. In his analysis of evidence and arguments, the third respondent stated that the case against the respondents was that they were allegedly seen at the bargaining council with the company truck without authority and that they allegedly failed to make deliveries on time and were even dishonest. It was the third respondent's view that the allegations against the respondents were not proven as the applicant only brought two witnesses who had not seen the respondents at the bargaining council and failed to bring the two witnesses who could testify on deviation from their route and the misuse of the applicant's property, being Mr. Krause and the HR director. It was the respondents' further view that the applicant failed to prove dishonesty as it conceded that the delivery note was completed by the client and failed to call the client to testify on the precise time of the delivery.
- [8] As such, the third respondent found that the respondents' dismissal was unfair. The applicant was ordered to retrospectively reinstate the respondents and to pay their back pay amounting to R26 884.00 and R29 124.80 respectively. As a result the respondents were to report for duty on 11 June 2012 and the back pay was payable on or before 9 July
2012. It was against this finding that the applicant lodged a review application. I will first deal with the condonation and dismissal applications.

Condonation

- [9] As indicated above, the arbitration was held on 10 May 2012 and the award was rendered on 21 May 2012. The applicant submitted that through its former attorneys of record, Spangenberg, Boshoff Incorporated, it applied to review the arbitration award of the third respondent on 17 September 2012 and neglected to simultaneously apply for condonation. In their answering affidavit, the respondents opposed the condonation application and submitted that the review application was only filed on 2 October 2012, which was out of time. From the pleadings, the date on which the review application was filed is not clear as the copies of the pleading bundles were filed. I will accept that the review application was

filed on 17 September 2012 as the respondents failed to substantiate their submission. The record of the arbitration proceedings was served and filed on 19 February 2014 and the respondents served and filed their answering affidavit on 27 February 2014. The condonation application for the late filing of the review application was served and filed on 14 March 2014. It is the applicant's view that it only became aware of the need to apply for condonation after receiving the respondent's answering affidavits and argued that the review application was therefore 21 days outside the prescribed period and submitted that the delay is not excessive and is, accordingly, justifiable in the circumstances. It is further submitted that a fair reason has been shown that the delay was not due to any fault of the applicant and that the applicant has attempted to rectify the situation.

- [10] In terms of section 145 (1A) of the Act, the Court may on good cause shown condone the late filing of an application. According to the decision of *Melane v Santam Insurance Co Ltd* (*Melane*),^[2] the factors that need to be considered are the degree of lateness, explanation thereof, the prospect of success and the importance of the case. This Court has consistently followed the case of *Melane* and the Labour Appeal Court in *NUM v Council for Mineral Technology*,^[3] and emphasised that the two crucial elements for deciding on the issue of condonation are prospects of success and a good explanation

for the delay. According to the court:

‘... 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.’^[4]

- [11] Section 145(1)(a) of the Act requires any person who alleges a defect in any arbitration proceedings under the auspices of the Commission to apply to the Labour Court for an order setting aside the arbitration award within six weeks of the date that the award was served on the applicant. For the purpose of calculating any period in terms of the rules of this Court, a day means a calendar day and the first day is excluded and the last day is included. Given that the award was rendered on 21 May 2012, the last day on which the review application had to be lodged was 12 July 2012. As stated above, the applicant only filed the review application on 17 September 2012, which was 66 days out of time. However, the condonation application was only filed on 13 March 2014, which was about one year nine months and twenty-two days from the date of the arbitration award.
- [12] The applicant's submission is that it only became aware of the need to file a condonation application on 27 February 2014 upon receipt of the answering affidavit. On the other side, the respondents' view is that the attorneys of record should have realised upon perusal of the file, when they were appointed in September 2013 that the review application was out of time. In *Allround Tooling (Pty) Ltd v NUMSA*,^[5] the Court held that an applicant should apply for condonation as soon as he or she realises that his or her papers are out of time. In the same judgment, the court observed as follows:

[8] ...Tanner knew by no later than 21 April that the respondent's heads of argument were three weeks late... He should have filed the application for condonation no later than on that day. Instead the application was filed six weeks later on the day of the appeal. The only explanation for his failure to make timeous application for condonation is that he forgot to do so. It goes without saying that that is not a reasonable nor acceptable explanation. It is an explanation which borders on contempt for the Court and is manifest of an unprofessional and irresponsible attitude towards the interests of the respondents, of which more later.'[6]

[13] There is no reasonable explanation for filing the review application late except to say that the applicant's previous attorneys neglected to do so and that the applicant was under the reasonable impression that its former attorneys of record had delivered the review application within the time frame and form as allowed and required by the rules of the above Honourable Court. It is accepted in law that an applicant in the condonation application cannot rely on the tardiness or negligence of its legal representative to justify the delay in filing a condonation application to this Honourable Court. In *Saloojee and Another v Minister of Community Development*, [7] the Court held that there was a limit to which an employee could blame the remissness of his representative. The applicant failed to explain the step it took to ensure that its review application is prosecuted diligently and timeously between the date on which the review application was filed and the date on which the attorneys of record was appointed. As such, I find that its reason for the delay is unreasonable and unacceptable.

[14] The review application was not only launched out of the prescribed period but the condonation application for late filing was filed about one year nine month and twenty two days from the date of the arbitration award. In *Seatlolo and Others v Entertainment Logistics Service (A division of Gallo Africa Ltd)*, [8] the following was stated:

[10] It is trite that an application for condonation must be brought as soon as the party becomes aware of the default. The Supreme Court of Appeal has emphasized this principle on numerous occasions (see *Saloojee supra* at 138H; *Rennie v Kamby Farms (Pty) Ltd* 1989 (2) SA 124 (A) at 129G; and *Napier v Tsaperas* 1995 (2) SA 665 (A) at 671 B-D). This approach has been endorsed by the Labour Appeal Court, which in fact advocates bringing the application for condonation on the same day it is discovered to be necessary. See in this regard *inter alia Allround Tooling (Pty) Ltd v NUMSA and others* [1998] 8 BLLR 847 (LAC) at 849 para 8; *NEHAWU v Nyembezi*

[1999] 5 BLLR 463 (LAC) at 464 D-F; and *Librapac CC v Fedcrow and Others*

[1999] 6 BLLR 540 (LAC) at 543.

[11] In order to exercise its discretion whether or not to grant condonation, this court must be appraised of all the facts and

circumstances relating to the delay. The applicant for condonation must therefore provide a satisfactory explanation for each period of delay. See NUMSA and another v Hillside Aluminium [2005] ZALC 25; [2005] 6 BLLR 601 (LC) where Murphy AJ held that an unsatisfactory explanation for any period of delay will normally be fatal to an application, irrespective of the applicant's prospects of success.'^[9]

[15] It is my view that even if it is accepted that the applicant only became aware of the need to apply for condonation on 27 March 2014, there is no reasonable or acceptable explanation for filing the condonation application 21 days outside the prescribed period. In *Grootboom v National Prosecuting Authority and Another*,^[10] Bosielo, AJ stated as follows:

'[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.'^[11]

[16] In view of *Melane*,^[12] without a reasonable and acceptable explanation for the delay, a court may, in the exercise of its discretion, refuse condonation

irrespective of the prospects of success. I do not believe that this is a case where prospects of success warrants consideration.

[17] The applicant further submitted that it will be prejudiced should the condonation application not be granted as the applicant was in no way responsible for the late filing of the review application and that the delay was purely due to the conduct of its previous attorney. As indicated above, the applicant's failure to act between the time that the review application was launched and the time the new attorneys were appointed is fatal to its condonation application. Furthermore, the applicant submitted that it would be prejudiced as it has already paid for the transcription of the record and has done everything in its power to rectify the situation. As much as the applicant will suffer financial loss, the respondents are prejudiced by lack of timeous finality of this matter. It is my view that the prejudice suffered by the respondents outweighs the prejudice suffered by the applicant.

[18] In its founding affidavit, the applicant submitted that it would be in the interest of justice that the late filing of the review application be condoned and that the applicant be granted leave to prosecute its review application. In *Grootboom v National Prosecuting Authority* above, the court stated that the test to be applied when considering an application for condonation is the interest of justice. In that case, Judge Zondo stated as follows:

'[50] In this Court the test for determining whether condonation should be granted or refused is the interests of justice. If it is in the interests of justice that condonation be granted, it will be granted. If it is not in the interests of justice to do so, it will not be granted. The factors that are taken into account in that inquiry include:

- (a) the length of the delay;
- (b) the explanation for, or cause for, the delay;
- (c) the prospects of success for the party seeking condonation;
- (d) the importance of the issue(s) that the matter raises;
- (e) the prejudice to the other party or parties; and
- (f) the effect of the delay on the administration of justice.

Although the existence of the prospects of success in favour of the party seeking condonation is not decisive, it is an important factor in favour of granting condonation.

[51] 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.

[52] Although the main judgment includes the prospects of success among the factors to be taken into account, it does not say whether there are reasonable prospects of success in favour of the respondents, nor does it take this factor into account in its assessment of whether it is in the interests of justice to grant or refuse condonation.

[53] The main judgment does not take into account that there are at least four factors which favour granting condonation to the respondents. These are:

- (a) the existence of reasonable prospects of success;
- (b) the importance of the issue raised by the matter;
- (c) the absence of prejudice to the applicant; and
- (d) the fact that the periods of delay (ie 15 court days in one case and 30 court days in the other) are not excessive.

[54] In my view the main judgment should have taken these factors into account in its assessment of whether it is in the interests of justice to grant or refuse condonation. Furthermore, there are two decisions of this Court, which discuss below, that support the granting of condonation which are not considered in the main judgment. In my respectful view the main judgment unduly focuses on the inadequacy of the explanation for the delay and ignores other important factors that are normally taken into account in considering

condonation applications.’[13]

- [19] In this case, the applicant failed to show sufficient cause as the extent of the delay was significant and the explanation of the delay was unreasonable and unacceptable. In the absence of a reasonable explanation for non-compliance with the rules of the court, the condonation application cannot not granted.

Rule 11 application to dismiss applicant’s review application

- [20] The respondents’ decision to file the application to dismiss applicant’s review is that the application failed to comply with Rules 7A. The dismissal application was filed on 04 September

2013. On 27 September 2013, the current applicant’s attorneys of record filed and served a notice of substitution of attorneys of record. It would seem that the applicant appointed the new attorneys in response to the respondents’ dismissal application.

- [21] It should be noted that it is at this point that, according to the applicant, the record of the arbitration proceedings was served and filed on 19 February 2014. Rule 7A(2)(b) requires a party desiring to review a decision or proceedings of a body or person performing a reviewable function justiciable by the court to deliver a notice of motion to the person or body and to all other affected parties calling upon that person or body to dispatch, within 10 days after receipt of the notice of motion to the registrar, the record of the proceedings sought to be corrected or set aside, together with such reasons as are required by law or desirable to provide, and to notify the applicant that this has been done. A failure to demand the record will render the application fatally defective.[14]

- [22] The record of the arbitration was filed one year four months and sixteen days out of the prescribed time and the applicant failed to apply for condonation. The applicant ascribe the delay to its previous attorneys negligence and/or incompetence, and further submitted that it was under the reasonable impression that its former attorneys of record had delivered the review application within the time frame and form as allowed and required by the rules of the above Honourable Court. In giving an explanation for the delay, the applicant submitted that it elected to terminate the services of its former attorneys of record during September 2013 for failure to diligently attend to the current and various other matters and approached the current attorneys of record during the same period. The applicant’s current attorneys of record, accordingly, attended to the necessary arrangements to immediately further prosecute the matter by the drafting of various correspondences to the Bargaining Council in an attempt to locate the record of proceedings and to attend to transcription of the record of proceedings, to serve the record of proceedings and deliver the applicant’s replying affidavit. There is no explanation from the applicant for waiting for a year to demand the record as required by the Rule 7A(2)(b) and/or to appoint new attorneys to diligently execute its review application. Of importance is that even after appointing the new attorneys, the applicant only made an application for the review application and failed and/or neglected to apply for the late filing of the record of the arbitration proceedings.

[23] That is what led the respondents to holding the view that the applicant's review application is defective. The applicant

opposed the application to dismiss the review application and raised a point in limine stating that the founding affidavit fails to comply with the provisions of section 10(1)(c) of the Justice of the Peace and Commissioners of Oath Act 16 of 1963 as read together with the regulations as respectively amended in that it failed to declare in paragraph 1 that the first respondent is a male. The applicant referred this Court to the judgment of Kathree-Setiloane, J of the North Gauteng High Court, in the matter of Absa Bank Ltd v Botha NO and Others,[15] where it was confirmed that the failure to differentiate between a male and female deponent, who signs what purports to be an affidavit,

renders same irregular.

[24] It is my view that in the absence of a condonation application for late filing of the record of the arbitration proceedings and in the absence of a reasonable explanation for late filing of the review application, the dismissal application should be granted. As such, consideration of the applicant's point in limine would only be academic. In the premises, there is no reason why costs should not follow cause.

Order

[25] The following order is made:

25.1 The condonation application for the late filing of the review application is refused.

25.2 The Court lacks jurisdiction to entertain the review application.

25.3 The applicant is to pay the costs of the first and the second respondents.

Mahosi, AJ

Acting Judge of the Labour Court

APPEARANCES:

For the Applicant:

Mr Luthuli (Union official)

Instructed by:

Ingubelaphambili Trade Union (ITU)

For the First and Second Respondents: Mr Ross Atcheson

Instructed by:

Lee and Mcadam Attorneys

- [1] Act 66 of 1995.
- [2] 1962(4) SA 531(A) at 532B-E.
- [3]
- [1999] 3 BLLR 209 (LAC).
- [4] Ibid at para 10.
- [5]
- [1988] 8 BLLR 847 (LAC). See also *Croeser v Standard Bank* 1934 AD 77 at 79; *R v Mkize* 1940 AD 211 at 213; *Reeders v Jacobsz* 1942 AD 395 at 397; *Commissioner of Inland Revenue v Burger* 1956 (4) SA 446 (A) at 449G; *Meintjies v H D Combrinck (Edms) Bpk* 1961 (1) SA 662 (A) at 264B; *Rennie v Kamby Farms (Pty) Ltd* 1989 (2) SA 124 (A) at 129G; *Napier v Tsaperas* 1995 (2) SA 665 (A) at 671B-D.
- [6] Ibid at para 8.
- [7] 1965 (2) SA 135 (A) at 141G-H.
- [8]
- (2011) 32 ILJ 2206 (LC).
- [9] Ibid at paras 10-11.
- [10] 2014 (2) SA 68 (CC); 2014 (1) BCLR 65 (CC); [2014] 1 BLLR 1 (CC);
- (2014) 35 ILJ 121 (CC).
- [11] Ibid at para 23.
- [12] See also *NUM v Western Holdings Gold Mine* (1994) 15 ILJ 610 (LAC) at 613 E; *Zondi and Others v President of Industrial Court and Another* [1997] 8 BLLR 984 (LAC) at 989 E-F; *Mziya v Putco Ltd*
- [2002] ZACC 30; [1999] 2 BLLR 103 (LAC) at 107 A-C; *NEHAWU v Nyembezi* [1999] 5 BLLR 463 (LAC) at 456J-466A; *Waverely Blankets Ltd v Ndimma and Others, Waverely Blankets v Sithukura and Others* (1999) 20 ILJ 2564 (LAC) at para 11; *Mgobhozi v Naidoo NO and Others* [2006] 3 BLLR 242 (LAC) at para 34 and *Moila v Shai NO and Others* [2007] 5 BLLR 432 (LAC) at paras 34-36. However in *NEHAWU obo Mofokeng and Others v Charlotte Theron Children's Home*
- [2004] 10 BLLR 979 (LAC), *PPWAWU and Others v AF Dreyer and Co (Pty) Ltd*
- [1997] 9 BLLR 1141 (LAC) at 1145E and *Toyota Marketing v Schmeizer*
- [2002] 12 BLLR 1164 (LAC) at para 18.
- [13] Ibid at paras 50-54.

[14] See *Dlala v Commissioner for CCMA and Another*

[1999] 7 BLLR 670 (LC).

[15] 2013

(5) SA 563 (GNP).

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