

REPUBLIC OF SOUTH AFRICA

Reportable

5

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN**JUDGMENT**

Case no: C788/2011

10 In the matter between:

LEON LOURENS

Applicant

AND

CCMA1st Respondent15 **WESTERN CAPE NATURE****CONSERVATION BOARD**2nd Respondent**JOSEPH WILSON THEE**3rd Respondent

Date of hearing: 21 May 2013

20 Date of judgment: 21 May 2013

JUDGMENT

GUSH J

25 [1] This is an application by the applicant who was dismissed by the 2nd respondent to review the award of the third respondent in which award the third respondent concluded at the conclusion of the arbitration

/RG

/...

hearing that the applicant's dismissal by the second respondent was fair and dismissed the applicant's application.

[2] The applicant in this matter has applied simply to have the award handed down by the third respondent set aside. The applicant has not applied for any ancillary relief apart from the prayer that the award be set aside.

[3] The applicant however having filed the review application 16 weeks after the six week the stipulated six week time limit within which an applicant is obliged to file an application to review an arbitration award, filed an application for condonation for the late filing of the review application.

[4] Prior to his dismissal, the applicant had been employed by the 2nd respondent as conservation manager of the respondent's Hottentots Holland Nature reserve.

[5] The applicant was charged with and had been found guilty of 4 charges of misconduct viz:

- a. you are engaged in unauthorised private work and/or employment outside of the employer without company permission;
- b. contravention of section 4.1 and 4.4 of the cape nature's policy on acceptable use of information technology automation systems by using the cape nature's IT and I S resources for personal gain or private work after official working hours;
- c. theft and/attempted theft/or misappropriation of cape natures funds in that you used Cape nature's petty cash to purchase cutter bar and lubricant for your personal use;

d. dishonesty in that you intentionally misrepresented to the cape nature in that you purchased the above cutter bar and lubricant as a legitimate purchase well knowing it was for your own private use.

5 [6] As a consequence of having been found guilty of misconduct the second respondent dismissed the applicant.

[7] 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.

10 [8] The arbitration commenced on 20 June 2011 and continued on 2 August 2011 and was finalised on 3 August 2011. The third respondent issued his award on 25 August 2011 and it was faxed to the applicant's trade union representative on the 31 August 2011. The applicant states that he received the award on the 1 September 2011.

15 [9] The applicant filed this review application, seeking to have the award of the third respondent set aside, on 7 February 2012. 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
20 matter the applicant, having received the award on 1 September 2011 was required to file his review application on 13 October 2011.

[10] The applicant however only filed his application on 7 February 2012 some 16 1/2 weeks after the expiry of the statutory six-week period. Accordingly as is required file the applicant filed, as part of the review
25 application itself, an application for condonation for the late filing of his

review application. The application for condonation was opposed by the second respondent.

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

[12] The principles applicable to an application for condonation have been set out by this court on many occasions. It is important to reiterate these principles against which the applicant's application for condonation must be considered. In *Melane vSantam 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

[13] 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:

¹1962 (4) SA 531 (A)

²at page 532

³(619/12) [2013] ZASCA 5 (11 March 2013)

⁴1969 (3) SA 360 (A) at 362F-G

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.

[14] In the judgement the court also referred to the matter of Uitenhage Transitional Local Council v South African Revenue Service⁵ 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.

[15] In the also as yet unreported judgment by the Constitutional Court in the matter of eThekweni Municipality and Ingonyama Trust⁶ 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

⁵2004 (1) SA 292 (SCA) para 6

⁶Case Number[2013] ZACC 7

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. (my emphasis)

[16] 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] 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

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

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.

[17] In this matter the applicant attempts to explain the late filing of his application as follows:

a. He sets out in his affidavit that he consulted advocate Hanekom, who appears to have represented him at all times including the drafting of his pleadings and today when the matter was heard, on 2 September 2011. He explains that he had approached Hanekom for an opinion on his prospects of successfully reviewing the award and for an estimate of the costs.

b. The applicant continues by stating that he had been without employment since his dismissal and that only obtained employment in October 2011. Apart from referring to travel

costs and a bald averment that he was only earning half his previous salary the applicants does not take the court into his confidence any further by explaining exactly what his remuneration was and what was the cost of his transport.

5 c. The applicant inexplicably suggests that his legal representative required a transcript of the record in order to prepare his review application and that securing the transcript took time. There is no confirmatory or explanatory affidavit from his legal representative dealing with this most startling
10 proposition. Apart from ignoring the provisions of section 145 of the Labour Relations Act and Rule 7A of the rules of this Court as is set out below, conspicuous by its absence is any reference whatsoever to the transcript in the founding or supplementary affidavits.

15 d. The applicant further avers that he was unhappy with the way in which his union and had with his representation and accordingly he believed that the union should fund his legal costs.

e. The applicant states in his founding affidavit that his friends and
20 family provided him with the deposit which was paid to Hanekom on 27 September 2011. Hanekom according to the applicant consulted again with Hanekom on the merits of his matter on 30 September 2011. This was still some two weeks before the review application was due to be filed.

f. What follows in the founding affidavit is a brief series of general statements regarding approaches the applicant made to his trade union, the attempts he made to obtain the record, the attempts made to have the record transcribed. The applicant records that the record was made available on 15 December 2011.

g. The applicant then explains that nothing further transpired until an undisclosed date in January 2012, (but after 11 January 2012) because Hanekom was on leave. There is no explanation for the period from the date upon which Hanekom returned from his vacation and the filing of the application on 7 February 2012.

[18] On 29 February 2012 the applicant filed a supplementary affidavit both in respect of the application for condonation and his grounds of review. The supplementary affidavit deals with the condonation as follows:

a. The applicant again refers to the transport costs related to his employment subsequent to his dismissal by the 2nd respondent referred to in his founding affidavit and simply indicates that he resigned from this employment in February 2012.

b. The applicant attaches to this affidavit an affidavit by his brother who states:

I personally paid the applicant's legal fees to the following attorneys ..." [And lists three separate firms.]

- c. The applicant in addition refers to an attached e-mail from his union to the effect that as from August 2012 they were not prepared to make any further contribution to his costs.

[19] This supplementary affidavit takes the applicants application for
5 condonation no further. Mr Hanekom was at pains to point out in his heads of argument that he had at the outset advised the applicant of the time limits within which an application to review an award of the CCMA should be brought. Hanekom based his argument in support of granting the applicant condonation on the applicant's lack of funds
10 and in particular the funds required to obtain a copy of the record. What Hanekom studiously avoids is any attempt to explain why, given the provisions of the Labour Relations Act and Rules, he found it necessary to obtain a copy of the transcript before filing the review application.

15 [20] It is pertinent to point out that the applicant has provided no confirmatory affidavits in respect of the delays or the applicants supposed lack of funds. In addition the applicant has provided no explanation whatsoever why it was necessary to obtain the record in order to file the review application and in particular why the founding
20 affidavit and the supplementary affidavit neither referred to nor mention not only the award but the record which the applicant avers was necessary in order to file his application.

[21] In his affidavit the applicant somewhat disingenuously explains in what appears to be ill disguised attempt to reduce the impact of the
25 extensive delay and in particular his inactivity for the duration of

Hanekom's vacation that Hanekom "had been on vacation during the "court recess".

[22] The applicant has not dealt with the extent of the delay and his inactivity between the very few dates he mentions in his founding affidavit. The applicants excuse or attempt to explain the delay included a suggestion by Mr Hanekom that his attorney was not qualified to deal with this matter presumably in his absence on vacation. Whilst it is so that the applicant is required to explain the delay it is startling that given the argument by Mr Hanekom that he had on the first occasion he consulted with the applicant he advised the applicant of the time limits applicable to a review application, there is no explanation whatsoever from the applicants attorney or for that matter Hanekom himself regarding the delays.

[23] More disturbing is the absence of any explanation as to why the applicant's attorney accepted the matter knowing that he or she was incapable of dealing with it. It is unreasonable to simply rely on Hanekom's absence on vacation for the failure to do anything from 15 December 2011 to the middle of January 2012.

[24] Counsel for the applicant 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.

[25] 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 took issue with the third respondent's refusal of

legal representation and the nature of the evidence in particular expert evidence adduced at the arbitration.

[26] Not only is the record on the face of it incomplete, there is no sign of what is repeatedly referred by the applicant as the vast number of documents used at the arbitration.

[27] IN matters of this nature the onus falls upon the applicant to place a proper record before the court and having done so, to at least attempt to show by reference to the award why the applicant believes the award is reviewable and to set out the grounds of review. Likewise once, having filed the review application and thereafter the record an applicant is required to show by reference to the record the basis upon which it is averred that the award is reviewable.

[28] Conspicuous by its absence is any reference to the award or the record in either the applicant's founding affidavit or supplementary affidavit. The only reference to the award or transcript appears in Mr Hanekom's heads of argument. It is however trite that heads of argument do not constitute pleadings.

[29] 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"

[30] The test to be applied in determining whether an award is reviewable or not is whether

*Whether the award is one that a reasonable decision maker could arrive at considering the material placed before him.*⁸

[31] 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 applicant in his notice of motion has confined the relief he seeks to simply setting aside the third respondents award. All that would serve to achieve is to restore the status quo ante the arbitration, or in other words leaving in place the 2nd respondents dismissal of the applicant. At no stage did the applicant seek to amend or the relief he sought.

[32] There is nothing to suggest that the conclusion reached by the third 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.

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

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

20

D H Gush

Judge

⁸Edcon Ltd v Pillemer NO & others[2010] 1 BLLR 1 (SCA) at p9 Para 15

APPEARANCES

APPLICANT: JP Hanekom

Instructed by R J Johnson & Associates.

5 SECOND RESPONDENT: Mr Garces

Instructed by Turner & Associates.