



REPUBLIC OF SOUTH AFRICA
IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN
JUDGMENT

Not Reportable

Case No C819/2006

In the matter between:

Julivan Anthony Marinus

Applicant

And

National Bargaining Council For

Road Freight Industry

First Respondent

Vanessa Pather N.O.

Second Respondent

Anderson Transport (Pty) Ltd

Third Respondent

Heard: 7/12/2012

Delivered: 9/7/2013

Summary: Application for condonation for tardy prosecution of review of an arbitration award

JUDGMENT

RABKIN-NAICKER J

- [1] The applicant seeks condonation for the delays in prosecuting his application for the review of an award issued on the 20 November 2006. If condonation is granted by this court he seeks to have that Award set aside. The Award found his dismissal for absenteeism to have been substantively fair.
- [2] The following facts are apparent from the papers before me:
- 2.1 Applicant received the Award during November 2006;
 - 2.2 The application for review was launched during January 2007;
 - 2.3 It is alleged by applicant that the tapes of the arbitration hearing could not be found at this court;
 - 2.4 Applicant received the requisite Notice from the First Respondent in terms of Rule 7A of the Rules of the Labour Court on the 31 May 2007. A year and six months later he sent a letter to the Bargaining Council regarding the missing tapes. No explanation is tendered for this delay.
 - 2.5 An affidavit on behalf of the First Respondent filed of record in opposition to an application to compel dated the 2 February 2009 brought by the applicant, confirms that the notice of compliance in terms of Rule 7A (2)(b), 7A(3) and 7A(9), and the index together with four cassettes was filed at this court on the 22 May 2007. The Notice of Compliance is duly endorsed by this court.
- [3] It was submitted on behalf of the third respondent that applicant has failed to provide any reasonable explanation for inter alia the following delays:
- 3.1 The 18 month period between 31 May 2007 and 24 November 2008 during which no steps were taken to contact the first respondent regarding the record;
 - 3.2 The 3 month period between 24 November 2008 and 11 February 2009, during which no steps were taken to obtain the record;

3.3 The almost 9 months period between 19 June 2009 and March 2010 during which applicant took no steps to proceed with the review application;

[4] I have considered the papers filed of record and I do not find that the applicant has given a reasonable explanation for his delay, more especially in respect of the periods referred to above. It is not necessary for me to deal with further delays that were occasioned in the prosecution of the matter after applicant instructed his current attorney of record on 22 April 2010.

[5] Where there is no reasonable explanation for lengthy delays in the prosecution of a matter, a court may refuse condonation on this basis alone. In **Seatlole & others v Entertainment Logistics Service (A Division of Gallo Africa Ltd)**¹ the court summarized the law pertaining to the granting of condonation as follows:

“[6] The onus is on the applicants to satisfy the court that condonation should be granted: *Meintjies v H D Combrinck* (Edms) Bpk 1961 (1) SA F 262 (A) at 263H-264A; *Saloojee & another NNO v Minister of Community Development* 1965 (2) SA 135 (A) at 138E-F; and *Glazer v Glazer* NO 1963 (4) SA 694 (A) at 702H.

[7] The test for determining whether good cause exists for the delay in filing a statement of claim in terms of s 191(11)(b) is now well established. In *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) Holmes JA set out the applicable principles as follows:

“[T]he 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. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation.... What is needed is an objective conspectus of all the facts. Thus a slight delay and a good

¹ (2011) 32 ILJ 2206 (LC)

explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked.'

[8] However it has been held that a bona fide defence and good prospects of success are not sufficient in the absence of a reasonable explanation for the default: *Chetty v Law Society Transvaal* 1985 (2) SA 756 (A) at 765. This principle has been interpreted as follows by the Labour Appeal Court 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 the delay, an application for condonation should be refused.'

[6] In my judgment, this is a matter where condonation stands to be refused on the ground that applicant has failed to give a reasonable explanation (and in respect of some periods no explanation at all), for the lengthy delays in prosecuting the matter. I have also considered the merits of the matter and although it is not necessary for me to decide same, I note that no case has been made out to render the award susceptible to review.

[7] On the basis that the applicant is an individual and on the principles of law and fairness developed in this court as regards to costs, I do not believe that a costs order is apposite in this matter. In the result I make the following order:

[1] The application for condonation is dismissed.

Rabkin- Naicker J

Judge of the Labour Court

APPEARANCES

For the Applicant: Abrahams & Straus Attorneys

For the Third Respondent: Adv De Wet instructed by Mostert and Bosman Attorneys