



Reportable

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT CAPE TOWN**

CASE NO: C261/2018

In the matter between:

THANDOLWETHU DYONASE

Applicant

and

THE BUILDING INDUSTRY BARGAINING COUNCIL

First Respondent

COMMISSIONER G.MCEWAN N.O

Second Respondent

FORREST PAINTING (PTY) LTD

Third Respondent

Heard: 9 July 2021

Date of Judgment: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing down judgment is deemed to be 10h00 on 6 August 2021

Summary: Application to review and set aside condonation ruling – test for review of a condonation ruling considered – condonation ruling reviewed and set aside

Practice and procedure – condonation hearing not recorded – Court unable to intervene on the merits in the absence of the record – matter remitted to the Bargaining Council for a condonation hearing *de novo*

JUDGMENT

REDDY AJ

Introduction

[1] This is an unopposed review application in which the Applicant seeks an order reviewing and setting aside a condonation ruling issued by the Second Respondent (“**the arbitrator**”) refusing condonation for the late referral of the Applicant’s dismissal dispute to the First Respondent (“**the Bargaining Council**”).

[2] The matter was enrolled for hearing on 9 July 2020. In accordance with the provisions of the Labour Court’s directive, the Applicant agreed that this matter be disposed of without oral argument. I have considered the papers filed as well as the written heads of argument submitted by the Applicant.

Material facts

[3] The Applicant was employed by the Third Respondent as a Painter since February 2015 until his dismissal on 9 December 2017.

- [4] On 5 December 2017 he was informed by the Foreman that he should not report for duty the following day and that he would be transferred to the Waterfront, as instructed by his manager, (referred to in the pleadings as Mr Richard).
- [5] The Applicant was not contacted by his manager the next day. On 9 December 2017 the Applicant contacted Mr Richard telephonically enquiring about his transfer. The Applicant contends that Mr Richard proceeded to shout at him and stated that the Applicant complains a lot. He further stated that the Applicant's services were no longer required and terminated his employment.
- [6] On 14 December 2017 the Applicant approached the Bargaining Council to seek assistance in referring an unfair dismissal dispute. According to the Applicant, an official at the Bargaining Council contacted the Third Respondent telephonically. Mr Richard advised the official that the Applicant was placed on a lay-off and was not dismissed. The Applicant disputed this and informed the official that he was dismissed and that he had not received any notice regarding a lay-off. Despite this, the Applicant was sent home and was advised by the Bargaining Council official that he would be contacted in due course once the relevant agent attends to the matter.
- [7] On 17 January 2018 the Applicant proceeded to follow up with the Bargaining Council regarding his dispute as he was not contacted. He was advised that his dispute was not in the system and that he needed to complete the

necessary referral forms. On receipt of the forms, the Applicant realised that he had already completed the same forms. However, he was advised that the initial form was incorrect and that he would need to complete new forms. He was further advised that his referral would need to be accompanied by a condonation application given that it was out of time.

The condonation application and ruling

[8] The Applicant ultimately referred an unfair dismissal dispute to the Bargaining Council on 26 January 2018, approximately sixteen days outside of the prescribed 30-day period (the Applicant refers to a delay of nine days in his founding papers, but this is corrected in heads of argument). His explanation for the delay offered in the condonation application aligns with the facts recorded above as he contended that the Bargaining Council refused to open a dismissal dispute based on the telephone call to the Third Respondent.

[9] The arbitrator determined the condonation application and issued a ruling on 15 February 2018 refusing condonation without providing any reasons.

Applicable legal principles and analysis

[10] The Applicant essentially raises the following grounds of review: (i) the arbitrator failed to properly apply his mind to the dispute before him; (ii) the arbitrator failed to consider all of the evidence before him; and (iii) the

conclusion reached by the arbitrator is not one that a reasonable decision-maker could reach.

[11] The test to be applied on review is well established. This Court may intervene if and only if the Applicant establishes that the decision to which the arbitrator came was so unreasonable that no reasonable decision-maker could come to it¹.

[12] Where an applicant seeks to review a condonation ruling, there is an additional hurdle. In *Mqobi Charles Duma v Commission for Conciliation, Mediation and Arbitration; Boitumelo Mokoena N.O; Transport, Education and Training Authority*², this Court held that:

“...condonation is a discretionary remedy and this court has accepted that the discretion to grant or refuse condonation is assailable only on review where the commissioner did not exercise his or her discretion judiciously and fairly”³.

[13] In *Parliament of the Republic of South Africa v Commission for Conciliation, Mediation and Arbitration and Others*⁴ it was held that:

“This Court accepts that when considering applications for condonation, Commissioners enjoy a wide discretion, and the Courts should be cautious

¹ *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2007 28 ILJ 2405 (CC) at para 110; *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA and Others* (2014) 35 ILJ 943 (LAC).

² Unreported judgment (JR1041/2014) [2020] Labour Court, Johannesburg.

³ The Court referred to Myburgh and Bosch *Reviews in the Labour Courts* at p 148.

⁴ Unreported judgment (C646/16) [2018] ZALCCT 12 (24 April 2018).

when interfering with decision arrived at by Commissioners in the light of that wide discretion.

The applicable test before the Court can interfere with a Commissioner's discretionary decision is whether or not it can be said that the discretion was exercised "capriciously, or upon a wrong principle, or in a biased manner, or for insubstantial reasons. Thus, the test is whether the Commissioner committed a misdirection, an irregularity, or failed to exercise his or her discretion, or exercised it improperly or unfairly."

[14] In *Cowley v Anglo Platinum and Others*⁵ it was held that:

"When a commissioner is endowed with a discretion this Court will be very slow to interfere with the exercise of that discretion. The commissioner's exercise of discretion will be upset on review if the applicant shows, inter alia, that the commissioner committed a misdirection or irregularity; or that he/she acted capriciously, or upon a wrong principle, or in bad faith, or unfairly, or that in exercising the discretion the commissioner reached a decision that a reasonable decision-maker could not reach. If it is clear that the commissioner exercised such discretion judiciously and fairly after taking into consideration all the relevant facts this court will not interfere with the exercise of such discretion."

⁵ [2016] JOL 35884 (LC) at para 21.

- [15] The ultimate question is whether holistically viewed, the decision taken by the arbitrator was reasonable based on the evidence placed before him. I have to consider this question taking into account the evidence contained in the condonation application that was placed before the arbitrator, the ruling issued, and the grounds of review raised by the Applicant. Since this application is unopposed, reliance is placed on the facts contained in the Applicant's founding affidavit.
- [16] Taken together, the grounds of review raised by the Applicant essentially contend that the arbitrator reached an unreasonable decision in refusing condonation based on the evidence before him. The Applicant contends that the degree of lateness was not excessive and that the Bargaining Council was closed during the period of delay.
- [17] The difficulty I have with the Applicant's application is that it is devoid of the transcribed record of proceedings. According to the founding affidavit, the arbitrator failed to record the hearing. The Applicant contends that had the proceedings been recorded, it would be clear that the arbitrator failed to consider the Applicant's submissions. What is before me is the documentary evidence from the Bargaining Council, including the Applicant's referral form, condonation application and the ruling. I am accordingly obliged to decide whether it is competent for this Court to determine a review application in the absence of a record, and if so, what relief would be appropriate in the circumstances.

[18] There are a long line of cases emanating from the Labour Court and Labour Appeal Court setting out the principles applicable to review applications in circumstances where the record is not available.

[19] In *Nkabinde v Commission for Conciliation Mediation and Arbitration and Others*⁶, this Court held that:

“In my view, from this perspective, it is the reviewing Court that should determine either to hear the matter on the merits and let the arbitration award in the third respondent’s favour stand or to set it aside and refer the matter for hearing de novo. It follows that it is the reviewing Court that should determine that the matter should not be heard on the merits and order that it be referred for re-arbitration.

*In this regard, my view is fortified by a number of decisions of this Court where, whilst seized with review applications, held either that the incomplete record or lack thereof warranted the matter to be reviewed and sent back for re-arbitration or that the incomplete record did not justify on its own to refer the matter back. For this reason, in my opinion, it is appropriate that such decisions be reserved for a reviewing Court...”*⁷

[20] In *Papane v van Aarde NO and Others*⁸, the LAC per Kruger AJA stated that:

⁶ Unreported judgment (J1812/12) [2013] ZALCJHB 161 (30 July 2013).

⁷ *Ibid* at paras 25 - 26.

⁸ [2007] 11 BLLR 1043 (LAC).

*“I do not understand the decided cases, cited earlier, to preclude this Court from determining an appeal on less than a complete record in an appropriate and exceptional case, provided the court feels able to do so on the material before it. I consider that this is such a case.”*⁹

- [21] More recently, in *Baloyi v Member of the Executive Committee for Health and Social Development, Limpopo and Others*¹⁰, the Constitutional Court had to determine whether the Labour Court erred in dismissing a review application in circumstances where the evidence established that no record existed. It held that:

*“There may be cases where it will be contentious to determine a review of arbitration proceedings in the absence of a record, or what remedy should follow when no proper record is available. In this case, it was improper of the Labour Court to dismiss the review without a proper record of the arbitration proceedings in the face of evidence that no record existed. This presents this Court with a choice: we can send the matter back for rehearing before another Arbitrator, which will be cumbersome and unduly hard on the applicant or intervene on the merits now.”*¹¹

- [22] The facts before me are partly aligned to those in *Baloyi*¹² as the Applicant contends that the condonation hearing was not recorded. The evidence before me is that no record exists. The Third Respondent has elected not to oppose

⁹ *Ibid* at para 30.

¹⁰ [2016] 4 BLLR 319 (CC).

¹¹ *Ibid* at para 36.

¹² *Supra* note 10.

the review application, and the Bargaining Council has elected to abide by the decision of this Court. Consequently, the allegation that the proceedings were not recorded remains undisputed.

[23] While I would ordinarily be inclined to intervene on the merits regardless of the absence of the record, the matter before me is hamstrung by the fact that the Third Respondent attended the condonation hearing and would presumably have made submissions opposing the Applicant's condonation application. The ruling issued by the arbitrator is devoid of any reasons for the decision to refuse the Applicant's condonation application and I can only assume that the arbitrator was persuaded by the Third Respondent's submissions at the hearing. In the absence of a record or a reasoned ruling, I am unable to consider the Third Respondent's evidence at the hearing and the arbitrator's reasons for refusing condonation. Intervening on the merits and substituting the ruling would accordingly not be appropriate in circumstances where the relevant evidentiary material is not before me.

[24] Had the arbitrator provided reasons for the ruling and summarised the contentions of both parties, the position may have been different, and it may have been possible to intervene on the merits despite the absence of a complete record. Unfortunately, it is impossible for this Court to interrogate the arbitrator's reasoning and decision to refuse condonation on the available evidence. While a delay of approximately 16 days is not excessive in my view, the appropriate remedy in these circumstances is to remit the matter to the Bargaining Council for a condonation hearing *de novo*.

[25] There is authority emanating from this Court establishing the point that where there has been no mechanical transcribing of the proceedings, the Applicant is still obliged to reconstruct the record as far as possible¹³ and that parties who seek relief on the basis of an incomplete record run the risk of being unsuccessful purely on this basis¹⁴. While I am mindful of the principles expressed in these cases, there are more compelling cases in which this Court has been reluctant to dismiss a review application on that basis¹⁵, and this approach has been affirmed by the Constitutional Court in *Baloyi*¹⁶. I am of the view that this is one of those cases where it would be unfair to merely dismiss the review on the basis that no record of the proceedings exists. This is particularly so in circumstances where the Applicant alleges that the proceedings were not recorded, and the Bargaining Council has elected not to file an affidavit addressing this point and has simply delivered a notice of intention to abide. Under these circumstances I am of the view that it would be fair to remit the dispute back to the Bargaining Council for a rehearing on condonation.

Order

1. The condonation ruling of the Second Respondent under case number BIGH26-18 dated 15 February 2018 is reviewed and set aside.

¹³ *Doornpoort Kwik Spar CC v Odendaal & Others* (2008) 29 ILJ 1019 (LC); *SATAWU obo Mapheto [F] v National Bargaining Council for the Road Freight Industry* (JR1954/2010) [2013] LC (unreported).

¹⁴ *Metalogik Engineering & Manufacturing CC v Fernandes & others* (2002) 23 ILJ 1592 (LC).

¹⁵ *Doornpoort Kwik Spar CC v Odendaal & Others* (2008) 29 ILJ 1019 (LC).

¹⁶ *Supra* note 10.

2. The matter is remitted to the Building Industry Bargaining Council for a determination on condonation *de novo* before an arbitrator other than the Second Respondent.
3. There is no order as to costs.



N Reddy

Acting Judge of the Labour Court of South Africa

Representatives:

For the Applicant: J. Duba
Instructed by: Legal Aid
For the Respondents: Unopposed