IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

Case no: C1032/18

In the matter between:

SHAYDA VAN NIEKERK Applicant

and

COMMISSION FOR CONCILIATION MEDIATION

AND ARBITRATION 1st Respondent

COMMISSIONER A VAN DIEMEN 2nd Respondent

STRATEGIC FUEL FUND (SFF) 3rd Respondent

Date heard: 18 November 2021

Delivered: 16 February 2021 by means of scanned email

JUDGMENT

RABKIN-NAICKER J

[1] This is an opposed application for condonation in respect of a review application. The Award in question is dated 9 September 2018. The Notice of Motion in the Review was filed and stamped by the Labour Court on the 4 July 2019. It appears however that the review application was served on the respondent on or about 24 October 2018. Thus the respondent was under the impression that the Record had been filed more than six months late and characterized the application as

one for condonation in respect of a resuscitation of the review. In fact the review itself was launched more than nine months late, and the Record filed on the same date. Given the fact that the principles of a condonation application apply to both applications[1], I treat this application as one for condonation for the late filing of the review.

[2] I have managed to piece together the above facts by making sense of a chaotic file presented by the applicant.

[3] The third respondent submits that the condonation application was not brought on affidavit. Nor was it signed by her or accompanied by a Notice of Motion. The applicant appears to have pursued her case unassisted by the time she made this application. Given that this is a court of law and equity, I am prepared to consider the application on its merits and not simply dismiss the matter on the basis that the applicant's papers are defective.

[3] The purported application for condonation summarizes the reason for the delay as follows:

> "**Below is the summary of the degree of lateness and the reason for lateness as required by the law in terms of the application for condonation.**
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> On the 10 October 2018 up until 12 October 2018 the Applicant was consulting with appointed legal team at a time to ascertain the prospect of success (see Section 1, marked 1-8) and within this date there were other communications took place between the legal team considering the time constrain.
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> On the 22 October 2018 and 24 October 2018 the applicant became aware that a Notice of Motion and founding Affidavit was prepared and submitted to labour Court and to the first respondent and to the Second Respondent (see section 1, marked 9-19) considering above evidence contained in the emails the Applicant was convince that submission was done on time, considering that the case number was issued by labour Court. At this time

[1] Samuels v Old Mutual Bank (2017) 38 ILJ 1790 (LAC)

the Applicant was aware that the transcript were not out and assume the legal team understand the law and probably consulted the certain aspect of the law that allows them to submit.

On the 5 November 2018 and 27 November 2019 the Applicant was waiting for transcript as it recorded that transcript will be ready by 22/23 November 2018 see attached email marked 20-29. At this stage the Applicant was aware that the transcript for day one was not received from CCMA, only day two was received from CCMA.

On the 16 January 2019 and 20 March 2019, the legal team emailed the Applicant transcript and in their view they suggested that the advocate. SDzakwa must be consultant to advise the Applicant on the impact of this missing transcript of day one hearing. Advocate SDzakwa was consultant gave his opinion as per section 1 marked 30-43. When SDzakwa express his opinion on a number of things at this stage Applicant express her concern that she paid the legal team service to get all transcript and why she must pay again because the legal team must just write to CCMA and state that transcript contained day 2 of the hearing and they must provide day one. At this stage the Applicant express her financial constraints and the legal team suggested they will ask from SDzakwa if there is any assistance of free service that can be offered and we pay later and in his report he touched on that see section 1 marked 41 under conclusion and bulletin number 27 of section 1.

On the 26 March 2019 to 11 April 2019 the legal team was communicating with CCMA about recovering missing transcript see section 1, marked 44-52. At this stage we realised that the process of consultation is delaying the Applicant process of submission and the Applicant decided to go herself at CCMA and the Applicant got day transcript. The Applicant immediately approached Labour Court and it was at this stage where the Applicant realise that actually submission was not done and the Applicant ask labour Court officials that how than did they issue a case number and told us that they got submission through the third respondent when there were doing application for opposition.

The Applicant immediately contacted transcript company to collect the document, parallel to that the Applicant approached the union to seek assistance with with preparation for application for condonation with no success see section 1 marked 53 and the **X international Courier (PTY) LTD** collection receipt marked 60 from the house of the Applicant and the date of the Tax Invoice Marked 59 and it was after we received transcript we started preparation for application for condonation." (sic)

[4] The above explanation is far from acceptable to cover the substantial delay in filing the review application (or 'submission' as the applicant refers to it). Essentially it seeks to apportion responsibility for the delay on those who were representing the applicant during this time. It is trite that a litigant cannot rely on the negligence of its legal representatives to seek condonation. It also appears from the attachments to her summary that the delay was further occasioned by applicant's financial constraints in paying for the transcription. Letters from her lawyers at the time who were representing her on a contingency basis reflect this.

[5] The issue of the prospect of success is recorded as follows:

"Prospect of Success

The prospect of success in this matter appear from the answering affidavit to the application to set aside the arbitration award.

The Applicant submit to the labour court that the content of the answering affidavit be incorporated into this condonation application as it illustrate clear prospect of success for condonation to be granted".

[6] I can only presume that the applicant is referring to her pleadings in the review. Essentially her review ground amounts to the submission that the Commissioner should not have found the sanction of dismissal appropriate in the circumstances. This submission was persisted with in argument before me by her union representative and herself.

[7] The Commissioner records the background to the dispute as follows:

"8. The applicant was charged with not adhering to the cell phone procedure, alternatively carrying her cell phone from the administration building to the

security department and used it in the security official's office in the presence of the security officer. It is alleged such conduct constitutes a breach of the contract of employment as well as the company's disciplinary rules and regulations.

9. Williams submitted that the applicant's dismissal was unfair as she admitted having her cell phone on her but did not breach the workplace rule. If the respondent established that the applicant boke the workplace rule, the rule was inconsistently applied.

10. Arendse, on the other hand, argued that the applicant broke an unimportant rule at the respondent when she used her cell phone while on duty in breach of the respondent's rule. Furthermore, the applicant was progressively disciplined for misconduct that included spitting at her supervisor."

[8] In the Court's view the applicant's submissions that the sanction of dismissal was too harsh do not accord with the facts and evidence before the Commissioner. The analysis of the evidence and argument by the arbitrator bears recording as follows:

> "63. The respondent dismissed the applicant after she was found with her cell phone in her possession in breach of the rule. And in addition, the respondent considered that the applicant received final written warnings for misconduct valid for six months from 09 February 2018.
>
> 64. The applicant withdrew her challenge at the CCMA to the final warning issued on 09 February 2018 since she was dismissed before the matter could be heard. As a result, the warnings issued were still valid.
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> 65. The respondent dismissed the applicant because of the seriousness of the breach of the cell phone policy. Arlow (found with cell phone in welding workshop whist it was supposed to be locked away) was warned on 07 December 2018; another employee, Sikade (in administration building busy with cell phone whilst it was supposed to be locked away) and was warned to lock away the cell phone.
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> 66. The applicant received a first warning on 05 December 2017 (after her previous records were expunged) for violating the cell phone

policy. Despite this, she again breached the cell phone policy on 12 April 2018. Arlow and Sikade received warnings, it was their first transgression after the records were expunged.

67. The applicant by breaching the rule endangered the safety of others in the workplace, especially in light of the fact that she was previously warned.

68. The applicant broke the cell phone policy rule when she had her phone on her outside the policy time frames. She also testified that she always had her phone on her while employed. This admission is a serious violation of safety standards, especially in an environment where fuel are managed and stored.

69. I also took into consideration Booysen's testimony that he was an expert and that the security office was not an area to be considered out of bounds for cell phone use. In fact he testified that cell phones could be used there at any time. However, his testimony does not obviate the fact that a rule existed that the applicant may not have her cell phone on her person outside designated areas and only in specific times.

70. The sanction of dismissal is an appropriate sanction for breach of the cell phone policy as the applicant was progressively disciplined and failed to heed the warnings. I therefore find the dismissal substantively fair."

[9] The Commissioner comprehensively applied himself to the evidence and the law as is reflected in his analysis above. He dealt with the progressive discipline the employer had imposed and interrogated the inconsistency arguments put forward by the applicant. The rule in the context of the nature of the employer's business was patently lawful.

[10] Given that the delay was substantial and the reasons for it unsatisfactory and as reflected above, there are no reasonable prospects of success on review, the application for condonation must fail. The review application will not be entertained by this Court. I therefore make the following order:

Order

1. The application for condonation is dismissed.
2. The review application is dismissed.
3. There is no order as to costs.

H. Rabkin-Naicker

Judge of the Labour Court of South Africa

Representation

For the Applicant: Union official

For the Third Respondent: Macgregor Erasmus Attorneys Inc