Not reportable

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT CAPE TOWN

Case No: C 511/2019

In the matter between:

ZINZILE QHAJANA	**First Applicant**
and	
COMMISSIONER JOHN H BROWN ***N.O.***	**First Respondent**
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**Second Respondent**
SOUTH AFRICAN HERITAGE RESOURCES AGENCY	**Third Respondent**

Date of Set Down: 3 November 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 14h00 on 5 November 2021.

Summary: (Review – Condonation – Lengthy delay only partly explained – prospects of success not reasonable)

JUDGMENT

LAGRANGE J

Introduction

[1] This is an application to review and set aside an arbitration award issued on 7 February 2019, in which the applicant's dismissal on 31 October 2017 was found to be substantively fair. He was found guilty of three charges, namely insubordination, failing to set a good example for his subordinates and assault. The insubordination concerned an allegedly disrespectful email he had sent to his immediate superior and failing to heed the latter's requests that he refrain from using disrespectful or insolent language towards him. Although the arbitrator confirmed that the applicant, Mr Z Qhajana, was guilty of all three charges, it was only on the charge of assault that his dismissal was justified.

Condonation

[2] Condonation is not there merely for the asking, nor are applications for condonation a mere formality (see N*UMSA v Hillside Aluminium* [2005] 6 BLLR 601 (LC); *Derrick Grootboom v National Prosecuting Authority & another* [2014] 1 BLLR (CC)). A party seeking condonation bears the onus to satisfy the court that condonation should be granted.

The delay

[3] The review application was filed on 14 August 2019. Only on 21 September 2020 did the applicant apply for condonation for the late referral, having appointed his own attorneys to represent him. In terms of s 145(1)(a) of the

Labour Relations Act, 66 of 1995 ('the LRA'), a review application should be launched within six weeks of the award being received, so it should have been launched by 21 March 2019. In this case, it was over four and a half months late. Accordingly, it took four times longer than it should have for the application to be launched. This delay is an excessive one.

The explanation for the delay

[4] The reason for the delay is wholly attributed to internal delays in the decision-making process of the applicant's trade union, NEHAWU. Some of the delay was ascribed to the local paralegal officer's doubt as to whether the merits of a review warranted the union bringing the application and the time taken to obtain approval from the union's head office in Johannesburg. On one occasion when an official was due to come and consult with the applicant in Cape Town, the consultation had to be postponed. Eventually, a thorough consultation did take place at the end of May 2019. The legal officer told the applicant he would take the file back to Johannesburg with him and make a determination.

[5] The applicant claims he made numerous calls to the officer in question in June to obtain feedback. Eventually, on 24 July, he wrote to the paralegal officer asking for the two opinions the union was supposedly seeking about the case. However, the documentary evidence in support of this request lacks email addresses and dates, and it is difficult to interpret the annexures he attached in support thereof. Nonetheless the union proceeded to prepare the review application, which was launched in mid-August. There were no corroborating affidavits from any of the union's legal officers confirming the protracted internal steps taken.

[6] To the extent that there is a degree of a reasonable explanation offered for the delay, the period covered by the applicant's explanation, at best that cannot justify a delay beyond mid-June, by which stage the application should have been launched because it was already late when the consultation with the applicant was finally conducted.

[7] After that consultation at the end of May it ought to have been a relatively simple matter to file a preliminary founding affidavit in support of the review

within a few days. In this regard, it is important to point out that an applicant in a review application is not confined to the grounds initially set out in the founding affidavit, but may completely amend and supplement those grounds when filing their supplementary affidavit in due course. Consequently, it is not essential at the stage of filing the founding affidavit to comprehensively deal with all possible grounds of review, provided that at sufficient grounds are provided to make out a preliminary case.

[8] Other than the applicant's own unsupported claims that he was constantly seeking feedback on the progress of the matter, there was no other detail provided to explain why the union took so long to launch the application after that. It should be noted that the full period of the delay, and not just a part of it, must be adequately justified[1]. Consequently, there is really no satisfactory explanation for the last two months of the delay. It is now well established that the internal approval processes of parties cannot take priority over the time frames for acting promptly, which are set out in the LRA[2]. Further, it is also a trite legal principle that in the absence of a 'reasonable and acceptable explanation' for delay, the prospects of success are immaterial[3]. On this basis alone, the condonation application ought to be dismissed.

[9] Nonetheless, the prospects of success will also be considered.

Prospects of success

[10] The applicant filed extensive heads of argument which essentially call for a complete reconsideration of the merits of all the arbitrator's adverse findings. The applicant drew up his heads himself as he was no longer represented by an attorney at that stage. It was only shortly before the hearing of the application that he obtained the services of Legal Aid South

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[1] See *Independent Municipal and Allied Trade Union obo Zungu v SA Local Government Bargaining Council and others* (2010) 31 ILJ 1413 (LC)) and I 2013 (5) BCLR 497 (CC).

[2] See, Steenkamp & others v Edcon Ltd (2019) 40 *ILJ* 1731 (CC) at para [41]; *Independent Municipal & Allied Trade Union on behalf of Zungu v SA Local Government Bargaining Council & others* (2010) 31 *ILJ* 1413 (LC), and *National Union of Metalworkers of SA on behalf of Thilivali v Fry's Metals (A Division of Zimco Group) & others* (2015) 36 *ILJ* 232 (LC) at paras [29] – [31]

[3] See *Collett v Commission for Conciliation, Mediation and Arbitration* [2014] 6 BLLR 523 (LAC),

Africa. In any event, the grounds of review argued in court cannot extend beyond those which were set out in an applicant's founding and supplementary papers[4]. The applicant did not supplement his grounds of review set out in his founding affidavit, and it is those grounds which must be considered. In argument, these were the principal grounds focused on by his representative, *Ms J Duba.*

[11] Firstly, he claims that the Commissioner concluded that an intentional assault had taken place without any evidence to support that and the Commissioner distorted evidence in order to arrive at that conclusion. In particular, he takes issue with the arbitrator's finding that Mr. Sekhabisa's spectacles were not simply "knocked off but were covered the distance from the applicant's office. He accuses the arbitrator of introducing the question of the glasses being found at a distance from where Sekhabisa was allegedly struck, without any evidence to support that finding.

[12] Secondly, he claims that the arbitrator impermissibly had regard to the evidence of a doctor's certificate produced by Sekhabisa to conclude that Sekhabisa had suffered head trauma.

[13] Thirdly, he claims the arbitrator ignored the fact that Sekhabisa had been issued with a final warning for unprofessional behaviour, which was because he had undermined the applicant in front of the applicant's subordinates. This related to Sekhabisa interrupting the applicant while he was having a discussion with another staff member in the open office and demanding he meet with him immediately in the applicant's office. The arbitrator ought to have realised that, if Sekhabisa had not behaved as he did, the incident would never have taken place.

[14] Fourthly, the arbitrator failed to consider that even if it was improbable that Sekhabisa would have spat the applicant, it was equally improbable the applicant would have jeopardized his job by striking Sekhabisa simply because he refused to leave his office. The evidence of Sekhabisa's

[4] See e.g., *Tao Ying Metal Industry (Pty) Ltd v Pooe NO and Others* 2007 (5) SA 146 (SCA) at paras [98], [122] and [124], and *Comtech (Pty) Ltd v Molony N.O and Othe*rs (DA 12/05) [2007] ZALAC 35 (21 December 2007) at [15].

dislodged spectacles was not enough to support an inference that he had struck Sekhabisa forcibly.

[15] Before surveying these grounds briefly, it must be mentioned that the test is not whether another arbitrator could have come to a different conclusion on the same evidence, but whether it was not possible for any reasonable arbitrator to make the findings he did. If the arbitrator failed to consider a particular piece of evidence, the question is whether the arbitrator could still have made the findings they did if that evidence had been considered.[5] Similarly, if the arbitrator took account of evidence that should not have been considered, the question is whether no reasonable arbitrator could still have reached the conclusion the arbitrator did without relying on such evidence.

[16] To contextualise the criticisms set out in the grounds of review, a brief sketch of the background to the applicant's dismissal is necessary. The applicant had been employed as a supply chain manager of SAHRA in February 2017. He had considerable prior experience in bigger institutions before joining SAHRA. On 1 April 2017, Sekhabisa was appointed as the Acting Chief Finance Officer, to whom the applicant had to report.

[17] Tensions developed between the two managers. In part that appears to have been the result of Qhajana questioning the award of a cleaning tender, in which Sekhabisa had been involved in the award of the tender. In any event, matters started to escalate about the processes of obtaining a new tender for insurance. At the beginning of May 2017, when Sekhabisa asked Qhajana for a status report on the procurement of the insurance, Qhajana responded outlining the process he expected to be followed. He also explicitly suggested that Sekhabisa might not be familiar with the process of obtaining insurance and copied his response to the CEO so that she would be aware that it seemed Sekhabisa was not familiar with the process. Sekhabisa responded that he was perfectly familiar with insurance processes in view of his previous experience, and expressed a concern that Qhajana had felt it necessary to include the CEO in the correspondence about an operational matter. He reiterated his request for feedback on the

[5] *Head of Department of Education v Mofokeng & Others* (2015) 36 *ILJ* 2802 (LAC) at para [33].

execution of the insurance project in view of the existing policy expiring soon. Qhajana replied that he had included the CEO in the correspondence because "I am starting to distrust your motives of reporting or inquiring and sooner that, will lead to our working relationship breaking down very soon." He also expressed further misgivings that the procurement plan was lying on Sekhabisa's table.

[18] The CEO intervened to try and dissipate the tensions which were developing in the relationship between Sekhabisa and Qhajana. However, the tension between them relating to the pending insurance tender continued to simmer.

[19] Shortly after Qhajana had returned from ten days leave, Sekhabisa sent him an email asking how far the submission to provide insurance on a month-to-month basis had progressed and when a meeting would be held to settle the specifications for the terms of reference for the new long-term contract. Qhajana's response, sent at around 08:30 on 22 June 2017, was to the effect that Sekhabisa was in a better position to answer that question as he was supposed to have done certain things relating to the issue. Qhajana concluded his email thus:

> "Since you have failed or in the lack of a better word omitted to handle the matter, I will finalize it for you as much as I am not sure of what you actual want because everything you needed we have given it to you, but after my meeting for Business Model Inception at 12:00 Noon. I hope you have clarity now. …"

[20] Sekhabisa decided not to wait until after 12:00 to sort matters out, but went to see Qhajana sometime after 09:00. He found him talking with a subordinate in an open office area and in no uncertain terms demanded a meeting immediately with Qhajana in Qhajana's office. Sekhabisa conceded that it was inappropriate the way he had approached Qhajana on that occasion. They went to Qhajana's office. Qhajana sat behind his desk and Sekhabisa remained standing near the door to the office. It seems that the door was closed after they had both entered the office.

[21] A brief exchange then took place between the two of them. Sekhabisa testified that Qhajana kept deviating from the issues he wanted to discuss

with him and was insulting him. The insults took the form of asking Sekhabisa how long he had been a manager and suggesting that he was like a spoiled boy from a rich family. His response had been that his background was not something they should be talking about. He claimed that he did not appreciate the way he was speaking to him as a supervisor and asked him to focus on the issue at hand which needed to be completed. Sekhabisa's evidence about Qhajana's verbal insults directed against him in Qhajana's office was not challenged.

[22] It was common cause that at some point, Qhajana stood up from behind his desk and walked around it so that he was standing facing Sekhabisa. Sekhabisa claimed that Qhajana opened the door and pushed him towards the door saying that he must leave his office. Sekhabisa did not want to leave and told Qhajana that they had not finished discussing what he had come to discuss and he could not leave if Qhajana still needed to understand what he was expected to do. He wanted to discuss it because the insurance contract was an urgent matter at that stage. It was at that point Sekhabisa claimed Qhajana had pushed him on his upper torso trying to turn him towards the door to leave. He claimed he turned around and asked Qhajana what he was doing at which point Sekhabisa slapped him with his open palm on the left-hand side of his face. He said his ear was ringing after being slapped with force and he was traumatized. He then walked away and left the office. When Qhajana slapped Sekhabisa, Sekhabisa's spectacles came off. He did not see where his glasses fell and later another employee brought them to him after he had left Qhajana's office.

[23] When he was cross-examined about why Qhajana had asked him to leave his office, he said he believed it was because he was asking him to do the work of finalising the terms of reference for the insurance contract tender. That had prompted Qhajana to start insulting him. It was put to him that Qhajana had been calm and collected and that he was the person who was the angry aggressor who refused to leave the office, even when asked a second time, and that when Qhajana stood up and opened the door for him to leave the office that is when Sekhabisa turned around spat in his face. It was also put to him that Qhajana then had to clean his glasses and in the

process put his hand to push Sekhabisa's "spitting face away from him". Qhajana testified that this was a defensive move on his part, as he did not know what might follow after being spat at.

[24] Qhajana's version of the verbal exchange between them at that time was not introduced in the proceedings until Qhajana testified, so it was not tested with Sekhabisa. Qhajana claimed that Sekhabisa had reprimanded him about his language in his emails and insulted him by saying he was a useless manager and that he had been trying to prove to management that he was incompetent. At that point, Qhajana claims he asked Sekhabisa to leave his office if he was finished with the official business. He claims he did so because the conversation had deteriorated "to an insult and belittling session". He then 'politely' pushed Sekhabisa to the door after opening it. Sekhabisa then spat in his face saying he was a 'useless bastard'. He reacted by pushing Sekhabisa on his face with his left hand and Sekhabisa's glasses fell down. A little later in his testimony, Qhajana claimed that immediately before spitting at him, Sekhabisa turned towards him and said "I am not finished with you yet". It must be mentioned that Sekhabisa was not challenged at any stage about the degree of force with which Qhajana's hand came into contact with his face.

[25] Qhajana claimed that he had gone to put his own glasses on his desk after being spat at. When he returned to the open door, Sekhabisa was standing outside the office with his fists raised in a fighting stance. According to him it was at that juncture that another employee came and stood between them and pleaded with them to stop what they were doing. He said that neither he nor Sekhabisa responded to the employee, and then he closed his door, while the employee was helping Sekhabisa to look for his spectacles outside Qhajana's office. He could see them through the door because the door had a frosted glass panel.

Evaluation of the grounds of review

[26] It is true that the arbitrator did consider the hearsay evidence of Sekhabisa that his doctor had said he had suffered head trauma. It is also correct that the arbitrator claimed that Sekhabisa's version was corroborated by the fact that his glasses were found some distance from Qhajana's office. The

arbitrator should not have had regard to the hearsay evidence of what the doctor supposedly said. It also did not appear on the face of the record that anyone testified at the arbitration that Sekhabisa's glasses were found some distance from Qhajana's door.

[27] The question which arises is whether the arbitrator's conclusion that Qhajana slapped Sekhabisa, forcibly dislodging his spectacles, was a conclusion that the arbitrator could never have reached on the evidence if he had not relied on the two factors mentioned. As stated above, Sekhabisa's evidence that Qhajana struck him so forcibly that his ear was ringing was not challenged when he testified. Secondly, on Qhajana's own account, Sekhabisa's spectacles did not fall inside his office where he supposedly pushed Sekhabisa on the face, but must have been found beyond his office door and it was necessary to look for them. It is not an unreasonable inference to draw that the glasses would not have been lying just outside the door if Sekhabisa and the other employee had to look for them. In the circumstances, leaving aside the evidence the arbitrator should not have relied on, there was sufficient evidence to infer that Qhajana had struck Sekhabisa on the face forcefully and was not just pushing his face away.

[28] Obviously, the specific incident would not have taken place if Sekhabisa had not come and interrupted Qhajana. Equally, despite the antagonistic nature of their exchange in Qhajana's office, the fact that Sekhabisa insisted on meeting Qhajana to sort out what needed to be done relating to the insurance contract and to raise the question of what Sekhabisa perceived to be offensive in Qhajana's emails, that did not necessarily require Qhajana to engage in physical action as part of that exchange. He did not have to push Sekhabisa to leave his office, he could simply have said he was leaving himself and gone to the appropriate superior to complain. In short, Qhajana would never have been charged with assault if it had not been for his own conduct on that occasion, and it is that conduct he was being held accountable for. Sekhabisa had accepted a final written warning for the way he had conducted himself in front of Qhajana's subordinates.

[29] On the question whether the probabilities of either version being true were equally balanced, the issue is not whether another arbitrator might have come to a different conclusion, but whether it could not be reasonably concluded that the employer's version was more probable. The arbitrator focused on the primary charge of assault and concluded that Qhajana probably had struck Sekhabisa forcibly, contrary to his version that he had merely pushed Sekhabisa's face away. The evidence was sufficient to support such an inference. Sekhabisa's version that Qhajana had pushed him on the torso to get him out of the office, was not disputed. On the evidence it was not an implausible inference to conclude that it was Qhajana who was the physical aggressor during the incident.

[30] Also, the evidence of the email correspondence between them plainly demonstrated that Qhajana was contemptuous of, and resentful towards, Sekhabisa, even though he was reluctant to concede that the language of his correspondence to Sekhabisa was anything more than 'forceful'. By contrast, Sekhabisa had tried to remain courteous in his correspondence with Qhajana. Previously, he had appealed to the CEO to intervene because of the tension between him and Qhajana. Consequently, it would not be an insupportable inference to make that Qhajana's hostility towards Sekhabisa boiled over on that occasion. I accept that, with hindsight, Qhajana might have refrained from striking Sekhabisa, but he had openly accused Sekhabisa of not doing what he should have and his stance towards Sekhabisa was accusatory and confrontational. Having been ordered to meet with Sekhabisa in his office, in front of his staff, it is not unreasonable to conclude that, if anything, his antagonism towards Sekhabisa would have been increasing at that point, as evidenced also by the demeaning things said to Sekhabisa when they were in his office. Sekhabisa's version of what Qhajana had said to him was not disputed when he was cross-examined.

[31] Having regard to all the above, I am satisfied that the applicant does not have reasonable prospects of success in the review application. Accordingly, even if the condonation application should not be dismissed on other grounds, the prospects of success also do not provide support for condoning the late filing of the review.

Order

[32] The Applicant's condonation application for the late filing of his review application is dismissed, and consequently the review application is also dismissed.

[33] No order is made as to costs

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R Lagrange J
Judge of the Labour Court of South Africa

Representatives

For the Applicant	J Duba of Legal Aid South Africa
For the Third Respondent	T du Preez instructed by Van der Spuy & Partners