REPUBLIC OF SOUTH AFRICA

Reportable

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Case no: D396/04

In the matter between:

CHEMICAL ENERGY PAPER PLASTIC

WOOD AND ALLIED WORKERS UNION **First Applicant**

NTSHANGASE AND 11 OTHERS **Second to twelfth Applicants**

and

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION **First Respondent**

A DEYZEL N.O. **Second Respondent**

MONDI LIMITED t/a MONDI KRAFT **Third Respondent**

Heard: **10 August 2012**

Delivered: 07 May 2013

Summary: Application for review and condonation for late filing of review. Applicants filing condonation application seven years later. Condonation refused.

JUDGMENT

GUSH J

[1] This matter involved three separate applications by the applicants. The first application was for the condonation for the late filing of the applicants' heads of argument; the second, an application for condonation for the late filing of the applicants' application to review the award of the second respondent; and the third the review application itself.

[2] There was no opposition to the application for condonation for the late filing of applicants' heads of argument and accordingly this application was granted.

[3] Before dealing with the application for condonation for the late filing of the applicants' application to review the award of the second respondent and the applicants' review application, it is necessary to set out briefly the chronology of the matter.

[4] The applicants were all employees of the third respondent and during 2001 were engaged in a protected strike at the third respondent's premises. During the course of the industrial action, 15 employees of the third respondent including the second to the 11th applicants were allegedly involved in acts of misconduct which led to them facing disciplinary charges during October 2001.

[5] A disciplinary enquiry took place during October 2001 which resulted in the dismissal of the 15 employees by the third respondent. The dismissed employees referred a dispute concerning their dismissal to the first respondent on 24 December 2001, which dispute was conciliated on 28 January 2002 and a certificate of non-resolution issued. The employees requested that the matter be referred to arbitration and the pre-arbitration procedures were finalised by 27 May 2002.

[6] The arbitration commenced on 29 July 2002 and continued on 31 July 2002, 24 January 2003, 30 June 2003, 1 July 2003 to 3 July 2003 and 22 September 2003. During the course of the hearing, an application to lead evidence in camera was heard and granted. The parties presented argument on 24 November 2003.

[7] The second respondent delivered his award on 6 January 2004. In his award, the second respondent reinstated four of the 15 dismissed employees and dismissed the application of the second to twelfth applicants in this matter.

[8] The applicants are unable to state on what day they received the award. The third respondent however avers that the applicants must have had knowledge of the award at the latest on 23 January 2004. The applicants have accepted this date as the date upon which they became aware of the award.

[9] It follows therefore that the review application should have been filed within six weeks of the date they became aware of the award namely 9 March 2004.

[10] The applicants filed their application to review the award of the second respondent on 30 June 2004, some three and a half months late. The application was filed without an application for condonation for the late filing of the review.

[11] The third respondent filed its notice of opposition to the application to review the second respondent's award on 14 July 2004.

[12] It is apparent from the pleadings in these applications (and in an application brought by the third respondent to dismiss the applicants' review on the grounds that the applicants had failed to prosecute the review application with reasonable expedition) that the applicants experienced some difficulty in compiling the record or transcript of the arbitration hearing as is required by the rules of this Court. (A chronology of the efforts to reconstruct the record is chronicled in the third respondents dismissal application and in a schedule attached to the third respondent's heads of argument.)

[13] It appears from the pleadings that during September 2004, the applicants' then attorney first advised the third respondent's attorneys of the difficulty he was experiencing regarding the record. It is disturbing in the extreme that what followed was that the efforts to reconstruct the record persisted for the next six years which lead the third respondent to launch its application to dismiss the applicants' review application on the grounds that the applicants were not diligently pursuing the review.

[14] This application unfortunately did not have the effect of expediting the filing of the record. When the application to dismiss the review application was heard some twelve months later the record still had not been filed. The application to dismiss the applicants review was enrolled and heard by this Court on 15 November 2010. The honourable Judge Cele in an *ex tempore* judgment dismissed the dismissal application with no order as to costs and directed the parties to file the transcript of the arbitration proceedings within 40 days. The import of this was that the record was to be filed by the end of December 2010. It is clear from the judgment that the 40 days period was agreed to by the applicants' counsel.

[15] It is clear that the applicants did not comply with this order, and it appears from the pleadings in the review application that the applicants only filed their supplementary affidavit (seemingly in accordance with Rule 7A (8) (a)) on 4 April 2011, almost seven years after the review application was filed. Rule 7A (8) requires an applicant to file its supplementary affidavit within 10 days of the record be made available by the registrar. The third respondent filed its answering affidavit timeously, on 14 April 2011.

[16] It is apparent from the judgment of Cele J that the failure of the applicants to apply for condonation for the late filing of the review application was raised in the application and referred to during in the course of argument in the dismissal application, Despite this, it must be emphasised that the applicants' condonation application was only filed without explanation almost five months after judgment was given in the dismissal application, on 4 April 2011. I shall return to this issue below.

[17] The pleadings having closed the applicants' applications were enrolled to be heard on 12 April 2012 but were adjourned on that day to 10 August 2012. . What is disturbing is the fact that the applicants, despite having spent seven years reconstructing the record in order to prosecute their review application, have made no reference whatsoever in their pleadings to any identifiable portion of the eight voluminous volumes of exhibits and transcripts which comprise the record they eventually filed. The rules of this Court applicable to review applications specifically enjoin the applicant to furnish copies of "...

such portions of the record as may be necessary for the purposes of the review..." [1]

[18] Three firms of attorneys have been involved in this matter. The first attorneys, who were responsible for the late filing of the application, were Sihlali Molefe Inc [SMI], who was on record from the date that the applicants received the award until approximately mid 2006 when CTH Attorneys [CTH] were instructed. They in turn were replaced by SRA attorneys in April 2007. SRA remained on record until shortly before these applications were heard when CTH were again instructed as attorneys of record.

[19] The applicants in their application for condonation expressly confined their explanation for the delay for the filing of the application for condonation only to the period between 6 January 2004 when the award was received by the applicants and 30 June 2004 when the review application was filed. The applicants expressly and intentionally did not attempt to explain the delay in launching the application for condonation, for the period June 2004 to 15 November 2010 for the reasons set out below. The applicants also offerred no explanation whatsoever for the delay in bringing the application for condonation between the filing of the application to dismiss and the judgment in that application or the period from 15 November 2010, on which date he dismissal application was disposed of and the date on which the applicants finally deigned to apply for condonation, viz. 4 April 2011.

[20] I shall deal with each period separately:

(a) 6 January 2004 to 30 June 2004.

(i) The essence of the applicants' "explanation" for the late filing of the review application is that the applicants are unable to explain the reasons for the late filing of the review application. The deponent to the founding affidavit states: "apart from the applicants themselves no other persons that were involved in the matter during [this], and for some time thereafter, have been

[1] Rule 7A (5)

able to be contacted – those that have, have not been able to assist in explaining the delay"[2].

(ii) It is clear from the founding affidavit that all the attorneys that at various times represented the applicants were aware of the late filing of the review application and they needed to apply for condonation. The deponent states when SRA received the file from CTH they discovered in the file a notice of motion (unsigned and with accompanying affidavit) seeking condonation for the late filing of the review dated 14 June 2004.

(iii) One of the reasons the applicants offer for not being able to ascertain the reason for the late filing of the review application is that the first applicant's official who was dealing with the matter at the time had been suspended by the first applicant and was subsequently dismissed in early 2009 and was not cooperative. There is no explanation as to why no attempt was made to contact this official in 2007 when the instructions were first received.

(iv) The applicants further aver that they were unable to get any information from SMI and that SMI are no longer in existence. There is no indication as to when this firm ceased to exist.

(v) The fact of the matter remains that the applicants have not explained the reason for the delay at all. What is clear however is that it is probable that the inability of the applicants to explain the delay is due in no small measure to the substantial delay in bringing the application for condonation.

(b) June 2004 to 15 November 2010.

(i) The applicants expressly argued that their application for condonation was only in respect of the period 6 January 2004 and 30 June 2004 and it was not necessary to deal with the

[2] Founding affidavit Condonation application para 7 page 6.

delay in launching the application for condonation from June 2004 to 15 November 2010.

(ii) The reason the applicants argued that the delay between June 2004 and 2010 was irrelevant and required no explanation was based on an extract from the judgement of the honourable Cele J, in dismissing the third respondent's application to dismiss the applicants' review application.[3]

(iii) In the course of his judgment Cele J said the following:

> What compounds the problem for the applicants is the fact that there is no condonation application that has been brought for the 3 1/2 months delay. I have been persuaded not to hold that against the applicants. Notwithstanding more than enough authority that an applicant for a condonation must file an application as soon as it arises. But I am alive to the fact that I am not here empowered to consider the condonation application because it is not before me.[4]

(iv) The applicants argued on the strength of the above that the court should conclude that the issue surrounding the delay in launching the condonation application had been determined by Cele J and therefore could not be taken into account.

(v) This interpretation by the applicants ignores the fact that the application before Cele J was to dismiss the applicants' review application on the grounds that they had failed to diligently pursue it. There is nothing to suggest that the application to dismiss the review was premised on the failure of the applicants to timeously apply for condonation. It must be borne in mind that at the time this application was heard the applicants had not filed a condonation application. As Cele J specifically states in indicating that he would not hold the fact that the applicants had not file a condonation application in considering the dismissal

[3] *Ex tempore* Judgment Cele J case number D396/04 dated 15 November 2010.
[4] At page 4 lines 15 to 21.

application that he was “am alive to the fact that [he was] not ... empowered to consider the condonation application because it is not before [him]”.

(vi) It is trite that the failure of an applicant to timeously bring an application for condonation is a factor to be considered in whether to grant condonation.

(vii) What is particularly startling is that the applicants make no attempt whatsoever to explain why, on receipt of the application to dismiss, they did absolutely nothing for approximately 12 months regarding an application for condonation for the late filing of the review, that being the time it took for the dismissal application to be concluded.

(c) 15 November 2010 to 4 April 2011.

(i) The applicants in their founding affidavit provided no explanation whatsoever for this period. In fact the delay between 15 November 2010 and four April 2011, as with the period between the filing of the application to dismiss the review and the hearing of the application is not even mentioned.

[21] The principles applicable to applications for condonation have been enunciated repeatedly by our courts.[5] The first and fundamental requirement is for an applicant to apply for condonation as soon as he realises that the application is out of time.[6] Even if the judgment of Cele J could be interpreted to mean that the period between the filing of the review application and the judgment in the application had been dealt with in his judgment, the applicants’ persistence in failing to apply immediately for condonation is inexcusable.

[22] It is also so the applicants’ have, seemingly intentionally, failed to account for the delays. In the matter of *Uitenhage Transitional Local Council v South*

[5] See inter alia *MELANE v SANTAM INSURANCE CO LTD* 1962 (4) SA 531 (A)
[6] *COMMISSIONER FOR INLAND REVENUE v BURGER* 1956 (4) SA 446 (A) at 449G

African Revenue Service[7] the Supreme Court of Appeals held that "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."[8] By no stretch of the imagination can it be said that the applicants have satisfied these requirements.

[23] In FEDERATED EMPLOYERS FIRE & GENERAL INSURANCE CO LTD AND ANOTHER v MCKENZIE[9] the Appellate Division set out the factors to be taken into account when considering condonation viz: "…the degree of non-compliance, the explanation therefor, the importance of the case, the prospects of success, the respondent's interest in the finality of his judgment, the convenience of the Court and the avoidance of unnecessary delay in the administration of justice"[10]. It is difficult to conceive of a matter where the applicants' and their representatives have, given the elapse of time between filing the application and filing the record, shown so little "interest in the finality" of the matter and "the avoidance of unnecessary delay".

[24] In considering the applicants' prospects of success it is necessary to consider the grounds of review upon which the applicants rely as set out in the founding and supplementary affidavits.

[25] The founding affidavit comprises of no more than a brief statement of the background, a lengthy recordal of the evidence and a summary of the second respondent's findings before setting out the applicants' grounds of review. These are recorded as:

1. The arbitrator failed to apply his mind on the evidence placed before him.

[7] 2004 (1) SA 292 (SCA)
[8] para 6 page 297
[9] 1969 (3) SA 360 (A)
[10] At page 362 F-G

2. Alternatively arbitrator misconducted himself and/or further alternatively committed a gross irregularity in the conduct of arbitration proceedings to apply the principle of collective misconduct.

3. That he failed to properly apply his mind to the evidence that was placed before him that despite that the applicants went into the factory they were not charged for interim the factory but identifiable misconduct of switching-off the machines.

4. That some of the witnesses had gone home during the strike as they were sick and were never near the factory. sic)[11]

[26] The supplementary affidavit, deposed to by the applicants' attorney, states specifically that the deponent has had sight of the reconstructed record and that the affidavit was prepared having regard to that record. Conspicuous by its absence, particularly given the assurance that the affidavit was prepared having regard to the record, is the absence of any reference whatsoever to specific passages in the award or the transcript or record in support of the averments made in the affidavit. In summary, the deponent does little more than criticise the second respondent's analysis and acceptance of the evidence. What is startling is the general nature of the criticisms or "grounds of review" which comprise the supplementary affidavit. This is particularly so in light of the fact that the award of the second respondent runs to some 52 pages. In his award, the second respondent has set out in detail the evidence adduced by the parties. This is followed by an equally detailed analysis of the evidence and argument, before setting his order.

[27] I am not satisfied that the applicants have in any way whatsoever established in their pleadings any prospects of success at all. There is nothing contained in the founding and supplementary affidavits that supports the averment that the second respondent's award is reviewable.

[28] In the circumstances and in particular in light of the applicants failure to adequately explain the reason for the delay in filing the review application timeously coupled with the absence of an explanation as to why the

[11] Pleadings review application page 23 – 24 para 8.

condonation application was not timeously brought, I am not persuaded that the applicants are entitled to an order condoning the late filing of the review application.

[29] Even if this was not sufficient to dismiss the applicants' application for condonation coupled with the applicants' failure to establish reasonable prospects of success in the review application too justifies the refusal of the applicants' application.

[30] It is so that the delays appear to have been occasioned by the legal representatives of the applicants failing to diligently and expeditiously it is relevant that there is no reasonable explanation offered by the applicants themselves setting out what attempts they took to expedite this matter. It cannot be ignored that the applicants were dismissed 11 years ago and that their trade union is the first respondent. Despite the absence of any explanation from any of the applicants save for the second applicant's confirmatory affidavit I am not, in the particular circumstances of this matter, persuaded that the requirements of law and fairness justify an order as to costs.

[31] I accordingly make the following order:

(a) The applicants' application for condonation is dismissed;

(b) There is no order as to costs.

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D H Gush

Judge

APPEARANCES

FOR THE APPLICANTS:	Adv Seery Instructed by Cheadle Thompson Haysom Attorneys.
FOR THE THIRD RESPONDENT:	A J Chadwick; Shepstone and Wylie Attorneys.