IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)
REPUBLIC OF SOUTH AFRICA

Case Number: 27487/2016

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED

DATE: 06/06/2018

SIGNATURE: .....

In the matter between:

THE COMPENSATION FUND — Applicant

and

HEADLINE CONSULTING (PTY) T/A TSHWANE AIR
(Registration number 2003/001639/07) — First Respondent

THE ARBITRATION FOUNDATION OF SOUTH AFRICA — Second Respondent

ADVOCATE FRANCIOS S.C. N.O. — Third Respondent

IN RE: CASE NUMBER: 92504/2015

THE COMPENSATION FUND Applicant

(In the Rescission Application)

And

HEADLINE CONSULTING (PTY) LTD Respondent
T/A TSHWANE AIR
(Registration number 2003/001639/07) (In the Rescission Application)

JUDGMENT

JANSE VAN NIEUWENHUIZEN J

[1] This is a review application brought in terms of section 33(1) of the Arbitration Act, 42 of 1965 ("the Act"). The section reads as follows:

"33 Setting aside of award

(1) Where

(a) any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire; or

(b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers; or

(c) an award has been improperly obtained,

the court may, on the application of any party to the reference after due notice to the other party or parties, make an order setting the award aside."

[2] The application pertains to an award made by the third respondent on 11 September 2015. In terms of the award the applicant was ordered to pay the first respondent an amount of R 2 077 977, 42 together with interests and costs.

[3] I pause to mention, that an application envisaged in section 33(1) of the Act must, in terms of section 33(2), be brought within six weeks after publication of the award. The applicant failed to comply with the time limit contained in section 33(2) and seeks an order condoning the late launching of the application.

PARTIES

[4] The applicant is the Compensation Fund, a statutory body established in terms of the provisions of the Compensation for Occupational Injuries and Diseases Act, No 130 of 1993.

[5] The first respondent is Headline Consulting (Pty) Ltd, a company registered in terms of the laws of the Republic of South Africa.

[6] The second respondent is the Arbitration Foundation of South Africa established in terms of the Act ("AFSA").

[7] The third respondent is cited in his capacity as the duly appointed arbitrator in the arbitration that forms the subject matter of this application ("the arbitrator").

[8] The application is only opposed by the first respondent.

FACTS

[9] The facts underlying the relief claimed by the applicant are common cause between the parties.

[10] On 12 May 2015 the applicant and the first respondent entered into a written agreement in terms of which the first respondent had to supply, install, commission and maintain an air conditioning system at the offices of the applicant.

[11] In pursuance of the agreement, the first respondent attempted on 26 October 2012 to deliver and install the air conditioning units at the offices of the applicant. The applicant refused to accept delivery of the units and consequently prevented the first respondent from fulfilling its obligations in

terms of the contract. The applicant's refusal led to the dispute that formed the subject matter of the arbitration proceedings.

[12] Having failed to resolve the dispute in terms of clause 11.1 of the agreement, the first respondent proceeded with arbitration in terms of clause 11.4 of the agreement.

[13] To this end and on 15 May 2015, the first respondent directed a request for arbitration to AFSA's Pretoria branch. On 18 May 2015 the first respondent received confirmation from AFSA that the arbitration proceedings will proceed under the auspices of AFSA. Shortly thereafter invoices in respect of the prescribed fees for the arbitration were forwarded to both the attorneys of the first respondent and to a certain Mr Maphologela in the Legal Services Department of the applicant.

[14] The applicant failed to pay its portion of the prescribed fees and failed to deliver a statement of defence. In order to proceed with the arbitration, the first respondent paid the applicant's portion of the prescribed fees and on 15 July 2015 both the first respondent's attorneys and Mr Maphologela was advised of a pre-arbitration meeting that was scheduled for 30 July 2015.

[15] The applicant did not attend the pre-trail meeting and the first respondent indicated that it would seek a default judgment against the applicant. The

default hearing was arranged to be held on 2 September 2015. A notice of set down was served on the applicant on or about 14 August 2015.

[16] The applicant, in a letter dated 31 August 2015, requested a postponement of the application for default judgment, which request was refused by the first respondent. Consequently, the application for default judgment proceeded on 2 September 2015.

[17] Shortly after the commencement of the proceedings on 2 September 2015, a certain Mr Phalai and Ms Mthethwa from the offices of the applicant arrived at the proceedings. The matter stood down for the parties to discuss the matter and upon the resumption of the matter, Mr Phalai stated that he requests a postponement of the matter.

[18] Having heard Mr Phalai in respect of the reasons for the postponement and having heard address from counsel on behalf of the first respondent, the postponement was refused and the default proceedings proceeded.

CONDONATION

Legal Principle

[19] Section 38 of the Act provides that a court may on good cause shown, extend any period of time fixed by the Act. In *South African Forestry Co Ltd v York Timbers Ltd* 2003 (1) SA 331 SCA, Nugent JA in considering an

application for the remitting of an award to an arbitrator in terms of section 32(2) of the Act, considered the term *"good cause"* in section 38 and held as follows at 338 I – 339 B:

"'Good cause' is a phrase of wide import that requires a Court to consider each case on its merits in order to achieve a just and equitable result in the particular circumstances. As pointed out by Innes CJ in Cohen Brothers v Samuels 1906 TS at 224 in relation to the meaning of that phrase albeit in another context:

> *'No general rule which the wit of man could devise would be likely to cover all the varying circumstances which may arise in applications of this nature. We can only deal with each application on its merits, and decide in each case whether good cause has been shown.'"*

[20] It is of some assistance to have regard to authorities dealing with condonation applications in review proceedings. For this purpose, guidance is to be found in the authorities on the extension of time limits contained in the Promotion of Administrative Justice Act, 3 of 2000.

[21] In *Asla Construction (Pty) Ltd v Buffalo City Metropolitan Municipality* 2017 (6) SA 360 (SCA) 2017 (6) SA 360 (SCA), the approach to an application for the extension of a statutory time period limit was considered in paragraphs [11] and [12]:

"*[11] The manner in which the discretion to extend the statutory time period should be exercised was described in Camps Bay Ratepayers' and Residents' Association and Another v Harrison and Another [2010] 2 All SA 519 (SCA) ([2010] ZASCA 3) para 54, in the following terms:*

'And the question whether the interests of justice require the grant of such extension depends on the facts and circumstances of each case: the party seeking it must furnish a full and reasonable explanation for the delay which covers the entire duration thereof and relevant factors include the nature of the relief sought, the extent and cause of the delay, its effect on the administration of justice and other litigants, the importance of the issue to be raised in the intended proceedings and the prospects of success.' [My emphasis.]

[12] Although a consideration of the prospects of success of the application for review requires an examination of its merits, this does not encompass their determination. In Beweging vir Christelik-Volkseie Onderwys v Minister of Education [2012] 2 All SA 462 (SCA) ([2012] ZASCA 45) paras 42 – 44 the proposition that a court is required to decide the merits before considering whether the application for review was brought out of time or after undue delay and, if so, whether or not to condone the defect, was rejected. Thereafter, in Opposition to Urban Tolling Alliance and Others v South African National Roads Agency Ltd and Others [2013] 4 All SA 639 (SCA) ([2013] ZASCA 148) paras 22,

26 and 43 it was decided that a court was compelled to deal with the delay rule before examining the merits of the review application, because in the absence of an extension the court had no authority to entertain the review application. The court there concluded that because an extension of the 180-day period was not justified, it followed that it was not authorised to enter into the merits of the review application. However, in South African National Roads Agency Ltd v Cape Town City 2017 (1) SA 468 (SCA) ([2016] 4 All SA 332; [2016] ZASCA 122) para 81 a submission based upon this decision, namely that the question of delay had to be dealt with before the merits of the review could be entertained, was answered as follows:

> *'It is true that . . . this court considered it important to settle the court's jurisdiction to entertain the merits of the matter by first having regard to the question of delay. However, it cannot be read to signal a clinical excision of the merits of the impugned decision, which must be a critical factor when a court embarks on a consideration of all the circumstances of a case in order to determine whether the interests of justice dictate that the delay should be condoned. It would have to include a consideration of whether the non-compliance with statutory prescripts was egregious.'"*

Explanation

[22] In the affidavit in support of the condonation application, the applicant states that it received the final arbitration award on 17 September 2015. I pause to mention, that in the circumstances, the period of six weeks would have expired on 29 October 2015.

[23] In explaining the delay in launching the application timeously, the applicant refers to the bureaucratic difficulties it encountered in obtaining a decision to either pay the amount awarded to the first respondent or to challenge the award. Its Executive Committee eventually decided during the middle of October 2015 to review the award and the State Attorney was briefed to attend to the matter.

[24] Consultation was arranged with counsel. It appears from the founding affidavit that the affidavit was commissioned on 22 December 2015. The application was, however, only issued on 6 April 2016. Save to mention that the State Attorney was instructed and that consultation with counsel occurred, no further explanation for the lapse of time from middle October 2015 to 6 April 2016, a period of almost six months, is provided.

[25] The explanation proffered by the applicant lacks essential information. The applicant, *inter alia*, fails to state:

i. on which date its Executive Committee decided to review the award of the arbitrator;

ii. on which date the State Attorney was instructed to proceed with the application;

iii. when consultation with counsel took place;

iv. why the founding affidavit was only signed on 22 December 2015; and finally

v. why it took a further three months to issue the application.

[26] The only reason advanced by the applicant for the delay, is the fact that its Executive Committee only took the decision to launch this application during middle October 2015. The decision was consequently taken within the six week period and the ensuing delay as alluded to *supra* should have been explained fully.

Prospects of success

[27] The grounds of review relied upon by the applicant in its founding papers are two-fold and in the alternative, to wit:

i. the arbitrator has committed a gross irregularity in the conduct of the arbitration proceedings; or

ii. the arbitrator has exceeded the powers conferred upon him by the Act.

[28] The allegations in support of the aforementioned grounds relate to the decision of the arbitrator to refuse the postponement and his refusal to allow the representatives of the applicant to cross-examine the witness of the first respondent.

[29] In order to consider the applicant's prospects of success, it is apposite to have regard to the nature of a review in terms of section 33(1) of the Act.

[30] The nature of a review in terms of section 33(1) of the Act was considered in *Telcordia Technologies Inc v Telkom* SA Ltd 2007 (3) SA 266 at paragraph [50], to wit:

"*[50] By agreeing to arbitration parties to a dispute necessarily agree that the fairness of the hearing will be determined by the provisions of the Act and nothing else. Typically, they agree to waive the right of appeal, which in context means that they waive the right to have the merits of their dispute re-litigated or reconsidered. They may, obviously, agree otherwise by appointing an arbitral appeal panel, something that did not happen in this case.*"

[31] In other words only procedural irregularities as defined in section 33 of the Act will entitle an applicant to an order setting aside the arbitration award.

[32] The refusal of the postponement pertains to the merits of the proceedings and does not constitute a procedural irregularity as envisaged in section 33 of the Act.

[33] The decision of the arbitrator to proceed with the default hearing without allowing the representatives of the applicant to cross-examine the first respondent's witness is in accordance with the power conferred on him in terms of article 11.2.4: to wit:

> *"11.2.4 to proceed with the arbitration in accordance with these Rules, and make an award in the absence of or* ***without hearing any party who is in default as provided for in these Rules*** *, or fails to appear or to comply with any ruling or interim award of the arbitrator."* [own emphasis]

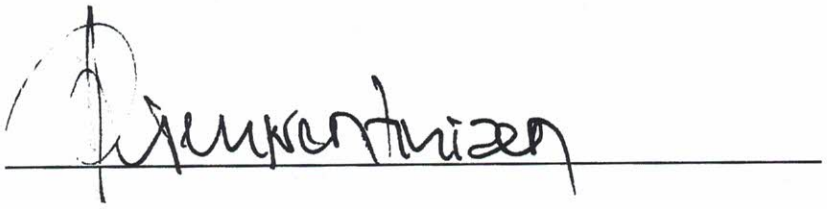
[34] In considering both the explanation, or lack thereof, for the delay and the prospects of success in the review application, I am of the view that the applicant failed to show good cause for the extension of the six week period prescribed by section 33(2) of the Act.

[35] In the premises, it is not necessary to consider the merits of the application and the application stands to be dismissed with costs. [See: *Beweging vir Christelik-Volkseie Onderwys and Others v Minister of Education and Others* [2012] 2 All SA 462 SCA at para 66.]

ORDER

[36] In the premises, I make the following order:

The application is dismissed with costs.



JANSE VAN NIEUWENHUIZEN J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DATE HEARD	2 May 2018
JUDGMENT DELIVERED	6 June 2018

APPEARANCES

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