



**IN THE LABOUR COURT OF SOUTH AFRICA**

**HELD AT DURBAN**

**CASE NUMBER: D1286/2019**

**In the matter between**

**VELILE THAMSANQA SHEZI**

**APPLICANT**

**and**

**TRANSNET BARGAINING COUNCIL**

**FIRST RESPONDENT**

**COMMISSIONER EBRAHIM PATELIA**

**SECOND RESPONDENT**

**TRANSNET FREIGHT RAIL**

**THIRD RESPONDENT**

Delivered: 24 May 2023

**JUDGMENT**

**NXUSANI AJ:**

[1] This is a review of a ruling of the Second Respondent, a Commissioner employed for that purpose by the Transnet Bargaining Council, the First Respondent herein.

[2] The genesis to the application dates back to 2016 following the Applicant's arrest on 22 November 2016. He was detained and arraigned on four (4) counts of murder.

[3] Following upon the Applicant's arrest and detention the Third Respondent made enquiries as to the charges, their seriousness, and the likelihood of his timely release. It then notified the Applicant that as a result of his inability to perform his contractual obligations as a consequence of his incarceration, it required him to make representations on his proposed termination. The Applicant made representations. He effectively complained that the period given to him to make his representations were too short and asked that his services should not be terminated. It is unclear from the papers whether the Applicant notified his employer of his arrest and detention. There is some evidence that some employees were identified as witnesses but in the end they did not testify.

[4] The Third Respondent then notified the Applicant on 31 December 2016 that it had considered his representations and was terminating his services with immediate effect on 31 December 2016. It reminded the Applicant that he had thirty (30) days to challenge his dismissal and that if he failed to do so he was entitled to apply for condonation with the First Respondent.

[5] The Applicant was a Shop Steward and a member in good standing of a trade union operating within the Third Respondent.

[6] It would appear that the Applicant was represented by a legal representative during his criminal trial. The Applicant was represented by Counsel and following upon an application to the High Court in Pietermaritzburg, the Applicant was granted bail.

[7] One of the conditions of his bail was that he was not entitled to leave the Magisterial District of Ixopo without the prior written permission of the Investigating Officer. The Court Order is dated 22 September 2017.

[8] On 5 October 2017 by way of email, the Applicant notified the Third Respondent that he had been granted bail on 22 September 2017 but that he was detained up to 28 October 2017 (sic). He required the Third Respondent to revert to him by 6 October 2017.

[9] The Third Respondent requested the Applicant to lodge any dispute that he may have with the Transnet Bargaining Council. This occurred on 6 October 2017.

[10] Following the Third Respondent's refusal to reinstate him, the Applicant referred a dispute to the Transnet Bargaining Council on 18 October 2017. He also then applied for the condonation of the late referral of his dispute. In that condonation application, the Applicant asserted that his dispute arose on 31 December 2017 despite the fact that he had been dismissed on 31 December 2016. The referral and the application for condonation was hotly opposed by the Third Respondent.

[11] According to the Applicant his referral was 322 days late and he effectively relied upon his detention as the basis for the lateness of the referral.

[12] The Third Respondent pointed out in its opposition to the condonation application that it was factually incorrect for the Applicant to assert that he had been released on 23 October 2017 because he had already referred his dispute on 18 October 2017 and that as at 5 October 2017, he must have been released given the fact that he was able to write an email to the Third Respondent regarding his request to be restored to his position. That this was so, is borne out by the bail receipt which proves that on 28 September 2017 one G.H. Keswa deposited an amount of R10 000,00 to secure the Applicant's release on 29 September 2017. It was only then that the Applicant in reply corrected the state of affairs and put up a copy of the bail receipt.

[13] The Applicant has not satisfactorily explained why he took no steps to obtain the assistance of his trade union or his attorney to prosecute his timely referral of his dispute even though he was in custody. After all the Applicant was not only a Shop Steward but was also studying law.

[14] The Applicant has also not explained what he did between the period following his release on 28 September 2017 to 4 October 2017. He has also not explained what steps he took between the period 6 October 2017 until 17 October 2017. All of this compounded the Applicant's problems. It points to dilatory conduct

which requires formal processes to wait until he has attended to them. That is unacceptable for a litigant on bended knees.

[15] When an employee is aware, as was the case with the present Applicant, that time was of the essence, there is a duty to act with expedition. It cannot behove an Applicant to further delay and to blame his incarceration as the sole reason for why his application is out of time. The incarceration in fact should focus an employee because there are no other distractions. Awaiting trial employees are entitled to vindicate any dispute.

[16] The application for condonation came before the Second Respondent. He issued a condonation ruling based on the affidavits as is the practice within most Bargaining Councils. The criticism against the Bargaining Council, *inter alia* that it had not heard the parties in person overlooked the manner in which condonation applications are normally brought in terms of Rule 31 of the Rules of Conduct for Proceedings before the CCMA. Both parties had made detailed submissions and in these circumstances the failure to arrange an in-person hearing was both appropriate and fair in the circumstances. The applicant would not have been able to travel to Durban to attend the in person application.

[17] In terms of Rule 31 the Applicant was required to deliver a reply within three (3) days of receipt of the Answering Affidavit. The Answering Affidavit was delivered on 25 October 2017 but the Applicant's Replying Affidavit was only commissioned on

7 November 2017. There was no explanation for why the Applicant's Replying Affidavit was filed outside of the three (3) day period stipulated in Rule 31.

[18] The Commissioner nonetheless had regard to the Replying Affidavit. He calculated the delay as being 257 days late and excessive. I agree that the delay is excessive.

[19] The Second Respondent relied upon the **Samancor** judgment<sup>1</sup>, which is authority for the proposition that it is inappropriate to place undue weight on the term 'incapacity' so as to limit it only to ill-health, injury, or poor performance. It extends beyond these easily identifiable forms of incapacity. Incapacity includes imprisonment which incapacitates the employee beyond the narrow confines of ill-health or injury.

[20] Where an employee holds an important position such as the Applicant held it is not reasonable to expect the employer to keep a position open until such time that the Applicant is able to perform his services. As it turns out the Applicant knew on 11 October 2017 that his application to leave the Magisterial District of Ixopo to write Unisa exams and to reside in Durban to attend to his employment affairs with the Third Respondent had been declined. The reason for the decline was that the Applicant would be able to write exams in Ixopo with Unisa and because witnesses were situated in proximity to the Third Respondent and that the address that he had provided was apparently invalid.

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<sup>1</sup> **Samancor Tubatse Ferrochrome v MEIBC and Others (2010) 31 ILJ 1838 (LAC)**

[21] The Applicant did not disclose these facts to the Commissioner and his employer. The refusal is dated 11 October 2017. So even if the Third Respondent were inclined to reinstate him, the Applicant would not have been able to perform his contract.

[22] Instead, he sought to contend that he had not been incapacitated within the purview of the Third Respondent's incapacity policy. This is a misunderstanding of what incapacity means.

[23] The Second Respondent consequently dismissed the application for condonation finding as he did that there were no prospects of success.

[24] The ruling on condonation was delivered upon the Applicant on 29 November 2017. He did not bring an application to review the condonation ruling until 11 October 2019 when the papers were issued by the Labour Court at Durban. The review application and the condonation application were both deposed to on the 4<sup>th</sup> October 2019.

[25] In his application for condonation the Applicant asserted that the review was 618 days late. He stated that the reason for the delay was that he had been ordered by the High Court to stay within the boundaries of Ixopo pending the finalisation of the trial and that this only occurred on 12 April 2019. He asserted that he was not permitted to contact the Third Respondent because there were witnesses in its

employ. He claimed that he had approached the Legal Aid Board at Ixopo but he did not receive any assistance. He claimed that he had no option but to wait until his trial was finalised and that since his release, he had been seeking to obtain the address and contact details of the Second Respondent and the First Respondent but was not able to do so.

[26] These reasons do not, with respect, withstand scrutiny. The fact that it was a condition of his bail, that he was not allowed to leave Ixopo without the written permission of the Investigating Officer or that he had refused written permission to leave the Magisterial District of Ixopo has nothing to do with the delay. After all the review application and the condonation application were prepared in Ixopo. This demonstrates that there was no need to travel outside of the Magisterial District to prepare the application. It is not the bail conditions which caused the delay. It is the Applicant's inertia.

[27] The Applicant states that the refusal of permission to leave the Magisterial District of Ixopo negatively impacted the preparation of the papers because the Labour Court was situated in Durban. This cannot be. The Investigating Officer refused the application partly because the Applicant supplied an invalid address. There is also no explanation for why the Respondent's addresses and emails proved difficult to obtain. Simple enquiries, either on the internet or telephonically would have revealed their addresses. The Applicant did not need to be in Durban to ensure service and the like. His trade union, an attorney or family could have been tasked with these simple tasks.



[28] There was no reason why the Applicant did not get his ducks in a row timeously and with the necessary urgency. He had access to legal representation. He also had access to the services of his trade union. Had he marshalled these resources he could probably have prepared the short Affidavits in a day or so.

[29] The claim that he sought the assistance of the Legal Aid Board at Ixopo is also not supported by any documentation. He states that he “tried” to approach the Legal Aid Board Ixopo. “Trying” to approach the Legal Aid Board is quite different from in fact approaching the Legal Aid Board for assistance. The Applicant does not state when and who he spoke to and what was told to him. After all he had over 600 days to prepare these papers. He could easily have approached the Legal Aid Board in Ixopo to provide him with written confirmation of the date when he approached them for assistance and the reason why he did not qualify for any assistance.

[30] The contention that he had no option but to wait until his trial was finalised, only needs to be stated to be rejected. No reasonable person waits for over 600 days before referring a review relating to a declined condonation application.

[31] I accept that the employer might have been well advised to hold a hearing as envisaged in the **Samancor** Judgment. It might have been prudent to also hold a post dismissal hearing. The provision in the Third Respondent’s Disciplinary Code and Procedure stated that it could discipline employees who were arraigned before a Criminal Court if the issue giving rise to the criminal proceedings was relevant to the

workplace or prejudiced legitimate business interests or undermined the relationship of trust and confidence between the parties. It also stipulated that it was not necessary to wait for the outcome of criminal proceedings before commencing disciplinary proceedings. It also provided that the Third Respondent would make reasonable efforts to give employees awaiting trial in custody an opportunity to state their case before dismissing them but could not reasonably be expected in the circumstances of a particular case to keep the position open until the proceedings were finalised. This was not a case of a termination for 'conduct'.

[32] A formal hearing is in any event not always necessary. A form of notice and comment is sufficient. In this case there was the opportunity to provide notice and comment.

[33] Given the extent of the delay and the extremely poor explanation for the delay I am of the opinion that the delay should not be overlooked.

[34] I accordingly dismiss the application for condonation. The review therefore also falls to be dismissed.

[35] In the result the following Order is made:-

[35.1] The application for condonation is refused.

[35.2] There is no order as to costs.

**J. NXUSANI**  
**Acting Judge of the Labour Courts of South Africa**

LABOUR COURT