



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JR261/17

In the matter between:

NTOMBOXOLO MANCAM

Applicant

and

**COMMISSION FOR CONCILIATION MEDIATION
AND ARBITRATION
Respondent**

First

**COMMISSIONER JABULANI JELMOND MASHABA
Respondent**

Second

FIRST NATIONAL BANK

Third Respondent

Heard: 27 June 2023

Date Delivered: 24 October 2023

JUDGMENT

BALOYI, AJ

Introduction

- [1] This is an application in terms of section 145 of the Labour Relations Act¹ (LRA) to review and set aside the arbitration award made by the second respondent (the Commissioner) acting under the auspices of the first respondent, the Commission for Conciliation, Mediation and Arbitration (CCMA).
- [2] The applicant further seeks condonation for the late filing of the review application. The arbitration award was issued on 24 November 2016. The review application was filed on 22 February 2017. The review application was not accompanied by an application for condonation. The application for condonation was filed on 20 March 2017. The review application and the condonation application are opposed by the third respondent (FNB).

Background

- [3] The facts of this matter are largely not in dispute and are thoroughly traversed in the arbitration award. The applicant was employed by FNB as a Credit Analyst until her dismissal on 22 July 2016. The Applicant was dismissed after being found guilty of the following charge:

Dishonesty: You amended an old “Newflash” relating to union salary negotiation results and forwarded this to two of your colleagues on the 10 June 2016 at 08h43, dishonestly pretending that the content of the amended email contains the outcome of the union salary negotiations for 2016.

This email has subsequently been circulated to some 800 employees on 10 June 2016 alone. This has created reputational risk for the Bank in that the Bank and the union has not reached an agreement at that point.

The above allegations have resulted in the irretrievable breakdown in the trust relationship between yourself and the bank.

- [4] The Commissioner find that the dismissal of the applicant was procedurally and substantively fair.

¹ No. 66 of 1995

Condonation application

- [5] The applicant asserts that she received the award on the 24 November 2016. On the 25 November 2016 she sought advice from Casual Workers Advice Office (CWAO). The CWAO could not assist her in preparing and filing the review application.
- [6] On the 15 December 2016, the applicant travelled to the Eastern Cape to take care of her sickly grandmother and she returned to Gauteng on or about 14 January 2017.
- [7] The Applicant contends that on 15 January 2017, she contacted the CWAO again and they referred her to David Cartwright Attorneys. David Cartwright Attorneys took instructions and did not return to her until she made contact with them on 9 February 2017. The applicant contends that she was informed by David Cartwright Attorneys that she could not be assisted and no reason was provided. On 10 February 2017, the applicant contacted Popela Maake Attorneys. Popela Maake Attorneys accepted her instruction and the review application was filed on 22 February 2017. It is alleged that the slight delay in filing the review application was as result of the busy schedule of the senior director of Popela Maake Attorneys who was involved in urgent matters in Polokwane.
- [8] As stated above, FNB opposes the condonation application. FNB asserts that it wrote a letter to the applicant's attorneys on 1 March 2016 regarding the applicant's failure to file an application for condonation. The Applicant's attorneys undertook to file the application for condonation by 10 March 2017 however, it was only filed on 16 March 2017. In the main, FNB contends that the application for condonation was filed three weeks after the review application was filed and that the review application is 47 days late. FNB further contends that the review application has no prospect of success and thus the condonation application must fail.

Analysis

- [9] The present application was filed outside the six weeks period prescribed in terms of section 145 of the LRA. It is incumbent on the applicant to show good cause why condonation should be granted. Condonation is not there merely for the asking, nor are applications for condonation a mere formality.²
- [10] A party seeking condonation must make out a case for the indulgence sought and bears the onus to satisfy the court that condonation should be granted. This court is required to exercise a discretion, having regard to the extent of the delay, the explanation proffered for the delay, the applicant's prospects of success, and the prejudice to the parties that would be occasioned by the application being granted or refused.
- [11] The Labour Appeal Court (LAC) has held that where there is an inordinate delay that is not satisfactorily explained, the applicant's prospects of success are immaterial.³
- [12] I have considered the applicant's explanation for the delay in filing the review application. In my view, the explanation is poor and not satisfactory. According to the applicant's explanation, she received the award on 25 November 2016. On 26 November 2016, the applicant contacted CWAOW who advised her that they could not assist but will refer her to attorneys for assistance. The applicant thereafter did nothing as it appears from her own affidavit. On 15 December 2016, the applicant departed for the Eastern Cape to look after her sickly grandmother and only returned to Gauteng on 14 January 2017. There is no explanation why the applicant did not pursue her case from 26 November 2016 to 15 December 2016. In my view, the applicant's decision to depart for the Eastern Cape without ensuring that her case is filed in Court means that the case was not of importance to her. The applicant does not explain the efforts she took during that period to advance her case. The applicant makes no effort to explain why David Cartwright

² *NUMSA and another v Hillside Aluminium* [2005] 6 BLLR 601 (LC); *Grootboom v National Prosecuting Authority and another* [2014] 1 BLLR 1 (CC).

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

Attorneys did not explain why they could not take her case. It is highly improbable that an attorney can refuse to take a case without giving a reason.

- [13] It took the third respondent to inform the applicant's attorneys that an application for condonation is required. The applicant does not explain in her affidavit why the application for condonation was not filed immediately when the application for review was filed. It has been held that when non-observance of the Rules has been flagrant and gross, an application for condonation should not be granted, whatever the prospects of success might be.⁴
- [14] I am therefore not persuaded that the applicant has adequately explained the delay. The application should therefore be dismissed on this point alone. The Applicant's reliance on having to look after her sickly grandmother and the commitment of her attorneys to other work is not a ground to warrant condonation. The explanation for the delay in filing the review application is very poor and lacks substance.
- [15] Even if I were to take the applicant's prospects of success into account, my decision would be no different. The applicant has not set out the grounds for the review of the award. The applicant admits that she amended an old "Newsflash" communication and forwarded it to her colleagues which purported to be a settlement agreement between FNB and the union. The applicant manipulated the communication by disregarding FNB policy and rules. The Newsflash communication that was amended by the applicant clearly state that FNB had a copyright of the document. The applicant was aware of this rule.

Costs

- [16] In relation to costs, the third respondent sought the costs of the application. In this court, costs do not follow the result, and a party seeking costs must

⁴ *Ferreira v Ntshingila* 1990 (4) SA 271 (A).

satisfy the court that for the purposes of section 162, the interests of the law and fairness are best advanced by an order for costs. At the hearing, counsel for the third respondent could not advance any cogent grounds on which the applicant should be liable for the costs of the application, and I intend to make no order in that regard.

[17] In the premise the following order is made:

Order

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

F. I. Baloyi

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant : Mr N Masondo of S Mabaso Inc

For the Respondent: Mr M.G Maeso of Shepstone & Wylie Inc

Instructed by:

LABOUR COURT