



IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Case No: D722/2023

Not Reportable

In the matter between:

MNAMBITHI TVET COLLEGE

Applicant

and

THAMSANQA V KUBHEKA

First Respondent

COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION

Second Respondent

COMMISSIONER SIPHELELE MAVUNDLA NO

Third Respondent

Heard: 30 May 2024

Delivered: This judgment was handed down electronically by circulation to the parties and / or their legal representatives by email. The date and time for handing-down is deemed 13h00 on 24 March 2025

JUDGMENT

ALLEN-YAMAN J

Introduction

[1] The applicant sought condonation for the late delivery of its review application and, if granted, that the arbitration award issued by the third respondent under case number KNNC 993-22 ('the award') be reviewed, corrected and set aside. Both applications were opposed by the first respondent.

Condonation

[2] The award was issued on 12 December 2022, and was furnished to the parties two days later. Although dissatisfied with the award in terms of which the first respondent was found to have been unfairly dismissed, and whose reinstatement was then awarded, the applicant did not initiate its review application within the time period prescribed in s145(1) of the LRA. This was done some one year later, on 11 December 2023, approximately eleven months after the effluxion of the time period in which the applicant had been afforded to do so timeously. Self-evidently, the delay is excessive.

[3] To the extent that the applicant was required to provide this court with a full and cogent explanation for its failure to have acted timeously, this court is unable to find that it did so.

[4] Having received the award the applicant took steps, through its attorneys, to initiate what was said by it to have been a review application. To this end, on its own version, it *'prepared an application for review well within the six-week period and sent a notice of motion and founding affidavit in support of the application for review to the first respondent, as well as the first respondent's representative by electronic mail as well as to the second respondent.'* An email annexed to the applicant's founding affidavit evinces that such a step was indeed taken, as alleged, on 22 December 2022.

[5] At some point thereafter, which this court presumes the applicant intended to have inferred was in January 2023, the deponent to the founding affidavit in the

condonation application (the applicant's attorney of record, Mr Coetzee) instructed his candidate attorney to apply to this court for a case number. Although also not expressed, this court presumes that such case number was to have been the case number intended to have been assigned to the applicant's intended review application.

[6] Albeit that there was then no reason to have done so, the first respondent delivered an opposing affidavit in response to that which had been transmitted to him in December 2022.

[7] No further steps were taken by the applicant until some time after 24 May 2023, on which date the Sheriff, Ladysmith made an attachment of the applicant's moveable assets in consequence of the first respondent's attempts to enforce the award. This led the applicant's attorney to instruct his correspondent attorney to inspect the file in this court, whereupon it was alleged by the applicant that it then discovered that no file had been opened as no case number had been allocated to the application.

[8] Independently of the processes of this court, the applicant's attorney obtained an electronic recording of the arbitration proceedings on 5 July 2023, which he caused to be transcribed. The transcriber's certificate reflects that the transcription of the recordings was completed on 12 July 2023.

[9] By way of an application initiated on 25 August 2023 under D472/2023 the applicant then approached this court for a declaratory order. The order sought in those proceedings was to declare that the first respondent was not entitled to the backpay portion of the award by virtue of his alleged failure to have tendered his services to the applicant in accordance with the award, and to order the release from attachment of the moveable property which had been attached by the Sheriff, Ladysmith earlier that year. That application was opposed by the first respondent, and was dismissed on 21 November 2023.

[10] Mr Coetzee was,

‘... then instructed to proceed with the application for review and immediately a case number was applied for, and the review delivered.’

Evident from the court stamps affixed to the review and condonation applications, both were initiated on 11 December 2023.

[11] In consideration of the aforementioned, the applicant has provided this court with no real explanation for its delay, let alone one which could be considered sufficient a basis upon which this court could exercise its discretion in favour of condoning its delay.

[12] The applicant's attorney was clearly well aware at all material times of the need on his part to have obtained a case number from this court prior to the initiation of the review proceedings. This then calls into question what was sought to be achieved in December 2022 when he caused a 'draft' review application which bore no case number (none having been applied for) to be served on the first and second respondents by way of email. This was never explained.

[13] On his own version, albeit wholly lacking in particularity, he issued a specific request to a candidate attorney that this be done in January 2023. The candidate in question was not named and no confirmatory affidavit on behalf of such a person was furnished to this court. Clearly, such an instruction was not adhered to however no explanation was provided for such failure on the part of that employee. Moreover, if Mr Coetzee did indeed request a candidate attorney in his employ to obtain a case number from this court in January 2023 then he must then have been well aware that what had been done in December 2022 had been of no legal consequence. This being so, the further unanswered question is why, having been well aware that no review application had been initiated in December 2022, save for the alleged, singular instruction given to the candidate attorney, he took no further action thereafter. He failed to explain either how this was overlooked in the circumstances of the express instruction given or why, when the first respondent delivered his premature opposing affidavit (which itself bore no case number) this did not then cause him to take the appropriate steps to rectify the error.

[14] No steps were taken by the applicant for a period of approximately four months thereafter. Whilst the applicant intimated that some type of blame should have been attributed to the second respondent by reason of its failure to have delivered the record, this evinced no more than the further lapse on the part of the applicant's attorney. Had he been aware that the record had not been forthcoming, he was required to have taken proactive steps to secure its delivery, either informally or, if necessary, by way of a formal application. Any action taken by him would have, again, been cause for him to have been reminded that without a case number no review application had been initiated, and that the omission on the part of the second respondent to have delivered a record was not a failing on its part, but as a mere consequence of there having been no review application to which a response in terms of R7A(3) would have been required.

[15] The attachment of its assets at the end of May 2023 also failed to elicit any positive action on the part of the applicant in the prosecution of a review application. On the contrary, on first respondent's undisputed version, the applicant sought to rely on its non-existent review application and a '*bond of security*' in order to stave off the process of execution. To that end Mr Coetzee addressed correspondence to the Sheriff, Ladysmith on 18 July 2023 in which he referred to his previous letter of 5 July 2023 and under cover of which he enclosed,

'Undertaking and Bond of Security together with the Suretyship that will be submitted to the Labour Court.'

[16] The documents referred to were an Undertaking and Bond of Security which had signed by the applicant's Principal on 5 July 2023, as well as a suretyship entered into by Mr Coetzee, representing the applicant's attorney in his capacity as its director, who undertook that the applicant's attorney would be jointly and severally liable together with the applicant for the due fulfilment of the applicant's obligations in terms of the award in the event of the dismissal of the review application. As may have been expected in light of the fact that no case number had been issued, neither documents bore any case number. Again, Mr Coetzee failed to explain how it came to be that he prepared documentation relating to a review application of this court

which had no case number, nor why the absence of a case number was then not cause for any concern on his part.

[17] Rather than initiating a review application at that stage, the applicant embarked upon its application for declaratory and ancillary relief. It may be mentioned that, in having done so, no mention was then made of its purported review application in its founding affidavit in support of the relief sought under D472/2023.

[18] When that stratagem failed on 21 November 2023, the applicant's attorney addressed correspondence to the first respondent in which he was advised, *inter alia*, that he had no legal right to report for duty; the review application was still pending; and the applicant had provided security in terms of the Rules of this court. The correctness of the assertion that the first respondent had no right to report for duty is highly doubtful. The assertions that a review application was then pending and that security had been provided in such a review application were patently false.

[19] The applicant finally initiated the review application which forms the subject matter of the condonation application on 11 December 2023, almost one year after the award had been delivered. In this respect Mr Coetzee's assertion that *post fact* the dismissal of the applicant's application under D472/23 he,

'... was then instructed to proceed with the application for review and immediately a case number was applied for, and the review delivered,'

called into question the end which had been sought to be achieved by the actions taken by him on behalf of the applicant prior thereto.

[20] The applicant's explanation constitutes no explanation at all. Notably absent was any explanation for the failure on the part of the applicant's attorney to have obtained a case number at the outset. No explanation was provided for the applicant's attorney's failure to have attempted to file a copy of its 'review application' with the court shortly after service thereof in December 2022. Also unexplained were the circumstances in which the matter was permitted to remain unattended for

successive, extended periods of time. In addition, no explanation was forthcoming concerning the failure on the part of the applicant's attorney to have discerned the absence of a case number attached to the documents delivered by the first respondent or those prepared by him in the course of 2023.

[21] In consideration of the circumstances of the delay, the cause thereof could have been for one of only two possible reasons: deliberate efforts on the part of those responsible to frustrate the effect of the award, or gross negligence on the part of the applicant's attorney. If for the latter reason, Mr Coetzee failed to explain the circumstances which gave rise thereto. Moreover, absent an affidavit deposed to by anyone authorised thereto by the applicant itself, it is impossible for this court to find that the conduct and failings of the applicant's attorney ought not to be attributed to it.

[22] The assertions that the applicant would be '*gravely prejudiced*' by the refusal on the part of this court to grant condonation for the late delivery of its review application in respect of which it had '*good prospects of success*' were wholly unsubstantiated. In light of the inadequacy of the explanation provided for the delay, this court would in any event not have been required to have considered either of these factors had they been dealt with by the applicant.

[23] It is trite that an applicant for condonation is required to show good cause for the exercise of such discretion in its favour. In the present matter the applicant has failed to provide a basis upon which this court can do so: the delay was inordinate, the explanation for the delay was wholly inadequate, and the applicant failed to provide demonstrable factual bases for its opinion that it enjoyed good prospects of success in its review application or that it would suffer any prejudice by the refusal of condonation.

[24] In view of the foregoing, this court is unable to conclude that the interests of justice would be served by granting the applicant condonation for the late initiation of its review application. Its application for condonation will accordingly be refused and, concomitantly, its review application will not be considered.

Costs

[25] As the first respondent, when opposing the applicant's condonation application, did not seek an order as to costs no order in this regard will be issued.

Order

1. Condonation for the late initiation of the applicant's review application is refused.
2. There is no order as to costs.

K Allen-Yaman
Judge of the Labour Court of South Africa

Appearances

Applicant:

Mr B Mgaga, Garlicke & Bousfield Inc
Instructed by DBM Attorneys

First Respondent:

Mr S Grootboom, Food and Allied Workers' Union