



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable
Case no: JR 850/19

In the matter between:

**SAMWU obo MOLOISANE
AND OTHERS**

Applicant

and

CITY OF TSHWANE LOCAL MUNICIPALITY

First Respondent

**SOUTH AFRICAN LOCAL GOVERNMENT
BARGAINING COUNCIL**

Second Respondent

TIMOTHY BOYCE N.O

Third Respondent

Heard: 7 September 2021

Delivered: 9 September 2021 (In view of the measures implemented as a result of the Covid-19 outbreak, this judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be on 9 September 2021)

JUDGMENT

PRINSLOO, J

Introduction

- [1] The Applicant seeks to review and set aside an arbitration award dated 12 March 2019 and issued under case number PMD031714 wherein the Third Respondent (the arbitrator) found that the Applicant's members on whose behalf it is acting, were unfairly dismissed and he ordered the First Respondent (the Respondent) to pay them compensation.
- [2] The Respondent opposed the application for review.
- [3] On 27 September 2019 the Respondent filed an application that the review application filed by the Applicant be deemed to have been withdrawn, alternatively to dismiss the Applicant's review application. The Applicant opposed this application.
- [4] On 31 July 2020 the Applicant filed an application for an order to reinstate the review application filed under case number JR 850/2019 and for condonation for the late filing of the record in the review application. The Respondent opposed this application.
- [5] The matter was heard on 7 September 2021 and in accordance with the provisions of the directive issued in respect of access to the Labour Court and the conduct of proceedings during the Covid-19 pandemic, the parties agreed to present arguments virtually via Zoom.
- [6] The following applications are before this Court: a review application filed by the Applicant, an application filed by the Respondent for the review application to be deemed withdrawn or be dismissed and an application filed by the Applicant to re-instate the review application and to condone the late filing of the record.
- [7] Before I deal with the merits of any of the applications pending before this Court, there is an important issue that calls for consideration namely the question of jurisdiction. It is obvious that the Court must have jurisdiction to adjudicate the pending applications before the merits of those applications could be considered.

Jurisdiction

- [8] In the Applicant's founding affidavit in the review application, the deponent stated that the purpose of the application was to review and set aside the relief awarded in the arbitration award "*which was delivered on*" 12 March 2019.
- [9] In its answering affidavit in opposition to the review application, which was filed on 21 August 2019, the Respondent raised a point *in limine* to the effect that the review application was filed late. The Respondent's version is that on 15 March 2019 and whilst at the premises of the First Respondent and during the course of another arbitration, a copy of the arbitration award, which is the subject of this review application, was handed to the Applicants. The Respondent's legal representatives handed it over to Ms Moloisane, Mr Moloto from SAMWU, Advocate Kirstein and Maenetja Attorneys. The Applicant is thus aware of the award since 15 March 2019 and as the review application was only served on the Respondent on 29 April 2019, it was filed late. The Respondent stated that the Applicant should have applied for condonation for the late filing of the review application.
- [10] The Applicant did not file a replying affidavit to the Respondent's answering affidavit and the aforesaid version of the Respondent, is therefore undisputed.
- [11] In the Respondent's application to dismiss the review application, which was filed on 27 September 2019, the Respondent once again raised the issue that the review application was filed late and that there was no application for condonation. The Applicant filed an answering affidavit in opposition and without providing any reason or explanation, denied the lateness of the review application.
- [12] On the papers before this Court, the Applicant stated in its founding affidavit that the arbitration award was delivered on 12 March 2019. There is no explanation to the effect that it was not delivered to the Applicant on 12 March 2019, nor is there any version as to when it was served on the Applicant. The Respondent's version that it was handed to the Applicants on 15 March 2019, is not disputed.

In the opposition to the dismissal application, no version is presented as to why the Applicant disputes that the review application was filed late.

- [13] Section 145(1)(a) of the Labour Relations Act¹ (LRA) provides that a review application should be filed within six weeks of the date the award was served on the applicant. Section 145(1A) provides that the Labour Court may condone the late filing of a review application on good cause shown.
- [14] If the arbitration award was delivered to the Applicant on 12 March 2019, the review application should have been filed by 23 April 2019. It is undisputed that it was handed to the Applicant on 15 March 2019 and calculating the six week period from that date, the review application should have been filed by 29 April 2019. The review application was only filed with the Registrar of the Labour Court on 2 May 2019.
- [15] In *Mbatha v Lyster and others*² (*Mbatha*) the Labour Appeal Court (LAC) considered the question whether the application was made on 17 March 1999 when the notice of motion and the annexure thereto were delivered to the registrar of the court or whether it was made when the third respondent received its copy of the papers.
- [16] The LAC held in *Mbatha* that the provisions of Rule 7A(1) put the matter beyond question. In terms of the aforesaid Rule the applicant in a review application is obliged to '*deliver a notice of motion to the person or body and to all other affected parties*'. It follows, reading rule 7A together with the effect of the definition of '*deliver*' in Rule 1, that an application is made within six weeks of the publication of the award only if it is delivered to all the respondents and filed with the registrar of the Labour Court within such period.
- [17] The question whether the review application had been filed within the prescribed six week period, is a fact or element which goes to establishing the jurisdiction of this Court to adjudicate and hear the application.

¹ Act 66 of 1995, as amended.

² (2001) 22 ILJ 405 (LAC)

[18] In *Ellerine Holdings Ltd v Commission for Conciliation, Mediation and Arbitration and others*³ the Court has held that:

‘Where the non-compliance relates to a statutory provision, ie as set out in an Act, then failure to comply with those provisions goes to jurisdiction. In such cases (for example where time-limits relate to jurisdiction) an application must be made to court to condone the non-compliance. In circumstances where the time-limit is prescribed by the *rules*, this court would be prepared to entertain a matter in spite of the fact that the pleadings were not filed within the prescribed time-limits, as long as there is no objection thereto by the party who stands in opposition to the party who has failed to comply with the time-limits prescribed by the rules of this court.’

[19] The late filing of a review application constitutes a failure to comply with a statutory provision and not a time limit prescribed by the rules and the Applicant had to apply for condonation. The review application *in casu* was filed with the Registrar on 2 May 2019, evidently outside the prescribed six week period. *In casu* there is no application for condonation for the late filing of the review application.

[20] The late filing of the review application as well as the absence of an application for condonation was raised in the Respondent’s answering affidavit in August 2019. The issue was persisted with and was raised again in the Respondent’s application to dismiss the review application.

[21] Instead of taking a step back and considering the issue raised by the Respondent, the Applicant filed an answering affidavit, providing no more than a bare denial that the application was filed late.

[22] Mr Feni for the Applicant persisted in his argument before this Court that the review application was not filed late. There was however no statement under oath to support Mr Feni’s submissions and the statements that were made under oath, showed otherwise. Most of the arguments Mr Feni presented, were not in accordance with the legal position or applicable authorities.

³ (2002) 23 ILJ 1282 (LC).

- [23] Mr Bekker for the Respondent submitted that the review application was filed late and that an application for condonation was necessary. Absent such an application, there is no case before this Court.
- [24] In *SA Transport and Allied Workers Union v Tokiso Dispute Settlement and others*⁴ the LAC confirmed that where a party is out of time (even where an application is filed one day late) and has to take the jurisdictional step to apply for condonation but failed to do so, a court cannot come to the party's assistance. The LAC held that in the absence of an application for condonation, the Court cannot assist the party.
- [25] The same principle applies *in casu* where the reality is that the Applicant had to apply for condonation for its failure to comply with a statutory time period and had failed to do that. It follows that absent an application for condonation this Court has no jurisdiction and cannot come to the Applicant's assistance.
- [26] It follows that if the Court does not have jurisdiction to adjudicate the review application, it also has no jurisdiction to adjudicate an application to either dismiss or reinstate the same review application, over which it has no jurisdiction.

Costs

- [27] Mr Bekker submitted that the Applicant should be ordered to pay the Respondent's costs. This Court has a wide discretion in awarding costs. In my view this is a matter where a cost order is warranted.
- [28] It is of great concern to this Court that more than two years after the Respondent had raised the issue regarding the late filing of the review application and the need to apply for condonation, the Applicant has not taken any step to apply for condonation. The Applicant was made aware of the fact that an application for condonation was needed, but it persisted with its refusal or failure to bring such an application. In my view the Applicant had one of two options: either to accept that the review application was filed outside the prescribed statutory period and

⁴ (2015) 36 ILJ 1841 (LAC).

to bring an application for condonation, or to place facts before this Court to show that such an application was indeed not necessary. The Applicant failed to do either.

[29] In the premises I make the following order:

Order

1. The review application is struck off the roll for lack of jurisdiction;
2. The Applicant is to pay the First Respondent's costs.

Connie Prinsloo

Judge of the Labour Court of South Africa

Representatives:

For the Applicant: Advocate Z Feni

Instructed by: Qhali Attorneys

For the First Respondent: Advocate W Bekker

Instructed by: Gildenhuis Malatji Inc Attorneys

LABOUR COURT