

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

**Not Reportable
Case No: JR 2308/2018**

In the matter between:

NEHAWU obo MAHOLE SMJ

APPLICANT

and

SOUTH AFRICAN REVENUE SERVICES

1ST RESPONDENT

DONALD KGALANE NKADIMENG

2ND RESPONDENT

**THE COMMISSION FOR CONCILIATION,
MEDIATION & ARBITRATION**

3RD RESPONDENT

Heard: 28 July 2022

Delivered: 29 July 2022

(In view of the measures implemented as a result of the Covid 19 pandemic, this judgement was handed down electronically by circulation to the parties' representatives, by email. The date on which the judgment is delivered is deemed to be 29 July 2022.)

JUDGMENT

VAN NIEKERK, J

[1] The applicant seeks to review and set aside an arbitration award issued by the second respondent (the arbitrator). In his award, the arbitrator found that the applicant had been dismissed for a fair reason, but that his dismissal was procedurally unfair. The arbitrator awarded the applicant the equivalent of three months' remuneration as compensation for the procedural unfairness. There is no cross-review against that finding; these proceedings are limited to a review of the arbitrator's finding on substantive fairness.

[2] The review application was filed outside of the six-week period prescribed by section 145 of the LRA. The applicant has applied for condonation. He states that he became aware of the award on 15 August 2018, and that the six-week period expired on 27 September 2018. On this basis, the applicant avers that the application is 'almost 32 days late'. At the hearing of the application, the applicant's counsel conceded that the application had been filed much later – the notice of motion indicates that it was signed only on 5 November 2018, served on the first respondent the next day, and served on the second and third respondents only on 5 December 2018, a month later. The application was filed in court on 6 December 2018. On this basis, the application is 110 days late.

[3] Insofar as the explanation for the delay is concerned, the applicant submits that he received the award and some three weeks later, returned to the union to discuss the matter and the prospect of an application for review. The regional office contacted the national office who advised the applicant on 18 October 2018 that the union would assist him to review the arbitrator's award. The applicant states that he was at all times intent on pursuing the matter but could only consult with the union's attorney on 31 October 2018 on account of the fact that he was busy with exams'. In regard to prospects of success, the applicant avers in a single sentence that he has prospects of success and appears to direct the court to the balance of the founding affidavit and in particular, his grounds for review.

[4] The Court is required to consider the extent of the delay, the explanation for the delay and the prospects of success in the main action. In certain instances, the

importance of the matter and prejudice are also relevant factors. Condonation is not there for the taking, and will not readily be granted in the absence of compelling circumstances. This approach is qualified by the principle that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused (*NUM v Council for Mineral Technology* [1999] 3 BLLR 209 (LAC)).

[5] In the present instance, the delay is lengthy. I did not understand the applicant's counsel to dispute this, nor did he dispute that the explanation proffered for the delay was poor. However, it is submitted that the delay was not excessive, and that there was an explanation for the delay, such as it is.

[6] A delay of 110 days, in my view, is excessive. The LRA prescribes a six-week time limit to promote the statutory purpose of expeditious dispute resolution. This purpose is undermined when applications for review are filed outside of that period particularly in circumstances such as the present, where the delay is not one of a few days or even a couple of weeks. The application for the delay is wholly unsatisfactory. On his own version, the applicant consulted the trade union who assisted him and ought to have known of the limited period within which any application for review had to be filed. It is no excuse to lay the blame on the union – on the contrary, the union officials dealing with the matter must have been aware of the applicable time limit but appear to have proceeded as if it did not exist. Further, the fact that the notice of motion was signed only on 5 November 2018 and the papers filed in this court a month later is simply not explained. It must have occurred to the applicant's attorney that the that the review application was significantly out of time, yet a month elapsed between service on the first respondent and service on the second and third respondents and the filing of the application in this court. In the absence of a satisfactory explanation for a lengthy delay, it is not necessary for me to consider the applicant's prospects of success. I might add that even if I were to have regard to the applicant's prospects, it does not appear to me from the founding affidavit (no supplementary affidavit was filed) that even

on a prima facie basis, the applicant has met the threshold for review. That threshold has deliberately been set high, and as the courts have observed on many occasions, it is not often that a review application would succeed.

For the above reasons, I make the following order:

1. Condonation for the late filing of the review application is refused.
2. The review application is dismissed.

André van Niekerk
Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	VL Makofane
Instructed by:	R Rangoanasha Inc.
For the respondents:	L Pillay
Instructed by:	VZLR Attorneys