IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: ***NO***
(2) OF INTEREST TO OTHER JUDGES: ***NO***
(3) REVISED:

Date: 14/01/2022 ***Signature***:

Case No. 11061/2014

In the matter between

KHUMALO, CF	Applicant
and	
BROMPTON COURT BODY CORPORATE	First Respondent
PROF R SCHLOSS	Second Respondent
THE SHERIFF OF THE HIGH COURT RANDBURG WEST	Third Respondent

JUDGMENT LEAVE TO APPEAL

MAHOMED, AJ

1. This is an application for leave to appeal the whole of the judgment which I handed down on 30 September 2021, in which I dismissed an application for condonation and review of an arbitration award. I awarded costs on an attorney client scale in terms of the rules of the first respondent as well as the rate of interest charged.

2. Section 32 of the Arbitration Act 42 of 1965 allows a party 6 weeks to apply for a review from the date the award is published.

3. The award was published on 21 December 2012.

4. On 13 April 2018, a writ of execution was authorised for the judgment debt in the sum of R87 349.48, for arrear levies and electricity. The first respondent, who represents a body corporate, holds the writ in abeyance, given the litigation instituted by the applicant.

5. The applicant served her review application on 22 June 2018, when the first respondent argued that she had not applied for condonation.

6. On 22 August 2018, the applicant served and filed her condonation application.

7. Although the applicant served her replying affidavit to the review application in October 2018, she served her heads of argument,

practice note and chronology only in March 2020. Based on the facts the applicant had no sense of urgency in finalising this matter.

8. I dismissed the application for condonation when the applicant failed to fully address the court on the long delay in prosecuting this matter since she allegedly knew of the award back in 2014. Although, on her version, she " knew on the date of the arbitration hearing which way the matter was going to be decided," having heard the arbitrator.

9. The applicant failed to show "good cause" to enable a court to understand, "what caused the long delay and why her non-compliance can be condoned."

10. The applicant bears the burden of "actually proving" as opposed to merely alleging, the good cause.

11. If she had good reasons for a long delay, she should surely have presented them to this Court, to assist the court in applying its discretion. No explanation was proffered, other than reference to the fact that she engaged in litigation to order the award had prescribed.

12. At paragraph 50.1 of my judgment, I noted the various occasions when the applicant could have brought her review application, when

she failed to do so. The delay is effectively over almost 9 years since the award was made.

13. Another court will require the same details for it to apply its discretion in condoning the delay and ensuring that the applicant is not in flagrant disregard of the rules. To overlook this critical test, would be to set a poor precedent for litigants in the future and undermines the very basis of an effective and efficient judicial system. Litigants must bear in mind that condonation is not a right, but an indulgence, when a decisionmaker, must apply her or his discretion to the facts presented.

13.1. The challenge in casu is that no such details are presented for any judicial authority to work with to exercise that discretion in fairness to all parties whist being mindful of the basic rule of natural justice, a right to a fair hearing.

13.2. The evidence is that the applicant “became active” only in 2014, when first respondent served papers and she realised that the first respondent was about to execute against her rental property in a housing complex, which it manages. But even at that date, she failed to bring her application for review of the arbitrator’s award, until only in 2018 when she properly, served her review application.

14. The applicant has raised several grounds of appeal, inter alia,

14.1. amounts awarded failed to include payments made previously,

14.2. disputing the first respondent's issue of summons for recovery of outstanding levies for a different period,

14.3. the exorbitant legal costs awarded by the arbitrator,

14.4. the arbitrator failed to order the first respondent to repair a structural defect in her unit and disputing the amount he awarded as a gratuitous payment,

14.5. the percentage interest charged on outstanding levy,

14.6. an award of costs on a punitive scale,

14.7. the award was mala fide, and the arbitrator was biased, he conspired and colluded with the legal representatives of the first respondent, the arbitrator considered the wrong documents in determining the award,

14.8. that this court stated that she had brought her review application before several courts when this is the first review she had brought before a court.

15. The applicant appeal against “punitive costs” I granted, is incorrect. The costs on a higher scale, is awarded as provided for in the rules of the second respondent, the costs were not punitive costs. The rate of interest on outstanding levies is also according to the Rules of the Body Corporate which she signed up to as its member, albeit she may not agree with that rate.

16. The applicant in her oral submissions, agreed she was incorrect that this court stated that she had taken her review application before several courts.

16.1. The history of her hearings before several courts appears in the judgment and is clear, it is not necessary to repeat the history at this point, save to state that a claim for damages against the first respondent is pending before the Magistrate’s Court Randburg for the repair for the structural damages to her unit, albeit, that this dispute has been resolved when the arbitrator compensated her for same. During that period, she

still failed to launch a review application and alleged in evidence that she had “always intended to do so.”

17. Furthermore, the applicant alleged bias, collusion, conspiracy, and mala fides on the part of the arbitrator and the legal representatives of the second respondent.

18. On the evidence before this Court, it was clear that the applicant had failed to prepare and present a proper case to the arbitrator and persists in her belief that it was not her onus to prove her damages, but the first respondent’s job to assess and prove her loss.

19. The applicant is unhappy with the award made in 2012 and seeks to “review” the award almost 9 years later.

19.1. However, she fails to inform of the Court details of why and how she failed to bring her matter for review within of 6 weeks as provided for in the Arbitration Act or within any reasonable time of the award being published. She does not proffer evidence to support why her late filing should be condoned.

19.2. She fails to provide any evidence of the various allegations of bias, collusion, mala fides and other allegations to support her

"review" of the award. Her argument relates to the award itself which cannot be her grounds of review.

20. Another court will require evidence to exercise its discretion on the condonation and certainly to determine the allegations of bias, mala fides and the like. A court cannot make findings on general and bald allegations. A litigant must be able to quantify a claim and present supporting evidence to prove his or her claim.

21. See **AARON'S WHALE ROCK TRUST v MURRAY & ROBERTS LTD 1992 (1) SA 552 (C) at 656 B-D**, where a court can only use the evidence before it, that is, there must be sufficient evidence for a court to make a proper assessment of damages, as it cannot embark on conjecture in assessing damages without a factual basis for it, nor can a court award an arbitrary approximation to a claimant who has failed to produce evidence to support a claim.

21.1. The evidence is that documents purported to support her claim are dated "after" the arbitration award was published and were clearly not before the arbitrator at that hearing.

22. In terms of the s17 of the Superior Courts Act 10 of 2013, leave to appeal may only be given, where the judge concerned is of the opinion that:

22.1. the appeal “would” have a reasonable prospect of success,

22.2. where there is a compelling reason, the appeal should be heard, including conflicting judgments on the matter under consideration.

23. In **MONT CHEVAUX TRUST v GOOSEN 2014 JDR 2325 (LCC) PARA 6, ACTING NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS AND OTHERS v DEMOCRATIC ALLIANCE (19577/09) [2016] ZAGPPHC 489 at para 25**, the threshold for the granting of leave to appeal against the judgment of a High Court has been raised in the new Act, where the court stated:

> *“the use of the word would indicates a measure of certainty that another court will differ from the court’s judgment sought to be appealed against.”*

24. I am not persuaded that the applicant has proffered any cogent reasons to condone her late filing of her application. Furthermore, another court will itself require reasons to arrive at a different

conclusion. No reasons for the long delay have been presented to this Court. If the applicant had a reasonable explanation for the delay, it ought to have been presented. The applicant alleged that she “always intended” to review the award, and that her review was included in her answering papers to the second respondent’s application to make the award an order of court. However, this argument cannot assist her, in that she, failed to bring a proper application, as provided for in Rule 6(1) of the Uniform Rules of Court and within the time allowed or any reasonable time. The applicant was unable to discharge the burden of “actually proving” good cause.

24.1. Her evidence that she was not obliged to bring her review application whilst the matter was before the Supreme Court of Appeals and the Constitutional Court, cannot assist her, as to the reasons for her long delay nor with her allegations of bias collusion and the like. She has not proffered any explanations for her failure to launch the review proceedings “before” the matters appeared before those courts, and besides the Constitutional Court was seized only with the issue of her leave to appeal, the decision of the Supreme Court of Appeals, on the validity of the award.

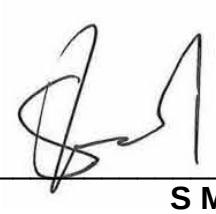
25. Furthermore, another court will also require “evidence” of bias, collusion, conspiracy, as alleged, for it to review the award.

26. I am not persuaded that another court, due to the paucity of evidence, will arrive at a different conclusion in this matter and accordingly, the application must fail.

I make the following order:

1. Leave to appeal is refused.

2. The applicant is to pay the costs on an attorney client scale.



S MAHOMED
Acting Judge of the High Court

This judgment was prepared and authored by Acting Judge Mahomed. It is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 14 January 2022.

Date of hearing: 13 December 2021

Date of Judgment: 14 January 2022

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