

IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

CASE NO: JR 825/07

In the matter between:

NORTHERN PLATINUM MINES

APPLICANT

AND

THE COMMISSION FOR CONCILIATION

MEDIATION & ARBITRATION

1ST RESPONDENT

ABEL RAMOLOTJE

2ND RESPONDENT

NUM obo OJ DANIELS

3RD RESPONDENT

JUDGMENT

NYATHELA AJ

Introduction

[1] This is an application for review in terms of section 145 of the Labour Relations Act 66 of 1995 of an arbitration award issued by the second respondent on 04 January 2007 under case number LP 4321/05.

[2] The second respondent found in favour of the third respondent by ordering as follows:

“2.1 The dismissal of the employee was substantively unfair.

2.2 I order the employer to reinstate the employee to the position he held prior to his dismissal, on the same terms and conditions that prevailed before.

2.3 The reinstatement is with effect from 1st February 2007

2.4 I further order the employer to pay the employee his five months salary in the amount of twenty one thousand, five hundred and thirty three rand (R21 533-00)

2.5 The amount is to be paid on or before 15th February 2007”.

- [3] The review application was filed outside the prescribed six weeks time limit.
- [4] The applicant has filed an application for condonation which is opposed by the third respondent.
- [5] Third respondent has also filed an application for condonation for the late filing of its answering affidavit. The said application will only be considered depending on the outcome of applicant's application for condonation.

The parties

- [6] The applicant is Northern Platinum Limited, a company with limited liability, duly registered as such in terms of the laws of the Republic of South Africa.
- [7] The first respondent is the Commission for Conciliation Mediation and Arbitration, a juristic person established in terms of section 112 of the Labour Relations Act 66 of 1995.
- [8] The second respondent is commissioner Abel Ramolotje NO, an adult male commissioner of the first respondent. The second respondent is cited in his official capacity as Commissioner who arbitrated the dispute between the applicant and third respondent.
- [9] The third respondent is National Union of Mineworkers acting on behalf of Johannes Dennis Daniels, a former employee of the applicant. The employee had been employed by the applicant as a Learner Miner prior to his dismissal.

Application for condonation

The applicant stated amongst others the following:

- [10] The arbitration award was issued on 04 January 2007. It came to its knowledge on 05 February 2007.

- [11] Due to the internal administration of applicant, certain procedures had to be followed before authorization was granted to proceed with the application for condonation. The necessary approval was obtained whereafter the attorneys of the applicant were instructed.
- [12] Applicant instructed counsel to prepare the necessary application on 2 March 2007.
- [13] Due to the fact that the above instructions were made mid-term when both the attorneys and counsel were involved in running court cases, the application was only finalised on 29 March 2007.
- [14] Respondents did not suffer any prejudice as a result of the applicant's delay in filing the matter.
- [15] The applicant has made out a case for the relief set out in the notice of motion and the honourable court is asked to grant the relief set out in the notice of motion.

Legal position

- [16] Rule 12(3) of the Rules of the Labour Court, provides as follows:
- “The court may, on good cause shown, condone non-compliance with any period prescribed by these rules”.*
- [17] The Labour has expressed its disapproval of a practice in which applications for condonation appear to be more of a general rule

rather than an exception. In *Classiclean (Pty) Ltd v CWUI* (1999) 291 at 293 para 6 – the LAC stated the following:

“In the recent past this court had had to deal with a depressing and monotonous number of matters where the failure of practitioners and the parties to adhere to the rules has come to the fore. In my view, the rules are drafted in simple, understandable language. They provide procedures to deal simply and inexpensively with problems such as those that arose in this matter. Failure to adhere to them will be viewed with an increasingly jaundiced eye in the future”.

[18] In *CWUI v Ryan* (2001) 3 BLLR 337 at 342 para 36, the Labour Court per Pillay J held as follows:

“Of late proceedings in this court are too frequently prefaced by applications for condonation. Rather than being an exceptional procedure, it is fast becoming a standard practice. More often than not, fault rests with the representatives and not the litigants personally. This is posing an unnecessary burden on the Labour Court and its diminishing resources. The time has come when such representatives should not be allowed to go unscathed for their own sins”.

See also in this regard, *Darries v Sheriff, Magistrate's Court Wynberg & Another* 1998 (3) SA 34 (SCA).

[19] The High court dealt with the issue of whether negligence by an attorney should serve as a ground to justify the granting of condonation in *Salojee & another v Minister of Community Development* 1965(2) SA 135. At page 141 (c), the court held as follows: “*There is a limit beyond which a litigant cannot escape the result of his attorney's lack of deligent or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the rules of this court*”.

[20] In *Allround Tooling (Pty) Ltd v NUMSA* (1998) 8 BLLR 847 (LAC), the Labour Appeal Court held that a practitioner's busy schedule is not an accepted explanation for a delay in observing the prescribed time frames. See also *PPWAWU & others v AF Dreyer & Co. (Pty) Ltd* (1997) 9 BLLR 1141(LAC)

[21] The above authorities show that the granting of condonation should not be treated as a mere formality since it has adverse implication of the rules of court and eventually the efficiency of the court in finalising the matters referred to it. Thus condonation should only be granted where an applicant has shown good cause.

[22] The factors which should be considered in determining whether the applicant has shown good cause or not have been dealt with extensively in *Melane v Santam Insurance Company Ltd* 1962 (4) SA 531 (A). However, the *Melane* test has been amplified by the LAC decision in *NUM v Council for Mineral Technology* (1999) 3 BLLR 209 (LAC).

[23] At page 211 para G-H, of the *NUM v Council for Mineral Technology* decision, the Labour Appeal Court has added a further principle to be considered, namely, “*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*”.

Analysis

[24] It is common cause that both parties were served with the arbitration award on 05 February 2007.

[25] In the application for condonation, the applicant stated that the application was made a few days after the six weeks prescribed time limit. The applicant’s representative also argued that the application was filed on 30 March 2007 and is one and a half

weeks late. In response, third respondent's representative argued that the application for condonation was signed on 10 April 2007 and therefore it could not have been filed on 30 March 2007. I have perused the papers and I agree with the respondent's representative that the application was only filed on the 10th April 2007 and not the 30th March 2007.

Degree for lateness

[26] Although I have not been provided with the exact period of delay, I am satisfied that both parties were served with the arbitration award on 5 February 2007. The six weeks period for lodging the review application therefore expired on 20 March 2007. The notice of motion and the founding affidavit were filed with the Labour Court on 10 April 2007. The period of delay is therefore about three weeks.

Reasons for lateness

[27] In this matter, the applicant has provided an explanation for the lateness for the period up to the 30th March 2007. The applicant has however not furnished any explanation for the delay in respect of the period 31 March 2007 to 10 April 2007. It is the applicant's duty to provide a reasonable and acceptable explanation for the

delay for the full period for which the application has been out of time. The applicant has therefore failed to justify the delay under the circumstances.

[28] The applicant's explanation for the delay for the period 20 March to 30 March 2007 is that there were certain internal procedures which needed to be complied with before authorisation could be obtained to proceed with the application. Applicant only instructed attorneys to lodge the application after its internal procedures have been complied with.

[29] The applicant has however not explained the nature of the internal procedures which caused the delay in this matter. There is further no explanation as to why the said internal procedures were not complied with timeously since the internal procedures appear to be things within the control of applicant. The applicant has further not indicated the dates on which the said internal procedures were complied with so as to enable the court to evaluate the extent of the delay properly.

[30] The applicant's second explanation for the delay is that both the instructed attorney and Counsel who handled this matter were too busy with other cases since it was mid-term. The applicant did not give any date on which the attorney was instructed. However, it is

clear from applicant's papers that Counsel was instructed on 02 March 2007. It follows therefore that since the applicant only received the award on 05 February 2007, the applicant was still within the six weeks period for lodging a review application when Counsel was instructed to handle the matter.

[31] In my view, the period for lodging a review application expired while the matter was in the hands of both the instructing attorney and Counsel. The only explanation which has been provided as to why the attorney and Counsel did not lodge the application timeously is because both of them were too busy as it was mid-term. As pointed out above, the Labour Appeal Court has already expressed its disapproval of a tendency by parties and their representatives to simply disregard the rules of court and eventually submit an application for the court to condone non-compliance with the rules. See in this regard: *Classiclean (Pty) Ltd v CWUI* and *CWIU v Ryan (supra)*. Rules of court cannot be observed only when it is convenient for the parties to do so.

[32] The Labour Appeal Court has already held in *Allround Tooling (Pty) Ltd v NUMSA (supra)* that a practitioner's busy schedule cannot serve as a reasonable explanation for the delay in complying with the rules of court. In this matter, the applicant did

not explain why it did not instruct another practitioner who had time to handle this matter to lodge the application on its behalf so that the application should be lodged timeously. Apart from merely stating that both the instructing attorney and Counsel were too busy to lodge the application timeously, applicant has not provided any indication of what the busy schedule entailed which could assist the court in determining whether it was not possible for the chosen representatives to lodge the application timeously. Applicant has further not provided an explanation of the steps which it had taken to ensure that the application is lodged timeously save to state it had instructed an attorney and Counsel who were too busy to handle the matter. In my view, both the applicant, the attorney and Counsel are therefore to blame for the delay in this matter. Applicant has therefore not provided a reasonable and acceptable explanation for the delay in this matter.

- [33] In *NUM v Council for Mineral Technology (supra)*, the LAC stressed that in the absence of a reasonable and acceptable explanation for the delay, the prospects of success are immaterial. As the applicant has failed to provide a reasonable and acceptable explanation for the delay, it is academic to proceed to determine whether the applicant has prospects of success on the merits or not.

[34] In view of the above findings, it is not necessary to deal with the third respondent's application for condonation.

Order

[35] I make the following order:

- (a) Applicant's application Condonation fails
- (b) The application for review is dismissed
- (c) There is no order as to costs.

NYATHELA AJ

Date of hearing: 23 April 2009

Date of judgement: 22 July 2009

Appearances:

For the applicant: Adv. Hulley

For the respondent Adv. G Bergeuthuin