

IN THE MATTER HELD IN PORT ELIZABETH

CASE NO: P 191/2010

Reportable

In the matter between

MASIXOLE MYOSANA

Applicant

And

**THE NATIONAL BARGAINING COUNCIL FOR
CHEMICAL INDUSTRY**

1st Respondent

BONTSWA MBOVANE NO

2nd Respondent

SHATTERPRUFE (PTY) LTD

3rd Respondent

JUDGEMENT

SHAI AJ

- [1] This is an application by the applicant for the condonation of his late filing of the review application and application for the review and setting aside of the condonation ruling made by the Second Respondent, “the Arbitrator” dated 19 February 2009 and issued under case no GPCHEM 268-08-09 under the auspices of the First Respondent.

The facts:

- [2] The applicant was employed by the Third Respondent in 2004 as a temporary employee. He was permanently employed in 2005. He was dismissed on 17 November 2007 following a disciplinary hearing. The applicant referred his dispute to the First Respondent on 2 February 2009 which made his referral late by 390 days.

- [3] Together with the referral form the applicant applied for condonation for his late referral. The arbitrator issued his ruling on 19 February 2009, denying the applicant condonation of his late referral.
- [4] It is this ruling that is the subject of the review application.
- [5] The Applicant lodged his application for the review and setting aside of the said ruling on the 29 March 2010.
- [6] The said ruling was faxed to the parties on the 23rd February 2009, a delay of more than a year in repeat of the lodging of the application for review.

Legal position:

- [7] The factors that need to be taken into account when determining whether there is sufficient cause to grant condonation were set out in *Melane v Santam Insurance Co Ltd 1962 (4) SA at 532* and involves weighing together the following factors; which are interrelated : degree of lateness, explanation thereof, the prospects of success and the importance of the case. The court went on and said that although these factors are interrelated, are not individually decisive, if there are prospects of success there would be no point in granting condonation.
- [8] The Melane decision was followed in many subsequent decisions. In the case of *Moila v Shai NO and Others (2007) 16 LAC 1.23.1* reported at (Butterworth) 2007 JOL 19117 LAC, Zondo JP cited the case of *Chetty v Law Society, Transvaal, 1985 (2) SA 756 AD* with approval and said: “In *Chetty v Law Society, Transvaal 1985, (2) SA 756 (AD)* Miller JA, on behalf of the unanimous Court, dealt with the term “sufficient cause” or “good cause” when used in the context of an application for rescission of a Judgement. At 765 D-E he said:

“For obvious reasons a party showing no prospect of success on the merits will fail in an application for rescission of a default judgement against him, no matter how reasonable and convincing the explanation of his default. An ordered judicial process would be negated if, on the other hand, a party who could offer no explanation of his default other than his disdain of rules was nevertheless permitted to have a judgement against him rescinded on the grounds that he had reasonable prospects of success on merits.”

[9] The court went further to say that this principle should equally be applicable to the application for condonation.

[10] The court went further at 33, and in relation to the excessiveness of the delay and said:

“If ever there was a case in which one can conclude that good cause has not been shown for Condonation without even considering prospect of success, then this is it. When, in an application for Condonation the delay is excessive and an explanation been given for that delay or an “explanation” has been given, but such explanation amounts to no explanation at all, I do not think it is necessary to consider the prospects.”

[11] In the case of *Kritzinger v CCMA and Others (JR 2254/05 (2007) ZALC 85 (November 2007) Molahlehi J* said the following in relation to the test as initiated in *Melane v Santam Insurance Co. Ltd. 1962 (4) SA A532*:

“These factors are not individually decisive but are interrelated and must be weighed against each other. In weighing the factors for instance, a good explanation for the delay in lateness may assist the application in compensation for weak prospects of success. Similarly strong prospects of success may compensate for the inadequate explanation and the long delays”

[12] What it means therefor is that the court when exercising its discretion will

consider the circumstances of each case to come to a reasonable conclusion.

- [13]]In this case the application is about 13 months late, which is excessive. The reason for the delay is that elections were taking place and I presume union officials did not have time to attend to this matter (about 5 months). The reason for delay for the other period was that private attorneys and Legal Aid Board became involved and in the long run told the applicant that they are unable to help him in January 2010. There was also a further unexplained period of delay, that is from January to 29 March. That the union official was busy with election cannot be a reason enough to constitute good cause. Perhaps one could understand the delay in respect of attorneys and Legal Aid Board trying to establish if they could help considering issues of fees and rules, but the further unexplained three months delay leads one to conclude that the delay is not properly explained.
- [14] Even if I were to conclude that the delay is properly explained the prospect of success in this matter is in my opinion very poor. The applicant was dismissed on 17 November 2007, but his late referral was made on the 2 February 2009. The reason was that when the union made the referral they substituted his name for the chairperson of his disciplinary hearing. The Bargaining Council informed the union of this problem but the union took about a year to correct that mistake. The applicant contends that he should be detached from the conduct of the union officials. The Commissioner decided that period is too excessive and that alone disallowed the Condonation..
- [15] In the unreported case of *Kurt Fontein v South African Breweries JR1583 /01 and Others* Pakade AJ dealt with a case where an applicant leaves his application in the hands of his representatives, without him to pursue the pleadings in order to adhere to time limits set down by a court. The application for Condonation was denied.
- [16.] Without deciding the issue I do not know how the applicant would surmount this hurdle in the review application.

[17] **My order is as follow:**

1. The application for Condonation of the late filing of the review application is dismissed.
2. No order as to costs is made.

[18] In view of the order above, I see no reason to deal with the review application.

Shai AJ

Date of Hearing : 23rd February 2011

Date of Judgment : 11 March 2011

Appearances

For the Applicant : In Person

Instructed by :

For the Respondent: Adv R Wade (SC)

Instructed by : Wilson McWilliams Inc