



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case No: JR2479/2013

In the matter between:

**THE DEPARTMENT OF JUSTICE & CONSTITUTIONAL
DEVELOPMENT**

Applicant

and

**THE GENERAL PUBLIC SERVICE SECTORAL
BARGAINING COUNCIL**

First Respondent

SEELE MOKOENA N.O.

Second Respondent

PSA obo L MOKONYAMA & OTHERS

Third Respondent

Heard: 18 December 2014

Delivered: 26 January 2015

Summary: Application to review ruling made by arbitrator refusing to condone late rescission application. Application dismissed.

JUDGMENT

LE ROUX, AJ

- [1] This is an opposed application to review and set aside a ruling made by the second respondent in terms of which condonation for the late filing of the applicant's rescission application under case number GPBC 1258/10 was refused.
- [2] This review application was also lodged two days late and the applicant also sought condonation for the late filing of this application. Application for condonation was not opposed. I have considered the matter and condonation for the late lodging of this review application is granted.
- [3] The Public Servants Association (hereafter referred to as the third respondent), acting on behalf of some of its members, referred a dispute concerning the application and interpretation of a collective agreement to the first respondent.
- [4] The arbitration was set down for a hearing on 10 September 2010. The applicant did not attend the hearing. On 10 October 2010, the second respondent issued a default award in favour of the third respondent and the relevant members.

The rescission application

- [5] During May 2013, more than two years later, the applicant lodged a rescission application. It was therefore necessary to apply for condonation for the late filing of the rescission application.
- [6] The founding affidavit of Mr Tsakane Dickson Muzwayne in the condonation/rescission application sets out the facts on which the application for condonation was based. These can be summarised as follows -

6.1 The applicant's regional office received the award on 19 October 2010. It forwarded the award to the national office which referred it to the labour section of this office. The affidavit states that Ms Maimela of this section then forwarded it to the legal section with instructions to refer it to the State Attorney. However, the relevant correspondence annexed to the affidavit indicates that Ms Maimela herself briefed the State Attorney on 9 December 2010. She was also party to the other correspondence referred to below. I

should add that, by this time, the rescission application was already a month late.

- 6.2 For reasons that are not clear from the affidavit, the State Attorney did not open a file immediately. The applicant had to send further correspondence in this regard on 15 December 2010 and again on 27 January 2011. A file was then opened by the State Attorney's office. A follow up letter was also sent to the State Attorney on 7 February 2011.
- 6.3 Consultation then took place with the State Attorney. Thereafter, a draft affidavit seems to have been prepared by a Mr Phamba of the State Attorney's office. From the record it is not clear whether a final affidavit was ever drafted by Mr Phamba. However, it is clear that if there was such an affidavit, it was never served and filed.
- 6.4 Although the affidavit does not refer to it, the record contains a letter dated 6 May 2011 marked "TDM 6" addressed to the State Attorney where the applicant again queries progress. This letter was signed by a Mr Sadiki.
- 6.5 Mr Phamba left the State Attorney's office in February 2012 and a Mr Mhambi took over his files in August 2012. It is not stated who was in charge of Mr Phamba's files during the intervening period. The affidavit creates the impression that nobody was placed in charge of these files during this period and states that during this period Mr Phamba's files did not receive the attention they deserved.
- 6.6 Mr Mhambi and Ms Maimela were unaware that the rescission application had not been served and filed until they received a memorandum from counsel who had been briefed to prepare heads of argument opposing the third respondent's application to have the award made an order of court. It is not stated when they became aware that the rescission application had not been served and filed and it is not stated precisely what they did when they became aware of the potential problem. However, it appears that this came to their knowledge in April/May 2013. No indication is given as to why Mr

Mhambi did not discover that the rescission application had not been served and filed in the intervening period.

- [7] The affidavit goes on to argue that the relevant employees would not be prejudiced by the delay because they had been correctly dealt with by the applicant in terms of the collective agreement and that the prospects of success on the merits of the case were good.
- [8] The opposing affidavit in the application to have the award made an order of court, in which the merits of the dispute are dealt with, was attached to the founding affidavit.
- [9] The third respondent's answering affidavit did not challenge in any detail the sequence of events set out in the founding affidavit. The main thrust of the response was that the delay was excessive and that there was no satisfactory explanation for this delay.

The ruling

- [10] In a ruling dated 13 October 2013, the second respondent refused condonation. His reasoning is set out in the ruling under the heading "Analysis of Arguments". He found that:
 - 10.1 the application was almost three years late, and that this delay is excessive;
 - 10.2 the explanation for the delay was neither satisfactory nor reasonable;
 - 10.3 the officials who dealt with this matter were senior officials who could have dealt with the matter and that at the time that they elected to refer the matter to the State Attorney, it was already late; and,
 - 10.4 the applicant was not entitled to rely on the tardiness of the State Attorney to justify the delay.
- [11] The second respondent also accepted that:

11.1 one of the purposes of the Labour Relations Act, 66 of 1995 (“LRA”) is to expedite the resolution of labour disputes and that the applicant’s conduct defeated this aim; and

11.2 that any prospects of success that the applicant may have had did not make up for the lengthy delay.

[12] Finally, the second respondent considered the prejudice that the parties may have suffered and came to the conclusion that the employees concerned who benefitted from the award would be more prejudiced if condonation were to be granted than the applicant if it were not to be granted.

Grounds for review

[13] It is this ruling that the applicant seeks to review.

[14] The founding affidavit in the review application argues: that the ruling is not one which a reasonable decision maker could have come to and that the second respondent came to a “wrong conclusion” when he found that the explanation for the delay was neither reasonable nor satisfactory; that the explanation was reasonable; that the applicant gave the matter the urgent attention that it deserved; that the second respondent’s criticism of the applicant’s decision to utilise the State Attorney was misplaced; that the second respondent did not give adequate weight to the argument that the applicant’s prospects of success on the merits of the case were good; and that the second respondent should have realised that all the facts were interrelated. The second respondent’s approach constituted misconduct as envisaged in section 145 of the LRA.

[15] In argument before me, the applicant’s representative reiterated the arguments set out in the founding affidavit. He emphasised the need to take a holistic approach to condonation applications and to consider all relevant factors. He argued that a relevant factor in this regard was that the applicant always intended to challenge the award and to have it rescinded. There had been no wilfulness in the disregard of the relevant time period. He also argued that the applicant’s prospects of success and the prejudice it would suffer if condonation was not granted had not been given sufficient weight by the second respondent.

- [16] In its answering affidavit and in argument the third respondent persisted with its view that the delay was unreasonable and that no adequate reason was provided for the delay

Analysis and findings

- [17] The approach adopted by the then Appellate Division with regard to condonation applications in *Melane v Santam Insurance Co Ltd*¹ has been accepted and adopted in numerous decisions of the Labour Court and the Labour Appeal Court. This is set out in the following excerpt from the decision -

‘In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective *conspectus* of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked. I would add that discursiveness should be discouraged in canvassing the prospects of success in the affidavits. I think that all the foregoing clearly emerge from decisions of this Court, and therefore I need not add to the ever growing burden of annotations by citing the cases.’

- [18] Although the second respondent does not refer to this decision, it is clear from the ruling that he adopted the approach set out therein. He considered the length of the delay, the reason for the delay and the prejudice suffered by the relevant parties. He also considered the applicant's prospects of success but found that this factor was outweighed by the other factors.

¹ 1962 (4) SA 531 (A) at 523 C-F.

- [19] The argument that he gave insufficient weight to the prospects of success can also be rejected. In *NUM v Council for Mineral Technology*² it was stated that following is stated –

‘[10] ...There is a further principle which is applied and that is 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 (cf *Chetty v Law Society, Transvaal* 1985 (2) 756 (A) at 765A–C; *National Union of Mineworkers & others v Western Holdings Gold Mine* (1994) 15 ILJ 610 (LAC) at 613E). The courts have traditionally demonstrated their reluctance to penalise a litigant on account of the conduct of his representative but have emphasised that there is a limit beyond which a litigant cannot escape the results of his representative’s lack of diligence or the insufficiency of the explanation....’

- [20] See also, for example, *Colett v Commission for Conciliation, Mediation and Arbitration and Others*³ and *Thompson v National Health Laboratory Services*⁴.
- [21] There is no doubt that the delay in launching the rescission application was excessive in the extreme. There is also no acceptable explanation for the delay. It took more than a month for the applicant to refer the matter to the State Attorney. No reason is given for this delay. No detail is given as to when the matter was referred to the National Office. No explanation is given why the State Attorney only opened the file in January 2011. There is no acceptable explanation as to why the matter was not properly and expeditiously dealt with by the State Attorney once it opened a file. No explanation is given as to why there was a period of six months during which, it appears, nobody at the State Attorney’s office dealt with Mr Phamba’s files. Also of relevance in this regard is the allegation that Mr Phamba prepared an application in terms of rule 31 of the CCMA Rules but did not serve and file it. If this were the case, one would have expected the signed affidavit to have been annexed to the papers.

² [1999] 3 BLLR 209 (LAC) at para 10.

³ [2014] 6 BLLR 523 (LAC)

⁴ [2009] JOL 24319 (LAC)

- [22] It is merely recorded that Ms Maimela and Mr Mhambi only became aware of the lack of progress with the matter when they received a memorandum from counsel in connection with the preparation of heads of argument in a case where the applicant was opposing an application to have the arbitration award made an order of court. When this memorandum was received and what immediate steps were taken to remedy the situation and how long this took is not stated. Why alarm bells did not ring when the application to have the award made an order of court was served on the applicant (or when subsequent pleadings were served on the applicant) is not explained.
- [23] In argument, the applicant sought to rely on the negligence of the State Attorney's office as an excuse for the delays. While it is accepted that the Courts are slow to penalise a litigant for its legal representative's inept conduct of litigation, there comes a point where there is no alternative but to make the client bear the consequences of the negligence of his attorneys. See *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)*⁵. I am of the view that this is one of the cases where the client must bear the consequences. In fact, in my view there is little doubt that the applicant itself did not act with the necessary diligence. The applicant provides no evidence to show that at any point during the period commencing 7 February 2011 (or 5 May 2011 if Annexure TDM 6 is properly before the court) and ending on the date when the relevant officials read the counsel's memorandum, presumably some time shortly before the launching of the rescission application in 2013, it took any steps whatsoever to enquire as to progress in the rescission application.
- [24] In so far as prejudice is concerned, the applicant gave very little detail as to what the extent of the prejudice is that it will suffer. From the papers it appears that the applicant argued that the award has the effect that certain employees will be paid salaries higher than those they are entitled to. It is not indicated how many such employees there are. From documents in the record it appears that there are four employees affected by this matter. If this is the case, the potential additional costs will, in the greater scheme of things, be minimal. The possible precedential effect of

⁵ 2003 (6) SA 1 (SCA)

the award can also be minimised in the sense that the applicant can refuse to apply it to other employees and then argue its case in any new arbitration proceedings. An arbitration award does not constitute a binding precedent. I should add that the applicant's conduct in not proceeding with this matter with due expedition does not support any argument that it is suffering significant prejudice.

- [25] The applicant argued that the importance of the matter should also have been considered. However, no evidence is provided in the founding affidavit to support this argument. Presumably the importance lies in the possibility that the award undermines pay systems. If this is the case this should have been explicitly stated to be so. In any event, as stated above, the applicant was only bound to apply the award to the employees concerned. The award did not constitute a binding precedent and any further attempt to apply it to other employees could have been defended in any new proceedings. Once again, the failure of the applicant to pursue the matter with any vigour indicates that the applicant itself did not regard the matter as important.
- [26] The argument that the applicant at all times indicated an intention to fight the matter is not raised in the condonation application. In any event it is simply not supported by the facts. Apart from the letters it sent up to February 2011 (or possibly May 2011) there is no further indication of any such intention. Indeed, the applicant's subsequent inactivity creates the impression that it had lost interest in pursuing the matter. If this were not the case, why is there no evidence of any further attempt during the rest of 2011, the whole of 2012, and a substantial period of 2013, to contact the State Attorney to see how the matter was progressing?
- [27] In several decisions the courts have emphasised the importance of employment disputes being resolved with due expedition and without delay. See, for example *CUSA v Tao Ying Metal Industries and Others*⁶ and *Colett v Commission for Conciliation, Mediation and Arbitration and others*⁷.

⁶ [2009] 1 BLLR 1 (CC)

⁷ *Supra*

[28] In my view the applicant has not established the existence of any ground for reviewing and setting aside the ruling as envisaged in section 158(1) (g). The second respondent considered all relevant factors as set out in the affidavits to the condonation application, did not misconceived the nature of his duties and exercised a discretion which resulted in a decision which was reasonable and rational. There was no misconduct on his part as alleged. The mere fact that he criticised the fact that the applicant's officials referred the matter to the State Attorney does not justify reviewing and setting aside the ruling.

Order

I make the following order:

1. The application is dismissed.
2. The applicant is to pay the third respondent's costs.

Le Roux, AJ

Acting Judge of the Labour Court of South
Africa

APPEARANCES:

For the Applicant: Adv Tshikereke

For the Respondent: Mr T Ntshebe