THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: J 2383 / 16

In the matter between:

RENA BUSINESS SOLUTIONS (PTY) LTD	**Applicant**
and	
RANGWAGA TEBOGO LEONARD	**First Respondent**
RAND MERCHANT BANK	**Second Respondent**
In re:	
RANGWAGA TEBOGO LEONARD	**Applicant**
and	
RENA BUSINESS SOLUTIONS (PTY) LTD	**Respondent**

Heard: **2 May 2017**

Delivered: **2 May 2017**

Reasons: 9 May 2017

Summary: Urgency – requirements for urgency – principles set out – applicant must make out case for urgency – urgency self created – no urgency shown

Application for interim relief – principles stated – relief sought actually final relief – application of final relief principles to matter – issues of clear right, alternative remedy and prejudice

Application for condonation – principles considered – material delay without proper explanation – application dismissed

Rescission – principles considered – no case for rescission made out – clear right to relief does not exist – application dismissed

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REASONS

SNYMAN, AJ

Introduction

[1] This matter came before me on 2 May 2017 as an urgent application brought by the applicant, Rena Business Solutions (Pty) Ltd, which application was filed on 31 March 2017. The substantive relief sought by the applicant was in two parts, with the first part seeking what the applicant called interim relief to 'unfreeze' the applicant's bank account that had been attached by the Sheriff, and the second part seeking rescission of an order previously granted by this Court against the applicant by default. After hearing argument presented on behalf of the parties on 2 May 2017, I made the following order:

> '1. The application by the applicant, Rena Business Solutions (Pty) Ltd, for interim relief and rescission, brought on 31 March 2017, is dismissed with costs.
>
> 2. Written reasons for this order will be handed down on 9 May 2017.'

[2] This judgment now constitutes the reasons for the order I have made, *supra*.

[3] Before dealing with the merits of the matter, there is a preliminary issue that must be addressed. The applicant, in the notice of motion and founding affidavit, has classified the relief it seeks where it comes to the 'unfreezing' of its bank account as interim relief. However, and to simply call the relief sought interim relief does not make it so. Just attaching a particular label to substantive relief sought in a notice of motion cannot change the true nature of what it is that is being applied for. It is always important to establish from the outset what the nature of the relief being sought by an applicant actually is, the reason being that the requirements for interim relief and final relief are different.[1] In simple terms, it is easier to obtain interim relief, especially where it comes to the issue of the 'right' sought to be protected. In seeking interim relief, all an applicant has to show is the existence of a *prima facie* right even if it is open to some doubt[2], as opposed to having to show the existence of a clear right in the case of final relief sought.

[4] I am satisfied that what the applicant is actually seeking is final relief. This is because the applicant's purported 'interim relief' sought to unfreeze its bank account, is directly linked to its application for a final order for rescission. The point simply is that once rescission is granted, it follows that there can be no basis to continue with the attachment of the applicant's bank account. This is clearly not interim relief, but final relief.[3]

[5] As this matter accordingly concerns the granting of final relief, and not interim relief, the applicant must satisfy three essential requirements, being: (a) a clear right; (b) an injury actually committed or reasonably apprehended; and (c) the absence of any other satisfactory remedy.[4]

[6] Further, and as these are motion proceedings in which final relief is sought, any factual disputes that exist between the parties must be resolved and determined on the basis as set out in the regularly referred to judgment of

[1] *Zondo and Another v Uthukela District Municipality and Another* (2015) 36 ILJ 502 (LC) at para 2.
[2] For the most recent authorities in this regard see *Palace Group Investments (Pty) Ltd and Another v Mackie* (2014) 35 ILJ 973 (LAC) at para 18; *SA Municipal Workers Union v City of Tshwane and Another* (2014) 35 ILJ 241 (LC) at para 21; *National Union of Mineworkers v Lonmin Platinum Comprising Eastern Platinum Ltd and Western Platinum Ltd and Another* (2014) 35 ILJ 486 (LC) at para 32.
[3] See *Mashiya v Sirkhot NO and Others* (2012) 33 ILJ 420 (LC) at para 19.
[4] *Setlogelo v Setlogelo* 1914 AD 221 at 227; *V & A Waterfront Properties (Pty) Ltd and Another v Helicopter and Marine Services (Pty) Ltd and Others* 2006 (1) SA 252 (SCA) at para 20; *Royalserve Cleaning (Pty) Ltd v Democratic Union of Security Workers and Others* (2012) 33 ILJ 448 (LC) at para 2.

Plascon Evans Paints v Van Riebeeck Paints.[5] The principles are aptly summarized in *Thebe Ya Bophelo Healthcare Administrators (Pty) Ltd and Others v National Bargaining Council for the Road Freight Industry and Another*[6], as follows:

> '… where an applicant in motion proceedings seeks final relief, and there is no referral to oral evidence, it is the facts as stated by the respondent together with the admitted or undenied facts in the applicants' founding affidavit which provide the factual basis for the determination, unless the dispute is not real or genuine or the denials in the respondent's version are bald or uncreditworthy, or the respondent's version raises such obviously fictitious disputes of fact, or is palpably implausible, or far-fetched or so clearly untenable that the court is justified in rejecting that version on the basis that it obviously stands to be rejected.'

When I summarize facts in this judgment, these are the facts I regard as the accepted evidence in terms of the *Plascon Evans* test set out above.

[7] Finally, as part of an introduction in this case, the applicant has brought this application as one of urgency. If a litigant seeks to have the matter determined as one of urgency, a proper case of urgency as contemplated by Rule 8 must be made out. The first question to be answered must therefore be whether the applicant has made out such a case for urgency, which I will turn to next.

<u>Facts relating to Urgency</u>

[8] The applicant's case for urgency is founded on one simple basis, being that its bank account has been attached by the Sheriff pursuant to an order granted by Nieuwoudt AJ on 10 January 2017, and in respect of which a warrant of execution was issued on 17 February 2017. Properly described, as explained by the second respondent, what happened is that a 'pledge indicator' was loaded against the applicant's bank account by the second respondent, pursuant to the Sheriff serving the warrant of execution on the second

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[5] 1984 (3) SA 623 (A) at 634E-635C. See also *Jooste v Staatspresident en Andere* 1988 (4) SA 224 (A) at 259C – 263D; *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at paras 26 – 27; *Molapo Technology (Pty) Ltd v Schreuder and Others* (2002) 23 ILJ 2031 (LAC) at para 38; *Geyser v MEC for Transport, Kwazulu-Natal* (2001) 22 ILJ 440 (LC) at para 32; *Denel Informatics Staff Association and Another v Denel Informatics (Pty) Ltd* (1999) 20 ILJ 137 (LC) at para 26.

[6] 2009 (3) SA 187 (W) at para 19.

respondent. It is clear from the evidence that this pledge indicator was ultimately implemented around 6 March 2017, but the urgent application followed only at the end of March 2017.

[9] The factual enquiry where it comes to urgency is not just limited to the period from which the pledge indicator was loaded. In fact, it may be said that the applicant remained idle in dealing with this matter until the point when it had no other choice but to act.

[10] The reality is that the order of Nieuwoudt AJ was served directly on the applicant on 12 January 2017. The applicant has conceded it was aware of the order as from that date. Other than one e-mail to its attorneys on 19 January 2017 stating that an application for rescission needed to be made as a matter of urgency, there is no evidence of any kind that the applicant actually did something concerning the rescission of the order until the end of March 2017.

[11] As stated above, the applicant was clearly aware as from about 6 March 2017 that its account had been attached and that a warrant of execution in this matter had been issued, and executed. This is apparent from e-mail correspondence between the applicant and its attorneys on 9 March 2017, in which the applicant’s attorneys requested the payment of a deposit for counsel’s fees to proceed with the matter on behalf of the applicant. It is clear from this correspondence that the applicant is actually quoted a fee of R30 000.00 in order to set aside the attachment order on the applicant’s bank account.

[12] But there is no evidence of the applicant ever paying the deposit sought, or providing the attorneys with any instructions to deal with the matter further. There is no explanation of any kind as to what happened between 9 March 2017, and 28 March 2017, the latter date being the date on which the Sheriff formally served the notice of attachment in terms of the warrant, on the applicant.

[13] In effect, the applicant did nothing about the order granted against it, from 12 January 2017 until 31 March 2017, on which date it then filed its urgent application referred to above.

<u>Principles - Urgency</u>

[14] Urgent applications are governed by Rule 8. In considering this Rule, the Court in *Jiba v Minister: Department of Justice and Constitutional Development and Others*[7] said:

> 'Rule 8 of the rules of this court requires a party seeking urgent relief to set out the reasons for urgency, and why urgent relief is necessary. It is trite law that there are degrees of urgency, and the degree to which the ordinarily applicable rules should be relaxed is dependent on the degree of urgency. It is equally trite that an applicant is not entitled to rely on urgency that is self created when seeking a deviation from the rules.'

[15] As to what an applicant must show in order to make out a case of urgency, the Court in *Mojaki v Ngaka Modiri Molema District Municipality and Others*[8], referred with approval to the following *dictum* from the judgment in *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others*:[9]

> '…. An applicant has to set forth explicitly the circumstances which he avers render the matter urgent. More importantly, the applicant must state the reasons why he claims that he cannot be afforded substantial redress at a hearing in due course. The question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of absence of substantial redress in an application in due course. The rules allow the court to come to the assistance of a litigant because if the latter were to wait for the normal course laid down by the rules it will not obtain substantial redress.'

[16] Also, the Court in *Maqubela v SA Graduates Development Association and Others*[10] dealt with the considerations pertaining to urgency as follows:

> 'Whether a matter is urgent involves two considerations. The first is whether the reasons that make the matter urgent have been set out and secondly

[7] (2010) 31 ILJ 112 (LC) at para 18. See also *Luna Meubel Vervaardigers (Edms) Bpk v Makin and Another (t/a Makin's Furniture Manufacturers)* 1977 (4) SA 135 (W).
[8] (2015) 36 ILJ 1331 (LC) at para 17.
[9] [2012] JOL 28244 (GSJ) at para 6.
[10] (2014) 35 ILJ 2479 (LC) at para 32. See also *Transport and Allied Workers Union of SA v Algoa Bus Co (Pty) Ltd and Others* (2015) 36 *ILJ* 2148 (LC) at para 11.

whether the applicant seeking relief will not obtain substantial relief at a later stage. In all instances where urgency is alleged, the applicant must satisfy the court that indeed the application is urgent. Thus, it is required of the applicant adequately to set out in his or her founding affidavit the reasons for urgency, and to give cogent reasons why urgent relief is necessary. As Moshoana AJ aptly put it in *Vermaak v Taung Local Municipality*:

'The consideration of the first requirement being why is the relief necessary today and not tomorrow, requires a court to be placed in a position where the court must appreciate that if it does not issue a relief as a matter of urgency, something is likely to happen. By way of an example if the court were not to issue an injunction, some unlawful act is likely to happen at a particular stage and at a particular date.''

[17] Where an applicant seeks final relief, the Court must be even more circumspect when deciding whether or not urgency has been established.[11] In simpler terms, the applicant must make out an even better case of urgency. In *Tshwaedi v Greater Louis Trichardt Transitional Council*[12] the Court said:

'… An applicant who comes to court on an urgent basis for final relief bears an even greater burden to establish his right to urgent relief than an applicant who comes to court for interim relief. ….'

[18] But it is not just about the applicant and its interests. Another consideration is possible prejudice the respondent might suffer as a result of the abridgement of the prescribed time periods and an early hearing.[13]

[19] Further, urgency must not be self-created by an applicant, as a consequence of the applicant not having brought the application at the first available opportunity.[14]

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[11] [2002] JOL 9452 (LC) at para 8.
[12] [2000] 4 BLLR 469 (LC) at para 11.
[13] *IL & B Marcow Caterers (Pty) Ltd v Greatermans SA Ltd and Another* 1981(4) SA 108 (C) at 113D-114C.
[14] See *Golding v HCI Managerial Services (Pty) Ltd and others* [2015] 1 BLLR 91 (LC) at para 24; *National Union of Mineworkers v Lonmin Platinum Comprising Eastern Platinum Ltd & Western Platinum Ltd and Another* (2014) 35 *ILJ* 486 (LC) at para 50; *Association of Mineworkers and Construction Union v Lonmin Platinum (comprising Eastern Platinum Ltd & Western Platinum Ltd) and Others* (2014) 35 *ILJ* 3097 (LC) at paras 30-44.

[20] A final consideration where it comes to urgency is expedition in taking action. In other words, the more immediate the reaction by the litigant to remedy the situation by way of instituting litigation, the better it is for establishing urgency.[15] But the longer it takes from the date of the event giving rise to the proceedings, the more the urgency is diminished. In short, the applicant must come to Court immediately, or risk failing on urgency.[16] In *Valerie Collins t/a Waterkloof Farm v Bernickow NO and Another*[17] the Court held:

> '… if the applicants seeks this Court to come to its assistance it must come to the Court at the very first opportunity, it cannot stand back and do nothing and some days later seek the Court's assistance as a matter of urgency.'

[21] Applying all the above principles to the facts *in casu*, I am convinced that the applicant has failed to make out a case of urgency. The requirements of Rule 8 have thus not been satisfied.

[22] The applicant in effect did nothing about the order granted against it for a period of close on three months. There is no proper explanation for this failure. The applicant should have immediately brought an application for rescission, within the time limits are prescribed by Rule 16A of the Rules of the Labour Court. If the first respondent persisted with execution in such circumstances, then the applicant may very well have convinced me to afford it urgent relief. But to simply do nothing is destructive of any case of urgency in this respect.

[23] Then, and even when the applicant was aware of the attachment of its bank account at the beginning of March 2017, it did not act immediately. It did not place its attorneys in funds and instruct such attorneys to proceed with the matter. The applicant only filed its application, without any proper explanation for this delay, some four weeks later.

[24] In the end, there is a total period of delay of some 12(twelve) weeks that must be considered, if the lack of bringing rescission proceedings is also taken into account, with some four weeks thereof being after the applicant's back

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[15] See *University of the Western Cape Academic Staff Union and Others v University of the Western Cape* (1999) 20 ILJ 1300 (LC) at para 15.
[16] *Association of Mineworkers and Construction Union and Others v Northam Platinum Ltd and Another* (2016) 37 ILJ 2840 (LC) at para 26; *National Union of Metalworkers of SA and Others v Bumatech Calcium Aluminates* (2016) 37 ILJ 2862 (LC) at para 26.
[17] [2002] JOL 9452 (LC) at para 8.

account was frozen. This situation is completely inconsistent with the existence of urgency. In *Mashiya v Sirkhot NO and Others*[18] the Court dealt with a period of delay from 25 July to 19 August which the Court considered to be unacceptable. And in *Ngcongo v University of South Africa and Another*[19] the Court found a five week delay in seeking to urgently challenge a ruling, without any proper explanation for it, to not be urgent. In my view, the same considerations apply *in casu*.

[25] The applicant, when this matter was argued before me, placed considerable emphasis on the financial prejudice it would suffer as a basis to establish urgency, because it was confronted with an order making it liable to pay an amount it contended it was not liable for. But if that was the case, then surely one would have expected the applicant to act with far more vigour and expedition, than what it did. In any event, for financial hardship to establish urgency per se, exceptional circumstances must be shown to exist[20], and the applicant simply made out no such case. In *Jonker v Wireless Payment Systems CC*[21] it was held:

> 'The general rule that financial hardship and loss of income are not considered to be grounds for urgent relief was upheld in *Malatji v University of the North* [2003] ZALC 32 (LC) and *Nasionale Sorghum Bierbrouery (Edms) Bpk (Rantoria Divisie) v John NO en Andere* (1990) 11 ILJ 971 (T).'

And in the case of *Harley v Bacarac Trading 39 (Pty) Ltd,*[22] the Court held:

> 'If an applicant is able to demonstrate detrimental consequences that may not be capable of being addressed in due course and if an applicant is able to demonstrate that he or she will suffer undue hardship if the court were to refuse to come to his or her assistance on an urgent basis, I fail to appreciate why this court should not be entitled to exercise a discretion and grant urgent relief in appropriate circumstances. Each case must of course be assessed on its own merits.'

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[18] (2012) 33 ILJ 420 (LC).
[19] (2012) 33 ILJ 2100 (LC) at para 9.
[20] See *Democratic Nursing Organisation of SA and Another v Director-General, Department of Health and Others* (2009) 30 ILJ 1845 (LC) at para 19.
[21] (2010) 31 ILJ 381 (LC) at para 16.
[22] (2009) 30 ILJ 2085 (LC) at para 8.

[26] In my view, the applicant's case of urgency is as good an example of self-created urgency as one can get. The applicant's financial hardship is of its own making. It should not have remained supine, as it did, until it was in effect too late, and then seek to do something on an urgent basis. In the end, there is no explanation for what is a material delay, and this in itself destroys any valid consideration of urgency.

[27] The first respondent, on the other hand, acted promptly in pursuing his matter throughout. On the applicant's own version, it owes the first respondent close on R190 000.00, but has not made any effort to pay this or tender payment, and there is no reason to have the first respondent continue to suffer further prejudice at the hands of the cavalier conduct of the applicant.

[28] For all these reasons as set out above, the application falls to be struck from the roll, or even dismissed, for a complete want of urgency. The Court in *February v Envirochem CC and Another*[23] dealt with a similar situation, and even though Steenkamp J in that judgment accepted that urgency was not established, the learned Judge still proceeded to dismiss the matter. I intend to follow suit, *in casu*, for the reasons I will now set out.

<u>Rescission</u>

[29] The applicant's clear right to the relief it seeks is squarely founded on it application for rescission. As touched on above, rescission applications in the Labour Court are regulated by Rule 16A of the Labour Court Rules, as read with Section 165 of the LRA. In terms of Rule 16A, an application for rescission had to have been brought within 15 (fifteen) Court days of the date when the applicant became aware of the order against it.[24] *In casu*, this was on 12 January 2017, meaning the applicant's rescission application was due by 2 February 2017. The rescission application was only filed on 31 March 2017, which is close on two months' out of time. Condonation was thus required, and the applicant indeed applied for the same. It is critical to consider the merits of this application for condonation first, because if the

[23] (2013) 34 ILJ 135 (LC) at para 17.
[24] See Rule 16A(2)(b).

applicant is unable to even overcome this hurdle, it has to be the end of the matter.

[30] Where it comes to deciding condonation applications, the law in this regard is now well settled, on the basis of the following principles as set out in the well-known judgment of *Melane v Santam Insurance Co Ltd*[25]:

> '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, save of course that if there are no prospects of success there would be no point in granting condonation.'

[31] In the case of condonation applications brought in the Labour Court, and in applying the *ratio* in *Melane*, the Court in *Academic and Professional Staff Association v Pretorius NO and Others*[26] summarized the principles for consideration in the case of condonation applications as follows:

> 'The factors which the court takes into consideration in assessing whether or not to grant condonation are: (a) the degree of lateness or non-compliance with the prescribed time frame; (b) the explanation for the lateness or the failure to comply with time frame; (c) prospects of success or bona fide defence in the main case; (d) the importance of the case; (e) the respondent's interest in the finality of the judgment; (f) the convenience of the court; and (g) avoidance of unnecessary delay in the administration of justice. …. It is trite law that these factors are not individually decisive but are interrelated and must be weighed against each other. In weighing these factors for instance, a good explanation for the lateness may assist the applicant in compensating for weak prospects of success. Similarly, strong prospects of success may compensate the inadequate explanation and long delay.'

I am satisfied this this *ratio* in *Academic and Professional Staff Association* properly and succinctly summarizes all the Court must consider when exercising its discretion whether or not to grant condonation.

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[25] 1962 (4) SA 531 (A) 532C-E.
[26] (2008) 29 *ILJ* 318 (LC) paras 17–18.

[32] What is further clear from the *ratio* in *Academic and Professional Staff Association* is that the providing of a proper explanation for any default or delay is a critical component of any condonation application. As to how this explanation must be provided, the Court in *Independent Municipal and Allied Trade Union on behalf of Zungu v SA Local Government Bargaining Council and Others*[27] held:

> 'In explaining the reason for the delay it is necessary for the party seeking condonation to fully explain the reason for the delay in order for the court to be in a proper position to assess whether or not the explanation is a good one. This in my view requires an explanation which covers the full length of the delay. ….'

[33] Applying all the aforesaid principles, I shall deal firstly with the length of the delay. As I have already said above, the delay is excessive. It is more than four times the permitted period. In the context of rescission applications, such an excessive delay strongly works against the granting of condonation.

[34] The next issue to be considered is the explanation for the delay. The explanation is abysmal. Despite it being required, the entire period of the delay was not explained, and in fact most of it is not explained. Properly considered, the explanation offered in seeking condonation is contained in two paragraphs of the founding affidavit, substantially lacking in any kind of particularity, which is in itself unacceptable.

[35] Considering the substance what has been provided as an explanation, it is clear that all the applicant has sought to do was to blame its former attorney, Mr Mokobane, for all the failures in this case. The explanation of the applicant is that Mokobane was instructed, immediately after the applicant became aware of the order against it, to apply for rescission, but he did nothing about it. According to the applicant, it trusted Mokobane as a professional service provider, and it should thus not be blamed for Mokobane's failure. But this kind of explanation has a fundamental flaw. This is that the applicant chose its attorney, and simply cannot hide behind the failure of such attorney. The Court

[27] (2010) 31 *ILJ* 1413 (LC) para 13.

in *Catering Pleasure and Food Workers Union v National Brands Ltd*[28] dealt with the following explanation by a litigant:

> 'The explanation for the delay is that the union's attorneys were lax in June, July and August 2004. On 8 September 2004, new attorneys were appointed …'

The Court then said the following about this explanation, and when refusing condonation:[29]

> 'There is no proper reason why the referral was out of time, other than the inaction of the union's attorneys which inaction does not amount to an acceptable explanation.'

[36] But even worse than seeking to just blame its attorney; the applicant has made out no case that it had regularly followed up with Mokobane about the status of the matter and what steps he had taken. Surely the applicant should have asked to see some kind of paperwork. The approach of the applicant was, crystalized down to its core, one of once the applicant had conveyed the matter to its attorney, it could wash its hands of the matter and just leave it to the attorney to deal with. This is a fundamentally wrong approach, and has been the subject matter of numerous warnings issued by the Courts. The principle in this respect has been articulated in *Saloojee and Another NNO v Minister of Community Development*[30] as follows:

> 'If, as here, the stage is reached where it must become obvious also to layman that there is a protracted delay, he cannot sit passively by, without so much as directing any reminder or enquiry to his attorney and expect to be exonerated of all blame; and if, as here, the explanation offered to this court is patently insufficient, he cannot be heard to claim that insufficiency should be overlooked merely because he has left the matter entirely in the hands of his attorney. If he realises upon the aptitude or remissness of his own attorney, he should at least explain that none of it is to be imputed to himself. That has not been done in this case.'

[28] (2007) 28 ILJ 1064 (LC).
[29] Id at para 26.
[30] 1965 (2) SA 135 (A).

[37] Other than one contact on 19 January 2017, there is no other attempt by the applicant itself to even communicate with Makobane until the beginning of March 2017. Then, and by March 2017, at the very least, and on its own version, it must have dawned on the applicant that it had heard nothing from Mokobane, and there was now a warrant of execution. The applicant should have then, at least, taken a detailed and active interest in this matter. But still, and other than one e-mail exchange at the beginning of March 2017, nothing is done until almost a month later. In the end, therefore, the applicant appears to have left the matter entirely up to its attorneys, took no active interest in the rescission, and never followed up on the prosecution of any process to set aside the order. This must be a factor that heavily counts against the applicant and mitigates in favour of the dismissal of any condonation application.[31] In *Superb Meat Supplies CC v Maritz*[32] the Court held as follows:

> '.... I also am of the judgement that the appellant through the agency of its member Schreiber was negligent in not monitoring progress of its case from the time of the service of the claim in August 1999 to the set down for the trial on 12 March 2001, a period of nearly 18 months. The appellant appointed new attorneys and the file was available to them and would have indicated what contact took place between Majola and Schreiber during that period. The court has not been informed of any communication and it can be inferred that the appellant took no active interest in its own litigation, a further reason to conclude that it was negligent.
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> As I have indicated Trengove AJA held in the De Wet case that disinterest and failure to keep in touch with an attorney barred relief. Attorneys cannot be blamed and the appellants - as in this matter - were the authors of their own problems. The present respondent has not erred and it would be inequitable to visit him with the prejudice and inconvenience flowing from such conduct. …'

These same considerations equally apply *in casu*.

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[31] See *Arnott v Kunene Solutions and Services (Pty) Ltd* (2002) 23 ILJ 1367 (LC); *Parker v V3 Consulting Engineers (Pty) Ltd* (2000) 21 ILJ 1192 (LC); *Independent Municipal and Allied Trade Union on behalf of Zungu v SA Local Government Bargaining Council and Others* (2010) 31 ILJ 1413 (LC); *GIWUSA obo Heynecke v Klein Karoo Kooperasie BPK* (2005) 26 ILJ 1083 (LC); *Theron v AA Life Assurance Association Ltd* 1995 (4) SA 361 (A) at 365; *Swanepoel v Albertyn* (2000) 21 ILJ 2701 (LC).

[32] (2004) 25 ILJ 96 (LAC) at para 27.

[38] But even on the facts, I am compelled to point out that I believe that the applicant's criticism of Mokobane was nothing else but a deliberate design, after the fact, to try and justify its own and inexplicable failures. On the evidence, and after becoming aware of the order on 12 January 2017, Mokobane attorneys never came on record for the applicant. In fact, and what the evidence showed, is that Mokobane quoted the applicant a fee to attend to the matter, and asked that a deposit be paid, which was never paid. There was no evidence of Mokobane actually being instructed to apply for rescission. And further, as set out above, the applicant never adequately communicated with Mokobane, nor followed up on the work being done for it. It seems far more likely that the applicant deliberately let matters be, hoping it would go away. This inference is further supported by the very same kind of inaction when the applicant was first served with the first respondent's application on the merits, at the end of October 2016. In *Chemical Energy Paper Printing Wood & Allied Workers Union and Others v Metal Box t/a MB Glass*[33] the Court said the following, which in my view similarly describes the conduct of the applicant in casu:

> 'It is abundantly clear from the self-contradictions in the explanation for the delay that the applicants and/or their attorneys had unfortunately not been candid with this court. It is obvious also on the papers, that the applicants have been as lax as their legal representatives in the prosecution of their claim.'

[39] In the end, I find the applicant's entire explanation for the delay unpalatable. This means that the total delay of close on three months in finally bringing the rescission application is completely unexplained. This must mean the end of the matter for the applicant. As was said in *3G Mobile (Pty) Limited v Raphela NO and Others*[34]:

> 'In the end, the applicant has thus provided no explanation for what is a material delay. This should be the end of the matter for the applicant without even considering the requirement of prospects of success. …'

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[33] (2005) 26 ILJ 92 (LC) at para 8. See also *Basson v Oosthuizen No and Others* (2008) 29 ILJ 1875 (LC).
[34] [2014] JOL 32479 (LC) at para 32.

[40] Because the applicant has committed such a gross and flagrant violation of the Court Rules and processes, has in effect provided no explanation for what is an excessive delay, and has sought to provide an explanation which I do not think is truthful, any consideration of the issue of prospects of success on rescission evaporates. In simple terms, prospects of success become irrelevant, in deciding this matter. In *Colett v Commission for Conciliation, Mediation and Arbitration and Others*[35] the Court held as follows:

> 'There are overwhelming precedents in this court, the Supreme Court of Appeal and the Constitutional Court for the proposition that where there is a flagrant or gross failure to comply with the rules of court condonation may be refused without considering the prospects of success. …'

[41] In argument, the applicant suggested that its case that it actually already paid the first respondent the bulk of the amounts encompassed by the order of Nieuwoudt AJ, should shrug off all other considerations when deciding on the applicant's rescission application. The applicant contends that it would be unduly and unfairly prejudiced if it expected that the applicant must pay money that is not due, and for this reason alone should be entitled to the relief it seeks. In other words, what the applicant is suggesting is that because of the nature of its case on the merits, condonation is there for the asking. I cannot agree with such a proposition. Condonation is not just there for the asking, no matter what the case may be. In *Seatlolo and others v Entertainment Logistics Service* (*a division of Gallo Africa Ltd*)[36] the Court held:

> 'It is trite law that condonation should only be granted where the legal requirements have been met and is not a default option. It remains an indulgence granted by a court exercising its discretion whilst being cognizant of the criticism emanating from the Constitutional Court and the SCA and

[35] (2014) 35 *ILJ* 1948 (LAC) at para 38. See also *Mziya v Putco Ltd* (1999) 3 BLLR 103 (LAC) at para 9: '… 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'; *National Education Health and Allied Workers Union on behalf of Mofokeng and others v Charlotte Theron Children's Home* (2004) 25 ILJ 2195 (LAC) at para 23: '… this Court has previously confirmed the principle that without a reasonable and acceptable explanation for a delay the prospects of success are immaterial'.

[36] (2011) 32 ILJ 2206 (LC) at para 27. See also *3G Mobile* (*supra*) at para 33.

> bearing in mind the primary objective of the expeditious resolution of disputes articulated in the Act.'

I agree with these sentiments. It was squarely in the hands of the applicant to have ensured that it took immediate action to challenge the order granted against it, especially considering that the amount payable was specifically reflected in such order. Had this amount ordered to be paid been such an issue to the applicant, and as I have already touched on above, I find it inexplicable that the applicant would not have been spurred into immediate action to set the record straight. But what it does is to plod along, in effect do nothing, and then cry foul when its bank account is attached. All of this is too little, and far too late.

[42] Finally, and even if the applicant has a properly sustainable case on the merits, as it alleges, it is my view that the following *dictum* in *Ferreira v Die Burger*[37] aptly describes what should equally apply *in casu*:

> 'I am sympathetic to the fact that the applicant may have a case but, were we to grant this application, this court would subvert a crucial principle in matters which deal with personal relationships, namely labour relations, that these disputes have to be dealt with expeditiously and finalized as quickly as possible. Where in a case such as this, there has been so flagrant of violation of the rules, then, as Myburgh JP correctly decided, a lack of any explanation at all shrugs off other considerations.'

[43] For all the above reasons, the applicant's condonation application for the late filing of its rescission application is doomed to fail. The excessive delay without any explanation for the bulk of it, trumps all else. There is simply no basis to depart from the normal and accepted principle that in such circumstances, the matter must now be brought to an end, once and for all. There is accordingly no need to consider the possible prospects of success of the applicant's rescission application.

[44] Because the applicant's rescission application fails, the applicant has shown no clear right to the relief sought where it comes to the issue of 'unfreezing' its

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[37] (2008) 29 *ILJ* 1704 (LAC) at para 8.

bank account. That would equally dispose of its application to have the pledge indicator that was loaded on its account uplifted, because this was done in terms of the order of Nieuwoudt J of 10 January 2017, which continues to stand. In the absence of the applicant having a clear right to any relief sought, it is therefore not necessary to consider any of the further requirements where it comes to the granting of the final relief sought by the applicant.

[45] This then only leaves the issue of costs. The applicant has elected to approach the Labour Court on an urgent basis when it must have been clear there was no basis for doing so. The applicant has brought its application on the basis almost of it being entitled to condonation for the failures on its part, which is entirely inappropriate. It must have been clear from a simple reading of the first respondent's answering affidavit (which the applicant did not even reply to) that the application had little hope of succeeding. The applicant has also not taken the Court into its confidence and has sought to present explanations which were in my view not entirely truthful. But then, and worse still, when this matter was argued, the applicant's counsel tried to offer explanations from the bar which were not even contained in the pleadings. I find the applicant's entire conduct in the course of this matter to be unacceptable. In terms of Section 162 of the LRA, I have a wide discretion where it comes to the issue of costs, and in this instance, I exercise this discretion in favour of making an order for costs against the applicant, which I consider to be justified.

[46] Based on all the above reasons, I made the order that I did on 2 May 2017, referred to *supra*.

S Snyman

Acting Judge of the Labour Court

<u>Appearances:</u>

For the Applicant:	Adv Sihlele
Instructed by:	Baloyi Inc Attorneys
For the First Respondent:	Mr M V Gwala of M V Gwala Inc Attorneys
For the Second Respondent:	Ms L Moodley of Norton Rose Fulbright