



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

CASE NO: JR2644/11

In the matter between:

PETER MARUTWANE MASHISHI

Applicant

and

ZODWA MDLADLA

First

Respondent

PUBLIC HEALTH AND WELFARE SECTOR

BARGAINING COUNCIL

Second

Respondent

MINISTER OF HEALTH

Third

Respondent

Application heard: 13 March 2018

Judgment delivered: 15 March 2018

Summary: Application to condone late filing of review application filed more than five years late. Explanation woefully inadequate, prospects of success irrelevant. Condonation refused. Liability of practitioners for pursuing 'hopeless case'. Ethical obligation owed to court as an institution to advise client not to pursue litigation; trumps client's narrow interests. Section 162 of LRA - orders for costs or orders that fees be forfeited to be granted in appropriate cases.

JUDGMENT

VAN NIEKERK J

- [1] This is an unopposed application to review and set aside an arbitration award issued by the first respondent, to whom I shall refer as 'the arbitrator'. In the award, the arbitrator held that the applicant's dismissal by the third respondent was both substantively and procedurally fair.
- [2] The arbitrator's award is dated 26 July 2006. The applicant avers that he received part of the award on the same day, but that the award was missing a page which he received on 3 August 2006. In terms of s 145 of the LRA, the review application was to have been filed within six weeks, by mid-September 2006. The application for review was filed on 10 November 2011, more than five years late.
- [3] In support of his application for condonation, the applicant states that during August 2006 he referred the matter to an attorney for the purpose of pursuing the case in this court. The attorney took no steps beyond opening a file and his mandate was terminated. The applicant states that during September or October 2006, he instructed another attorney, who similarly took no steps to pursue the matter. During December 2006 the applicant states that he was admitted to hospital, that he was diagnosed with tuberculosis in or around August 2007 and

that he his treatment for that condition was completed in February 2008. He was advised that he would need rest in order to recover fully from his condition and it was only in March 2008 that he instructed yet another firm of attorneys to pursue the matter. They declined to take up the case. In September 2008, yet another attorney was consulted who after discussion with the third respondent advised the applicant that she was no longer proceeding with the matter and closed the file. The applicant then states that he became depressed due to ill-health and is unemployment, that he later (at some undisclosed date) was required to undergo surgery and treatment and that he obtained employment in January 2009 until February 2010, when he says he was unfairly dismissed by his new employer. On 1 April 2010 he was employed by current employer as a contract driver and needed to devote his full time and attention to his new employment.

- [4] The applicant states that on 31 March 2011 he approached his current attorneys of record who accepted his mandate and advised him that he would need to produce evidence supporting his explanation for the late filing of the review application. As I've indicated above, the application was filed more than seven months later. The applicant submits that his failure to comply with the statutory time limit was neither wilful nor negligent in order to give rise to the probable inference that he had no interest in resolving the dispute.
- [5] In regard to his prospects of success, the applicant simply states that he has been advised by his attorneys of record that he would need to demonstrate prospects of success and sets out in some detail while he believes that his prospects of success or such that condonation ought to be granted. I do not intend to canvass all of the points made by the applicant but the fact remains that after his suspension for unauthorised payments to suppliers, the applicant was charged with nine counts of misconduct after an investigation by what was then the scorpions investigating unit. The applicant pleaded guilty to 7 of the eight charges that were ultimately pursued against him. The applicant was dismissed and that sanction was upheld on appeal. The applicant disputed the fairness of his dismissal and referred the matter to the bargaining Council. The matter was

referred ultimately to the arbitration proceedings which are the subject of this review application. I do not intend to canvass all of the submissions made by the applicant in regard to the conduct of the arbitration hearing, save to say that he now contends that he ought to have been acquitted in respect of all of the charges in respect of which he was found guilty.

- [6] Condonation is not there merely for the asking, nor are applications for condonation a mere formality (see *NUMSA v Hillside Aluminium* [2005] 6 BLLR 601 (LC); *Derrick Grootboom v National Prosecuting Authority & another* [2013] ZACC 37]). A party seeking condonation must make out a case for the indulgence sought and bears the onus to satisfy the court that condonation should be granted.
- [7] This court is required to exercise a discretion, having regard to the extent of the delay, the explanation proffered for that delay, the applicant's prospects of success, and the relative prejudice to the parties that would be occasioned by the application being granted or refused.
- [8] In this court, that formulation, which has its roots in *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A), has long been qualified by the rule that where there is an inordinate delay that is not satisfactorily explained, the applicant's prospects of success are immaterial. In *National Union of Mineworkers v Council for Mineral Technology* [1999] 3 BLLR 209 (LAC) the LAC said the following:
- ... 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.
- [9] This principle was recently reaffirmed in *Collett v Commission for Conciliation, Mediation and Arbitration* [2014] 6 BLLR 523 (LAC), a unanimous judgement of the LAC, Musi AJA 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. In *NUM v Council for Mineral Technology* [1999] 3 BLLR 209 (LAC) at para 10, it was pointed out that in considering whether good cause has been shown the well-known approach adopted in *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532C-D ... Should be followed but:

‘There is a further principle which is applied and that is without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without good prospects of success, no matter how good the explanation for delay, an application for condonation should be refused.’

The submission that the court a quo had to consider the prospects of success irrespective of the unsatisfactory and unacceptable explanation for the gross and flagrant disregard of the rules is without merit.

- [10] When an applicant seeks to ascribe blame for a delay on the part of a legal or other representative, the courts have made clear that the applicant may not rest content in the knowledge that the representative concerned has been furnished with instructions – it is incumbent on the applicant to follow up and ensure that those instructions are being executed. There is a limit beyond which a litigant cannot escape the consequences of an attorneys lack of diligence (see *Salojee and another NNP v Minister of Community Development* 1965 (2) SA 135 (A)). An applicant in these circumstances must satisfy the court that none of the delay is to be imputed to him or herself.
- [11] There is a further consideration that must necessarily be taken into account, consequent on the publication of this court’s practice manual and recent amendments to the LRA. In the recent decision by Myburgh AJ in *Makuse v Commission for Conciliation Mediation & Arbitration and others* (2016) 37 ILJ 163, the court alluded to measures recently instituted to address systemic

delays, particularly in review applications. The practice manual records that a review application is 'by its very nature an urgent application. The practice manual also requires that all of the necessary papers in any review application be filed within 12 months of the date of the launch of the application. A review application is one that must necessarily be prosecuted with diligence and urgency. As the court observed, the corrective steps taken by this court and the legislature (in the form of the 2014 amendments to the LRA) the statutory imperative that labour disputes must be effectively and thus expeditiously resolved. What this requires is a strict scrutiny of condonation applications and an approach that affords due regard to the statutory purpose of expeditious dispute resolution.

- [12] The period of delay in the current matter is excessive, to say the least. The explanation for delay is manifestly inadequate – there are significant periods of the delay that are simply left unexplained, and in respect of those periods for which an explanation is proffered, that explanation is weak. For these reasons alone, the applicant's prospects of success are irrelevant, and the application for condonation stands to be dismissed.
- [13] Ordinarily, a matter such as the present would have been swiftly dealt with by way of an *ex tempore* judgment. The only reason that I have prepared a written judgment is to draw the attention of practitioners and others with right of appearance in this court to the abuse of this court's process that continues, notwithstanding prior indications from the Bench that given the court's limited resources and the backlogs that have built up (especially in relation to the motion rolls), consideration would be given to making punitive costs orders and orders to the effect that practitioners forfeit their fees where that is appropriate.
- [14] Judge Owen Rogers recently suggested that it is improper for counsel to act for a client in respect of claim or defence which is hopeless in law or on the facts. (Rogers O, 'The Ethics of the Hopeless Case' Advocate vol 30 number 3 December 2017. Although these assertions are directed primarily at counsel (the article having been published in the South African Bar Journal), the same

principles apply to attorneys, and indeed all those who have the right of audience before a court.) By this he means that counsel must be able to formulate a coherent argument comprising a series of logical propositions which have a reasonable foundation in law or on the facts and which, if they are all accepted by the court, will result in a favourable outcome, even if counsel believes that one or more of the essential links are likely to fail. But counsel acts improperly when she is 'quite satisfied' that one or more of them will fail. In particular, there is an ethical obligation on counsel, to ensure that only 'genuine and arguable' cases are ventilated, and that this be achieved without delay (at p 51).

- [15] What is significant about Judge Rogers' argument is his acknowledgement that there is no express or even implied prohibition against pursuing the hopeless case to be found in the General Council of the Bar's Uniform Rules of Professional Conduct. The obligation not to accept or pursue a hopeless case is located outside of the formal rules of professional conduct, in sources that include the court's power to stay those proceedings that amount to an abuse of process, the court's right to mulct a practitioner in costs (something that necessarily implies impropriety), and the founding values of the Constitution; in particular, effective, efficient and expeditious adjudication (at pp 49-50).
- [16] Recent experience in the Labour Court during a pre-enrollment assessment of opposed motion files awaiting the allocation of hearing dates suggests that a significant number of matters referred to the Labour Court are hopeless or unarguable cases, in the sense that Judge Rogers uses that term. In the Labour Court, the right of appearance extends beyond advocates and attorneys to officials of trade unions and employers' organisations. In my view, in respect of all those who enjoy right of appearance in the Labour Court, the same obligation (i.e. to refrain from pursuing a hopeless case) applies. The same penalties, in the form of punitive costs orders and orders that practitioners forfeit their fees) ought also to apply. The obligation owed by those who have the privilege of right of appearance in this court requires them in return to respect this institution and the statutory purposes of expeditious dispute resolution that it is statutorily mandated

to uphold. Section 162, which regulates orders for costs in this court, confers a discretion to make orders for costs, based on the requirements of the law and fairness. Those requirements, as I have stated above, compel practitioners and other representatives to refrain from referring hopeless cases to this court, and to place the interests of justice and of the court before the parochial interests of their clients and what might be seen to be a principle of partisanship that requires representatives to advance their clients' partisan interests with the maximum zeal permitted by law; and the principle of non-accountability, which insists that a representative is not morally responsible for either the ends pursued by the client or the means of pursuing those ends.

- [17] The present application is a hopeless case. The applicant's attorney ought never to have filed the application for review, or the application for condonation. He ought to have advised the applicant not to institute these proceedings, whatever the applicant's instructions may have been. The fact that the applicant consulted at least four other attorneys, all of whom for one reason or another declined to pursue a review application speaks volumes, and ought to have caused the applicant and his attorney to consider very carefully the merits of seeking to review the arbitrator's award in circumstances where any review would be filed years out of time. The founding values of the Constitution (in particular, the efficient and effective operation of an independent judiciary), and the purpose that underlies the LRA (the expeditious and efficient resolution of labour disputes and the promotion of labour peace) ought all to have obliged the applicant's attorney, as a matter of professional ethics and conduct, to have declined to file the review application, whatever the applicant's instructions.
- [18] The present application is unopposed, and the question of costs accordingly does not arise. In fairness to the applicant's attorney, I did not afford him the opportunity to make submissions on why he should forfeit his fees, and for that reason. I do not intend to make any such order. But those who appear in this court should be aware that in future, the pursuit of the hopeless case will attract consequences.

I make the following order:

1. Condonation for the late filing of the review application is refused.
2. The review application is dismissed.

André van Niekerk
Judge

REPRESENTATION

For the applicant: Mr Pillay, Pillay Thesigan Attorneys