**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

**JUDGMENT**

**Not reportable**

**CASE NO: JR 1376/15**

In the matter between

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| **NEHAWU obo YN MATIYANE** | **Applicant** |
| and | |
| **LARRY SHEAR *N.O*** | **First Respondent** |
| **CCMA** | **Second Respondent** |
| **LGSETA** | **Third Respondent** |

**Heard: 14 February 2019**

**Judgment delivered: 15 February 2019**

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**JUDGMENT**

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VAN NIEKERK J

[1] This is an application to review and set aside an arbitration award issued by the first respondent on February 2015. In his award, the first respondent (the arbitrator) upheld the applicant's dismissal by the third respondent. The review application was filed outside of the applicable statutory time limit, and the applicant seeks condonation for the late filing.

[2] The application for review was filed on 27 July 2015. In terms of s 145 of the LRA, the application was to have been filed within six weeks of the date of receipt of the award. The deponent to the founding affidavit in the review application, a union official, states that he received the award on 24 February 2015. The application ought therefore to have been filed by 7 April 2015. The period of delay is thus just short of four months.

[3] The court has a discretion, to be exercised judicially, to grant condonation. Among the factors usually relevant for consideration are the degree of lateness, the explanation therefor, the prospects of success, the prejudice that parties will suffer if condonation is granted or refused, and the importance of the case. None of these factors are individually decisive and the court must consider all the facts. In the final analysis, it is a matter of fairness to the parties. Condonation applications require a court to balance various interests and factors, having regard to all of them with none of them being decisive. (See *Melane v Santam Insurance Co. Ltd* 1962 (4) SA 531 (A) at page 532; *NEHAWU obo Mafokeng and Others v Charlotte Theron Children's Home* [2004] 10 BLLR 979 (LAC).

[4] In *Foster v Stewart Scott Inc.*(1997) 18 *ILJ* 367(LAC),the Labour Appeal Court noted the following as factors which have to be considered or taken into account in a condonation application:

> the degree of lateness or non-compliance with the rules;
> the explanation therefor;
> the prospects of success;
> the importance of the case;
> the respondent's interest in the finality of the judgment;

the convenience of the court; and

the avoidance of unnecessary delays in the administration of justice

[5] The principles were also summarised in *South Africa Post Office Ltd v CCMA & Others* [2012] JOL 28463 (LAC). In this case, the court recognised that ultimately the test is whether it is in the interests of justice to grant condonation. The court accepted that in matters where importance is placed upon the speedy and expeditious resolution of a dispute, even a short delay may not be excusable, unless an explanation is proffered that sets out the reasons for the delay which the Court should find acceptable. The court further held that:

> Where it is evident that the party seeking condonation has no prospects of succeeding in his principal claim or opposition, no purpose is served in granting condonation and the Court must in such circumstances refuse to grant condonation irrespective of the degree of delay or the explanation provided.

[6] In *National Union of Mineworkers v Council for Mineral Technology* [1998] (2) ZALAC 22, the LAC established the principle that given the extent of the delay and the poor explanation for the delay, it was not necessary to consider the applicant's prospects of success in the main application. This was affirmed more recently in *Collett v Commission for Conciliation, Mediation & Arbitration* [2014] 6 BLLR 523 (LAC) where the court stated 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 532 C-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 the delay, an application for condonation should be refused.'
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> 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."

[7] In the case of reviews, this matrix has been the subject of some modification, which requires the court to adopt a strict approach. These modifications were summarised by Myburgh AJ in *Makuse v Commission for Conciliation Mediation & Arbitration and others* (2016) 37 *ILJ* 163 (LC), where the court emphasised the statutory purpose of expeditious dispute resolution and the 'strict scrutiny' to which applications for condonation in review applications especially in the context of individual dismissals, ought to be subjected. Myburgh AJ concluded:

> The corrective steps taken by the Labour Courts as an institution and the legislature to ensure the expeditious prosecution and determination of review applications outlined above underscore the statutory imperative that labour disputes must be effectively (and thus expeditiously) resolved. And the strict scrutiny of combination applications relating to the late launching of s 145 review applications is very much part of this overall scheme of things.

[8] In the founding affidavit in the review application, the applicant seeks condonation despite having been advised that 'no need exists for a condonation application.' This advice appears to have been predicated on the view that the application had been brought within a reasonable time, and that the application had been 'actively pursued'. This view is clearly misguided. The review application had been filed late, condonation was required, and the facts do not disclose any degree of active pursuit of the matter. Indeed, a separate, substantive application for condonation was filed on 18 July 2017, almost exactly two years after filing the review application. In that application, the applicant makes out a case for condonation 'albeit that the application for review contains

a short application for condonation…' The founding affidavit is deposed to by Stuart Marshall, the union's national coordinator: legal. The deponent does not explain why a further condonation application was filed two years after the filing of the review. Much of the explanation for the delay concerns events that occurred after the filing of the review application, and has little bearing on the failure to file the review application within the prescribed time. The deponent avers that the review 'was indeed drafted and launched within the 180 days as referred to above'. Section 145 requires that a review application be filed within six weeks, and not six months, of service of the award. The affidavits filed in support of the application make clear that the union became aware of the award on 24 February 2015. To the extent that the deponent of the affidavit filed in support of the later application suggests that the award was only 'brought to the attention of the union and dealt with during the first part of April 2015', this is patently in conflict with the version that the award was received in February. The reasons for delay that relate to the fact of the applicant's residence in North West and her inability to travel , and her status as a lay person ignorant of the law, are specious, to say the least. The applicant at all times was assisted by the union. The union represented her at the arbitration hearing and represents her in these proceedings, to the extent that the founding papers are deposed to by union officials. The union's legal officials who dealt with the matter must have known that they had six weeks after receipt of the award to file any review, and they were no doubt able to draft what is a straightforward application. In any event, the account of delay fails to explain why it took almost four months from early April to the end of July to file the application. The explanation for an ordinate delay in filing the review application is wholly unsatisfactory. What the affidavits disclose is that the union officials concerned were either unaware of the statutory time limit applicable to review applications and that they were content to wallow in their ignorance, or that their affidavits are deliberately misleading.

[9] In regard to the prospects of success, these are not dealt with, as they are required to be, in the founding affidavits filed in support of the applications for

condonation. Instead, the court is left to determine any prospects of success by way of reference to the review application. This is unacceptable.

[10] In short: the delay in filing the review application is inordinate, and the explanation for it patently unsatisfactory.

[11] Strictly, in terms of the applicable authorities, the applicant's prospects of success are irrelevant in these circumstances, and the application stands to be dismissed. Even if I were to have regard to of the applicant's submissions in support of her contention that her prospects of success are good, the starting point in any application to condone the late filing of a review is the test to be applied. This court is empowered to intervene by way of review if and only if the arbitrator commits a reviewable irregularity that has the consequence of a reasonable result. It is not enough that the arbitrator came to a conclusion that the applicant contends is incorrect.

[12] The ground for review canvassed most vigourously during argument was that there was no workplace rule that the applicant had infringed, and that her dismissal was substantively unfair on that account. The arbitrator canvasses this issue in his award. He noted that the applicant had been charged with non-compliance with various regulations, a failure to maintain a database of suppliers, and the procuring of services from suppliers not recorded in the data base. The arbitrator noted that the applicant had elected not to testify at the arbitration hearing, but that she had not disputed the charges and submitted that she had not received adequate training, and that there were no policies in place. On the evidence before him, the arbitrator found that the requirements were inherent for the work to be done by a head of supply chain management in government. The requirements had been canvassed in the evidence given by a Mr Senwamadi, who specifically stated that the he was satisfied that the applicant knew what was required and what was to be done. I fail to appreciate how it can be said that on this undisputed version the arbitrator came to a conclusion that was so unreasonable that no reasonable person could come to it, when he decided that there were requirements applicable to the applicant's work and that she ought to

have taken steps to become proficient and efficient in the performance of her functions had she felt that there were gaps in her knowledge. In short, while it is strictly not a relevant consideration in the exercise of the discretion in relation to condonation, the applicant's prospects of success (such as they are) are not so overwhelming that they outweigh the significant period of delay and the poor explanation proffered for it.

[13] In so far as costs are concerned, the provisions of s 162 afford this court a broad discretion to make orders for costs according to the requirements of the law and fairness. The applicant has been represented throughout by a trade union, assisted by legally trained union officials. Union officials have right of appearance in this court, and they are thus expected to be familiar with the substantive principles of law and this court's procedures. The applications for condonation display a wholly inadequate understanding of both. In terms of s 162 ((3), the court is empowered to make an order for costs against any representative of any party. In my view, there is no reason why the union ought not to pay the costs of these proceedings.

I make the following order:

1. Condonation for the late filing of the review application is refused.
2. The review application is dismissed with costs, such costs to be paid by the National Education Health and Allied Workers Union.

André van Niekerk
Judge