THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

CASE NO: JR1069/17

In the matter between:

ARTHUR THABO PILANE **Applicant**

and

COMMISSIONER: SHAAM FRIEDMAN N.O. **First Respondent**

DISPUTE RESOLUTION CENTRE FOR

MOTOR INDUSTRY BARGAINING COUNCIL **Second Respondent**

SHAFI SERVICE STATION **Third Respondent**

Heard: 27 August 2019

Judgment delivered: 29 August 2019

JUDGMENT

VAN NIEKERK J

[1] This is an unopposed application to review and set aside an arbitration award issued by the second respondent (the arbitrator). In her award, the arbitrator found that the applicant had failed to establish acts of unfair labour practices that he alleged the respondent had committed and dismissed the applicant's referral to arbitration.

[2] The arbitration award was issued on 25 April 2017. The present application was filed only on 28 March 2018 almost a year later. The applicant has sought condonation for the late filing of the review application.

[3] 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* [2014] 1 BLLR (CC)). 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.

[4] 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.

[5] 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.

[6] This principle was 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:
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> > '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.'
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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 review applications, 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 *Makuse v CCMA & others* [2015] 12 BLLR 1216 (LC), Myburgh AJ alluded to the measures instituted to address systemic delays, particularly in review applications. The practice manual, introduced in April 2013, 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. 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.

[8] In the present instance, the applicant states that he received the award on 22 May 2017. The application was filed some 37 weeks (or nine months) late which by any account, is an excessive delay. The explanation proffered for the delay is one which is primarily to the effect that the applicant is a layperson and had difficulty, in the absence of legal skills and legal representation, in complying with the prescribed time limit. The applicant states that he approached the pro bono office as early as June 2017, where he was advised that he had no prospects of success. Undeterred by this advice he proceeded to obtain the records of the hearing under review and preparing the application and to seek further advice from other sources. While I accept that the applicant genuinely attempted to process the application as best he could with the resources at his disposal, the explanation that he has provided is simply not adequate given the extent of the delay. In terms of the principles referred to above, that disposes of the application for condonation. However, even if I were to give consideration to the applicant's prospects of success, in my view, these are minimal if they exist at all. In essence, the arbitrator rejected the applicant's contention that the respondent had committed various unfair labour practices. Central to the applicant's complaint was that he was not given overtime work, that he was discriminated against, and that the respondent unilaterally changed his terms and conditions of employment. It should be recalled that in the definition of unfair labour practice contained in s 186 (2) of the LRA, an unfair labour practice is defined in specific terms. It is a closed list, and does not admit of all and any grievance that an employee might have against his or her employer. It does not contemplate acts

of discrimination (these must be brought in terms of the Employment Equity Act), nor does it contemplate unilateral change to terms and conditions of employment. To the extent that the applicant's complaints relate to his hours of work, these are matters regulated by the Basic Conditions of Employment Act and not the unfair labour practice. In short, the applicant did not establish in the course of the arbitration hearing that the respondent was guilty of any of the specific acts that are listed in s186 as potentially comprising unfair labour practices, and the arbitrator was not unreasonable in coming to the conclusion that she did.

[9] In summary: the present application was filed inordinately late, with no satisfactory explanation for the delay and in circumstances where the applicant's prospects of success are poor. It follows that condonation stands to be refused.

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: In person