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

**JUDGMENT**

**Not reportable**

**CASE NO:JS 377/14**

In the matter between:

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| **NATIONAL UNION OF MINEWORKERS** | **First Applicant** |
| **PETRUS MNISI** | **Second Applicant** |

and

| | |
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| **COMMISSION FOR CONCILIATION** | |
| **MEDIATION AND ARBITRATION** | **First Respondent** |
| **HAROLD NTALE MATSEPE N.O** | **Second Respondent** |
| **MODIKWA PLATINUM MINES** | **Third Respondent** |

**Heard: 9 October 2019**

**Judgment delivered: 11 October 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 second respondent (The arbitrator). In his award, the arbitrator found that the second applicant (the employee) had been fairly dismissed by the third respondent, but for the third respondent's failure to afford the employee the opportunity to place mitigating factors before the chairperson of his disciplinary hearing. Although he found that this omission amounted to an act of procedural unfairness, the arbitrator elected to make no order of compensation in that regard.

[2] The review application was filed late. The award was received on 11 March 2014, and the review application filed on 20 May 2014, 26 days late. The applicants have applied for condonation.

[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. Further, the applicant must provide an explanation that covers the full period of the delay, in terms that are comprehensive and convincing (see *eThekwini Municipality v Ingonyama Trust* 2013 (5) BCLR 497 (CC)).

[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.'
>
> 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 in review applications and an approach that affords due regard to the statutory purpose of expeditious dispute resolution.

[8] In the present instance, the delay is not minimal but it is not excessive. The explanation for the delay is based on internal union procedures for the assessment of cases, the instruction of attorneys and the filing of legal process. The deponent to the founding affidavit in the condonation application states that the union's regional office received the award and consulted with the national office. A consultation with the employee followed, after which instructions were received to proceed with the review. The union's legal department was notified of this decision in mid- April 2014. The matter was allocated to an official at the union's head office and 'an instruction was then given to our attorney of record, hence the review application was filed outside of the requisite time periods.'

[9] The applicants seek to expand on the explanation for delay in the replying affidavit by including further detail, but that is not the time nor is it the place to make out a case. The applicants are obliged to make out their case for condonation in their founding affidavit, and the case must stand or fall on that basis. The explanation that has been proffered for the delay is not one that takes the court into the applicants' confidence. There is no indication as to what precisely transpired after mid-April, when the statutory period had not yet expired. At that point, it will be recalled, the union had been notified of the instruction to review the award. There is no detailed explanation as to the dates on which the matter was allocated to the Union's head office for assessment, when that assessment was concluded, when an instruction was given to the applicants' attorney of record to draft the application, and the period required for

taking instructions and drafting. Although the applicants acknowledge in their founding affidavit that it is incumbent on them to 'state in detail and/or account for each lapse of period', they simply fail to do so.

[10] All of the parties involved in the drafting of the application after the instruction was given in mid-April are either legal professionals or union officials. They must have been aware of the six-week time limit, and that there was a degree of urgency required. That notwithstanding, they appear to have litigated at their leisure.

[11] Strictly, in the absence of an acceptable explanation for a delay that exceeds what would be considered minimal, it is not necessary for the court to canvass the applicants' prospects of success. Again, the applicants acknowledge that they must satisfy the court that the employee was dismissed and that his dismissal was unfair. However, the deponent then submits that 'I need not necessarily have to dwell much on the prospects of success based on the fact that the applicant dismissal is not disputed by the respondent. As a result the respondent does not bear the onus to proof that the dismissal was fair (sic).'

[12] This entirely misconceives what is required of the applicants in an application for condonation. The applicants are required to established that they have at least some *prima facie* prospects of success in the review application. The onus of proof in a dismissal dispute is entirely irrelevant – the main application is a review application in which the applicants are required to establish that the arbitrator committed a reviewable irregularity and that his award is so unreasonable that no reasonable decision-maker could come to it. The applicants proffer nothing to establish that they have prospects of success on review. Even if I were to have regard to the papers filed in the review application and assess the applicants prospects of success from this perspective, I am not persuaded that they are such that the delay and poor explanation for it are outweighed. The starting point is the onerous hurdle that faces an applicant in a review application. The applicant is required to establish a reviewable irregularity that had the

consequence of a decision that falls outside of a band of decisions to which reasonable decision-makers could come on the available material. In essence, the irregularity averred by the applicants relates to the weighing of the evidence. The arbitrator was confronted with two mutually exclusive versions, and for reasons that he articulated, he decided that the third respondent's version was the more probable. There is nothing inherently irrational or unreasonable about that conclusion or its consequence, i.e. the decision that the employee has committed an act of serious misconduct. A reviewing court must necessarily no interfere too readily with credibility findings made by arbitrators. In so far as the applicants rely on the arbitrator's conclusions in relation to procedural fairness, a finding of procedural unfairness does not automatically entitle an applicant to compensation. This is especially so where, as in the present case, the employee failed to lead evidence as to which mitigating circumstances he wished to place before the chairperson of the disciplinary enquiry. In matters (such as the present) where the ground for review amount to no more than a broad-based attack on the arbitrator's assessment of the evidence, credibility findings and determination of where the probabilities lie, a reviewing court must be particularly cautious not to stray into the area reserved for appeals. Equally, applicants must avoid dressing up what are in essence appeals as reviews. In short, the prospects of success in the present instance are not such so as to ignore an inadequate explanation for the delay. In short: the applicants' prospects of success are minimal, if they exist at all.

[13] Finally, I must take into account that the award under review was issued some 5 and a half years ago. The interests of justice would not be served by the review being heard, with the prospect of the matter being remitted to the CCMA for rehearing (as the applicants' counsel urged me to do). In my view, the interests of expeditious dispute resolution and finality trump, and condonation thus stands to be refused.

[14] The third respondent left the issue of costs in the court's hands. In this court, costs do not necessarily follow the result. For the purposes of s 162 of the LRA,

the interests of the law and fairness are best satisfied by there being no order as to costs.

I make the following order:

1. Condonation for the late filing of the review application is refused.
2. The review application is dismissed.
3. There is no order as to costs.

André van Niekerk
Judge

REPRESENTATION

For the applicant: Adv. Phkubje instructed by Moseamo Papola Inc

For the respondent: Adv. A Makka instructed by Cliffe Dekker Hofmeyr