THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Case no: JR 1127/17

In the matter between:

SAPU obo MAKGETSI ROSINAH SEKATI **Applicants**

and

S SITHOLE N.O. **First Respondent**

SSSBC **Second Respondent**

SAPS **Third Respondent**

CHRISTINA SMITH **Fourth Respondent**

Heard: 25 October 2019

Judgment: 29 October 2019

JUDGMENT

VAN NIEKERK J

[1] The applicant seeks to review and set aside an arbitration award issued by the first respondent (the arbitrator). In his award, issued on 30 September 2016, the arbitrator dismissed a claim by the applicant that she had been subjected to an unfair labour practice in relation to promotion.

[2] The arbitration award was received on 30 September 2016. The review application was filed only on 15 June 2017. The applicant accepts that the application was filed some 216 days late, an inordinate delay by any account.

[3] The general principles to be applied are well-established. 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] The applicant for condonation must offer an explanation for the full length of the delay (see *Independent Municipal and Allied Trade Union obo Zungu v SA Local Government Bargaining Council and others* (2010) 31 *ILJ* 1413 (LC)). In *eThekwini Municipality v Ingonyama Trust* 2013 (5) BCLR 497 (CC), the Constitutional Court said the following:

> In a case where the delay is not a short one, the explanation given must not only be satisfactory but must also cover the entire period of the delay. Thus in *Van Wyk v Unitas Hospital and another (Open Democratic Advice Centre as Amicus Curiae),* this Court said in this regard:
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> > 'An applicant for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of the delay. And, what is more, the explanation given must be reasonable. The explanation given by the applicant. Short of these requirements. Her explanation for

the inordinate delay is superficial and unconvincing.

[8] Where 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 a representative's 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. What this requires is that the applicant follow up to ensure that his or her instructions are being executed, or to take steps to file a review application on his or her own behalf. They are pro forma documents available to applicants for this purpose. In short, the applicant in such circumstances must satisfy the court that none of the delay is to be imputed to him or herself (see *Mashishi v Mdladla* (2018) 39 *ILJ* 167 (LC)).

[9] 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.

[10] In the present instance, the period of delay, as I have noted, is excessive. The explanation for the delay is one that seeks to attribute blame to the applicant's representatives. First, she states that she advised her union representatives that she was not happy with the award and instructed him to arrange for the award to be reviewed. On 31 October, the union representative sent a letter to the union's provincial office. It was only on 23 November 2016 that the provincial office sent a letter to the national office. On 17 January 2017, the national office sought an opinion from the applicant's attorneys of record. They replied on 23 January 2017 requesting a legible copy of the award and a summary of events that led to the award. This was done on 30 January 2017 when was sent to the attorneys. On 10 February 2017 the applicant's attorneys of record received an email from the union's national office requesting a briefing. The consultation was duly arranged on 19 May 2017 but took place only on 22 May 2017. During that meeting, the attorney requested information that was not readily available – that information was finished to him on 26 May 2017. On 13 June 2017, drafts of both reviewed condonation application was sent to the union official for consideration.

[11] The explanation, as I have indicated, is one that centres on the failure by the applicant's union representatives and attorneys of record to pursue the review application with due diligence. The applicant has furnished no substantive explanation for why she failed to follow up on the instruction that she had given more than once during the course of the period of delay. Further, there are periods of delay for which no explanation is proffered. These include the periods 31 October 2016 to 23 November 2016; 29 November 2016 to 17 January 2017; and 10 February 2017 to 9 May 2017. Further, the applicant has been assisted throughout by an experienced trade union official and about professional legal practitioners. By mid-November 2016, they must have known that the six-week statutory time limit was to expire. By the time the union's provincial office sent a letter to the national office seeking permission to review the award, it was already out of time this notwithstanding, both the union and the attorneys thereafter did not act with due diligence and indeed, conducted themselves as if the time limit

in s 145 did not exist. The applicant was poorly served by her advisers, but her failure to make persistent enquiries as to progress in the matter and to ensure that her instructions were being attended to with diligence render her explanation for the delay unsatisfactory.

[12] In the absence of a satisfactory explanation for an inordinate delay in filing the review application, it is not necessary for the court to have regard to the applicant's prospects of success. Insofar as both parties raised the issue of prejudice, the applicant's counsel submitted that the merits of the case raised issues related to transformation and that it was in the broader public interest for the arbitrator's findings to the subject of review. On the other hand, the respondents counsel placed emphasis on the right to finality, and submitted that it was not in the interests of justice for the matter to be remitted for rehearing (the remedy sought by the applicant) in circumstances where the events that were the subject of the dispute took place more than five years ago. In my view, the issues raised during the course of the arbitration are not such that their importance to the public interest outweighs the statutory purpose of expeditious dispute resolution. If the applicant had at the relevant time accorded the matter the importance she now wishes to attach to it, the application would have been served within the prescribed time limit.

[13] Finally, in relation to costs, the court has a broad discretion to make orders for costs according to the requirements of the law and fairness. While I appreciate that the parties to the present dispute are collective bargaining partners, the present case is not one that stands to prejudice any collective bargaining relationship between them. This court is inundated by review applications, many of them filed way beyond the prescribed time limit. Parties ought to be discouraged from pursuing applications in those circumstances, save in the most exceptional circumstances. This case does not fall into that category. In my view, the requirements of the law and fairness are best served by the applicant paying the third respondent's costs.

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

APPEARANCES

For the applicant: Adv. R Tulk, with her Adv. A Karim, Instructed by Thapelo Kharametsane attorneys

For the third respondent: Adv. S Tilly, instructed by the state attorney.