

THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not reportable

Case no: PR 110/14

In the matter between:

**JE FIKILE
AND 16 OTHERS**

Applicants

and

MINISTER OF ROADS AND TRANSPORT

First Respondent

**MEC FOR THE DEPT OF ROADS AND
TRANSPORT, EASTERN CAPE**

Second Respondent

GPSSBC

Third Respondent

PI DHLODHLO N.O

Fourth Respondent

Heard: 22 August 2019

Judgment: 23 August 2019

JUDGMENT

VAN NIEKERK J

- [1] The applicants seek to review and set aside an arbitration award issued by the fourth respondent (the arbitrator). In his award, issued on 23 September 2013, almost 6 years ago, the arbitrator held that the third respondent (the bargaining council) had no jurisdiction to arbitrate a dispute between the parties. The applicants had referred an unfair labour practice dispute to the bargaining council concerning what was alleged to be an unfair promotion.
- [2] The review application was filed only on 30 July 2014 in circumstances where the notice of motion was dated 5 May 2014, the founding affidavit signed on 9 May 2014 and the application served on the state attorney on 6 June 2014.
- [3] The applicants' representative states that he received the award on 10 November 2014. The review application ought therefore to have been filed on or about 22 December 2014. It was filed some seven months late. On the same date that the review application was filed, 30 July 2014, the applicants filed a discrete application seeking condonation for the late filing of the review. The first and second respondents, who oppose the review, have not filed an answering affidavit in the condonation application but they oppose the granting of condonation.
- [4] 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.
- [5] 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.

- [6] 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.

- [7] 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:

'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.

- [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 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.
- [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] As I have indicated, in so far as the degree of lateness is concerned, the application for review was filed some seven months late. By any account, this is an inordinate delay. The essence of the explanation for the delay in filing the review application is one in which the applicant's erstwhile attorney records that she was on sick leave from 12 November 2013 to 15 November 2013 and consequently incapacitated. She eventually consulted with the applicants on 20

November 2013, and further consultations became necessary. The logistical arrangements for these meetings was made more difficult by the applicants having to travel a long distance to meet with their attorney. The attorney was instructed to brief counsel which she did in early December 2013. Counsel sought additional documentation which was acquired in mid-December 2013. Little of any moment occurred until mid-January 2014 on account of the holiday season, and it was only towards the end of January that counsel was instructed to prepare the necessary review application. The attorney states that the possibility of avoiding any delays was expressly discussed. Be that as it may, a consultation with counsel was arranged only on 3 March 2014 and discussion centred around the prospect of briefing a more senior counsel to settle the draft papers that were in the process of being finalised. On 26 March 2014, senior counsel furnished a memorandum of advice and meetings were held between the senior and junior counsel to further discuss the matter. On 31 March 2014, the applicant's attorney received a copy of the draft papers for the attention and consideration. It was decided that amendments to the papers were necessary and these were made during the course of early May. This is the extent of the applicants' explanation.

[11] The explanation is not satisfactory. First, the explanation extends only to early May 2014 and thus fails to cover the full period of the delay. There is no explanation for the significant period of delay between early May 2014 and 30 July 2014 when the papers were eventually filed. The delay here is one of some three months. The applicants' legal representatives must have been aware of the six-week time limit that applies to review applications. Indeed, they must have been aware since late December 2013 that the application was already out of time. That notwithstanding, there appears to be no sense of urgency demonstrated by the conduct of the applicant's representatives, who clearly prepared the application for review as if the applicable time limit did not exist.

[12] While it may be argued that the significant gaps in the explanation for the delay

that has been proffered should be overlooked since it was not the fault of any of the individual applicants, I must necessarily have regard to the fact that there is nothing on record to suggest that any of the applicants made any regular enquiries as to progress in the matter, or took any steps to expedite the filing of the review or to ensure that their instructions were being executed.

- [13] In the absence of a satisfactory explanation for an excessive delay, the application for condonation stands to be refused. In accordance with the principles elaborated above, the applicant's prospects of success in the main application are immaterial.
- [14] What counts against the applicants in the present instance more than any other factor is the prejudice that would be caused to the first and second respondents should condonation be granted and the review application proceed. This matter has its roots in events that occurred in 1996. Indeed, in their referral to the bargaining council, the applicants claim back pay to July 1996, more than 23 years ago. The dispute was referred to arbitration only in April 2013. The ruling that the applicant seeks to review, as I have indicated, is dated 23 September 2013. If the review were to succeed and the matter were to be remitted to the bargaining council for rehearing, some six years would have elapsed without any substantive progress in the resolution of the dispute. To grant condonation would fly directly in the face of the stated statutory purpose of expeditious dispute resolution. The interests of justice require finality.
- [15] Finally, for the purposes of s162, the interests of the law and fairness are best satisfied by there being no order as to costs.

For the above reasons, 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 OF THE LABOUR COURT

APPEARANCE

For the Applicants: Adv J Grogan, instructed by Matthew Moodley Attorney

For the first and second respondents: Adv I Lamprechts, instructed by the state attorney.