

**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG****Case No JR 1063/19****Not reportable****MALUTI-A- PHOFUNG LOCAL MUNICIPALITY****First Applicant****MALUTI -A- PHOFUNG WATER SOC LTD****Second Applicant****MOSES MOREMI N.O****Third Applicant****BLAKE MOSLEY-LEFATOLA****Fourth Applicant****MOKETE VICTOR DUMA****Fifth Applicant****and****SOUTH AFRICAN MUNICIPAL WORKERS****UNION (SAMWU)****First Respondent****SOUTH AFRICAN LOCAL GOVERNMENT****BARGAINING COUNCIL (SALGBC)****Second Respondent****THE INDEPENDENT MUNICIPAL AND ALLIED****TRADE UNIONS (IMATU)****Third Respondent****SOUTH AFRICAN LOCAL GOVERNMENT****ASSOCIATION (SALGA)****Fourth Respondent**

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| <b>JOSEPH DLENGEZELE</b>                                         | <b>Fifth Respondent</b>       |
| <b>PM VENTER N.O</b>                                             | <b>Sixth Respondent</b>       |
| <b>VUYO BASHILO N.O</b>                                          | <b>Seventh Respondent</b>     |
| <b>JANA DELL N.O</b>                                             | <b>Eight Respondent</b>       |
| <b>COMMISSION FOR CONCILIATION<br/>MEDIATION AND ARBITRATION</b> | <b>Ninth Respondent</b>       |
| <b>MASILO KOENANE N.O</b>                                        | <b>Tenth Respondent</b>       |
| <b>MOTHUSI MOJE N.O</b>                                          | <b>Eleventh Respondent</b>    |
| <b>GERT VAN DER BERG N.O</b>                                     | <b>Twelfth Respondent</b>     |
| <b>NEO RAMPAI N.O</b>                                            | <b>Thirteenth Respondent</b>  |
| <b>ADV LUCAS MABUSELE N.O</b>                                    | <b>Fourteenth Respondent</b>  |
| <b>JANA BURGER N.O</b>                                           | <b>Fifteenth Respondent</b>   |
| <b>SURIA VAN WYK N.O</b>                                         | <b>Sixteenth Respondent</b>   |
| <b>MOKATI,LIZA</b>                                               | <b>Seventeenth Respondent</b> |
| <b>NTHABISENG MOKOENA</b>                                        | <b>Eighteenth Respondent</b>  |
| <b>NTHABISENG MOFOKENG</b>                                       | <b>Nineteenth Respondent</b>  |
| <b>In re:</b>                                                    |                               |
| <b>SAMWU obo KHASEBE//MALUTI-A- PHOFUNG-</b>                     | <b>Case No.J3927/18</b>       |
| <b>SAMWU obo TSHABALALA//MALUTI-A-PHOFUNG-</b>                   | <b>Case No.J03/19</b>         |
| <b>IMATU obo NTEMA//MALUTI-A-PHOFUNG -</b>                       | <b>Case No. J4515/18</b>      |

**Heard: 11 December 2019**

**Judgment delivered: 31 January 2020**

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**JUDGMENT**

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**VAN NIEKERK J**

- [1] This is not the first time that the labour-related consequences of a dysfunctional municipality have featured in this court, nor is it likely to be the last. The first applicant is a municipality established under the Municipal Structures Act, 117 of 1998. The municipality was placed under administration on 10 February 2018. It is not in dispute that the municipality is under administration on account of adverse findings in a report prepared by the Department of Co-operative Governance and Traditional Affairs and the Free State Treasury into a state of affairs that included labour unrest, an inability to pay creditors, non-billing for municipal services and numerous civil claims, all of which placed service delivery and the municipality's financial viability at risk.
- [2] In these proceedings, the municipality seeks to review and set aside a number of arbitration awards issued against it. The application was filed on 20 May 2019, more than a year after the municipality placed under administration. In essence, the administrator seeks to have arbitration awards issued prior to the date on which he was appointed reviewed and set aside, and settlement agreements concluded in the same period. I have had some difficulty in establishing exactly which awards are the subject of review, a task that has not been made any

easier by the filing of a supplementary affidavit in terms of Rule 7A (8) in which a number of awards not referred to in the founding affidavit are sought to be reviewed, and a number of settlement agreements reached under the auspices of the second respondent (the bargaining council) set aside, in circumstances where none of them are referred to in the founding papers.

- [3] Specifically, in the founding affidavit, the applicant seeks to review and set aside the following arbitration awards, in each case the first applicant in these proceedings being the respondent. These are FSD 111702 *SAMWU obo Kasebe & 189 others* (issued 9 March 2018), FSD 051510 *MM Selepe & 13 others* (issued 8 September 2015), FSD 051511 *MN Sikosana & 52 others* (issued 21 October 2015), FSD 031502 *SAMWU obo Tsoeu Paul Mokomatsili* (issued 3 June 2015) and FSD 011502 *Thusliele Doris Mlangeni*, (issued on 31 May 2015). The supplementary affidavit in terms of Rule 7A (8) was filed in mid-October 2019, some five months after the application was filed, the supplementary affidavit was filed, refers to 13 further awards that the applicant seeks to review and, to the extent that any of those awards have been certified in terms of s 143 of the LRA, to have that certification nullified, rescinded and/or set aside. Further, there is reference to 10 matters that served before the bargaining council, the applicant seeks to have the settlement agreements that were made arbitration awards in each instance declared null and void, and set aside.
- [4] The grounds for review on which the applicant relies are broadly the municipality's status as a creature of the Constitution, subject to legislation regulating local government. In broad terms, the applicant avers that the Constitution requires municipalities to structure and manage their administration, budgeting and planning processes so as to give priority to the basic needs of the communities they serve, and to promote social and economic development in that community. Further, municipalities are required to put in place systems and to ensure the effective, efficient and transparent use of resources. Municipalities are further obliged to exercise executive and legislative authority so as to provide

for democratic and accountable government and to ensure that municipal services are provided to local communities in a financially and environmentally sustainable manner.

- [5] In essence, the applicant contends that in the light of statutory demands, the applicant developed and approved staff establishments and adopted policies on the recruitment, selection and appointment of employees. In respect of each of the awards sought to be reviewed, the applicant contends that the arbitrators concerned failed to consider the legislative and policy framework applicable to the human resources management within the municipality, failed to take into account relevant considerations, made awards that were contrary to the 'tenets and precept of just and equitable local government laws', and acted in a grossly negligent manner. The applicant submits that the awards concerned ought to be reviewed (and where they have been certified, the certification rescinded) because they were obtained in a manner that is inconsistent with fairness, lawfulness and because their implementation would be contrary to public policy. In relation to the settlement agreements that the applicant seeks to have set aside, the applicant contends that these agreements were entered into on behalf the first applicant by a former labour relations officer who was not authorised nor delegated to offer settlements, at least without the prior written approval of the first applicant.
- [6] The review application was filed late. The case for condonation is made out in the founding affidavit where the applicants acknowledge that it 'might have taken some time to bringing this review application (sic)'. That is an understatement. All but one of the arbitration awards sought to be set aside in terms of the original notice of motion were issued in 2015. Only one award was issued in March 2018, some one year and two months prior to the filing of the review application in May 2019. In most instances, the delay exceeds four years from the date on which the impugned outcomes were issued or became available. The delay is ascribed to the complexities of the problems with which the intervention team has had to

grapple. The intervention team was appointed in February 2018 by the provincial member of the executive council for COGTA in terms of s139(1)(b) of the Constitution with a mandate to resolve labour disputes, restore good governance and sound management practices ensure compliance with collective agreements, address anomalies and inconsistencies relating to the irregular transfer of staff, illegal appointments of staff and fraudulent elevation of post levels by the previous municipal management. The applicants aver that the irregularities at the municipality were only discovered after the appointment of the intervention team. The deponent states that it took some five months to 'acclimatise' and receive all the relevant records and information relating to the municipality's legal and labour relations challenges. Some matters had to be referred for independent legal advice and a lack of financial resources, intervening legal actions and the attachment of equipment including laptops, computers and other critical movable assets led to delays in issuing proper instructions. Further, the intervention team sought to engage with the unions but no agreement could be reached on the policy applications proposed by the applicants. In these circumstances, the applicants submit that there was no wilful default and the like, and that the prospects of success on the merits of the review, overwhelmingly exceed any defect in the explanation of the delay and that in these circumstances, condonation ought to be granted.

- [7] In the answering affidavits, the first and third respondents (the union's) that the applicants dispute that the applicants have made a case for condonation, and contend that condonation ought properly to be refused.
- [8] 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.

[9] 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.

[10] 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.

[11] 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.

- [12] 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 *eThekweni 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:

'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.

- [13] 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.

- [14] The delay in seeking the review of all of the awards sought to be set aside is excessive. The explanation for the delay is generic and fails to account for the full period of the delay in each case. In a nutshell, the applicants' case is that they inherited a mess of considerable proportions, that it has taken more than a year to appreciate the scope of the problem and to identify specific arbitration awards and settlement agreements that they contend are reviewable and/or invalid and should never have been granted, and that an appeal to constitutional obligations is sufficient to trump any of the difficulties posed by the need for condonation. This submission has no merit. In essence, a new management team seeks to undo what it considers were the shortcomings and misdemeanours of the old. The application is a mass review, directed at undoing a history of outcomes never the subject of challenge at the time. Although the alleged irregularities were discovered after the appointment of the intervention team, there is no clear and concise explanation as to why it took a year and three months to bring a handful of cases to court in May 2019, and the bulk in November 2019, the latter without any discreet application for condonation. On this basis alone, condonation stands to be refused.
- [15] To the extent that the applicant's prospects of success are relevant, the first and third respondents have raised a number of preliminary issues which, the failure to make out a proper case for condonation aside, would in in any event result in the main application being dismissed. First, the respondents contend that in the amended notice of motion dated 14 October 2019, the applicants have impermissibly amended the original notice of motion to include an additional

applicant and nine additional respondents in the headings of both the amended notice of motion in the supplementary affidavit. What this amounts to is an apparent joinder of those parties in the absence of any application having been brought in terms of Rule 22 for the proper joinder as parties. Further, it does not appear from the amended notice of motion that service of the supplementary affidavit was effected on the additional parties. Secondly, there is no application to condone the late filing of the supplementary affidavit. On the applicant's own version, the review record was provided by the bargaining council on 21 June 2019. Paragraph 11.2.1 of the practice manual requires the applicant to collect the record within seven days of being notified by the registrar that the record has been received. The applicants were then afforded 10 days after the registrar had made a record available within which to deliver a Rule 7A (8) notice and accompanying affidavit. The amended notice of motion and supplementary affidavit were delivered only on 17 October 2019, with no application for condonation. In these circumstances, the amended notice of motion and supplementary affidavit are not properly before the court. Further, in terms of the recently amended s 145(5) of the LRA, the applicant was required to apply for a date for the matter to be heard within six months of delivering the review application. The applicant has failed to do so. Further, in respect of the recently amended s145(8) the applicant was required to furnish security to the satisfaction of the court in accordance with that provision. No security has been furnished, nor has any exemption from the requirement to furnish security being sought. Finally, and on the assumption that the supplementary affidavit filed in terms of Rule7A (8) is properly before the court, it is not permissible for an applicant in a review application simply to include in that affidavit original awards and, as in this case, settlement agreements, within the scope of review. The purpose of the supplementary affidavit is to supplement that any grounds for review recorded in the founding affidavit in respect of which a specific arbitration award is sought to be reviewed. Should an applicant wish to seek the review of additional awards and/or settlement agreements, that review ought to be the subject of separate review proceedings, as opposed to being included for the first time in the notice

and accompanying affidavit contemplated by Rule 7A (8). In short, and to the extent that the merits of the main application are relevant to the exercise of the discretion to grant or refuse condonation, the applicant's prospects of success in the main application are minimal, if they exist at all. Condonation for the late filing of the application for review thus stands to be refused.

- [16] The court has a broad discretion in terms of s 162 to make orders for costs according to the requirements of the law and fairness. The court conventionally does not make orders for costs in circumstances where collective bargaining partners are in dispute, particularly where the effect of the order may be to compromise the collective bargaining relationship between the parties. In the present instance, the parties are collective bargaining partners. The present dispute arises from circumstances that are to say the least unfortunate, and in all probability, the result of forces that are numerous and various and over which none of the parties may have direct control. It seems to me that the interests of the law and fairness are best satisfied by each party paying its 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

#### APPEARANCES

For the Applicant: Adv M Mathaphuna, with Adv Ngwana and Adv Mahlase

instructed by Bokwa Inc

For the Respondent: Adv S Grobler SC, instructed by Kramer Weihmann & Joubert  
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Labour Court