

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR421/2018

In the matter between:

NDODA DOCTOR MABUZA

Applicant

and

**SOUTH AFRICAL LOCAL GOVERNMENT
BARGAINING COUNCIL**

First Respondent

FAITH GUMEDE, N.O.

Second Respondent

MBOMBELA LOCAL MUNICIPALITY

Third Respondent

Heard: 8 January 2020

Delivered: 05 February 2020

**Summary: Application for the review and setting aside of a ruling rendered by the
Second Respondent acting under auspices of the First Respondent.**

**Principles – condonation and review not met. Application dismissed
with no order as to costs**

JUDGMENT

RAMDAW, AJ

Introduction:

[1] This is an application by the Applicant against the First, Second and Third Respondents in terms of which the Applicant seeks an order, *inter alia* in the following terms:

‘1.1 That the Rescission Ruling rendered by the Second Respondent’s acting under the auspices of the First Respondent on 23 February 2018, Ref. MPO 121203 be reviewed and set aside.

1.2 That the First Respondent is directed to set the matter down for arbitration within 30 days of the date of a court order.

1.3 That the costs of this application be paid by the Respondents

1.4 Further or alternative relief.'

- [2] The Application was dated 26 March 2018 and was served and filed on 9 April 2018. The same is opposed by the Third Respondent.
- [3] The rescission ruling by the Second Respondent was dated 23 February 2018. The same dealt with a ruling issued on 10 April 2013, some five years later, when the Applicant failed to attend the arbitration proceedings set down on 8 April 2013. The same was opposed by the Third Respondent who filed an answering affidavit.
- [4] The Applicant filed an application for condonation and conceded that his application is four years, five months and twenty four days late. He complained of his union representative passing away and SAMWU not assigning another person to assist him. Furthermore, that the First Respondent did not have an office in the province where he lived and that the nearest office was in Pretoria, some 300 km away which attributed to the delay in bringing this application. He also stated that he did not have the financial resources to engage the services of an attorney up and until his family assisted him to do so.
- [5] The Third Respondent in its answering affidavit stated that the Applicant failed to substantiate his application by asserting that he has a good defence and that he did not explain the long delay of over four years in bringing his rescission application. Furthermore, that proper notice of the set down of the arbitration was served on the Applicant per fax 086 762 5221 on 8 March 2013. In other words, the Third Respondent challenges the excessive delay and the failure by the Applicant to address the issue of prospects of success.
- [6] The Second Respondent per a written ruling dismissed the rescission application

and stated *“I find that the Applicant has not shown “good cause”* for this application to be rescinded or the late referral to be condoned. She refused to rescind her dismissal ruling of 10 April 2013 and made no order as to costs. The Applicant seeks to review and set aside this ruling on the grounds as set out in the founding affidavit.

- [7] Both parties filed elaborate heads of argument. However, the Third Respondent’s counsel failed to attend court to present his heads of argument.
- [8] The test to be followed for the rescission of an arbitration award or ruling has been clearly set out in numerous decisions of this Court and the Constitutional Court.
- [9] The Applicant has to show that there are reviewable defects on the aforesaid ruling and that this Court should review and set aside the same.
- [10] In an application for rescission the reasons for the delay or lateness and as well as the prospects of success need to be clearly set out. In considering such an application, the Court will exercise its discretion having taken into account the degree of lateness, the explanation thereof, the prospects of success and the importance of the case. These factors are interrelated and they are not individually decisive. Furthermore, one can give the best reasons for the delay but without fair prospects of success, the application for condonation will fail and vice-versa.
- [11] There has been a considerable delay by the Applicant in bringing his application for rescission, which is some four and a half years late. On or about 15 May 2013 the Applicant’s union representative from SAMWU indicated that he was bringing an application for rescission which he never did. On or about 6 November 2017 the Applicant was assisted by his current attorneys to file the application for rescission. The Third Respondent opposed this application.

[12] The Court in *Melane v Santam Insurance Company Ltd*¹ sets out very clearly and crisply the requirements for a condonation application. The Supreme Court of Appeal (SCA) in *Colyn v Tliger Food Institutions Ltd, T/A Meadow Feed Mills Cape*² endorses this approach. The Applicant has to show good cause by:

12.1 Giving a reasonable explanation for or cause for, the delay and explaining each step of the delay.

12.2 By showing the prospects of success;

12.3 Dealing with the importance of this case as well as the prejudice should the application be dismissed;

12.4 Dealing with the effect of the delay in the administration of justice.

[13] In the unreported case of *Giwusa obo members v Zibo Containers and Others*³ per Gush J, the court held that although the existence of the prospects of success in favour of the party seeking condonation is not decisive, it is an important factor in favour of granting condonation.

[14] This Court enjoys a discretion to be exercised judicially upon a consideration of all facts and in essence it is a matter of fairness to both sides.

[15] However, before me there is an application to review and set aside the ruling made by the Second Respondent who found “*that the Applicant has not shown a “good cause” for this application*”.

[16] The Applicant raises the issue of inconsistency in the application of the disciplinary rules but concedes that his actions could have resulted in a loss or potential prejudice of R2 000,000.00 (Two Million Rands) to the Third Respondent.

¹ 1962 (4) SA 531 (A)

² 172/2002, 2003 (2) ALL SA SCA (31/3/03)

³ JS 877/15 delivered on 8 April 2016

- [17] The Second Respondent found that the Applicant did not have any prospect of success in this matter.
- [18] The Second Respondent correctly cited the test set out by the Labour Appeal Court (LAC) in *Shoprite Checkers (Pty) Ltd v CCMA and others*⁴ which held that “*good cause*” also includes a valid reason for rescission.
- [19] It is quite clear that the delay of four years, five months and twenty four days is grossly excessive and inordinate. In other words, a substantive application has to be made out for the condonation of this delay given the fact that the Applicant around 15 May 2013 was already made aware of the adverse ruling made and the need to apply for the rescission of the same. He clearly failed to provide a reasonable and/or acceptable explanation for this excessive delay.
- [19] Any other reasonable decision maker hearing this application for condonation and rescission would have also found that the Applicant failed to provide a reasonable and/or acceptable explanation for the delay. Even if one finds in his favour that he has explained the long delay of 53 months, he has to show good prospects of success in the form of a *bona fide* case showing that his dismissal was unfair.
- [20] The Applicant worked in the vehicle registration unit of the Third Respondent and is obviously computer literate. Given access to the internet he could have easily ascertained the status of his matter, the steps he is expected to take to bring a rescission application and to have the same set down for hearing timeously. The excuse of the SALGBC offices being 300 km away is not an acceptable excuse nor is tardiness or negligence on the part of a union official a good reason or explanation for any delay.
- [21] The spirit of the LRA and the decisions of the Labour Courts duly endorsed by the Constitutional Court, all promote the speedy and expeditious resolution of labour disputes. To expect the Third Respondent to prepare for and deal with a dismissal it made some seven years later is grossly unfair. The effect of the

⁴ [2007] 28 ILJ 2246 (LAC).

delay in the administration of justice cannot be ignored as the Third Respondent raised the same in the pleadings before me. The Applicant himself is to be blamed for the predicament he finds himself in and the lack of financial resources is also no reasonable excuse or explanation given our efficient system of legal aid and *pro bono* which he could have invoked.

[22] This application fails to meet the grounds for review of arbitration awards as stipulated in Section 145 of the LRA and the various applicable case law.

[23] I cannot find that the ruling made by the Second Respondent acting under the auspices of the First Respondent is a reviewable ruling and should be set aside granting the Applicant the relief sought in his Notice of Motion.

[24] As far as the issue of costs is concerned, I am not persuaded that in the circumstances an award of costs is justified.

[25] In the circumstances, I make the following order:

Order

1. The Application is dismissed.
- 2.
3. There is no order as to costs.

R. Ramdaw

Acting Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: Mr Dimakatso Mashebo of Dima Mashebo Attorneys

For the Third Respondent: No appearance