

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: JR 196/2016

In the matter between:

SOUTH AFRICAN MUNICIPAL WORKERS UNION

obo TAKALANI GEORGE MARAGENI

Applicants

and

CITY OF JOHANNESBURG METROPOLITAN COUNCIL

First Respondent

SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL

Second Respondent

G.M RABYANA N.O

Third Respondent

Heard: 10 October 2019

Delivered: 18 February 2020

JUDGMENT

TLHOTLHALEMAJE, J

Introduction:

- [1] The applicants seek an order reviewing and setting aside the arbitration award dated 1 December 2015 issued by the third respondent (Commissioner). In the award, the Commissioner had found that the dismissal of Mr Marageni, a member SAMWU on 4 August 2014 by the first respondent (COJ) was substantively and procedurally fair.
- [2] Marageni was employed by the COJ with effect from August 1990 and was at the time of his dismissal, employed as Human Resources Manager. The allegations leading to Marageni's dismissal were that he had fraudulently assisted another employee (Mr Leslie Magaro) in claiming pension benefits in circumstances where Magaro had not retired and had remained in the Council's service.
- [3] It was COJ's case that Magoro was initially employed on a fixed term contract, which was then converted into permanent contract of employment as a result of a bargaining agreement reached between COJ and SAMWU. It was further alleged that Marageni was present in all the meetings where these changes were discussed, and was therefore aware that Magaro's contract was converted into a permanent contract. Marageni had however according to COJ, engineered a change on the pension fund withdrawal forms to reflect that the reason for termination of services of Magoro was due to 'resignation' rather than that the fixed term contract had expired. It was further contended that throughout his engagements with the pension fund, Marageni had submitted the forms referring to Magaro's resignation; had telephonically contacted the Pension Fund in that regard contrary to procedures; and had failed to furnish any explanation as to the reason Magoro was entitled to his pension when he was still employed.
- [4] The Commissioner's findings were essentially that Marageni was not a reliable witness, was evasive and his evidence was full of contradictions. The Commissioner noted that Marageni was fully aware of the conversion of Magaro's contract of employment, and that there was a pattern followed by Marageni in making telephone calls to the Pension Fund, up to a point when payments were made. This showed that he had a personal interest in the claim.

- [5] The Commissioner also noted that once the HR personnel had submitted all the necessary documentation to the Pension Fund, there was no further obligation on Marageni to follow up on the matter, as that was now a private and confidential matter between the Pension Fund and the concerned employee. To the extent that the offence was proven, the Commissioner had concluded that because it was serious, this had destroyed the trust relationship, and that the dismissal was fair. The Commissioner had also dismissed Marageni's claims that the dismissal was procedurally unfair.
- [6] The arbitration award having been issued on 1 December 2015, the review application was launched on 3 March 2016. It was however submitted on behalf of the applicants that a copy of the arbitration award was only received on 26 January 2016 after enquiries were made with South African Local Government Bargaining Council (SALGBC), and that the application was accordingly filed within the prescribed time limits. The initial review application was launched by Thulisile P Malimela Attorneys (erstwhile attorneys) on behalf of the applicants.
- [7] The SALGBC filed the record of proceedings on or about 16 March 2016. The erstwhile attorneys filed and served a transcribed record of proceedings on 19 April 2016. The applicant's current attorneys (Qhali Attorneys) came on record on 21 September 2017, and had filed and served the supplementary affidavit on 26 September 2017. The answering affidavit was filed and served on 13 June 2018 in which various points in limine were raised.
- [8] The points *in limine* raised pertained to the lack of authority on the part of the applicants' attorneys of record to act on their behalf; the non-joinder of the SALGBC as an institution where the dispute was heard; problems with the incomplete record of arbitration proceedings; and the introduction of new evidence by the applicants in the review proceedings.

The non-joinder of SALGBC:

- [9] Rule 7A (1) and (2) of the Rules of this Court provide that a party desiring to review a decision or proceedings of a body or person performing a reviewable function justiciable by the court must deliver a notice of motion to the person

or body and to all other affected parties. Furthermore, the notice of motion must call upon the person or body to show cause why the decision or proceedings should not be reviewed and corrected or set aside. Obviously this requires that a body such as the SALGBC under whose auspices the impugned award was issued should be cited as an interested party.

- [10] The Notice of Motion and the founding affidavit as served and filed by the applicant's erstwhile attorneys of record had cited SALGBC as the second respondent. It was only in the supplementary affidavit that SALGBC was not cited. Despite this omission being brought to the applicants' attention in the answering affidavit, no attempt was made whatsoever to correct it. I agree that the supplementary affidavit is indeed defective, but not to the extent that it can cause the dismissal of this application.

Condonation:

- [11] A more serious concern however is the late filing of the supplementary affidavit. The applicants filed and served an application for condonation for the late filing of a notice in terms of Rule 7A(8) of the Rules of this Court¹, which the COJ had opposed. The transcribed record of proceedings having been filed and served on 19 April 2016, the notice in terms of Rule 7A(8) was only complied with on 26 September 2017, some 17 months outside of the prescribed time periods.
- [12] The principles applicable to applications for condonation are well-known. Condonation generally is not there merely for the asking, nor are applications for condonation a mere formality². A party seeking condonation must make

¹ Which provides:

- (8) The applicant must within 10 days after the registrar has made the record available either-
- (a) by delivery of a notice and accompanying affidavit, amend, add to or vary the terms of the notice of motion and supplement the supporting affidavit; or
- (b) deliver a notice that the applicant stands by its notice of motion.

² See *NUMSA v Hillside Aluminium* [2005] 6 BLLR 601 (LC); *Derrick Grootboom v National Prosecuting Authority & another* [2013] ZACC 37; 2014 (2) SA 68 (CC); 2014 (1) BCLR 65 (CC) at para 20 where it was held;

"[i]t is axiomatic that condoning a party's non-compliance with the rules of court or directions is an indulgence. The court seized with the matter has a discretion whether to grant condonation."

out a case for the indulgence sought and bears the onus to satisfy the court that condonation should be granted. In considering whether or not to grant an indulgence, this court is required to exercise a discretion, having regard to a variety of factors including but not limited 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. In the end, the decision to grant or refuse condonation must be in the interests of justice³.

[13] In *SA Post Office Ltd v Commission for Conciliation, Mediation & Arbitration & others*⁴ however, it was held that where a dispute pertains to an individual dismissal, this court must be cautious before exercising a discretion in favour

³ *Steenkamp and Others v Edcon Limited* CCT29/18) [2019] ZACC 17; 2019 (7) BCLR 826 (CC); (2019) 40 ILJ 1731 (CC); [2019] 11 BLLR 1189 (CC) at paragraphs [36] – [37], where it was held;

“Granting condonation must be in the interests of justice. This Court in *Grootboom* set out the factors that must be considered in determining whether or not it is in the interests of justice to grant condonation:

“[T]he standard for considering an application for condonation is the interests of justice. However, the concept ‘interests of justice’ is so elastic that it is not capable of precise definition. As the two cases demonstrate, it includes: the nature of the relief sought; the extent and cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the importance of the issue to be raised in the intended appeal; and the prospects of success. It is crucial to reiterate that both *Brummer* and *Van Wyk* emphasise that the ultimate determination of what is in the interests of justice must reflect due regard to all the relevant factors but it is not necessarily limited to those mentioned above. The particular circumstances of each case will determine which of these factors are relevant.

It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or court's directions. Of great significance, the explanation must be reasonable enough to excuse the default.

The interests of justice must be determined with reference to all relevant factors. However, some of the factors may justifiably be left out of consideration in certain circumstances. For example, where the delay is unacceptably excessive and there is no explanation for the delay, there may be no need to consider the prospects of success. If the period of delay is short and there is an unsatisfactory explanation but there are reasonable prospects of success, condonation should be granted. However, despite the presence of reasonable prospects of success, condonation may be refused where the delay is excessive, the explanation is non-existent and granting condonation would prejudice the other party. As a general proposition the various factors are not individually decisive but should all be taken into account to arrive at a conclusion as to what is in the interests of justice.”

And,

“All factors should therefore be taken into account when assessing whether it is in the interests of justice to grant or refuse condonation.”

⁴ (2011) 32 ILJ 2442 (LAC) para 20

of the indulgence sought, because there is an imperative placed upon the speedy and expeditious resolution of such disputes.

[14] Other than the above, it is further trite that an application for condonation ought to be made as soon as a defaulting party becomes aware of the need to do so. In this case, the application for condonation was filed and delivered on 5 April 2018, some 23 months since the review application was launched, and some seven months since the filing of the supplementary affidavit.

[15] In seeking condonation, Marageni conceded that the delay was indeed excessive. He nonetheless blamed the applicants' erstwhile attorneys of record for failing to file a notice in terms of Rule 7A(8) after the Registrar of the Court had made the record available on 19 April 2016. He further averred that he had diligently followed up on the progress of his case with the attorneys and was assured that the matter was receiving attention through case management.

[16] In the end, Marageni conceded that he had no other explanation to proffer other than to blame the alleged negligence of the applicants' erstwhile attorneys. He further averred that he only became aware of the delays when the new attorneys of record took over the matter on 11 September 2017.

[17] Clearly there are difficulties with the explanation proffered by Marageni for the delay in filing the Rule 7A(8) notice, more particularly to the extent that his sole explanation is the alleged negligence of the applicants' erstwhile attorneys of record. In *Mashishi v Mdladla and Others*⁵, Van Niekerk J held that;

'When 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 *Saloojee and another NNP v Minister of*

⁵ [2018] 7 BLLR 693 (LC); (2018) 39 ILJ 1607 (LC) at para 10

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.'

- [18] The Labour Appeal Court in *Superb Meat Supplies CC v Maritz*⁶ has long restated that;

'It has never been the law that invariably the litigant will be excused if the blame lies with the attorney. To hold otherwise might have a disastrous effect upon the observance of the rules of this court and set a dangerous precedent. It would invite or encourage laxity on the part of practitioners. The courts have emphasized that the attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a rule of court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are.'

- [19] As it was correctly pointed out on behalf of COJ, despite Marageni alleging that he had diligently followed up the matter with the applicants' erstwhile attorneys, there are no details provided as to when and how those follow ups were made, and with whom in particular at the erstwhile attorneys of record, for over a period spanning seventeen months

- [20] The period of delay in this case is indeed excessive in the extreme as conceded on behalf of the applicants. Other than furnishing no explanation as to the reason the condonation application could not be filed immediately after September 2017 subsequent to the supplementary affidavit having been filed, the explanation proffered for the entire delay is wholly inadequate, and in the words of *Moila*⁷, amounts to no explanation at all. No attempt was made by

⁶ (2004) 25 ILJ 96 (LAC). See also *Saloojee v Minister of Community Development* 1964 (2) SA 135 (AD)

⁷ *Moila v Shai NO and Others* (JA 26/04) [2007] ZALAC 1; [2007] 5 BLLR 432 (LAC), at para [34] where it was held;

'I do not have the slightest hesitation in concluding that this is a case where the period of delay is excessive and the appellant's purported explanation for the delay is no explanation at all. I accept that the case is very important to the appellant. However, the weight to be attached to this factor is too limited to count for anything where the period of delay is as excessive as is the case in this matter and the explanation advanced is no explanation at all. If ever there was a case in which one can conclude that good cause has not been shown for condonation without even considering the prospects of success, then this is it. Where, in an application for condonation, the delay is excessive and no explanation has been given for

the applicants to explain any of the periods of the delay. A simple averment that Marageni 'diligently followed up on the progress of the matter' is clearly meaningless without specifics. SAMWU despite assisting Marageni in this review application has also made no attempt whatsoever, to proffer any explanation as to the reason the matter was not attended to timeously or what it had done to ensure that the time frames were complied with. Ultimately, there is no reason why it cannot be concluded that the delay should be imputed to Marageni and SAMWU.

- [21] The confirmatory affidavit deposed to by Monyane Qhali of the applicants' current attorneys of record is equally of no assistance, as it does not shed any light as to the delays before they took over the matter. There is clearly no basis for the alleged negligence of the erstwhile attorneys to be condoned, and it cannot be correct as submitted on behalf of the applicants, that there was no prejudice to COJ as a consequence of the delays. The dismissal of Marageni took place in August 2014, and clearly the COJ is entitled to have the dispute timeously resolved.
- [22] In circumstances such as in this case, where the delay is excessive in the extreme, and the explanation furnished in that regard is manifestly inadequate or amounts to no explanation at all, it has been held that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial⁸. Even though the interests of justice ought to be determined with reference to all relevant factors as stated in *Grootboom*⁹ and confirmed in *Steenkamp*¹⁰, this case represents those instances where there is clear justification to leave out other factors to be considered in such applications.
- [23] Other than the question of the unexplained excessive delay, there is a further issue of the incomplete record which COJ had raised, and which the applicants have not attended to since the transcribed record was filed in

that delay or an "**explanation**" has been given but such "**explanation**" amounts to no explanation at all, I do not think that it is necessary to consider the prospects of success.'

⁸ *NUM v Council for Mineral Technology* [1999] 3 BLLR 209 (LAC) at para 10

⁹ Fn2

¹⁰ Fn 3

April 2016. To the extent that the transcribed record is incomplete, there would in any event, have been no basis to consider the review application.

[24] For the above reasons, it follows that both the applications for condonation and the application to review the Commissioner's award ought to fail. I have further had regard to the requirements of law and fairness, and I am of the view that a costs order as sought by COJ is not appropriate given the circumstances of this case.

[25] Accordingly, the following order is made;

Order:

1. The application for condonation for the late filing of the Rule 7A(8) Notice in terms of the Rules of this Court is dismissed.
2. The review application is dismissed.
3. There is no order as to costs.

Edwin Tlhotlhamajje

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicants:

Adv. C.M Sihlali, instructed by Qhali Attorneys

For the First Respondent:

Adv M Beckenstrater, instructed by Moodie & Robertson