



THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

JUDGMENT

Not reportable

CASE NO: JR 933/17

In the matter between:

POPCRU obo NR NKUNA

Applicant

and

**AFETY AND SECURITH SECTORAL
BARGAINING COUNCIL**

First Respondent

K MASEGE N.O

Second Respondent

MINISTER OF POLICE

Third Respondent

Date enrolled: 10 June 2020 (By agreement, decided in Chambers)

Date of judgment: 22 June 2020. Judgment distributed by email at 12:00

JUDGMENT

VAN NIEKERK J

- [1] The applicant seeks to review and set aside an arbitration award issued by the second respondent (the arbitrator) on 25 November 2016. In his award, the arbitrator held that the third respondent had followed the correct procedure in applying Agreement 2/2002 and refusing to pay the applicant an acting allowance.
- [2] The present application was filed on 15 June 2017. The applicant states that the award was provided to him only on 9 February 2017. The six-week period within which the application ought to have been filed expired on 23 March 2017.
- [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:

‘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.

- [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 *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 is hord 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. There 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] As I have observed, the delay in the present instance is not insignificant. The explanation proffered by the applicant is one that seeks to ascribe blame to a union official. He states that he requested a Mr Mofokeng to file a review application and that it was necessary to obtain permission from the union's head office. An application for authorisation to review the arbitrator's award was sent on 17 February 2017. The applicant spoke to Mofokeng periodically, and relied on the union to further his interests. The applicant's present attorneys of record received instructions on 24 April 2017. The attorney struggled to get hold of the applicant to arrange a consultation. Mofokeng was not reachable since he had been admitted to hospital, and only returned to work on 6 June 2017. The applicant's attorney was only able to get hold of Mofokeng on 7 June 2017 and a meeting was arranged for the morning of 8 June 2017. The applicant states that he had at all times been under the impression that the matter was under control. It was only when he consulted with his attorney was he advised that the application had been filed out of time. It warrants mention that the medical certificate attached to the papers makes no reference to Mofokeng's hospitalisation, nor any period during which he was admitted to hospital. In so far as the prospects of success are concerned, the applicant states simply that he has good prospects of success that are apparent from the founding affidavit.

[11] The explanation for the delay in filing the present application is incomplete and unacceptable. There is simply no explanation for the delay of more than two months between receipt of the award, and the instruction from the trade union to the applicant's attorneys of record. By the time that those instructions were received, on 24 April 2017, the application was already more than a month out of time. Even if I accept that Mofokeng was indisposed during the course of May

2017, the delay in filing the application, where the applicant's advisers must have appreciated the need for urgency, is not satisfactorily explained.

- [12] The applicant's prospects of success are by no means apparent from the founding affidavit. The issue that the arbitrator was required to decide was whether the applicant was entitled to payment of an acting allowance in terms of a collective agreement. The agreement provides for the payment of acting allowances in circumstances where the appointment is made by a major general or higher rank in a vacant post at provincial or national level. In the present instance, the arbitrator recorded that the criteria for payment of an acting allowance clearly stipulates the procedures to be followed in posts where the acting allowance would be paid. The fact that the agreement stipulated that acting allowances could be paid to employees were justified, did not mean that by virtue of being appointed in an acting position, all employees qualify for payment. It could thus not be said that the applicant had an expectation that he would be paid an acting allowance. In particular, the criteria for the appointment of persons to acting positions in the payment of acting allowances required certain stipulated conditions to be met. These included the existence of a vacant post at provincial or national level, funded by the organisational development and for which financial authority has been obtained. The applicant had not submitted any evidence to show that post was confirmed as vacant and funded or that any financial authority was obtained for his appointment. The arbitrator further considered that the applicant had acted in the position for a 'considerably long period', in circumstances where the collective agreement was clear that employees could not act in a position for a period longer than six months without approval. Finally, the arbitrator held that there was no evidence before him to establish that a divisional provisional commissioner had appointed the applicant to act in the post, and that the extended period was properly approved. For these reasons, the arbitrator concluded that he was not persuaded that the applicant was entitled to an acting allowance and in particular, that the third respondent

had breached the terms of the collective agreement by refusing to pay the allowance.

[13] The test to be applied in a review proceeding is whether the arbitrator's award falls within a band of decisions to which reasonable decision-makers could come on the available evidence. The test is one that firmly draws a line between appeals and reviews and which limits this court's capacity to interfere to truly exceptional cases. In the present instance, the grounds for review attack the arbitrator's decision on the basis of the correctness. Arbitrators are allowed to be incorrect. There is no case made out in the founding papers that seeks to apply the reasonableness threshold or which identifies any material irregularity that had the result that the outcome of the proceeding under review is unreasonable. In other words, the founding papers simply fail to make out a case to the effect that the arbitrator's award is so unreasonable that no reasonable person could reach the decision that he did on the material that served before him. In consequence, the applicant's prospects of success appear to be limited, if they exist at all. They are certainly not so overwhelming that they trump a poor explanation for a significant delay.

[14] For the above reasons, in my view, the applicant has failed to make out a case for condonation of the late filing of the review application, and the review application stands to be dismissed.

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

APPEARANCES:

For the applicant:

M Mashaba of Mashaba Attorneys

For the Third Respondent:

H Maponya of the State Attorney