Reasons given 210710
Not reportable
Not of interest to other judges

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT BRAAMFONTEIN

CASE NO:JR 152/09

In the matter between:

MOTLATSO ANGELINA RAMADIBA	**APPLICANT**
And	
LIMPOPO LEGISLATURE	**1ST RESPONDENT**
JOSIAI SELLO MAAKE	**2ND RESPONDENT**
THE COMMISSION FOR CONCILIATION MEDIATION & ARBITRATION	**3RD RESPONDENT**

REASONS FOR JUDGMENT

VAN NIEKERK J

[1] On 28 May 2010, I made an order dismissing an application to review and set aside a ruling made by the second respondent, with costs. A request for reasons was filed in this court on 14 June 2010. For reasons that are not apparent to me, the request languished in the office of the registrar until it was drawn to my attention today, 22 July 2010. These are my reasons for making the order.

[2] On 15 December 2008, the second respondent (the commissioner) issued an in limine ruling in which he refused to condone the late referral of an unfair dismissal dispute to the third respondent, the CCMA. The applicant was dismissed on 4 March 2005.. The dispute was referred on 10 October 2008, some three years and eight months late. The commissioner observed that this delay was inordinate, but that that in itself, did not warrant a refusal of condonation. He considered the relevant facts, and in particular, a failure by the applicant after 10 December 2007, when she was advised by the CCMA to re-refer her dispute to conciliation, and 10 October 2008, when the dispute was in fact referred. This 10 month delay was not satisfactorily explained, and on this basis, and without considering the applicant's prospects of success, condonation was refused.

[3] In these proceedings, the applicant set out in some detail the action she took after disputing the fairness of her dismissal. This included the filing of an urgent application for review in this court in December 2004 to review and set aside the findings of the disciplinary enquiry. The application was dismissed on 11 January 2005, for lack of urgency and a failure to exhaust internal remedies. The applicant thereafter launched an internal appeal against her dismissal. In March 2005, the appeal was dismissed. Thereafter, a dispute was referred to the CCMA. A point in limine relating to the jurisdiction of the CCMA given the applicant's pending review application was taken by the first respondent, and dismissed. That ruling became the subject of an application for review. In or about the same period, the applicant withdrew her review application. Thereafter, the applicant attended at court to hear the first respondent's review application, without opposing the application. She was directed to file reasons setting out the basis of her non-opposition to the application. The review application was ultimately heard on 7 November 2006, when the application was granted. The applicant states that she was advised to seek clarity on the terms of the order. The applicant engaged various attorneys, and was unsuccessful in locating the court file and obtaining the clarity she sought. When she referred the dispute to

the CCMA in December 2007 for re-enrollment of an arbitration hearing, she was advised by the CCMA to apply for condonation for the late referral. The applicant states that she attended at court during May 2008 to seek clarification on the order granted during November 2006, but without success. Attorneys that she later appointed advised that she should re-refer the dispute with an application for condonation, which she did in October 2008.

[4] The principal ground for review articulated in the founding affidavit is that the commissioner erred in finding that it was unnecessary for the applicant to search for the file at this court since she knew that the application for review had been granted, and that there was accordingly no longer any impediment on the applicant referring her dispute to the CCMA again. Further, the applicant attacks the commissioner's failure to deal with her prospects of success.

[5] The test to be applied in this court is well-established. It requires that an applicant demonstrate that the decision under review is a decision that is so unreasonable that no reasonable decision maker could come to it. The test encompasses not only outcomes, but also conduct related reviews. These are of course linked, since no commissioner that conducts him or herself unreasonably in a CCMA proceeding is likely to produce a result that is reasonable.

[6] In *Minister of Health & another v New Clicks South Africa (Pty) Ltd & others (Treatment Action Campaign & another as amici curiae)* 2006 (2) SA 311 (CC), Ngcobo J made the point in the following way:

> "There is obviously an overlap between the ground of review based on failure to take into consideration a relevant factor and one based on the unreasonableness of the decision. A consideration of the factors that a decision-maker is bound to take into account is essential to a reasonable decision. If a decision maker fails to take into account a factor that he or she is bound to take into

consideration, the resulting decision can hardly be said to be that of a reasonable decision-maker"

[15] In his judgment in *Sidumo v Rustenburg Platinum mInes Ltd & others* [2007] 12 BLLR 1097 (CC), Ngcobo J reaffirmed the role of reasonableness in relation to conduct (as opposed to result) in these terms:

> "It follows therefore that where a commissioner fails to have regard to material facts, the arbitration proceedings cannot in principle be said to be fair because the commissioner fails to perform his or her mandate. In so doing … the commissioner's action prevents the aggrieved party from having its case fully and fairly determined. This constitutes a gross irregularity in the conduct of the arbitration proceedings as contemplated in section 145 (2) (a) (ii) of the LRA. And the ensuing award falls to be set aside not because the result is wrong but because the commissioner has committed a gross irregularity in the conduct of the arbitration proceedings'.

[7] In the present instance, the commissioner carefully reviewed the evidence before him. There can be no suggestion (nor is any made) that he had regard to irrelevant evidence or that he ignored relevant evidence. He applied the correct legal test, that based on the well-established principles enunciated in *Melane v Santam Insurance Company Ltd* 1962 (4) SA 531 (A). It is equally well-established that where a period of delay is not satisfactorily explained, the prospects of success are not determinative. In *NUM v Council for Mineral Technology* [1999] 3 BLLR 209 (LC), the Labour Appeal court said the following

> "There is a further principle which is applied and that is that 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."

The commissioner clearly gave the applicant the benefit of the doubt in respect of the period preceding the advice given to her by the CCMA to re-refer her dispute, with an application for condonation. The explanation before the commissioner in relation to the period following that advice and the date on which the dispute was ultimately referred was thin, to say the least, and the commissioner cannot be faulted for concluding that there was an inadequate explanation for what amounted to an inordinate delay. In short, the commissioner took into account all of the relevant facts and applied the correct legal test.

[8] Both counsel, at least in their heads of argument, appeared to regard this matter as one in which the matter of condonation ought to be reassessed on the merits. An application for review is not an appeal. This court is not at liberty to substitute its own view for that of the commissioner simply because on the same facts, the court would have come to a different conclusion. The test is narrow, and places a significant hurdle before an applicant in a review application. In my view, for the reasons recorded above, the applicant failed to establish that the ruling to which the commissioner came was so unreasonable that it fell outside of the band of decisions to which reasonable decision-makers might come.

[10] Finally, and in relation to costs, the present application was entirely misguided. In addition to the principle that cost should follow the result, there is the question of the conduct of these proceedings and those under review. The LRA places a premium on expeditious dispute resolution, and requires parties to act without delay to further their interest. The applicant has clearly litigated at her leisure. To grant the application for review will have the effect of triggering the first step in the dispute resolution process in circumstances where the dispute arose almost six years ago. In these circumstances, there is no reason why the applicant should not pay the costs of the application.

[9] For these reasons, I dismissed the application for review, with costs.

ANDRE VAN NIEKERK
JUDGE OF THE LABOUR COURT

Date of reasons for judgment 21 July 2010