THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

CASE NO: JR1189/13

JR487/13

In the matter between:

AUTHORITY SIPHOSETHU GAMEDE **First Applicant**

VINCENT HLUBI **Second Applicant**

and

COMMISSIONER ADV K MASEGE *N.O* **First Respondent**

SAFETY AND SECURITY SECTORAL BARGAINING COUNCIL **Second Respondent**

SOUTH AFRICAN POLICE SERVICES **Third Respondent**

Application heard: 7 June 2018

Judgment delivered: 8 June 2018

JUDGMENT

VAN NIEKERK J

[1] This is an application to review and set aside an arbitration award issued by the first respondent, to whom I shall refer as 'the arbitrator'. In her award, the arbitrator found that the dismissals of the applicants were substantively and procedurally fair. The review application was filed late, and in terms of an order granted on 22 march 2017, the applicants were directed to file an application for condonation. The application is opposed by the third respondent.

[2] The delay in filing the review application is seven weeks. The third respondent submits that the explanation for this delay is wholly unsatisfactory, the prospects of success favour the third respondent and the third respondent has been severely prejudiced by the delay. The third respondent further submits that the application for condonation should be refused as it has been brought some three years and ten months after the review application was filed, without any explanation.

[3] The court has a discretion, to be exercised judicially, to grant condonation. Among the factors usually relevant for consideration are the degree of lateness, the explanation therefor, the prospects of success, the prejudice that parties will suffer if condonation is granted or refused, and the importance of the case. None of these factors are individually decisive and the court must consider all the facts. In the final analysis, it is a matter of fairness to the parties. Condonation applications require a court to balance various interests and factors, having regard to all of them with none of them being decisive. (See *Melane v Santam Insurance*

Co. Ltd 1962 (4) SA 531 (A) at page 532; *NEHAWU obo Mafokeng and Others v Charlotte Theron Children's Home* [2004] 10 BLLR 979 (LAC).

[4] In *Foster v Stewart Scott Inc.*(1997) 18 *ILJ* 367(LAC),the Labour Appeal Court noted the following as factors which have to be considered or taken into account in a condonation application:

> the degree of lateness or non-compliance with the rules;
> the explanation therefor;
> the prospects of success;
> the importance of the case;
> the respondent's interest in the finality of the judgment;
> the convenience of the court; and
> the avoidance of unnecessary delays in the administration of justice

[5] The principles were also summarised in *South Africa Post Office Ltd v CCMA & Others* [2012] JOL 28463 (LAC). In this case, the court recognised that ultimately the test is whether it is in the interests of justice to grant condonation. The court accepted that in matters where importance is placed upon the speedy and expeditious resolution of a dispute, even a short delay may not be excusable, unless an explanation is proffered that sets out the reasons for the delay which the Court should find acceptable. The court further held that:

> Where it is evident that the party seeking condonation has no prospects of succeeding in his principal claim or opposition, no purpose is served in granting condonation and the Court must in such circumstances refuse to grant condonation irrespective of the degree of delay or the explanation provided.

[6] In *National Union of Mineworkers v Council for Mineral Technology* [1998] (2) ZALAC 22, the LAC established the principle that given the extent of the delay and the poor explanation for the delay, it was not necessary to consider the applicant's prospects of success in the main application. This was affirmed more

recently in *Collett v Commission for Conciliation, Mediation & Arbitration* [2014] 6 BLLR 523 (LAC) where the court stated 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 532 C-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 the 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 award was sent to the applicants on 22 March 2013; the six week period envisaged in section 145(1)(*a*) of the Labour Relations Act (LRA) within which to file the review application expired on 3 May 2013. The review application was filed on 21 June 2013. The delay is not excessive, but it is not insignificant.

[8] The applicants blame the conduct of their previous attorney, Mr Mnisi, solely for the delay in the late filing of the review application. It is trite that a litigant cannot hide behind the tardiness of his representative. In *Saloojee and another v Minister of Community Development* 1965 (2) SA 135 (A) at paragraph 141C-E, the court said "*there is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered . .*"

[9] In *Mngomezulu and Another v Mulima NO and Others* (JR2744/12) [2017] ZALCJHB 415 (7 November 2017I) the court stated the following, at paragraph 12:

> … In *National Union of Metal Workers vs Kroon Gietary and Staal* the court refused a condonation application wherein the deponent attributed the delay to his representative. The court quoted in approval the case of *Regal v African Superstate (Pty) Ltd* where the court held that there is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. A litigant is not entitled to hand over his matter to his attorney and wash his hands of it.

[10] The applicants have left periods of the delay unexplained. It is trite that condonation is not a mere formality and there for the taking; rather, the applicant for condonation must provide a proper and full explanation for the period of the delay. The applicants has failed to furnish a proper explanation for the periods between payment to Mnisi attorneys on 30 March 2013 to 4 June 2013, save for a weak excuse that they contacted Mnisi attorney and made a follow up call and between 4 June 2013 until the application was filed on 27 June 2013, except for a few unsubstantiated averments.

[11] In *Independent Municipal and Allied Trade Union on behalf of Zungu v SA Local Government Bargaining Council and Others* (2010) 31 *ILJ* 1413 (LC) at para 13, the Court held:

> In explaining the reason for the delay it is necessary for the party seeking condonation to fully explain the reason for the delay in order for the court to be in a proper position to assess whether or not the explanation is a good one. This in my view requires an explanation which covers the full length of the delay. …"

[12] In *eThekwini Municipality v Ingonyama Trust* 2013 (5) BCLR 497 (CC) at para 28, the Court said the following where the explanation furnished did not cover the entire period and part of the delay was unexplained:

As stated earlier, two factors assume importance in determining whether condonation should be granted in this case. They are the explanation furnished for the delay and prospects of success. In a proper case these factors may tip the scale against the granting of condonation. 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 delay. And, what is more, the explanation given must be reasonable. The explanation given by the applicant falls far short of these requirements. Her explanation for the inordinate delay is superficial and unconvincing."

[13] The application for condonation is not accompanied by any proof of the allegations made therein. In the replying affidavit, the applicants attached two annexures of proof of averments. These do not come to their assistance as annexure "AG1" and "AG2" do not relate to the period for the delay – being between 3 May 2013 (which was the date when the six week period envisaged in section 145 within which to file the review application expired) and the review application was filed on 21 June 2013. These annexures are dated 8 October 2012 and 17 October 2012 respectively.

[14] In short, the reasons thus proffered by the applicants for their delay is inadequate, unacceptable and do not constitute a good reason for the delay in the filing of the review application.

[15] Strictly, according to the applicable authorities, in the absence of a satisfactory explanation for a unreasonable delay, it is not necessary for the court to embark on an inquiry into the prospects of success. (See *Collett v Commission for Conciliation, Mediation & Arbitration* (*supra*).

[16] Even if I were to have regard to the applicants' prospects of success, when regard is had to totality of evidence as contained in the record and the analysis of evidence and argument in the award, it is evident that the arbitrator considered the principal issue that was before her; that she evaluated the facts presented at the hearing and that the conclusion that she reached - that the dismissal of the applicants was substantively fair - was reasonable and one that a reasonable decision-maker would have reached in relation to the totality of evidence before him. The arbitrator evaluated most, if not all, of the applicants versions presented at arbitration and that facts, which the applicant contends were ignored by her, were not material and would not have resulted in a different outcome.

[17] The test to be applied in review applications is one that carefully preserves the distinction between an appeal and a review. For this reason, it is incumbent on an applicant to establish that the arbitrator committed a material irregularity and that the decision or outcome of the proceedings, in the form of the award, falls outside of a band of decisions to which a reasonable decision-maker could come on the same material. In the present instance, the applicants' case is no more than that the arbitrator failed properly to assess the evidence.

[18] In *Gold Fields Mining SA (Pty) Ltd v CCMA* [2014] 1 BLLR 20 (LAC)), The Labour Appeal Court noted that a review court is not required to take into account every factor individually, consider how the arbitrator treated and dealt with each factor and then determine whether a failure by the arbitrator to deal with one or more factors amounted to a process-related irregularity sufficient to set aside the award. The court cautioned against adopting a piecemeal approach since a review court must necessarily consider the totality of the available evidence (at paragraph 18 of the judgment). Specifically, the questions for a review court to ask or whether the arbitrator gave the parties a full opportunity to have their say in respect of the dispute, whether the arbitrator identified the issue in dispute that he or she was required to arbitrate, whether the arbitrator understood the nature of the dispute, whether he or she dealt with a substantial merits of the dispute

and whether the decision is one that another decision-maker could reasonably have arrived at based on the evidence (see paragraph 20). So, when arbitrator fails to have regard to the material facts it is likely that he or she will arrive at a decision that is unreasonable. Similarly, where an arbitrator fails to follow proper process he or she will arrive at an unreasonable outcome. But, as the court emphasised, this is to be considered on a totality of the evidence and not on a fragmented, piecemeal analysis (at paragraph 21).

[19] As I have indicated above, the award discloses that the arbitrator afforded the parties a full opportunity to have their say, identified the primary issue in dispute, understood the nature of the dispute and dealt with the substantial merits of the dispute. In my view, the evidence does not disclose any reviewable irregularity on the part of the arbitrator and on that basis, in accordance with the two-stage test to be applied, the applicant's prospects of success are minimal. The applicants were dismissed after it had been ascertained that they had been in contact with a suspect involved in ATM bombings. They were identified after cell phone data acquired from a cell phone provider revealed regular contact between the suspect and a number identified as that of the second applicant. In so far as it was submitted that in respect of the second applicant, there was insufficient evidence to sustain the finding made against him, at paragraph 7.6 of the award, the arbitrator records that it was not disputed that the second applicant's phone was used to communicate with the suspect of the investigation. She finds that the only inference to draw from the evidence relating to a visit by the police and the contact initiated by the second applicant with the first applicant in this regard is that the second applicant was anxious or apprehensive about the visits from the police because he was involved in some criminal activity or was aware of it. On this basis, the arbitrator rejected the second applicant's version that he knew nothing about the suspect prior to the interview with the investigating officer. This is not an unreasonable inference to draw, or a conclusion that falls outside of the bounds of reasonableness,

[20] Finally, in relation to prejudice, it is apparent from the papers that the third respondent would be severely prejudiced by any further delay in the matter. Not only have the applicants delayed in instituting the review application, but they have also been dilatory in the prosecution of the review application. The application was filed on 21 June 2013; the applicant's filed the record on 17 April 2014 and their supplementary affidavit on 20 May 2016. In terms of the practice manual, this in itself or to have resulted in the application for review being deemed to have been withdrawn. The review application that was set down for 22 March 2017 was postponed *sine die* so that they could bring an application for condonation. The review application was thereafter set down for June 2018. If the application for condonation is granted and the applicants are successful in the review application, then it is likely that their dispute will be remitted to the SSSBC to be heard *de novo*. If this is indeed the case, the third respondent will be prejudiced and hampered in putting a proper defence forward. The facts giving rise to the dispute arose in 2013. It is now some five years later since the events had occurred. Furthermore, the third respondent relied on the evidence of witnesses who may not be available to give evidence at the arbitration. If they are available then it is likely that their memories would be diminished by the effluxion of time. Furthermore, documents relied on may be misplaced. The prejudice therefore that the third respondent will suffer should condonation be granted far outweighs that of the applicants.

[21] Finally, I should mention the inordinate delay in filing application for condonation. In this regard, it should be noted that the review application was filed on 21 June 2013 and the application for condonation was filed on 7 April 2017. A period of some three years and ten months have elapsed prior to them bringing an application for condonation. Aside from the delay been excessive, the applicants have not tendered an explanation for this delay. It is trite that a review application must be brought as soon as possible. The applicants have brought it several years after the review application was instituted even though they have been represented throughout.

[22] In *Darries v Sheriff, Magistrate's Court, Wynberg and Another* 1998 (3) SA 34 (SCA) at 40H-41E, the Court held as follows:

> Condonation of the non-observance of the Rules of this Court is not a mere formality. In all cases some acceptable explanation, not only of, for example, the delay in noting an appeal, but also, where this is the case, any delay in seeking condonation, must be given. An appellant should whenever he realizes that he has not complied with a Rule of Court apply for condonation as soon as possible. Nor should it simply be assumed that, where non-compliance was due entirely to the neglect of the appellant's attorney, condonation will be granted.

[23] In *Seatlolo & others v Entertainment Logistics Service (A Division of Gallo Africa Ltd)* [2011] JOL 27264 (LC), the Labour Court held:

> It is trite that an application for condonation must be brought as soon as the party becomes aware of the default. This principle has been emphasised by the Supreme Court of Appeal on numerous occasions (see Saloojee, supra, at 138H; Rennie v Kamby Farms (Pty) Ltd 1989 (2) SA 124 (A) at 129G; and Napier v Tsaperas 1995 (2) SA 665 (A) at 671B–D). This approach has been endorsed by the Labour Appeal Court which in fact advocates bringing the application for condonation on the same day it is discovered to be necessary (see in this regard, inter alia, Allround Tooling (Pty) Ltd v NUMSA & others [1998] 8 BLLR 847 (LAC) [also reported at [1998] JOL 2719 (LAC) – Ed] at 849 paragraph [8]; NEHAWU v Nyembezi [1999] 5 BLLR 463 (LAC) [also reported at [1999] JOL 4612 (LAC) – Ed] at 464D–F; and Librapac CC v Fedcraw & others [1999] 6 BLLR 540 (LAC).

[24] In summary, the applicants failed to file the application for condonation as soon as they became aware of the default, they have failed to provide a satisfactory explanation for a not insignificant delay, and their prospects of success, having regard to the manner in which they grounds for review have been pleaded, are poor. Further, the prejudice to the third respondent should condonation be granted outweighs the prejudice to the applicant's in refusing to grant the application.

[25] The third respondent did not pursue the issue of costs. The applicants appear to be indigent and there would in any event be little purpose in making any order as to costs.

[26] Finally, the court must express its gratitude to the SASLAW *pro bono* clinic who assisted the applicants when the application for condonation was argued.

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

REPRESENTATION

For the applicant: G Mthalane (Pro bono)

For the respondent: Adv Tilly, instructed by the state attorney