THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Case no JR 1218/2015

In the matter between:

HYGIENIK (PTY) LTD	Applicant
and	
THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	First Respondent
LERATO THANDY MADIA *N.O*	Second Respondent
CHIMANO JONAS LEGODI	Third Respondent

Heard: 01 November 2016

Judgment: 04 November 2016

Edited: 23 February 2017

EX-TEMPORE JUDGMENT

VAN NIEKERK J

[1] This is an application to review and set aside an arbitration award issued by the second respondent on 16 February 2016. The review application was filed late and the application seeks condonation for the late filing of the review.

[2] The factors that the court must necessary take into account are well-established. They include the degree of lateness, the explanation for the delay, the prospects of success and the importance of the case to the parties. In the present matter the degree of lateness is not insignificant, the application was filed 82 days late.

[3] The explanation for the delay is one that concerns the employers' organization that acted for the applicant and delays occasioned within that organization on account of problems with service providers. These had the consequence that the arbitration award issued by the second respondent found its way into the junk e-mail folder and did not come to the attention of the relevant parties. The deponent to the founding affidavit records that the award first came to the attention of a Mr Theron of the employer's organization on 7 April 2015. He conducted an investigation.

[4] The matter was further complicated by a Ms Elsa van Zyl, an office assistant, who had been given instructions to draft the review application. It would seem that she was new in the office and did not understand what was required of her. The matter was never followed up and Mr Theron says that he was under the *bona fide* belief that the application had been finalized and lodged.

[5] In May 2015 it came to Theron's attention that the review application had not even been drafted. He made arrangements to meet with the third respondent to ascertain whether the matter could be resolved amicably. By

18 May 2015 it became clear to him that an amicable settlement was not possible and the matter would need to proceed to court.

[6] On or about 3 June 2015, Theron was advised by another representative of the employers' organization to seek the assistance of an attorney to launch the present application. A consultation was held more than a week later, on 12 June 2015. There was a further consultation, when documents were provided for the purposes of the preparation of the application and a further consultation was held on 19 June 2015. The papers were provided by the attorney to Theron on the evening of 22 June 2015.

[7] That notwithstanding, the present application was filed only on 6 July 2015.

[8] The applicable legal principles are clear. 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* [2013] ZACC 37]). 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. 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.

[9] That formulation, which has its roots in *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A), has long been qualified in this Court 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.

[10] This principle was recently 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
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> … 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.'

[11] 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 *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.

[12] 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 the recent decision by Myburgh AJ in *Makuse v CCMA & others* (JR 2795/11, unreported, 18 August 2015), the court alluded to

measures recently 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. Although in the present instance the practice manual was not in force at the relevant time, the classification of the review application is one that necessarily requires its prosecution with diligence and urgency remains apposite. 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.

[13] When I perused these papers prior to the hearing of this application, I recalled having dealt with a similar set of facts and was able to find the judgment that was the subject of my recollection. It was a matter between *NBS Transport v CCMA* (JR1208/2015), an application argued on 23 August 2016 and in which I gave judgment on 26 August 2016.

[14] What is striking is that the explanation provided for a delay in that matter is precisely the same explanation provided in the present application. In that application, I refused to condone the late filing of the review given that the explanation was thin and that the prospects of success were poor.

[15] In this matter I do not intend to come to different conclusion. The application is significantly late, 82 days is not insignificant given the six-week time limit established by section 145 and given the statutory imperative of expeditious dispute resolution.

[16] The explanation for the delay is unsatisfactory. One would expect an official

of an employers' organization to be acutely aware of time limits that apply in review applications. On Theron's own version, the arbitration award came to his attention on 7 April 2015. He must have known by that date that the application was already out of time.

[17] Even after the attorney of record had been consulted there were delays in ensuring that this application was served and filed. Frankly this matter was conducted as if the time limit in Section 145 did not exist, or was one that placed a merely inconvenient obstacle in the path of the applicant.

[18] The law is quite clear, where there is a significant delay and the explanation for the delay is poor, the applicant's prospects of success are irrelevant. This principle was recently reaffirmed by the Labour Appeal Court in

[19] In my view, the applicant has failed to make out a case for condonation and the application therefore stands to be refused.

I make the following order.

1. The condonation for the late filing of the application for review is refused.
2. There is no order as to costs.

ANDRÉ VAN NIEKERK
JUDGE OF THE LABOUR COURT