

**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

Not Reportable  
Case No: JR2148/20

In the matter between:

**SACCAWU obo LANGWENGA MUTI**

**Applicant**

and

**COMMISSION FOR CONCILIATION MEDIATION  
AND ARBITRATION**

**First Respondent**

**COMMISSIONER NTHABISENG L, MANTSHULE N.O**

**Second Respondent**

**JDG GROUP (PTY) LTD**

**Third Respondent**

**Heard: 4 July 2023**

**Delivered: 30 August 2024 and served on the parties by email**

**JUDGMENT**

**NTSHEBE, AJ**

Introduction

[1] This is an application to review and set aside a ruling issued by the Second Respondent (Commissioner) wherein she dismissed the Applicant's condonation application. The review application is opposed by the Third Respondent.

### Background facts

[2] Mr Lagwenga Muti was employed by the Third Respondent until his dismissal on 20 June 2019. Following his dismissal, his union duly referred an unfair dismissal dispute within the stipulated time frames to the Commission for Conciliation, Mediation and Arbitration (CCMA). On 26 August 2019, the CCMA issued a certificate of outcome indicating that the dispute could not be resolved and that the matter had to be referred for arbitration within 90 (ninety days). However, this was not done by the union official, Maseko, despite assurances to Muti that the dispute had been referred for arbitration.

[3] Muti was in contact with Maseko on 19 November 2019, who informed him that the matter had been referred to the CCMA for arbitration on 18 October 2019 and was awaiting a notice of set down.

[4] In January 2020, Muti contacted Maseko through a WhatsApp message. On 20 January 2020, he visited Maseko who informed him that he had not received the date from the CCMA and also provided him with a copy of a completed Labour Relations Act<sup>1</sup> (LRA) form 7.13 dated 18 October 2019 which he claimed he had sent to the CCMA via email.

[5] On 28 January 2020, Muti sent another follow-up to Maseko and another one on 5 February 2020 which Maseko responded to, stating that he must not panic. He sent other messages on 20 February 2020 and 4 March 2020 which were not responded to by Maseko.

[6] On 20 March 2020, he visited Maseko at his office and was referred to Rabelani Tshidimo who informed him that Maseko's employment was terminated on 20 February 2020 due to an unsuccessful probation period. Thereafter, Tshidimo completed the request for arbitration form.

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<sup>1</sup> No. 66 of 1995.

[7] The request for arbitration was served on the Third Respondent on or about 20 March 2020, accompanied by a condonation application. However, the referral was not filed with the CCMA until 31 July 2020.

#### The grounds of review

[8] The Applicant contends that the Commissioner committed a gross irregularity pertaining to the admission or interpretation of evidence which resulted in flawed reasoning by the Commissioner. In essence, the Applicant states that the Commissioner's finding that the absence of Maseko's confirmatory affidavit to support the Applicant's submissions renders the allegations as a bare allegation. The Applicant contends that Maseko left the employ of the union under acrimonious circumstances and thus it would not have been reasonable to expect him to freely volunteer participation in the matter.

[9] The other ground of review is that the Commissioner failed to apply his mind to the relevant issues in accordance with the provisions of the LRA and the tenets of natural justice that a reasonable decision maker could not reach. The Applicant in respect of this ground contends that the Commissioner failed to apply the correct legal principles for condonation applications.

[10] The Applicant submitted that the Third Respondent stated that it was going to call witnesses which it did not call during the disciplinary hearing and that questions the basis of his dismissal.

[11] Further, the Commissioner's finding that prejudice to be suffered by the Applicant is outweighed by the delay caused by his own tardiness was unreasonable and not supported by evidence.

#### The ruling

[12] In her ruling, the Commissioner found that the delay of 238 days was excessive and extreme. This finding is not challenged by the Applicant.

[13] With regards to the explanation for the delay, the Commissioner noted that the Applicant relied on his chosen union, the union official failed him and that the Applicant cannot be absolved from the negligence of his chosen representative. She found that the Applicant's explanation for the delay was unreasonable and unacceptable. She relied on the case of the *National Union of Mineworkers v Council for Mineral Technology*<sup>2</sup>.

[14] In respect of prejudice, the Commissioner found that any prejudice to be suffered by the Applicant is outweighed by the other grounds she had already dealt with. As a result, she dismissed the Applicant's condonation application.

#### Evaluation

[15] The key ground of review by the Applicant is that the Commissioner failed to apply the correct legal principles in condonation applications in that she failed to take into account the importance of the matter and the prospects of success.

[16] It is common cause that the period of delay in this matter is excessive. The Commissioner had to take into account the principles outlined by our courts in coming to a decision on whether or not to grant condonation. These principles have been outlined in a number of judgments of the various courts including this court.

[17] It is trite that relevant considerations in a condonation application may include the degree of non-compliance with the rules, the explanation thereof, the prospect of success, the importance of a case, the respondent's interest in the finality of the judgment, the convenience of the court, and the avoidance of unnecessary delay in the administration of justice.<sup>3</sup> This list is not exhaustive.

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<sup>2</sup> [1999] 3 BLLR 209 (LAC).

<sup>3</sup> See: *Foster v Steward Scott Inc* (1997) 18 ILJ 367 (LAC).

[18] In *Independent Municipal and Allied Trade Union on behalf of Zungu v SA Local Government Bargaining Council and Others*<sup>4</sup> 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...’

[19] In *eThekweni Municipality v Ingonyama Trust*<sup>5</sup> the Court said the following where the explanation furnished did not cover the entire period and part of the delay was unexplained:

‘... 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.’

[20] In *Colett v Commission for Conciliation, Mediation and Arbitration and Others*<sup>6</sup> the Labour Appeal Court (LAC) stated that:

‘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.’

[21] What was required of the Applicant was an explanation covering the entire period of delay. However, in this instance, except for a few messages sent to

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<sup>4</sup> (2010) 31 ILJ 1413 (LC) at para 13.

<sup>5</sup> 2013 (5) BCLR 497 (CC) at para 28.

<sup>6</sup> [2014] 6 BLLR 523 (LAC) at para 38.

Maseko and the visits in January and March 2020, there is no further explanation for the delay.

[22] To make matters worse, on 20 March 2020, a referral to the CCMA accompanied by a condonation application was made by the union but this was not filed with the CCMA until 31 July 2020. There was no explanation before the Commissioner for this period of delay.

[23] The Commissioner further found that the Applicant could not be absolved from the negligence of his chosen representative. This is in line with a number of authorities that a litigant cannot hide behind the tardiness of his representative.

[24] In *Mngomezulu and Another v Mulima NO and Others*<sup>7</sup> the court stated the following:

'In the case of *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.'

[25] The Applicant's explanation did not cover the whole period and therefore it is not only unreasonable but it is not satisfactory and does not constitute a good reason for the delay in referring the matter to arbitration. The Applicant was required to account for the entire period of delay especially for this excessive period of delay and failed to do so on the papers before the Commissioner.

[26] The Applicant seems to have laboured under a false belief that condonation applications are there for the taking. In my view, there is no basis to interfere with the Commissioner's exercise of her discretion.

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<sup>7</sup> [2017] JOL 39230 (LC) at para 12.

[27] Under the circumstances, the review application falls to be dismissed.

Costs

[28] During the hearing, neither of the parties pursued costs against the other. I have also considered the fact that there is an on-going relationship between the parties. Under the circumstances, I do not deem it appropriate to award a cost order against the Applicant.

Order

1. The review application is dismissed.
2. There is no order as to costs.

T. G. Ntshebe  
Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr P Ngoato  
Instructed by: Union Official SACCAWU

For the Respondent: Mr S Snyman  
Instructed by: Snyman Attorneys