

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT DURBAN

CASE NO: 802/08

Reportable

In the matter between:

INDEPENDENT MUNICIPAL AND ALLIED UNION

obo EM ZUNGU

APPLICANT

and

SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL

FIRST RESPONDENT

BS HLELA N.O.

SECOND RESPONDENT

ETHEKWINI MUNICIPALITY

THIRD RESPONDENT

JUDGMENT

Conradie AJ

Background

1. In this matter the Applicant, a registered trade union, has brought an application on behalf of its member, Mr Zungu, in which it requests this court to review and set aside the award of the Second Respondent under case number EMD020861. I will refer to this as the Review Application in this judgement.
2. The Applicant's Review Application is approximately 9 weeks out of time. An application for condonation has been filed with this court by the Applicant. I will refer to this as the Condonation Application.
3. When the matter was heard I requested counsel for the parties to address me on the Condonation Application. I also heard them on the Review Application on the

basis that I would have regard to these arguments in the event that the Condonation Application succeeded.

Facts Relevant to the Condonation

4. The Applicant received the arbitration award on 20 August 2008.
5. In terms of section 145(1)(a) of the Labour Relations Act the Applicant was therefore required to apply for the review of the award within 6 weeks of the award being served on it. In the circumstances of this case this meant that the review application should have been filed with this court by no later than 1 October 2008.
6. The Review Application was, however, only filed on 8 December 2008, which is closer to 10 weeks late according to my calculation.
7. The Applicants explanation for the delay consists of the following:
 - 7.1. After it received the award on 20 August 2008 it was tabled at the Applicant's Dispute Resolution Committee meeting held on 17 September 2008.
 - 7.2. The Dispute Resolution Committee determined that a formal opinion should be sought from the Applicant's attorneys before proceeding with any review application.
 - 7.3. The Applicant's attorneys were contacted and instructed to provide a written opinion on 16 October 2008.
 - 7.4. Upon receipt of the opinion from the attorneys the Applicant instructed them to prepare the necessary papers for filing the Review Application. These papers were prepared during the first week of November 2008.
 - 7.5. In order to finalise the review papers a consultation was necessary with Mr Zungu. The Applicant experienced difficulty in contacting Mr Zungu as he had returned to his homestead. Mr Zungu was eventually contacted after about two weeks via his brother.
 - 7.6. Mr Zungu consulted with the attorneys on 20 November 2008, whereafter the review papers were finalised and filed with this court on 8 December 2008.

8. As far as prospects of success are concerned the Applicant states that it is advised that these are good as is apparent from the substantive merits of the matter which are set out in the founding affidavits in support of the Review Application.
9. As far as the balance of convenience is concerned the Applicant contends that the delay is not excessive and that the Third Respondent will suffer no prejudice “*should this matter be permitted to be dealt with in the ordinary course*”.

Dealing with Review Applications

10. In dealing with review applications this court is specifically empowered by section 145(1A) of the Labour Relations Act to condone the late filing of a review application on good cause shown.
11. In *NUM v Council for Mineral Technology [1999] 3 BLLR 209 (LAC)*¹ it was stated that in considering an application for condonation a court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both parties. Among the facts usually relevant is the degree of lateness, the explanation therefore, the prospects of success and the importance of the case. According to the court these facts are interrelated and are not individually decisive. What is needed is an objective conspectus of all the facts. A slight delay and a good explanation may help to compensate for prospects of success which are not strong. The importance of the issue and the prospects of success on the other hand may tend to compensate for a long delay. These principles referred to by the Labour Appeal Court are consistent with the approach adopted in *Melane v Santam Insurance Co Ltd 1962 (4) SA 531 (A)* and the long line of cases thereafter.
12. In the Num case the Labour Appeal Court also pointed out that 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.

Explaining the Delay

13. 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. The mere listing of significant events which took place during the period in question without an explanation for the

¹ at page 211.

time that lapsed between these events does not place a court in a position to properly assess the explanation for the delay. This amounts to nothing more than a recordal of the dates relevant to the processing of a dispute or application, as the case may be.

14. In the matter before me the founding affidavit in support of the Condonation Application explains the delay as follows:

“Satisfactory Explanation for the Delay

4. Following receipt of the Arbitration Award, such Award was tabled at Dispute Resolution Committee (“DRC”) meeting of the Applicant’s Trade Union on 17 September 2009.

5. It was determined that a formal Opinion should be sought from the Applicant’s Legal Advisors, prior to proceeding with any Review Application.

6. Our Attorneys were contacted and instructed to provide a written Opinion on or about 16 October 2008.

7. Upon receipt of the Opinion recommending that the matter be Reviewed, we instructed our Attorneys to prepare the necessary Review papers for filing.

8. Such documents were prepared during the first week of November 2008.

9. In order to finalise the Application Papers it was imperative that consultation be undertaken with Mr Zungu. I experienced substantial difficulties in contacting Mr Zungu, and having him attend our offices in order to finalise the Review papers. The reason for this was that Mr Zungu had returned to his homestead having had no income in Durban. I contacted Mr Zungu’s brother telephonically and requested that he personally proceed to Mr Zungu’s residence and inform Mr Zungu that he needed to contact the Union offices with a view to a meeting. It took approximately two weeks for the message to reach Mr Zungu and for him to contact our offices. Upon his contacting our offices, I explained the need for a consultation to Mr Zungu, and made arrangements for him to meet with our Legal Representatives.

10. Mr Zungu consulted with our Legal Representatives on 20 November 2008, whereafter the Review papers were finalized and duly served upon this Honourable Court, on 8 December 2008.”

15. From the above explanation it is apparent that:

- 15.1. The Applicant does not explain to the Court why the award had to be tabled at the Dispute Resolution Committee on 17 September 2008. Relevant information in this regard may have included an explanation of the reason why this committee exists, the frequency of these committee meetings, the fact that no litigation can be launched without its approval, and if so, whether or not any approval from the committee which may be required can be dispensed with in any circumstances. In argument, Mr Smithers who appeared on behalf of the Applicant submitted that I should accept that as an organisation the Applicant cannot just engage in litigation and that there is obviously good reason as to why the committee exists. The problem of course is that none of this appears from the affidavits.
- 15.2. There is no explanation as to why it took about one month from the Dispute Resolution Committee meeting for the Applicant to refer this matter to its attorneys. Was this because the person tasked with dealing with the matter was unavailable or had other commitments or was not aware of the time periods for filing a review application? This critical period is simply not explained to this court in the founding affidavit. An attempt is made in the replying affidavit to explain what happened during this period. This is however as a result of the Third Respondent stating in its answering affidavit that the Applicant has failed to explain why its attorneys were only instructed to provide a written opinion on 16th October 2008, when a decision to instruct the attorneys was taken on 17 September 2008. The Applicant's reply to this is that *"The period between the decision being taken by the DRC, and the instruction being given to our attorneys is less than four weeks. Legal argument will be advanced at the Hearing of this matter, that such period is not unreasonable. Mr Zwane who deposed to the affidavits further states that "In my capacity a Shop-Steward I am daily concerned with approximately 8 matters. I had prioritised the instruction to our attorneys, in relation to the other matters, which I was at that time concerned. Having instructed our attorneys a consultation was arranged"*.
- 15.3. No detail is given as to what information was required from Mr Zungu for purposes of the Review Application and why this information was so critical that the application could not proceed without his input. This particularly in light of the fact that the Applicant assisted Mr Zungu at the arbitration and must have been able to provide the required information. Further, reviews are generally of a "technical" nature and as such do not

necessarily require information from the parties to the arbitration. In addition, and very importantly, any uncertainty could have been cleared up after the record was received from the First Respondent and transcribed. The Rules of this court anticipate such difficulties and therefore allows an applicant in a review application to file a preliminary founding affidavit and to supplement this affidavit if need be after the record of the matter has been received and perused.

- 15.4. There is no explanation in the founding affidavits as to why it took from 20 November 2008 when the consultation with Mr Zungu was held to 8 December 2008 to file the application with this court.
16. Certain of these issues are picked up in the Applicant's replying affidavit but even then the level of detail which in my view is required is still not satisfied. In this regard there is still no explanation regarding the "workings" of the Dispute Resolution Committee".
17. In his founding affidavit in support of the Review Application Mr Zwane states that "*my Founding Affidavit was deposed to on 2 December 2008 and, whereafter our Attorneys of Record served and filed the application without delay.*" I am of the view that this statement is without merit if one considers that it took from Tuesday 2 December 2008 until Monday 8 December 2008 for the application to be served on the respondents and filed with this court. It also strongly suggests to me that the Applicant was not possessed with any sense or urgency to comply with the time periods required of it by the Labour Relations Act.
18. A confirmatory affidavit from Mr Zungu is attached to the replying papers in response to the Third Respondent having raised this issue in its answering papers. No explanation is given as to why this affidavit was not filed along with the founding affidavit in the condonation application as it ought to have been.
19. Based on the above I am of the view that the Applicant has failed to adequately explain the reason for the delay. If anything the explanation that has been offered leaves one with a sense that the Review Application was not given the priority which was required in order to ensure compliance with the time periods in the Labour Relations Act.
20. In the absence of a satisfactory delay I see no need to evaluate the prospects of success. As sated in the cases referred to above, in the absence of a reasonable or acceptable explanation for the delay, the prospects of success are immaterial.

Should Mr Zungu be prejudiced?

21. There is however an additional consideration in this matter which needs to be dealt with. That is the contention by Mr Smithers that even if I find that the Applicant has been tardy in launching the review application, Mr Zungu should not be punished for the Applicant's failing.
22. While courts have traditionally demonstrated their reluctance to penalise a litigant on account of the conduct of his representatives they have at the same time emphasised that there is a limit beyond which a litigant cannot escape the results of his representatives lack of diligence or the inefficiency of the explanation tendered (*NUM v Council for Mineral Technology supra* at 211 [10]; *Saloojee and Another NNO v Minister of Community Development* 1965 (2) SA 135 (A) at 140H – 141D; *Buthlezi & Others v Eclipse Foundries Ltd* 1997 18 ILJ 633 (A) 638I – 639A.) These cases referred to are in the context of an attorney failing to comply with stipulated time periods.
23. In this case it is a trade union which has failed to process a review on behalf of a member timeously. There is however no affidavit before this court from Mr Zungu setting out why he should not be prejudiced because the Applicant has not complied with the six week period. As mentioned above, it was only during argument that Mr Smithers contended that Mr Zungu should not be prejudiced.
24. It appears that Mr Zungu was content with the Applicant processing this matter. After his dismissal he returned to his homestead. There was an onus on him to enquire from his union what the Review Application entailed and what was required of him. It does not appear that he kept in contact with the Applicant about his case. When the Applicant needed to speak to him they had to get word to him through his brother. I would imagine that they indicated to him that it was urgent that he contact the union about his case and come to Durban as soon as possible. When he met with the Applicant and the attorneys it was again incumbent on him to get details of his case and to enquire what was to be done about the fact that they were out of time. It is clear that none of this has taken place otherwise an affidavit would have been produced explaining why Mr Zungu should not be penalised.
25. Trade unions exist for the very reason of looking after the interests of their members. When employees join a trade union they entrust responsibility for issues relating to their employment and the termination thereof to the trade union. In the circumstances of this relationship I believe that there is an even greater limit on the extent to which a trade union member can escape the results of their trade unions lack of diligence. Trade unions have a vested interest in the processing and outcome of disputes

referred on behalf of their members. Their very existence is about acting in the interests of their members. Members for their part are happy to entrust their labour relations affairs to their union. This case is a good example of where the trade union has been involved with the dispute from the inception. It represented Mr Zungu at the arbitration and as the Applicant in this matter have deposed to the affidavits in support thereof. It engaged the attorneys to provide an opinion and to launch the Review Application. Based on the papers the involvement of Mr Zungu was only towards the end when the papers had to be finalised. In these circumstances a member such as Mr Zungu would have to put up good reasons as to why he should be allowed to escape the consequences of the union's lack of diligence in launching the Review Application timeously. In this case there is no explanation at all before this court from Mr Zungu that would enable it to come to his assistance. The Condonation Application must according fail.

26. As far as costs are concerned I can see no reason why the Third Respondent should not be entitled to its costs in this matter.

27. In the circumstances it is ordered that

27.1. The application for condonation is dismissed

27.2. The Applicant is to pay the Third Respondent's costs.

Conradie AJ

Date of Hearing: 10 December 2009

Date of Judgment: 15 December 2009

Appearances:

For the Applicant: Adv M Smithers instructed by Fletcher Attorneys

For the Respondent: Adv L Naidoo instructed by Shepstone and Wylie