IN THE LABOUR COURT OF SOUTH AFRICA

(CAPE TOWN)

CASE NUMBER: C177/2016

DATE: 12 OCTOBER 2017

In the matter between:

AM MODIOKGOTLA Applicant

and

HEAD OF DEPARTMENT:
NORTHERN CAPE PROVINCIAL
GOVERNMENT: DEPT OF EDUCATION First respondent

J B MTHEMBU N.O. Second respondent

EDUCATION LABOUR RELATIONS
COUNCIL Third respondent

J U D G M E N T

STEENKAMP, J:

This is an application for condonation for the late filing of a review application by Mr Modiokgotla who was employed by the Department of Education of the Northern Cape.

It arises from a rather unfortunate set of events where he had referred a dispute to the Education Labour Relations Council. The matter came before Commissioner Jerome Mthembu who dismissed the referral because the employee's counsel had failed to abide by an agreement to deliver a written argument at a certain date.

In short, what happened is that the parties agreed to file written submissions. The Department's attorney asked for an extension, which was granted, until 24 October 2014. The employee's counsel however did not deliver his submissions timeously, although Commissioner Mthembu advised his attorney that he had to file his submissions by 24 October.

Then Mr *Lechwano*, who appears for the employee today and also appeared in the arbitration, telephoned the Commissioner and asked him for an indulgence to file his submissions by Monday 27 October. The Commissioner refused to grant that indulgence. Despite that, Mr Lechwano did not file the submissions on time and in those circumstances the Commissioner dismissed the referral

What happened then is that, instead of taking that ruling on review, the employee -- assisted by attorneys and counsel -- delivered an application to the Labour Court to compel the Bargaining Council to set the matter down for arbitration. That application failed for obvious reasons and judgment was handed down in November 2015.

The application to review Commissioner Mthembu's dismissal ruling was only filed on 8 April 2016. The application is about 14 months late. I must consider that against the principles set out in Melane v Santam Insurance Company Limited 1962 (4) SA 531(A) and the jurisprudence that follows that well-known judgment.

Firstly, the delay is clearly excessive. What become most important are the reasons for the delay. Mr *Lechwano* argued that, at least for the first period until November 2015, the employee cannot be blamed as he acted on the wrong legal advice. But even if that is so, the Court must then consider the further delay of five months from November 2015 until April 2016. By that stage the employee and his legal team were now well aware of the fact that they were already well out of time. Despite that, they waited another five months to bring this application (and I stress that at all stages the employee was represented by attorneys and counsel).

The only reason proffered by the employee in his application for condonation is the following:

> "In summary, apart from my failed application to compel, the delay in filing my review application was occasioned, on the one hand, by the unavailability of counsel during the festive holidays which shortly followed the delivery of the Court's judgment and on the other hand the exigencies of counsel's practice in February 2016 which led to him taking longer than usual to finalise the drafting of the review application.
>
> It is relevant to mention in this regard that counsel officially returned to work from vacation leave only towards the end of January 2016."

Those two paragraphs raise more questions than answers. Firstly, I have no idea what it means to say that counsel "officially" returned to work from vacation leave "towards the end of January 2016" and when that might have been. Secondly, this Court has held on numerous occasions that what the Court has called a "collective slumber" that the country appears to go into in December is no excuse for lawyers not doing their job. There are no *dies non* in this Court.

There is no explanation why, given the fact that the matter was already well out of time, the employee's attorneys and counsel in whom he placed his trust could not have spent half an hour to draft a simple review application as well as an application for condonation. There is also no explanation why counsel was necessary at all. The employee sought the advice of attorneys. It is inexplicable why those attorneys could not draft a simple application and if they did not feel comfortable doing so, despite the fact of presumably charging their client a fee, there is no explanation why they could not have sought the help of counsel who was available.

There is no explanation what "the exigencies of counsel's practice in February 2016" mean. If it means that counsel was simply too busy, again, it raises the question why another counsel could not be briefed or why the attorneys could not do the job themselves.

And in any event, it still leaves the question of what happened between February and April 2016. The answer appears to be nothing. There are also no affidavits attached by either the attorneys or counsel to explain why they did not come to the assistance of their client.

It may be so that the employee was let down by his legal team, but this Court and the High Courts have held in numerous cases, staring with *Saloojee*'s case[1] as far back as the 1960's, that there is a limit beyond which a litigant cannot escape the laxity or negligence of his chosen legal representatives. This is such a case.

As Mr *Petersen* pointed out, this Court has held in NUMSA v Hillside Aluminium [2005] 6 BLLR 601 (LC) at paras 18 and 19 that the factors set out in Melane and expanded upon by the Constitutional Court in Grootboom v National Prosecuting Authority 2014 (1) BCLR 65 (CC) at para 22 may be left out of consideration in certain circumstances. For example, where the delay is unacceptably excessive and there is no proper explanation for the delay, there is no need to consider the prospects of success. This is exactly such a case.

Mr *Petersen* has also referred to the well-known case of Makuse v CCMA (2016) 37 *ILJ* 163 (LC); [2015] 12 BLLR 1216 (LC) at para 5 where this Court made it clear that an application for condonation will be subject to strict scrutiny and that the principles of condonation in the context of the Labour Relations Act which makes provision for the effective and expeditious resolution of labour disputes, should be

[1] *Saloojee v Minister of Community Development* 1965 1 All SA 521 (A).

applied on a much stricter basis than the other civil courts.

The explanation proffered by the employee is so poor that it amounts to no explanation at all. In those circumstances the Court need not consider the prospects of success. Both parties have asked for costs to follow the result. I see no reason to differ.

THE APPLICATION FOR CONDONATION -- AND THUS THE APPLICATION FOR REVIEW -- IS DISMISSED WITH COSTS.

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STEENKAMP, J

APPEARANCES

APPLICANT:	A.I.B. Lechwano
Instructed by	Fizane attorneys (Bloemfontein).
FIRST RESPONDENT:	F. Petersen
Instructed by:	Mjila and partners (Kimberley).