



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Not reportable

CASE NO D 134/12

In the matter between:

PETER JOHN REGINALD BOUWER

Applicant

and

ETHEKWINI MUNICIPALITY

First Respondent

MOKGERE MASIPA N.O

Second Respondent

**SOUTH AFRICAN LOCAL GOVERNMENT
BARGAINING COUNCIL**

Third Respondent

DEVRAJAN PILLAY

Fourth Respondent

Date heard: 15 April 2014

Judgment delivered: 15 April 2014

Date edited: 7 July 2014

EX-TEMPORE JUDGMENT

VAN NIEKERK J

- [1] This is matter number D134/2012. The main application before the Court is an application to review and set aside an arbitration award made by the second respondent on the 13 October 2011.
- [2] It is common cause that the application was filed outside of the six-week time limit prescribed by section 145 of the Act. Before the Court this morning, is an application to condone the late filing of the review application. The principles to be applied are well-established; this Court applies the test of good cause and considers those factors identified as relevant in the case decided by the then Appellate Division of the Supreme Court in *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A). In terms of that test the Court is required to consider first, the degree of lateness then the explanation given for that lateness, the prospects of success and finally the respective prejudice that might be caused to either party.
- [3] The test established in *Melane* has been supplemented by decisions of the Labour Appeal Court which indicate that if an applicant fails to provide a satisfactory explanation for a significant period of delay then the prospects of success are irrelevant. In other words, in the absence of a satisfactory explanation for an inordinate delay, the application for condonation must fail. Applying those principles to the facts of this case, it is common cause that the arbitration hearing was conducted during the course of 2011 over much of that year. Indeed it seems that the final date of the hearing was the 28 September 2011. The arbitrator made his award on the 13 October 2011. The dispute referred to arbitration concerned an unfair labour practice in the form of a failure to promote. The arbitrator found that the respondent's conduct in not appointing the applicant did not constitute an unfair labour practice. In regard to the finding of unfair procedure, the applicant was awarded compensation equivalent to one

months' salary.

- [4] The first factor that must necessarily be the subject of enquiry is the degree of lateness. The applicant concedes that he received the award on or about the 20 October 2011. He then says that he approached Legal Wise, an insurance company who referred him to Lushen Pillay Attorneys on or about 16 November 2011. Less than a month later, Legal Wise confirmed cover in the applicant's case.
- [5] The papers in the present matter were filed only on 7 March 2012, way beyond the six week period that commenced running on 20 October 2011. The period of delay in my view is not in-significant.
- [6] The purpose of the time limit in s 145 this Court has emphasised recently in a number of matters is to meet the statutory imperative of expeditious dispute resolution. Indeed the current Judge President of the Labour Court has gone so far as to say that a review application ought properly to be viewed as a semi-urgent application. This is on account of, as I have indicated, the six-week period within which the application must be filed and the time limits that are thereafter prescribed for the filing of affidavits and the record in terms of Rule 7(A) and the practice manual that applies in this court. A delay of some four and a half months is by any standard excessive.
- [7] The explanation given for the delay is dealt with in some three sentences in the application for condonation. After confirming that Legal Wise would cover his matter the applicant then says that an advocate thereafter had been instructed, that the matter was complex and the preparation of papers took some time to be drafted and finalised. On receiving the affidavit, he then made changes and amendments to it.

- [8] Again, the Supreme Court of Appeal has emphasised on a number of occasions that an applicant seeking condonation must take the Court into his or her confidence and must set out with a degree of precision the explanation for the delay. The Courts have gone so far as to suggest that an explanation is required in respect of each day of the period of delay. In this instance, there is no indication from the papers before me as to when counsel was instructed, when the papers were drafted and made available to him or her, during which period the papers were required to be finalised, and how long it took to make changes and amendments to the affidavit.
- [9] The explanation for the delay frankly is cursory and falls short of what is required in terms of the relevant principles. The first respondent's counsel goes so far as to submit on the heads of argument that the applicant is glib and vague, and that the only inference to be drawn from the application for condonation is that it is an attempt to deceive this Court. On the face of it there appears to be some merit in that submission, I do not make any finding in regard to the conduct of the applicant deceitful or otherwise. I simply make the point that one might have expected a person in his position (he is a seasoned shop steward) to have provided a full and proper explanation for a delay of almost five months in filing this application.
- [10] In so far as they are relevant, the prospects of success and prejudice the last two factors that the Court must take into account. The applicant says in a single sentence, "The respondent at all material times has been aware that I am persisting in my claim." That is no indication of any prospects of success in the main application, it is also no indication of any prejudice that might be caused to the applicant should condonation be refused.
- [11] Again as I have indicated, where there is a failure to proffer a reasonable

explanation for an unacceptable delay, prospects of success are not relevant nor is the issue of prejudice. But I refer to those issues simply to highlight the vagueness of the explanation before the Court and the total inadequacy, in particular the explanation that is proffered for the delay in filing the review.

[12] In short therefore, I am not satisfied that the applicant has offered an acceptable explanation for a significant period of delay and for those reasons the application for condonation stands to be dismissed.

[13] In so far as costs are concerned this Court has a broad discretion in terms of section 162 of the Act to make costs according to the requirements of the law and fairness. I am in one mind inclined to make an order for costs on the basis that the first respondent should not be denied the costs of opposing what amounts to a misguided application. On the other hand the Labour Appeal Court has made clear recently that this court ought to be loathe to grant orders for costs against individuals who may form the perception that the doors of the court are closed to them on account of the potential of adverse orders for costs that might be made. I have noticed that the party to the arbitration proceedings was a union acting on behalf of the applicant. In the review the applicant appears to act on his own behalf. In those circumstances I am prepared to accept that he is indeed an individual employee who has approached this Court in good faith, but with a wholly misguided application, and that he ought to be accorded the benefit of the doubt and that he ought not to be held liable for the first respondent's costs in regard to the condonation application.

For those reasons, I make the following order.

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

ANDRE VAN NIEKERK

JUDGE OF THE LABOUR COURT

APPEARANCES

For the Applicant: Adv. Z Oliver instructed by Lushen Pillay Attorneys

For the Respondent: Adv. J Nxusani instructed by Hughes-Madondo Incorporated