REPUBLIC OF SOUTH AFRICA

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THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR 1282/10

In the matter between:

Andile Aaron MASEKO	Applicant
and	
CCMA	First Respondent
B S MTHETHWA N.O.	Second Respondent
SASOL INFRACHEM (PTY) LTD	Third Respondent
NBCCI	Fourth Respondent

Heard: 27 July 2016

Delivered: 23 August 2016

Summary: Application to declare employee vexatious litigant. Condonation and review – CCMA commissioner deciding condonation application without notifying parties and giving them an opportunity to make submissions. Ruling reviewed and set aside. Court invited to rule on review application on merits. No prospects of success on substance of condonation application at Bargaining Council. Application for condonation at Bargaining Council

dismissed. Employee ordered to satisfy previous costs orders before being allowed to litigate further.

JUDGMENT

STEENKAMP J

Introduction

[1] The applicant, Andile Aaron Maseko, has been involved in litigation with the third respondent, Sasol Infrachem (Pty) Ltd, for the past seven years. He has been unsuccessful in this Court, the Labour Appeal Court, the SCA and the Constitutional Court. He has failed to satisfy five costs orders against him. Yet he continues to litigate. Sasol has asked this court to declare him a vexatious litigant. But before that may be considered, this Court is called upon to decide afresh whether he is entitled to have a condonation ruling by the second respondent, a panellist of the National Bargaining Council for the Chemical Industry (NBCCI, the fourth respondent) reviewed and set aside.

[2] I find that the condonation ruling must indeed be set aside because the commissioner and the Bargaining Council did not notify the employee of the way in which he intended to deal with the matter and hence the parties were not given an opportunity to address him, whether orally or by way of written submissions. That deprived the employee of a fair hearing.

[3] But having set the ruling aside, the Court accepted an invitation by Sasol's counsel – acceded to by the employee's counsel – to prevent a further waste of time and money by deciding the condonation application afresh. In order to do so, I gave the parties two weeks to submit further written arguments on the merits of the initial condonation application that served before the Bargaining Council, apart from the arguments they presented in court. Nor Mr Maphoma nor his instructing attorneys had delivered any further submissions by that date. Mr *Kirstein*, for Sasol, stood by his earlier submissions. Having considered those submissions, I decide that the application for condonation before the Bargaining Council must fail.

[4] I also had to decide on an application for condonation for the late filing of this review application. It was more than 18 months late; yet, given that the employee was successful in his review application, I granted condonation.

[5] I decline to declare the employee a vexatious litigant, given that he has been successful in this review application. But he cannot carry on litigating *ad infinitum* when he has five costs orders against him that he hasn't satisfied. I rule that he may only take further steps, if he so wishes, once he had satisfied those costs orders and once he has put up security for any further costs.

[6] And lastly, I make no order as to costs in this application for condonation and for the review of the Bargaining Council's condonation ruling.

Background facts

[7] Sasol dismissed the employee, Mr Maseko, for misconduct in April 2010, more than seven years ago. That followed an inquiry by an arbitrator (then called a pre-dismissal arbitration) in terms of s 188A of the Labour Relations Act.[1] The arbitrator, Pat Stone, determined that the employee should be dismissed for the following misconduct:

- "Abusive behaviour, undermining attitude and frequently absent from work during the period of secondment at VUT[2] leading to a breach of trust with his employer; and
- Abusive language in making unfounded allegations against senior management of [Sasol]."

[8] The employee took that decision on review. This Court [Cele J] dismissed the review application on 10 February 2012. And on 17 August 2012 he dismissed an application for leave to appeal with costs.

[9] The employee petitioned the Labour Appeal Court. The LAC refused the petition on 2 November 2012.

[1] Act 66 of 1995 (the LRA).

[2] Vaal University of Technology.

[10] The employee then petitioned the Supreme Court of Appeal. The SCA refused the petition on 12 March 2013 and ordered the employee to pay the costs.

[11] The employee then applied to the Constitutional Court for leave to appeal (under case number CCT 32/2013). He now alleged infringement of his constitutional and human rights. The apex court dismissed that application on 6 May 2013.

[12] The employee then pursued a claim based on alleged discrimination in this Court. He subpoenaed a number of witnesses employed by Sasol and VUT. On 17 January 2014 this Court (Van Niekerk J) set aside the subpoena and ordered the employee to pay Sasol's costs. The employee delivered an urgent application to rescind the judgment of Van Niekerk J. On 4 February 2014 Lagrange J dismissed that application with costs.

[13] Basson J removed the damages claims based on discrimination from the roll on 6 February 2014, holding that this Court did not have jurisdiction. She delivered reasons for her judgment on 17 February 2014. She noted:

> "It is also clear from the papers that the applicant has decided to change tack in light of the fact that all doors to contest his unfair dismissal claim were slammed shut. The applicant has now decided to contest his unfair dismissal on the basis of unfair discrimination… The applicant's current cause of action now falls squarely within the parameters of the Employment Equity Act. Consequently the only access that the applicant has to the labour courts is through the prescripts of the Employment Equity Act. It was not disputed that applicant has not referred a dispute about unfair discrimination to the Commission for Conciliation, Mediation and Arbitration. In the circumstances this court does not have any jurisdiction.
>
> There is a further point that is dispositive of the matter and that is the fact that the unfair dismissal dispute that has been pursued by the applicant since 2010 has been determined by the Labour Court, The Labour Appeal Court, the Supreme Court of Appeals and the Constitutional Court. The dispute before this court is still the very same dispute and that is an unfair dismissal dispute. The matter is therefore *res judicata*. This application therefore stands to be dismissed.

> The second application before the court is an action for compensation and damages inflicted as a result of alleged unfair discrimination. The same considerations in dismissing the previous application apply in respect of this application: the applicant's unfair dismissal claim was determined to be fair by various forums as indicated herein above. Furthermore, the applicant's services were terminated on 30 April 2010. If any unfair discrimination was conducted by Sasol (which is denied by the respondent) it could only have been conducted prior to the date of termination of the applicant's services. A period of three years has lapsed since the dismissal of the applicant. The claim has therefore prescribed."

[14] The applicant then referred a fresh unfair discrimination dispute to the CCMA[3], based on a letter that he had written to the *Sunday Times* on 2003, thirteen years ago and seven years before his dismissal. That body referred it to the relevant bargaining council with jurisdiction, i.e. the NBCCI. The referral was three years and seven months late. The employee applied for condonation. Both parties filed affidavits. The Commissioner, Bhekinhlanhla Stanley Mthethwa (the second respondent), decided the condonation on the affidavits. He ruled against the applicant. The applicant now seeks to have that condonation ruling reviewed and set aside.

Condonation for this review application

[15] This application is also about 18 months late. The delay is clearly excessive. Having regard to the principles in *Melane v Santam Insurance Ltd*[4] I need to consider whether the excessive delay can be rescued by the explanation therefor and the prospects of success in the review application.

[16] The explanation for the delay is poor. All that the applicant says in a supplementary affidavit is the following:

> "I hereby apply for condonation for any delays in this matter as explained in my founding affidavit. The further delay in the matter was caused by the order that the fourth respondent [the Bargaining Council] must be joined,

[3] Commission for Conciliation, Mediation and Arbitration (the first respondent).

[4] 1962 (4) SA 531 (A).

> who [*sic*] I erroneously did not join as I laboured under the belief that since I had referred the matter to the CCMA, it was sufficient of me to join only the latter and the Commissioner himself."

[17] As will be apparent from the discussion hereunder, I have nevertheless concluded that the employee has good prospects of success in the review application. In those circumstances I have exercised my discretion to grant condonation for the late application for review, despite the excessive delay and the poor explanation.

The Bargaining Council's condonation ruling

[18] The Bargaining Council took into account that the dispute was referred three years and seven months late. At all material times the employee was represented by an attorney. The reasons for the late referral were "without any substance". And he had not set out his prospects of success on the merits. The Commissioner refused condonation.

Review grounds

[19] The employee asks that the Bargaining Council's condonation ruling be declared a nullity; or that it should be reviewed and set aside. He does so, not because of the ruling on the merits, but because the Commissioner decided the condonation application "on papers without hearing the parties and without their consent".

Evaluation / Analysis

[20] Mr *Maphoma* could not refer to any authority for his argument that the condonation ruling was reviewable because the commissioner had not given the parties an oral hearing, instead deciding on condonation by referring only to the affidavits filed in the condonation application. But his opponent, Mr *Kirstein*, came to his rescue. He referred the Court to the unreported judgment of Molahlehi J in *SAMWU v Piotrans (Pty) Ltd.*[5] In that case, the Court held that the Commissioner was supposed to have obtained the agreement of the parties if the matter was to be decided on

[5] [2016] ZALCJHB 2 (6 January 2016).

paper. This was not done and therefore the Commissioner adopted an irregular approach in considering the condonation application only on papers submitted.

[21] In *Piotrans*, Molahlehi J also referred to a judgment of the LAC to which neither party had referred in this case. In *Kungwini*[6] the court noted:

> "Another point is that in terms of rule 31(9)(a), the Commission must allocate a date for the hearing of an application, including an application for condonation, and in terms of rule 31(9)(b) the Commission must notify the parties of the date, time and place of the hearing of the application.
>
> Rule 31(10) provides that:
>
> 'Despite this rule, the Commission or a commissioner may determine an application in any manner it deems fit.'
>
> However, I do not think that this provision can possibly be relied upon to dispense with the giving of notice to the parties, or at least to the applicant if the respondent is in default, of the commissioner's intention to hear a matter. For a commissioner to hear and determine an application for condonation without notice to the parties would be to ignore the *audi alteram partem* rule."

[22] Despite the provisions of CCMA rule 31(10), this Court is bound by the LAC's authority. And in this case it is common cause that the Commissioner did not give the parties notice of the way in which he intended to deal with the condonation application. The condonation ruling must be set aside for that reason.

<u>Deciding afresh on condonation at the Bargaining Council</u>

[23] The parties agreed that, should this Court set aside the arbitrator's ruling on condonation, I was in as good a position as an arbitrator at the Bargaining Council to decide afresh on that application. All of the affidavits filed in respect of that application are in the court file and counsel had an opportunity to address the Court in respect of the merits of that application. I also invited the parties to deliver supplementary heads of

[6] *Kungwini Residential Estate & Adventure Sport Centre Ltd v Mhlongo NO* [2006] 5 BLLR 423 (LAC); (2006) 27 *ILJ* 953 (LAC) para [13] 962C.

argument in respect of the condonation application that served before the Bargaining Council by 10 August 2016. Sasol's attorneys notified the Court that it would not deliver supplementary submissions. The applicant's attorneys and counsel did not deliver any further submissions by the agreed date.

[24] In the initial application for condonation filed with the CCMA (and referred to the Bargaining Council along with his referral of an alleged automatically unfair dismissal, the employee explained his delay of more than three years as follows:

24.1 He pursued his unfair dismissal dispute through the Labour Court, the Labour Appeal Court, the SCA and the Constitutional Court. He was unsuccessful in all these fora.

24.2 "I gave up the fight and was about to throw away all the paperwork regarding this matter. Then in June 2013, a man who was assisted by the CCMA in his case asked me if I was discriminated against."

24.3 The employee then reread Sasol's bundle of documents that they submitted at the pre-dismissal arbitration. He came across the letter that he wrote to the *Sunday Times* on 9 November 2003. He then decided that "a secret file was kept about my politics and the harassment began and culminated in my dismissal." He then decided to refer an automatically unfair dismissal dispute to the CCMA in February 2014 based on the letter that he had written in 2003.

[25] I shall consider the application for condonation referred to the CCMA (and then to the Bargaining Council) on the basis of this affidavit and on Mr *Mapoma*'s further submissions.

[26] The extent of the delay – three years and seven months – is clearly excessive.

[27] The explanation for the delay is poor. The employee initially referred an unfair dismissal dispute to the CCMA after he had been dismissed in 2010. Conciliation failed and he was unsuccessful at arbitration. He was then unsuccessful on review to this court [per Cele J] and in every other court in the Republic, including the apex court. Only after he had

exhausted every appeal available to him, and after having been prompted by an unnamed person who suggested to him that he may have been discriminated against, did you decide to change tack and to claim that his dismissal was somehow related to a letter that he had written to a newspaper 10 years earlier.

[28] Apart from the excessive delay and the poor explanation therefore, the employee did not address his prospects of success at all. He simply states that the 2003 letter somehow "culminated in" his dismissal for misconduct seven years later. He has not set out any basis for prospects of success in a fresh dispute arising from the same dismissal.

[29] In those circumstances, the application for condonation must be dismissed.

Conclusion

[30] The delay in referring the dispute to the CCMA and to the Bargaining Council is excessive. The explanation is a poor one. And the prospects of success are slim. The application for condonation of the dispute that the applicant had referred to the CCMA is dismissed.

Vexatious litigant?

[31] Mr *Kirstein* has argued that the employee should be declared a vexatious litigant. In the alternative, he suggested that the employee be ordered to put up security for costs before pursuing any further litigation; and that he be ordered to make good the previous costs order against him before proceeding any further.

[32] It is, of course, a drastic step to close the doors of the court to a litigant. The principles are well established.

[33] The Vexatious Proceedings Act[7] provides in s 2(1)(b):

> "If, on an application made by any person against whom legal proceedings have been instituted by any other person or has reason to believe that the institution of legal proceedings against him is contemplated by any other

[7] Act 3 of 1956.

person, the court is satisfied that the said person has persistently and without any reasonable ground instituted legal proceedings in any court or in any inferior court, whether against the same person or against different persons, the court may, after hearing that person or giving him an opportunity of being heard, order that no legal proceedings shall be instituted by him against any person in any court or any inferior court without the leave of the court, or any judge thereof, or that inferior court, as the case may be, and such leave shall not be granted unless the court or judge or the inferior court, as the case may be, is satisfied that the proceedings are not an abuse of the process of the court and that there is *prima facie* ground for the proceedings."

[34] Despite the convoluted language, the impact of the provision is clear. This court may order that the employee may not Institute any further legal proceedings if I am satisfied that the employee has persistently and without any reasonable grounds instituted the previous legal proceedings.

[35] The Constitutional Court summarised the purpose of the Vexatious Proceedings Act in *Beinash v Ernst & Young*[8]*:*

> "This purpose is 'to put a stop to persistent and ungrounded institution of legal proceedings'. The Act does so by allowing a court to screen (as opposed to absolutely bar) a 'person (who) has persistently and without any reasonable ground instituted legal proceedings in any Court or inferior court'. This screening mechanism is necessary to protect at least two important interests. These are the interests of the victims of the vexatious litigant who have repeatedly been subjected to the costs, harassment and embarrassment of unmeritorious litigation; and the public interest that the functioning of the courts and the administration of justice proceed unimpeded by the clog of groundless proceedings.
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> The effect of s 2(1)(b) of the Act is to impose a procedural barrier to litigation on persons who are found to be vexatious litigants. This serves to restrict the access of such persons to courts. That is its very purpose. In so doing, it is inconsistent with s 34 of the Constitution, which protects the right of access for everyone and does not contain any internal limitation of the right. The barrier which may be imposed under s 2(1)(b) therefore does

[8] 1999 (2) SA 116 (CC) para 15 [per Mokgoro J].

> limit the right of access to court protected in s 34 of the Constitution. But, in my view, such a limitation is reasonable and justifiable."

[36] On the facts of this case, the employee has unsuccessfully been pursuing litigation against Sasol for six years arising from his dismissal in 2010. Five costs orders have been granted against him. The total taxed costs amount to R 155 425, 18. Sasol's attorneys have attempted to execute the cost order is against him but have not been successful.

[37] On the face of it, that does seem to be unmeritorious litigation against which Sasol should be protected and that should not further clog up the rolls of this and other courts.

[38] I do take into account, though, that the employee has been successful in having the condonation ruling at the bargaining Council reviewed and set aside, albeit on a mainly procedural ground; and despite the fact that I have found that condonation should be refused in any event. In those circumstances I cannot find that the current review application was frivolous or without sufficient grounds. I am therefore not inclined to accept the invitation to declare the employee vexatious litigant.

[39] Nevertheless, Sasol cannot be expected to continue defending proceedings against it in circumstances where the employee has failed to satisfy five costs orders against him. He must satisfy those orders before he can continue with any further legal proceedings, should he be so inclined; and he must put up security for the costs of any further legal proceedings.

[40] This Court has the power to deal with any matters necessary or incidental to performing its functions in terms of the LRA or any other law.[9] The order I intend to make is such a power. As Conradie J remarked in *Hurter v Hough*:[10]

> "Sover ek kon vasstel is daar geen beslissing oor hierdie onderwerp wat handel met *sui generis* verrigtinge soos die onderhawige nie. Die *dicta* in die sake is, soos verwag kan word, beperk tot die gevalle waarmee gehandel word. Daar is egter geen aanduiding dat die Hof, by die

[9] Labour Relations Act s 158(1)(j).

[10] 1989 (3) SA 545 (C) 552 c.

> uitoefening van sy inherente bevoegdheid om sy eie prosedure te reël (cf *Universal City Studios Inc and Others v Network Video (Pty) Ltd* 1986 (2) SA 734 (A) D op 754G), nie by magte is om ook kwelsugtige *sui generis* verrigtinge, of selfs *sui generis* verrigtinge wat nie as sodanig bestempel kan word, op 'n wyse te beheer wat die belange van die regspleging dien nie. Na my mening is hierdie Hof wel in beginsel bevoeg om 'n opskortingsbevel onder hierdie omstandighede te maak. Regter Schreiner beklemtoon in *Potchefstroom Town Council v Botes* 1939 TPD 4 dat 'the foundation of all such orders is the inherent right of the Court to prevent its procedure being abused' (op 5). Daar is heelwat gesag vir die stelling dat 'n litigant wat in staat is, maar hardnekkig weier om sy teenstander se kosterekening in vroeëre verrigtinge te betaal, hom kwelsugtig gedra. *White v Northern Insurance Co* 1918 WLD 25 op 27."

[41] I therefore intend to order that the employee may not institute or pursue any further proceedings against Sasol before satisfying the earlier costs order against him and putting up security for further costs.

Costs of this application

[42] The applicant has been successful in the application for review, but unsuccessful in the initial condonation application before the Bargaining Council. In law in fairness, I do not consider a costs award in these proceedings to be warranted.

Order

[43] I therefore make the following order:

43.1 The condonation ruling by commissioner Bhekinhlanhla Mthethwa under the auspices of the NBCCI is reviewed and set aside.

43.2 It is replaced with a fresh ruling that the application for condonation of the applicant employee, Andile Aaron Maseko, is dismissed.

43.3 The applicant, Mr Maseko, may not pursue any further litigation against the third respondent, Sasol Infrachem (Pty) Ltd, unless and until he has satisfied all costs orders against him relating to litigation against the third respondent.

43.4 Should the applicant decide to pursue any further litigation against Sasol, he must furnish security in the amount of R150 000 before he may do so.

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Anton Steenkamp
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	S X Mapoma (with him G Badela)
Instructed by:	Jakes Ncala & Maja.
RESPONDENTS:	Paul Kirstein
Instructed by:	Johanette Rheeder.