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

Reportable

Case no: JR1157/20

In the matter between:

**NTEU OBO JAN MOKGAKELE MOEKETSI** **Applicant**

and

**THE CCMA** **First Respondent**

**EVA NGOBENI N.O** **Second Respondent**

**TSHWANE UNIVERSITY OF TECHNOLOGY** **Third Respondent**

**Heard**: **10 August 2022**

**Delivered**: **16 August 2022**

**Summary: Application seeking to review and set aside a condonation ruling. The commissioner found that no reasonable explanation for the delay has been proffered. Interpretation of section 191 (1) (b) (ii) of the LRA – the 90 day period commences to run from an act or omission alleged to be an unfair labour practice and not from the date parties failed to achieve internal resolution of the act or omission (dispute). A party seeking condonation must provide a detailed explanation for the delay as opposed to an excuse for the wrong interpretation**

**of the legal provision. Applying the wrong legal interpretation and or strategy does not amount to a proper and reasonable explanation.**

**The granting and refusal of condonation involves an exercise of true discretion. A Court of review may only interfere with the exercise of discretion if (a) wrong principles have been applied; (b) the exercise is capricious; (c) the exercise is tainted by *mala fides*; or (d) it has not been exercised judiciously.**

**The review application had not been launched outside the prescribed six weeks period. Condonation is not required in order to acquire jurisdictional powers. Held: (1) The application is dismissed. (3) There is no order as to costs.**

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**JUDGMENT**

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**MOSHOANA, J**

Introduction

[1] Before me serves an application seeking to review and set aside a condonation ruling issued by the learned Commissioner Eva Ngobeni (Ngobeni). In terms of the impugned ruling, Ngobeni refused to exercise her discretion in favour of granting the applicant condonation for the late referral of a dispute alleging an unfair labour practice related to promotion. The applicant contends that condonation was not required, if required, by refusing to grant it, Ngobeni exercised her discretion wrongly. Tshwane University of Technology (TUT) duly opposes the application. In opposing the application, TUT alleged that the review application was launched outside the prescribed six weeks period.

Background facts

[2] Briefly, the facts appertaining the current application are as follows. Mr Jan Mokgakele Moeketsi (Moeketsi) is an employee of the TUT. He is a member of the National Tertiary Education Union (NTEU). Moeketsi applied for two promotional posts. The one post was at the Arcadia campus of the TUT, whilst the other post was at the Pretoria campus. Moeketsi was shortlisted for the Arcadia campus post but not for the Pretoria campus post. Around February 2017, Moeketsi discovered that an employee, contrary to the procedures and requirements applicable to the filling of posts, had filled the Pretoria campus post.

[3] Moeketsi was piqued by this discovery. As a result, in April 2017, he lodged an internal grievance. In terms of the applicable policy, a grievance must travel three steps. At the first step, Moeketsi did not achieve smugness. He escalated the grievance to the second step. At this step, Moeketsi alleges that he achieved smugness in that the appointed chairperson found in his favour. However, the TUT failed to implement the findings of the appointed chairperson. Consequently, Moeketsi gravitated to the third and final step. At this step, a finding was made that Moeketsi be provided with reasons why he was not shortlisted and that the position concerned be re-advertised internally within 20 days of the finding. This finding was made on 23 February 2019.

[4] Once more, the TUT failed to implement the findings in step 3. Owing to that, Moeketsi referred a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) and alleged an unfair labour practice in relation to promotion. The referral was made within 90 days of the failure to implement the findings in step 3. At arbitration, the TUT challenged the jurisdiction of the arbitrator and contended that the referral was made outside the statutory 90 days period. Following this challenge, the applicant was directed through a formal ruling to seek condonation since the referral was late. Indeed, a formal application for condonation was launched, which application birthed the star-crossed ruling.

Grounds for review

[5] The primary ground for review is that Ngobeni committed an error of law by applying the provisions of section 191 (1) (b) (ii) of the Labour Relations Act[1] (LRA) wrongly. Properly applied, the 90 day prescribed period begins to run from the date when Moeketsi became aware of the TUT's failure or refusal to implement step 3 of the grievance process findings, so contends Moeketsi. Thus, condonation was not required.

[6] As an alternative, NTEU and Moeketsi contend that Ngobeni committed a gross irregularity in the exercise of the statutory discretion by failing to take into account the material facts explaining the delay. Additionally, Ngobeni erroneously failed to consider Moeketsi's prospects of success.

Evaluation

*Is the review application launched out of time?*

[7] The TUT contends that since the impugned ruling was dated March 2020, NTEU and Moeketsi should not be believed when they allege that they became aware of the ruling in July 2020.

[8] The answer to objections of this nature lies in the text of section 145 (1) (a) of the LRA. There is no doubt that in issuing a ruling, Ngobeni was performing a function provided for in section 191 (2) of the LRA. Such performance of the statutory function is subject to the Labour Court review powers in terms of section 158 (1) (g) of the LRA. Such review powers are subjected to the provisions of section 145 of the LRA. In other words, the review application must be launched within six weeks of the date the ruling was served on the

[1] Act 66 of 1995, as amended.

applicant. The word *serve* has been afforded a technical definition in section 213 of the LRA.

[9] It is not the contention of the TUT that the ruling was served on NTEU and Moeketsi earlier than what they allege to be the date. Its case is predicated on the date *ex facie* the ruling. The date of the ruling is not the determinative date. The determinative date is the one on which NTEU and Moeketsi were served. They specifically allege that they received the ruling on 18 July 2020. In disputing this allegation, the TUT specifically called upon the pair to provide proof of service on them by the CCMA. The pair obliged.

[10] Accordingly, the review application having been launched on 25 August 2020, it was launched within the prescribed six weeks period. No condonation is required. The conclusion to reach is that the review application is not late. I must state that Mr Gerber SC for the TUT did not press on this point during oral submissions. However, this Court did not hear him abandoning the point.

*Did Moeketsi require condonation or not?*

[11] NTEU and Moeketsi contend that in their interpretation of section 191 (1) (b) (ii) of the LRA, the prescribed 90 days commenced to run from the date on which Moeketsi became aware of the refusal to implement step 3 findings. There is no merit in this contention. At this stage, step 3 that is, what occurred was the failure to resolve a dispute that was birthed earlier. When parties fail to reach a solution, a dispute is not birthed then. This simply signifies to the disputing parties that it is time to escalate the already existing dispute to another level. In short, it signifies a deadlock. A deadlock typifies a situation where opposing parties are unable to make progress towards resolving an existing dispute. At that stage, ordinarily another deadlock breaking mechanism should be ushered.

[12] Generally, a grievance occurs when an employee or a person strongly feels that he or she has been treated unfairly. The LRA is designed in such a way that not every feeling of unfair treatment of an employee amounts to an unfair labour practice. The simple reason for this is that the LRA accommodates a constitutional right to strike. It defines strike action in section 213 as a weapon to remedy a grievance in respect of any matter of mutual interest between an employer and employee. Section 65 (1) (c) of the LRA limits the right to strike if the issue in dispute is one that a party has the right to refer to arbitration in terms of the LRA. If each work grievance was given a status of an unfair labour practice, collective bargaining would be unduly stifled and power play would be severely trammelled.

[13] Moeketsi complained about the conduct of the TUT which relates to his promotion. On his own version, he knew of the conduct in February 2017. Section 186 of the LRA provides a definition of an unfair labour practice. For the purposes of this judgment, section 186 (2) (a) of the LRA states that an unfair labour practice means any unfair act or omission that arises between an employer and an employee involving unfair conduct by the employer relating to promotion. It is to be observed that the section refers to (a) any unfair act or omission and (b) involvement of an unfair conduct. First, there must be an act or omission. The grammatical definition of an *act* is that which is done or doing; the exercise of power, or the effect, of which power exerted is the cause; a performance; a deed. An *omission* grammatically means the act of omitting; neglecting or failing to do something required by propriety or duty.

[14] Once an act or omission exists, in order to qualify as an unfair labour practice that act or omission must be unfair and it must involve unfair conduct in relation to promotion. It cannot be said that an unfair act or omission happens first and later on the unfair conduct. The grammatical meaning of conduct is the act or method of conducting. Thus, an act and conduct take place symbiotically. On Moeketsi's version, the act or conduct that he complains about is the failure to shortlist him for the position at the Pretoria campus. In other words, when the

TUT excluded Moeketsi from a shortlisting for the Pretoria campus post, it ignited a cause of action – an unfair labour practice for Moeketsi because in his view he met the requirements, hence he was shortlisted for the Arcadia campus. Curiously, it must have dawned on Moeketsi when he got shortlisted for the Arcadia campus post that he was not shortlisted for the Pretoria campus post. Nevertheless, he avers that he only became aware in February 2017 that the Pretoria campus post has been filled.

[15] It is doubted that the date in February 2017 is the date of the act or conduct that involves unfairness. On Moeketsi's own version, February 2017 is the date of his discovery of the filling of the post. Axiomatically, if the unfair act or conduct was when he was not shortlisted, such an act or conduct ordinarily predates the filling of the position. A position may be filled in January and a grievant may discover this filling in February. If there was any unfair conduct, such conduct must predate January or be in January when the filling happens. It cannot happen once an employee discovers the act of filling the post.

[16] That notwithstanding, section 191 (1) (b) (ii) reckons the 90 days from two different points. The first is from the date of the act or omission. The second is from the date on which an employee becomes aware of the act or omission. If Moeketsi's case is that the act or omission is the failure to shortlist him. It is unclear from the papers as to when the TUT shortlisted employees for the Pretoria campus post. The second part of the section is worded similar to the provisions of section 12 (2) of the Prescription Act[2], which states that prescription shall not commence to run until the creditor becomes aware of the existence of the debt. It must follow that the Prescription Act is a statute *in pari materia*. The Constitutional Court in *Links v MEC: Department of Health, Northern Cape Province*[3] stated that acquiring knowledge means being in possession of sufficient facts to suspect that there is fault. It must follow that

[2] Act 68 of 1969.
[3] 2016 (4) SA 414 (CC).

the *becoming aware* phrase, as employed in section 191 (1) (b) (ii) of the LRA, should as a matter of course include deemed knowledge or awareness[4].

[17] At a point, Moeketsi became aware, on his version, that he was only shortlisted for Arcadia and not Pretoria. At that time, he could have reasonably launched an inquiry as to whether he was or was not shortlisted for the Pretoria campus post. Had he launched such an investigation he could reasonably have become aware that he was not shortlisted for the Pretoria campus post – an act or omission. On the facts of this case, this Court takes a view that Moeketsi could have become aware of the act or omission at the time when he was shortlisted for the Arcadia campus post. Such implies that the date of reckoning is not February 2017 but much earlier. Although there is no indication as to when the shortlisting for the Pretoria campus post happened, the closing date for applications was in September 2016. In all probabilities, the shortlisting must have happened in or about October 2016.

[18] Nevertheless, Moeketsi contended that he only became aware of the filling of the position in February 2017. This contention then elevates the act or omission to be the failure to appoint/promote him to the Pretoria campus post. Therefore, on application of the second part, even if the post was filled in January 2017 – the date of the act or omission – the 90 days commenced to run in February 2017. Thus, Moeketsi ought to have referred a dispute around May 2017. Instead, Moeketsi referred a dispute on 9 May 2019. Ms Withaar, who appeared on behalf of Moeketsi, submitted that since at a final stage 3, it was found that he is entitled to reasons, that entitlement gave rise to a claim for unfair labour practice. In other words, failure to provide reasons for not shortlisting a candidate of itself constitutes a distinct act of unfair labour practice. This Court invited Ms Withaar to provide authority for that submission. Indeed on or about 11 August 2022, she provided this Court with a brief note. She submitted that

[4] See *First National Bank v Scenematic One (Pty) Ltd* unreported judgment under case no: 20832/14 delivered on 14 April 2016.

in a commentary to section 186 (2)(a), the book *Labour Law Through Cases*[5], states that:

> 'Though it may not always be easy to justify the preference of one candidate over another, the employer should at very least be able to provide reasons for its decision.'(Own emphasis)

[19] She further submitted that the authors of the commentary cited two cases in support of the above statement. Those are *Mashegoane v University of the North*[6] and *Public Servants Association of SA on behalf of Petzer v Department of Home Affairs*[7]. Sadly, in the Court's view, the commentary and the authorities are not braced for the proposition that failure to give reasons of itself is a distinct act or omission constituting an unfair labour practice.

[20] By complying with a directive to apply for condonation, Moeketsi somewhat perempted his impugn to the ruling that the referral was late. It was never his contention that the referral was not late; otherwise, he would have resisted the advice or ruling to apply for condonation. This Court does accept that where a commissioner wrongly directs a referring party to apply for condonation, where one is not required, such a ruling or directive is *brutum fulmen*[8]. In this particular instance, the directive was, on a proper interpretation of section 191(1) (b) (ii) of the LRA, a correct one. It was for that reason that NTEU and Moeketsi failed to challenge that ruling which was made earlier than the impugned ruling. An argument that the ruling is now being symbiotically challenged in the current review application is disingenuous if regard is had to the notice of motion in support of the current application. As correctly argued by Mr Gerber SC, until the ruling is challenged and set aside, that ruling stands, which ruled that condonation was required. On application of the principle of peremption,



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[5] D Du Toit et al, "*Labour Law Through the Cases"* LexisNexis South Africa, updated April 2022.

[6] [1998] 1 BLLR 73 (LC).

[7] (1998) 19 ILJ 412 (CCMA).

[8] See: *Premier Gauteng and Another v Ramabulana N.O and others* (2008) 29 ILJ 1099 (LAC).

Moeketsi would be hard pressed to persuade any Court that that ruling was in any manner wrong.

[21] In advancing an incorrect interpretation of section 191 (1) (b) (ii) of the LRA, NTEU and Moeketsi place heavy reliance on the decision of this Court *per* the learned Acting Justice Sedile in the *City of Johannesburg Metropolitan Municipality v SAMWU obo Matsheka and others*[9] (*City of Johannesburg*). In this matter, Sedile AJ dealing with a grievance policy concluded that since step 3 of the grievance process was not concluded, the employee was not entitled to refer a dispute for arbitration. The view taken by Sedile AJ was that until internal remedies are exhausted there is no jurisdiction to arbitrate. Although the matter is distinguishable on the facts, in that it dealt with an interpretation and application of a collective agreement dispute (section 24 of the LRA), its correctness regarding the lack of jurisdiction is doubted. In *Madondo v SSBC and others*[10] (*Madondo*), the learned Acting Justice Prior, correctly in my view concluded thus:

> '[57] I am of the view therefore that the jurisdictional issue in clause 3.2 read with clause 1.5(c) "merely constitutes a bar to a remedy" and is akin to the imposition of "a procedural bar on the institution of an action to enforce the right" as enunciated in the case of *Society of Lloyds ibid*.
>
> [58] The effect of having to exhaust internal remedies as provided for in the above provisions <u>does not extinguish</u> the applicant's <u>right to proceed to the bargaining council to determine the alleged unfair dismissal; it simply required the applicant to take a compulsory procedural step before doing so.'</u> (Own emphasis)

[9] Unreported judgment under case no: JR214/2016 delivered on 14 December 2014.

[10] Unreported judgment under case no D305/2013 delivered on 28 January 2015 at paras 57 – 58.

[22] In *casu*, Moeketsi was not compelled to refer a dispute involving an unfair labour practice to the internal grievance process. Within 90 days of the dispute, Moeketsi was not gaged to refer the dispute to the CCMA. If Moeketsi saw benefits in the grievance processes, he could have engaged that within the prescribed 90 days. The grievance procedure anticipates a grievance to be resolved in a matter of weeks. It remained unexplained as to why Moeketsi took two months after the discovery to engage the internal grievance process. He became aware of the appointment at the Pretoria campus in February yet he lodged a grievance in April. The jurisdiction to arbitrate or adjudicate in terms of the LRA is conditioned upon referral to conciliation or mediation. It is not conditioned upon any exhaustion of internal remedies. Once a dispute is processed through the conciliation stage, an employee may request resolution by arbitration or refer for adjudication. In order to undergo the conciliation and/or mediation stage what is required is a dispute. In terms of section 213, a dispute includes an alleged dispute. In *Williams v Benoni Town Council*[11], Roper J said:

> 'A dispute exists when one party maintains one point of view and the other party a contrary view or a different one. When that position has arisen, the fact that one of the disputants, while disagreeing with his opponent, intimates that he is prepared to listen to further argument, does not make it any less a dispute.'[12]

[23] Therefore, in my view, the fact that internal remedies have not been exhausted does not mean that a dispute cannot exist. Internal remedies are aimed at resolving an existing dispute/grievance. Logically, existentially, a dispute predates invocation of internal remedies. With considerable regret, I part ways with the learned Acting Justice when he concludes that failure to exhaust internal remedies deprives a dispute resolution body with jurisdictional powers. This situation is akin to a situation where parties agree to subject a dispute to an arbitration process. The existence of an arbitration clause does not oust the



[11] 1949 (1) SA 501 (W) at p 84.
[12] Followed in *Newu v Sithole & Others* [2004] 11 BLLR 1085 (LAC). In *Edgars Stores Ltd v SACCAWU and another* [1998] 5 BLLR 447 (LAC) the Labour Appeal Court approved of a *dictum* in *Durban City Council v Minister of Labour & others* 1953 (3) SA 708 (A) at 712A namely, a dispute "*must as a minimum …postulate the notion of the expression by parties, opposing each other in controversy, of conflicting views, claims or contentions*".

jurisdiction of a Court.[13] I also do not agree with the categorisation of procedural and substantive jurisdiction as suggested in *Madondo*. The meaning of the word *jurisdiction* was outlined in *Graaff-Reinet Municipality v Ryneveld's Pass Irrigation Board*[14]*.* In simple terms, it is the power or competence to hear or determine an issue between parties. If the power or competence emanates from a statute, like in this instance, the LRA, it will be that statute which will place some limitations on how and when jurisdiction must be assumed. In as much as the LRA recognises sanctity of collective agreements, such agreements would not override a statute. Where a statute like the LRA directs that a dispute must be referred to conciliation and arbitration within specified periods, no collective agreement shall prevent a party to engage the dispute resolution mechanism outlined by that statute. For instance, the LRA does accommodate the extension of the conciliation/mediation period. It also allows parties to revert to conciliation/mediation at any given time.

[24] Thus, it is wrong in my view to suggest that before exhaustion of the internal remedies, an employee is not entitled to refer a dispute to the CCMA or the bargaining council for resolution. The time periods for referral exist for a reason. Labour disputes require speedy resolution. Could it have been the intention of the drafters of the current LRA that a party is excused from the prescription period for as long as that party is still exhausting internal remedies? In my view that could not have been the intention of the drafters of the LRA, regard being had to section 1 of the LRA. The time frames must be adhered to and if a party wishes to exhaust the conciliation/mediation process to the fullest, it can do so *intra* the LRA dispute resolution mechanism.

[25] The correct legal position should be that where a collective agreement seeks to limit the jurisdictional power of the statutory dispute resolution bodies, such an agreement will be in direct conflict with the LRA and the LRA must prevail. Section 210 of the LRA buttresses the point. Mr Manyikana[15] correctly argues

[13] See *Stieler Properties CC v Shaik Prop Holdings (Pty) Ltd* [2015] 1 All SA (GJ).
[14] 1950 (2) SA 420 (AD).
[15] M Manyikana, "*Dealing with the red tape of a dismissal or unfair labour practice within local government", De Rebus* 2022 (Aug) *DR* 13.

that the case of the *City of Johannesburg* has been wrongly decided. I agree that the existence of jurisdiction does not depend on the exhaustion of internal remedies. In any event, in my view, if parties wish to accommodate the exhaustion doctrine, they have a period within the prescribed 90 days to attempt that.

[26] The doctrine of exhaustion is effectively an administrative law principle. It is aimed at giving parties an opportunity to attempt resolution before rushing to Court for judicial review. The Federal Court of Appeal in *Canada (Border Services Agency) v CB Powell Limited*[16] appropriately defined the exhaustion doctrine to be:

> '[30] The normal rule is that parties can proceed to the court system only after all adequate remedial recourses in the administrative process have been exhausted. The importance of this rule in Canadian administrative law is well-demonstrated by the large number of decisions of the Supreme Court of Canada…'

[27] In *Gupta v Attorney General of Canada*[17], Madam Justice St-Louis dealing with a judicial review by Dr Gupta had the following to say about the doctrine.

> '[31] Administrative law judgments and textbooks describe this rule in many ways: the doctrine of exhaustion, the doctrine of adequate alternative remedies, the doctrine against fragmentation or bifurcation of administrative proceedings, the rule against interlocutory judicial reviews and the objection against premature judicial reviews…
>
> [32] This prevents fragmentation of the administrative process and piecemeal court proceedings, eliminates the large costs and delays associated with premature forays to court and avoids the waste associated with hearing

[16] 2010 FCA 61.

[17] 2020 FC 952.

> an interlocutory judicial review when the applicant for judicial review may succeed at the end of the administrative process anyway.'

[28] It is by now settled law that labour disputes do not amount to administrative actions[18]. Therefore, it is entirely inappropriate, in my view, to infuse into the LRA administrative law principles. It ought to be remembered that the dispute resolution bodies envisaged in the LRA do not function like Courts. They are not possessed with judicial review powers like the Courts do. Even section 7 (2) (a) (b) (c) of the Promotion of Administrative Justice Act (PAJA)[19] does not deprive a Court of its review jurisdiction. A Court may direct a party to first exhaust internal remedies before it can review any administrative decision. Section 7 (1) (a) of PAJA expressly provides that the 180 days commence to run after the internal remedies are concluded. The LRA has no similar provisions.

[29] In conclusion, I firmly take a view that the CCMA's jurisdictional powers to resolve a dispute are not ousted by the possibility to subject a dispute to some internal remedies. Accordingly, there was nothing in the LRA that could have prevented NTEU and Moeketsi to refer a dispute to the CCMA timeously. Any decision that suggests otherwise is not binding on this Court, since, for the reasons outlined above, it is with respect wrongly decided.

[30] Howbeit, the relevant question in this matter is not whether the CCMA acquired the necessary jurisdiction but whether the 90 days commenced and when did the running commence. As indicated above it runs from the date of the act or omission or the date of becoming aware of the act or omission if it was somehow hidden away from an employee.



[18] See: *Gcaba v Minister for Safety and Security and others* (2010) 31 ILJ 296 (CC) and *Chirwa v Transnet Limited and others* 2008 (4) SA 367 (CC).

[19] Act 3 of 2000.

[31] In the final analysis, Moeketsi required condonation since he referred the dispute two years after he became aware of his non-appointment – an act or omission. The shifting of the date to the date of the third step events is nothing but a legal machination by NTEU and Moeketsi's lawyers. If it was their view throughout, they should not have applied for condonation in the first instance.

*Did Ngobeni commit an error of law?*

[32] In the matter of *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*[20], the learned Justice Ackerman had the following to say:

> 'A Court of appeal is not entitled to set aside the decision of a lower court granting or refusing a postponement in the exercise of its discretion merely because the court of appeal would itself, on the facts of the matter before the lower court, have come to a different conclusion; it may interfere only when it appears that the lower court had not exercised its discretion judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles.'

[33] When a commissioner refuses or grants condonation, such a function involves an exercise of a true discretion. Section 191 (2) provides that if an employee shows *good cause,* the Commission may permit the employee to refer the dispute after the relevant time limit has expired. The principles applicable to condonations are well known since the time of *Melane v Santam Insurance Co Ltd*[21]. A delay of two years in the context of a labour dispute yearns for and requires an adequate and proper explanation. Applying a wrong legal strategy can never serve as a reasonable explanation[22].

[20] 2000 (2) SA 1 (CC) at para 11.
[21] 1962 (4) SA 531 (A).
[22] See *Edcon Ltd v Steenkamp and Others* (2018) 39 ILJ 531 (LAC).

[34] The Labour Appeal Court in *Colett v Commission for Conciliation, Mediation and Arbitration and others*[23] authoritatively concluded that where the explanation is poor, prospects of success are irrelevant. Ngobeni applied this trite principle. The review Court cannot fault her exercise of discretion in this regard.

[35] I must remark, where an explanation is required, such an explanation must be about the delay and it must be *bona fide*. It is one thing to give an excuse and it is another thing to provide an explanation. What Moeketsi provided is an excuse. Effectively he says ignorantly, he interpreted section 191 (1) (b) (ii) of the LRA to mean the 90 days commences to run after the last grievance step. *Ignorantia juris non excusat* – ignorance of the law is not an excuse. If a person holds a wrong legal view, such is not factual. Where an explanation is given, such an explanation must be factual. It is important to emphasise that a party is required to explain the delay and not to express a view. Explaining a delay requires a detailing of the facts that caused the delay. Each day of the delay ought to be explained. The Supreme Court of Appeal in *Mulaudzi v Old Mutual Life Insurance Company (SA) and others,*[24] had the following to say:

> '…A full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the Court to understand clearly the reasons and to assess responsibility…' (Own emphasis)

[36] Expressing a view – "I was exhausting internal remedies and the running of the period was interrupted" – does not equate a detailed and accurate account of the causes of the delay. Other than the view that the 90 days commenced to run after the third step, Moeketsi provides no explanation why he let the two years slide, whilst engaged in a process that surpassed the dedicated time frames by a proverbial mile. Moeketsi contended that the train has not started

[23] (2014) 35 ILJ 1948 (LAC).
[24] 2017 (6) SA 90 (SCA) at para 26.

moving and it shall wait for him for two years. Ngobeni was correct when she concluded that there was no proper and reasonable explanation provided for the delay. Such is a decision any reasonable decision maker may reach.

[37] For all the above reasons, Ngobeni did not exercise her discretion wrongly. Resultantly, this Court is loath to interfere with her exercise of a true discretion. There is no scintilla of an act of capriciousness, *mala fides*, of application of wrong principles and or non-judicious exercise of discretion.

Conclusion

[38] The irresistible conclusion to reach is that the review application is not out of time. Additionally, Moeketsi required condonation and he failed to provide a detailed and accurate account of the inordinately long delay of two years in processing what is quintessentially a labour dispute. Accordingly, the application for review is bound to fail.

[39] In the results, the following order is made:

Order

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

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G.N. Moshoana

Judge of the Labour Court of South Africa

Appearances:

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|---|---|
| For the Applicant: | J D Withaar |
| Instructed by: | Len Dekker Attorneys Inc, Pretoria. |
| | |
| For the Respondent: | Gerber SC |
| Instructed by: | Clarinda Kugel Attorneys, Pretoria. |