

THE ETHICS OF LEGAL PRACTITIONERS IN RESOURCE-SCARCE INSTITUTIONS

PM Mashishi v Z Mdlala
[2018] 17 BLLR 693 (LC); (2018) 39 ILJ 1607 (LC)

1 Introduction

Recent commentary on the current state of the Labour Court of South Africa paints a rather dismal picture. Overworked judges and increasing caseloads appear to be the order of the day. Although there are no official statistics regarding the functioning of the labour courts, one judge has estimated that it takes 18 to 24 months to finalise a matter. In correspondence on file with co-author Whitear, Van Niekerk J advised that “the backlog for the enrollment of opposed motions (mainly reviews) is such that the roll in Johannesburg is full until December 2019. In other words, if you apply for a hearing date for an opposed motion [in September 2018] you’ll get a date in the first term of 2020. In the case of trials, in Johannesburg, the waiting list is about 12 months.” According to attorney Patrick Deale it is common for a party to obtain a hearing date for an opposed motion up to 24 months post-request (Deale “No! To NO-Hope Cases: Labour Court on a Mission to Stop Hopeless Cases from Clogging up the System.” <https://www.venns.co.za/2018/01/22/no-no-hope-cases-labour-court-mission-stop-hopeless-cases-clogging-system/> (accessed 2018-09-12)).

While we can refer to the well-known saying that “justice denied is justice delayed”, the current state of affairs in the labour courts appears to fly directly in the face of one of the primary objectives of the Labour Relations Act 66 of 1995 (LRA) – namely, a speedy resolution of disputes (*Strategic Liquor Services v Mvumbi NO* [2009] ZACC 17; (2009) 30 *ILJ* 1526 (CC) par 12–13; Van Niekerk “Speedy Social Justice: Streamlining the Statutory Dispute Resolution Process” 2015 36 *ILJ* 837 837). In *Shoprite Checkers (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration* ((315/08) [2009] ZASCA 24; 2009 (3) SA 493 (SCA); [2009] 7 BLLR 619 (SCA); [2009] 3 All SA 466 (SCA) (27 March 2009) par 34), the court held:

“The entire scheme of the LRA and its motivating philosophy are directed at cheap and easy access to dispute resolution procedures and courts. Speed of result was its clear intention. Labour matters invariably have serious implications for both employers and employees. Dismissals affect the very survival of workers. It is untenable that employees, whatever the rights or wrongs of their conduct, be put through the rigours, hardships and uncertainties that accompany delays of the kind here encountered. It is equally unfair that employers bear the brunt of systemic failure.”

In *Republican Press (Pty) Ltd v CEPPWAWU* ((218/06) [2007] ZASCA 121; 2008 (1) SA 404 (SCA); [2007] 11 BLLR 1001 (SCA) (27 September

2007) par 8), the court spells out, in some detail, how “speedy resolution” is envisioned to occur:

“The procedures for resolving disputes concerning unfair dismissal are designed to bring them to finality expeditiously. In the ordinary course such a dispute must be brought before a conciliator within 30 days of the dismissal [section 191(5)(b)(ii), LRA]. If the dispute remains unresolved after another 30 days the employee may refer the dispute either to arbitration or to the labour court depending upon the nature of the dispute [section 191(1)(b)(i), LRA]. In some cases that are subject to arbitration the arbitrator is required to commence the arbitration immediately after it has been certified that the dispute remains unresolved after conciliation [section 191(5), LRA]. In all cases an arbitrator is obliged to determine the dispute ‘fairly and quickly’ with the ‘minimum of legal formalities’ [section 138(1), LRA] and must deliver an award within 14 days of the conclusion of the proceedings [section 138(7), LRA]. Cases that are referred to the Labour Court rather than to arbitration are to be disposed of subject to its rules [Rules for the Conduct of Proceedings in the Labour Court promulgated by Government Notice 1665 in Government Gazette 17495 of 14/10/96], which similarly envisage the minimum of formality. Proceedings are initiated by the filing of a statement of claim that must be responded to within ten days [Rule 6(3)(c), Rules for the Conduct of Proceedings in the Labour Court]. Not later than ten days thereafter the parties must hold a pre-trial conference and a copy of the minute must be delivered within five days thereafter [Rule 6(4)(a) and (d), Rules for the Conduct of Proceedings in the Labour Court]. Once that has occurred, or the time for filing the minute has expired, the registrar must send the file to a judge who may direct that the matter be enrolled for hearing or give directions for the holding of a conference [Rule 6(5), Rules for the Conduct of Proceedings in the Labour Court].”

Note the comments by Van Niekerk J (in his address to a SASLAW conference in Port Elizabeth, September 2018) regarding the fact that the Labour Court lacks a Rules Board and that therefore many of the measures to improve speedy and efficient resolution of disputes in the labour courts, introduced by a draft set of amended rules compiled in 2015, cannot be implemented (presentation is on file with co-author Whitear. See also, Van Niekerk 2015 *ILJ* 840).

It appears that the first port of call for labour disputes – the Commission of Conciliation, Mediation and Arbitration (CCMA) – is delivering its mandate in this regard. In his address to the SASLAW conference in Port Elizabeth, in September 2018, Van Niekerk J said: “If the responsibility for the management of the court were to be placed under the Department of Labour and its management integrated with that of the CCMA, perhaps there would be some prospect of meeting the statutory imperatives of speed and efficiency.” The CCMA operates a highly sophisticated electronic case-management system (Van Niekerk 2015 *ILJ* 838). In contrast, the Labour Court is not living up to its mandate (CCMA Annual Report 2017/2018 presented to Parliament by the Director of the CCMA on 12 September 2018. See, also, comment by Van Niekerk J in his address to the SASLAW conference in Port Elizabeth, September 2018 (presentation on file with co-author Whitear) that “[i]t is clear that the CCMA has been a success, at least in the sense that as an institution it remains capable of giving effect to its statutory mandate [to deliver expeditious, inexpensive and efficient services]. I regret to say that the same cannot be said of the labour courts”). This is despite the fact that the CCMA’s caseload is enormous and likely to keep

increasing. Some 188 499 new cases were referred to the CCMA for the year ending April 2017 (CCMA Annual Report 2017/2018 11).

A total of 186 902 cases were referred during the 2017/2018 financial year, while 148 403 conciliations were heard, and 18 942 arbitration awards were sent to parties (CCMA Annual Report 2017/2018 11). This is a decrease of 1 per cent from the previous year, the first year in five in which the CCMA saw a decrease rather than an increase in the number of cases referred to it. The CCMA attributes the decrease to “the enhancement of the Dispute Management and Prevention (DMP) function, aiming at empowering users to resolve matters at plant level first” (CCMA Annual Report 2017/2018 11). With the implementation of the Employment Law Amendments and the National Minimum Wage Act, an increase in referrals is anticipated. There will also be a further increase in subsequent financial years when the National Minimum Wage Act is fully rolled out in the domestic and agriculture sectors (CCMA Annual Report 2017/2018 16).

Whether the CCMA will continue to deliver its mandate efficiently is moot. This is because the CCMA also appears to be battling with a lack of resources:

“The budget allocation from the government is increasingly proving to be insufficient to cover the competing needs of the CCMA and the high caseload operational cost. The insufficient budget has affected the execution of the strategy, [and has] prohibited the CCMA from fully rolling out its DMP programmes, disempowered the CCMA’s attempt to digitise and introduce new innovations, and paralysed the sourcing of core talent. Of critical concern is that the anticipated introduction of the Employment Law Amendments and the anticipated NMW Act will exert further pressure on current budget constraints.” (CCMA Annual Report 2017/2018 16).

Many of the CCMA cases find their way into the Labour Court as reviews, trials and a variety of applications. In 2016, the Labour Court had 10 354 new cases referred to it. By September 2017, 6 326 cases had already been referred (Van Niekerk J, address to the SASLAW conference in Port Elizabeth, September 2018). In 2016, 41 per cent of the cases referred to the Johannesburg Labour Court were reviews. Sixty-six of the cases referred to the Labour Court in 2016 were to the Johannesburg Labour Court (Van Niekerk J, address to the SASLAW conference in Port Elizabeth, September 2018). Deale, a labour lawyer, comments on when one can expect the Labour Court to hear your matter:

“The Labour Court has only 11 full time Judges. Using a simple average, the numbers mean they would each have to deal with over 600 cases per year or over 50 cases per month. The actual number of cases which proceed in part or go the full distance is a lot lower for a variety of reasons – settlements, withdrawals, dormancy, use of acting judges etc. Even so, if judges have to deal with only 50% of cases, it’s still an impossibly unrealistic workload to expect them to bear. And it explains why it takes so long to complete a case in the Labour Court – on average 18 to 24 months.” (Deale <https://www.venns.co.za/2018/01/22/no-no-hope-cases-labour-court-mission-stop-hopeless-cases-clogging-system/>)

Part of the problem is simply an inadequate number of courts and judges to deal with the caseload (Van Niekerk J, address to the SASLAW conference in Port Elizabeth, September 2018; s 152(1) of the LRA provides

that the court is composed of the judge president, the deputy judge president, and as many judges as the president may consider necessary). It is also indicative of the South African workplace in general. As Van Niekerk J points out, the general reason that people resort to the statutory system is a failure of internal workplace systems – and the lack of trust between employers and employees. Furthermore, it is also the result of a mentality of automatically proceeding to the next step when suffering a setback at one level – a mentality that arguably is encouraged by the very nature of a system that operates on the ideal of facilitating access to justice (Van Niekerk J, address to the SASLAW conference in Port Elizabeth, September 2018).

At least in part, however, the overwhelming caseload can also be attributed to abuse of the court processes. As both Van Niekerk J and Deale point out, this abuse results in a systemic failure of speedy dispute resolution, where “delaying tactics, squeezing opponents out financially, misrepresentation of facts, excessive legal fee-making, unnecessary information overload, technical point-taking and, often – plain incompetence by parties or their legal representatives,” are the order of the day (Deale <https://www.venns.co.za/2018/01/22/no-no-hope-cases-labour-court-mission-stop-hopeless-cases-clogging-system/>).

This type of abuse of process is hardly a new issue in our courts (see for eg, *Burnham v Fakheer* 1938 NPD 63 and *Hudson v Hudson* 1927 AD 259; also *Webb v Botha* 1980 (3) SA 666 (N) 673D–F, where the court found the legal representative to have “(a) obstructed the interests of justice ... by the exploitation of the Rules; (b) occasioned unnecessary costs ... for no reason other than gratification of his apparent obsession with frivolous technical points; and (c) delayed the final determination of the action to such an extent that prejudice may well result to the parties to it”). In both the court *a quo* and the Supreme Court of Appeal decisions in *ST v CT* [2018] ZASCA 73 (a case dealing with a bitterly contested divorce), the court characterised the defendant’s (a senior counsel) approach as a “scorched earth” policy in regard to the litigation – which included drumming up unnecessary costs, raising spurious defences, and demanding interim orders.

However, it is a different problem that takes up the court’s (and our) interest in the *Mashishi* case (*PM Mashishi v Z Mdlala* [2018] 17 BLLR 693 (LC); (2018) 39 *ILJ* 1607 (LC) par 16, where the court states that “recent experience in the Labour Court during a pre-enrolment assessment of opposed motion files awaiting the allocation of hearing dates suggests that a significant number of cases referred to the Labour Court are hopeless or unarguable cases”. In his address to the SASLAW conference in Port Elizabeth, in September 2018, Van Niekerk J explained that pre-enrolment hearings were one of the innovations introduced in 2017 to deal with backlogs in the court. He explains that “[t]he idea was that all opposed motions awaiting set-down dates would be screened, in open court, to determine their readiness for enrolment and that all interlocutory issues would be dealt with simultaneously. The idea was that the backlog could be significantly reduced by ensuring that the matters that were enrolled for hearing and placed before a judge were ready to run”. In Johannesburg, from May 2016 to June 2016, 1 564 files were reviewed and 988 (or 63 per cent) were enrolled for hearing). The problem dealt with by the court in the

Mashishi case was the developing trend of legal practitioners pursuing hopeless cases. It drew the court's ire and resulted in the judge, Van Niekerk J, drafting a written judgment where an *ex tempore* judgment would have been sufficient. Van Niekerk J explicitly notes that he wrote the judgment "to draw the attention of practitioners and others with rights of appearance" (in the Labour Court, rights of appearance extend to trade union officials and officials of employer organisations) (*Mashishi v Mdlala supra* par 16) that pursuing hopeless cases in the Labour Court amounts to an abuse of process and may result in a punitive costs order or an order of forfeiture of fees (*Mashishi v Mdlala supra* par 13). In justifying this stance, Van Niekerk J turned to a duty not to pursue hopeless cases in light of the court's limited resources and the backlogs that had built up (especially in relation to the motion rolls) (*Mashishi v Mdlala supra* par 13).

In what follows then, we consider what the court says in relation to hopeless cases in resource-scarce institutions, and consider how we could understand the required ethical conduct of legal practitioners in these situations better – specifically with reference to William Simon's "ethical discretion" approach to lawyering. Simon's critique of contemporary legal ethics in the United States appears to be particularly apt in the circumstances of the *Mashishi* case – specifically on the perceived amorality of the lawyer's adversarial role, which results in an uninhibited pursuit of client ends, so long as they are arguably within the law (Simon "Ethical Discretion in Lawyering" 1988 101 *Harvard Law Review* 1083 1085).

2 Facts

The applicant applied for a review of a bargaining-council arbitration award in which the arbitrator had confirmed the fairness of his dismissal for seven counts of misconduct to which he had pleaded guilty at the internal disciplinary enquiry. In terms of section 145 of the LRA, the review application was to have been filed within 6 weeks of the arbitration award. The application for review was, however, filed more than five years late, and so it was accompanied by an application for condonation of the late filing (*Mashishi v Mdlala supra* par 1).

In considering the application, the court referred to *Melane v Santam Insurance Co Ltd* (1962 (4) SA 531 (A)), *National Union of Mineworkers v Council for Mineral Technology* ([1999] 3 BLLR 209 (LAC)), and *Collett v Commission for Conciliation, Mediation and Arbitration* ([2014] 6 BLLR 523 (LAC)), respectively. In *Melane*, the court had been at pains to set out the factors that will be taken into account when considering a condonation application:

"In deciding whether sufficient cause has been shown, the basic principle is that the 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 sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success and the importance of the case. Ordinarily these facts are interrelated, they are not individually decisive, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good

explanation may help to compensate prospects which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interests in finality must not be overlooked." (532 B–E)

The court (in *Mashishi*) also found that, in the Labour Court, the *Melane* formulation is qualified by the rule that where there is an inordinate delay that is not satisfactorily explained, the applicant's prospects of success are immaterial. The court referred to the Labour Appeal Court (LAC)'s statements in the second case, *Council for Mineral Technology*, where the court held:

"[W]ithout 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." (par 10)

Finally, the court referred to *Collett* as affirmation of this principle in a unanimous judgment of the LAC, where Musi AJA held:

"[t]here are overwhelming precedents in this court, the Supreme Court of Appeal and the Constitutional Court for the proposition that where there is a flagrant or gross failure to comply with the rules of court condonation may be refused without considering the prospects of success. In *NUM v Council for Mineral Technology* [1999] 3 BLLR 209 (LAC) at para 10, it was pointed out that in considering whether good cause has been shown the well-known approach adopted in *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532C–D ... should be followed but:

'There is a further principle which is applied and that is without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without good prospects of success, no matter how good the explanation for delay, an application for condonation should be refused.'

The submission that the court *a quo* had to consider the prospects of success irrespective of the unsatisfactory and unacceptable explanation for the gross and flagrant disregard of the rules is without merit." (par 38 and 39)

In the *Mashishi* case, the main reason for the delay given by the applicant was that he had instructed attorneys who had not pursued the matter on his behalf. He explained that he had instructed four different attorneys between August 2006 and September 2008 before he consulted the attorneys who eventually took on his case on 31 March 2011. During this period, he was also ill, depressed and preoccupied with various employment and unemployment problems. The court summarises his plight as follows:

"In support of his application for condonation, the applicant states that during August 2006 he referred the matter to an attorney for the purpose of pursuing the case in this court. The attorney took no steps beyond opening a file and his mandate was terminated. The applicant states that during September or October 2006, he instructed another attorney, who similarly took no steps to pursue the matter. During December 2006 the applicant states that he was admitted to hospital, that he was diagnosed with tuberculosis in or around August 2007 and that his treatment for that condition was completed in February 2008. He was advised that he would need rest in order to recover fully from his condition and it was only in March 2008 that he instructed yet another firm of attorneys to pursue the matter. They declined to take up the case. In September 2008, yet another attorney was consulted who after

discussion with the third respondent advised the applicant that she was no longer proceeding with the matter and closed the file. The applicant then states that he became depressed due to ill-health and his unemployment, [and] that he later (at some undisclosed date) was required to undergo surgery and treatment and that he obtained employment in January 2009 until February 2010, when he says he was unfairly dismissed by his new employer. On 1 April 2010 he was employed by his current employer as a contract driver and needed to devote his full time and attention to his new employment ... The applicant states that on 31 March 2011 he approached his current attorneys of record who accepted his mandate and advised him that he would need to produce evidence supporting his explanation for the late filing of the review application. As I've indicated above, the application was filed more than seven months later." (*Mashishi v Mdlala supra* par 3–4)

In respect of his prospects of success, the court does not go into much detail, but highlights that the applicant was charged with nine counts of misconduct after an investigation by, what was then, the Scorpions Investigating Unit. Ultimately, he pleaded guilty to seven of the eight charges that were eventually pursued against him. The arbitrator upheld the dismissal as having been fair (*Mashishi v Mdlala supra* par 5).

The court was not impressed with his explanation for lateness – particularly his attempt to ascribe blame to his attorneys. The court held that:

"When an applicant seeks to ascribe blame for a delay on the part of a legal or other representative, the courts have made clear that the applicant may not rest content in the knowledge that the representative concerned has been furnished with instructions – it is incumbent on the applicant to follow up and ensure that those instructions are being executed. There is a limit beyond which a litigant cannot escape the consequences of an attorney's lack of diligence (see *Saloojee v Minister of Community Development* 1965 (2) SA 135 (A)). An applicant in these circumstances must satisfy the court that none of the delay is to be imputed to him or herself." (*Mashishi v Mdlala supra* par 10)

The court found that he had no plausible reason for his delay (*Mashishi v Mdlala supra* par 12 and par 10; see also *Saloojee v Minister of Community Development supra*). Accordingly, and in line with the principles set out above, the court found that his prospects of success were irrelevant (*Mashishi v Mdlala supra* par 8; *Melane v Santam supra*; *NUM v Council for Mineral Technology supra*; *Collett v CCMA supra*; cf *CEPPWAWU, Keetso and 211 others v CTP Limited* case no JS 215/2010 [2011] ZALCJHB 48 (7 June 2011)).

The court noted that it was instructive also to refer to the decision by Myburgh AJ in *Makuse v Commission for Conciliation and Arbitration* ((2016) 37 ILJ 163), where "the court alluded to measures recently instituted to address systemic delays, particularly in review applications" and noted that review applications were, by their nature, urgent applications and should therefore be pursued with diligence and urgency. Van Niekerk J concluded that what was therefore required was the "strict scrutiny of condonation applications and an approach that affords due regard to the statutory purpose of expeditious dispute resolution" (*Mashishi v Mdlala supra* par 11). The court ultimately concluded that the condonation application was a hopeless case, and that the applicant's representatives had had an ethical obligation not to pursue it notwithstanding the applicant's instructions to the contrary (*Mashishi v Mdlala supra* par 17).

In reaching this conclusion, the court explicitly aligned itself with the stance taken by Judge Owen Rogers, who has argued extra-curially that it was improper for an advocate to act for a client in a case that is hopeless in law or on the facts (*Mashishi v Mdlala supra* par 14; Rogers “The Ethics of the Hopeless Case” 2017 30(3) *Advocate* 46). He explained that a hopeless case is one in which the advocate is not able to:

“formulate a coherent argument comprising a series of logical propositions which have a reasonable foundation in law or on the facts and which, if they are all accepted by the court, will result in a favourable outcome, even if counsel believes that one or more of the essential links are likely to fail.” (*Mashishi v Mdlala supra* par 14)

The judge explained that counsel acts improperly in pursuing a case where s/he “is quite satisfied” that one or more of the essential links of the argument will fail. In particular, there is “an ethical obligation on counsel to ensure that only ‘genuine and arguable’ cases are ventilated, and that this be achieved without delay” (*Mashishi v Mdlala supra* par 14; Rogers 2017 *Advocate* 51).

According to the court, this ethical obligation is not explicitly set out in any code of professional conduct (*Mashishi v Mdlala supra* par 15). In contrast, the professional rules that apply to solicitors and barristers in England (Rule 1B 5.7 (a) of the Solicitor’s Code of Conduct 2011 and Rule C 9(2)(b) of the Code of Conduct contained in the Bar Standards Handbook 3ed April 2017, respectively) provide that it is improper for a legal representative to make a submission which s/he does not regard as properly arguable (see also *Buxton v Mills-Owen* [2010] EWCA Civ 40; (1994) Ch 205 234, quoted in Rogers 2017 *Advocate* 47). The Australian rules of professional conduct do not expressly refer to this duty, but Rogers argues that it is implied in other rules that emphasise that a lawyer’s primary duty is to the court and the administration of justice (Rogers 2017 *Advocate* 48–49; see also Fraser “The Ethics of the Advocate” (speech delivered at the Bar Practice Course 17 February 2012) par 53 <http://archive.sclqld.org.au/judgepub/2012/Fraser170212.pdf>, referred to in Rogers 2017 *Advocate* 49; as well as *Steidl Nominees v Laghaifer* [2003] QCA 157 par 24–27; *Carson v Legal Services Commission* [2000] NSWCA 308 par 113; *Lemoto v Able Technology Pty Ltd* [2005] NSWCA 153 par 92–112; *Tran v Minister for Immigration and Multicultural and Indigenous Affairs (no 2)* [2006] FCA 199 par 15; *D’Orto-Ekenaike v Victoria Legal Aid* [2005] HCA 12; (2005) 223 CLR 1 par 111). There are similar rules in the Canadian states of British Columbia, Ontario and Quebec (see Rogers 2017 *Advocate* 49 and fns 23–28; also *Loughheed v Armbuster* 1992 Canlii 1742 (BCCA); (1992) 63 BCLR (2d) 317 (CA) 324–325 quoted in Rogers 2017 *Advocate* 49). Following Rogers’s views, the court found that the obligation is sourced:

“outside of the formal rules of professional conduct, in sources that include the court’s power to stay those proceedings that amount to an abuse of process, the court’s right to mulct a practitioner in costs (something that necessarily implies impropriety), and the founding values of the Constitution; in particular, effective, efficient and expeditious adjudication.” (*Mashishi v Mdlala supra* par 15; Rogers 2017 *Advocate* 49–50)

The judge also makes it clear that the ethical obligation not to pursue a hopeless case extends not only to all legal practitioners, but to all those who are granted rights of appearance in the labour courts – notably trade union officials and employers organisation officials. They too have an obligation to respect the institution of the courts they appear in, and the statutory purposes of expeditious dispute resolution that they are statutorily mandated to uphold (*Mashishi v Mdlala supra* par 15; see also *Sumodhee v State of Mauritius* [2017] UKPC 17), where the Privy Council articulated the relationship between practitioners' duty not to argue hopeless cases and the administration of justice (quoted in Rogers 2017 *Advocate* 47). See also Ipp "Lawyers' Duties to the Court" 1998 114 *Law Quarterly Review* 63 99, quoted in Rogers 2017 *Advocate* 48). They are required to:

"place the interests of justice and of the court before the parochial interests of their clients and what might seem to be a principle of partisanship that requires representatives to advance their partisan interests with the maximum zeal permitted by law; and the principle of non-accountability, which insists that a representative is not morally responsible for either the ends pursued by the client or the means of pursuing those ends." (*Mashishi v Mdlala supra* par 16; see also Van Niekerk J, address to the SASLAW conference in Port Elizabeth, September 2018)

If they pursue hopeless cases in the Labour Court, the court may make punitive cost orders against them, or order that they forfeit their fees (*Mashishi v Mdlala supra* par 16 and 18).

3 Discussion

3.1 How to define a hopeless case?

The judgment of Van Niekerk J is welcomed as an explicit endorsement of the view that hopeless cases should not be pursued. However, the difficulty that the case throws up is the basis on which a lawyer (or anyone else with rights of appearance) should proceed in identifying a hopeless case. While there is no doubt that the case under discussion amounted to a hopeless case, every lawyer is well aware of the dictum in *John v Rees* ([1970] 1 Ch 345) where, in another context, the court explains that this task may be more complex than it appears at first. Megarry J famously comments that:

"As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change." (*John v Rees supra* 402)

How then are lawyers to proceed where a *prima facie* "hopeless case" presents itself? It would seem counter-intuitive to block parties' access to the dispute-resolution system when, in fact, that is the very point of the system's existence in the first place. Furthermore, the Supreme Court of Appeal in *Van der Berg v General Council of the Bar of South Africa* ([2007] 2 All SA 499 (SCA) (22 March 2007) par 14) has approved of both the following noteworthy statements:

“A man’s rights are to be determined by the Court, not by his [solicitor] or counsel ... A client is entitled to say to his counsel, *I want your advocacy, not your judgment*, I prefer that of the Court.” (quoting Bramwell in *Pannick Advocates* (1992) 92–93; authors’ own emphasis)

“[A barrister] has a monopoly of audience in the higher courts. No one save he can address the judge, unless it be a litigant in person. This carries with it a corresponding responsibility. A barrister cannot pick or choose his clients. He is bound to accept a brief for any man who comes before the courts. No matter how great a rascal the man may be. No matter how given to complaining. No matter how *undeserving* or unpopular his cause. The barrister must defend him to the end.” (*Rondel v Worsley* 1967 (1) QB 443 (CA) 502; authors’ own emphasis)

The answer, we believe, lies between the two extremes of, on the one hand pursuing obviously undeserving or hopeless cases, and on the other hand only taking on obviously merit-worthy cases (Lord Pearce in *Rondel v Worsley* [1969] 1 AC 191 as approved in *Ridehalgh v Horsefield* [1994] EWCA Civ. 40; [1994] Ch 205 227). This is where William Simon’s “discretionary judgement” approach appears to provide legal practitioners with realistic and practicable measures to establish the heart of the matter. Various terms “ethical discretion” (Simon 1988 *Harvard Law Review* 1083), the “contextual view” (Simon *The Practice of Justice: A Theory of Lawyers’ Ethics* (1988) 2–3) and the “pursue justice view” (Atkinson “Lawyering in Law’s Republic” 1999 85 *Virginia Law Review* 1505 1510, interpreting Simon 1988 *Harvard Law Review* 1090 (speaking of his model’s “seek justice” maxim)) by Simon and others, this approach to lawyering seems particularly well suited for the South African Labour Court context – given its extreme resource constraints.

3 1 1 William Simon’s “ethical discretionary” approach

Simon offers his view of lawyering as follows: “The lawyer should take such actions as, considering the relevant circumstances of the particular case, seem likely to promote justice” (Simon *The Practice of Justice* 9).

The basic idea behind Simon’s view is a rejection of both the libertarian model of lawyering (in terms of which one should do everything and anything for one’s client that is arguably legal) and the regulatory model (whereby the lawyer seeks to promote the resolution of disputes on the substance of the issues as opposed to mere technicalities). Instead, he seeks a balance between the two extremes – where the contextual circumstances of the case are taken into account in deciding whether to take it on or not. What makes Simon’s approach to lawyering so attractive is not only his rejection of these models as being “too categorical”, but also that his model takes into account the distribution of enforcement resources and institutional competence (Simon 1988 *Harvard Law Review* 1096) – what Simon calls “procedural imperfection” (Simon 1988 *Harvard Law Review* 1102).

So how would Simon have a legal practitioner deal with a case in the South African labour law context where a legal practitioner is faced with an apparently hopeless case?

Central to Simon’s model is the exercise of discretion. Just as Dworkin requires that judges “find” the law, so too must lawyers “find justice”. In other

words, Simon requires lawyers to incorporate into their norms of practice whatever norms of justice can fairly be attributed to their best understanding of the law itself (West “The Zealous Advocacy of Justice in a Less Than Ideal Legal World” 1999 51 *Stanford Law Review* 973 980; see also Strassberg “Taking Ethics Seriously: Beyond Positivist Jurisprudence in Legal Ethics” 1995 80 *Iowa LR* 901 905). He offers a type of formula as to how legal practitioners should exercise their judgement. First, he asks the lawyer to consider the relative merits of cases. Here, the legal practitioner ought to consider the uncontroversial claim that certain cases have more legal merit than others. Given that legal resources are limited, a legal practitioner ought to decide on the relative merits of the apparently hopeless case before him. Simon essentially implies that lawyers should not simply be required to take any case that raises an apparently legally permissible claim, but rather that they should give consideration to the legal rights or interests involved. Simon says here:

“In deciding whether to commit herself to a client’s claims and goals, a lawyer should assess their merits in relation to the merits of the claims and goals of others whom she might serve.” (Simon 1988 *Harvard Law Review* 1092)

He goes on to give some criteria for a lawyer to consider in this exercise: the extent to which the claims and goals are grounded in the law, the importance of the interests involved, and the extent to which the representation would contribute to the equalisation of access to the legal system (Simon 1988 *Harvard Law Review* 1093).

Taking this approach, even given the adverse *prima facie* facts in *Mashishi*, a legal practitioner may agree to take on the matter given the importance of easy access to justice, and the value of dispute resolution in the labour context, and also the general inequality suffered by employees. Simon’s legal practitioner would then look at the internal merit of the matter. Here, the legal practitioner would attempt to reconcile the conflicting legal values implicated directly in the client’s claim or goal (Simon 1988 *Harvard Law Review* 1096). As Simon indicates, these conflicts usually arise in the form of tensions between substance and procedure, purpose and form, and broad and narrow framing (Simon 1988 *Harvard Law Review* 1096; see also Kennedy “Form Over Substance in Private Law Adjudication” 1976 89 *Harvard Law Review* 1685). It is really in the internal merits of a hopeless case that a legal practitioner could resolve whether to pursue it; and with hopeless cases, the substance-versus-procedure tension issue appears to loom large. Here, the issue is the lawyer’s sense of the limitations of her individual judgement of the substantive merits of the dispute on the one hand, and of the established procedures for resolving it on the other.

As indicated earlier, one of the objections to restricting practitioners from taking on apparently hopeless cases is the idea that the lawyer will effectively act as a “pre-trial screen”, which would effectively make them a “preliminary judge” of the issue (Webb “Hopeless Cases: In Defence of Compensating Litigants at the Advocate’s Expense” 1999 30 *VUWLR* 295 297). This then makes a practitioner act as the wrong institutional actor (namely, the judge). Simon notes that “[j]udges acting within the relevant public procedures are generally able to make more reliable determinations on the merits than the individual lawyer” (Simon 1988 *Harvard Law Review*

1097). Thus, in general, he accepts that lawyers should not ordinarily assume the responsibility for determining the outcome of cases:

“Responsibility to justice is not incompatible with deference to the general pronouncements or enactments of authoritative institutions such as legislatures and courts. On the contrary, justice often, perhaps usually, requires such deference.” (Simon *The Practice of Justice* 138 and Simon 1988 *Harvard Law Review* 1096–1097)

However, Simon says the qualifications “generally” or “usually” in the sentences in the above paragraph are crucial. If a practitioner believes that there are procedural defects, or if the institution is under strain, or if there is a breakdown (we would say similar to the backlogs and overworked judges in the labour court), the lawyer needs to assume more responsibility for the substantive outcome of the case. Simon says:

“[T]he more reliable the relevant procedures and institutions, the less direct responsibility the lawyer need assume for the substantive justice of the resolution; the less reliable the procedures and institutions, the more direct responsibility she needs to assume for substantive justice.” (Simon *The Practice of Justice* 140 and Simon 1988 *Harvard Law Review* 1097–1098)

The next question that arises is what taking responsibility for the substantive outcome of a case entails for a legal practitioner. Simon notes that this responsibility requires revisiting the question of what would most likely promote justice. This would, in Dworkinian-style, require looking at the purpose and values behind the legal system and, in our particular instance, the Labour Relations Act (66 of 1995), which gives effect to the constitutional imperative of fair labour practices and sets up the speedy dispute-resolution statutory framework. This is where the identification of a hopeless case could be different in different contexts, and even at different times.

If labour courts were fully capable of delivering the cheap, efficient and speedy resolutions (*Shoprige Checkers v CCMA supra* par 34) they were created for, as set out in their founding legislation, legal practitioners can push the boundaries for their clients in certain instances. For example, looking at *Mashishi*, it is plausible to suggest that the lawyer could justify his stance in exploring how long after the arbitration award a court will condone a review application – given that it involves the complex exercise of discretion, and where, in the past, courts have excused substantial delays after having been convinced that the prospects of success and the public interest warranted ventilation of the matter (see for eg, *CEPPWAWU, Keetso and 211 others v CTP Limited supra* – albeit the delay here was seven months as opposed to the five-year period in the *Mashishi* case being discussed). The lawyer may even have considered that in exploring the court’s attitude to a case of an extreme delay of five years, he would bring further clarity to the question of when condonation applications might be granted and when they should be regarded as a hopeless case: something that could have created more certainty in the law. Likewise, bringing the condonation application in *Mashishi* may have brought more certainty to the question of when a client may justifiably hide behind the inaction of their representative to justify lateness. This is an important question in the labour context, where representatives are often not trained attorneys but rather officials from trade unions or employers organisations who are relatively

unaccountable. We should take care not to conflate good-faith efforts with bad-faith efforts of a practitioner. In the *Mashishi* case, the facts seem to point to the latter, given that even after the firm of attorneys was instructed, it took a further seven months to bring the condonation application to court (*Mashishi v Mdlala supra* par 4) – either that (bad faith), or in fact incompetence (Webb 1999 *VUWLR* 299, in which is noted: “Where a hopeless case is brought with the assistance of the advocate, the advocate must either be believing that it is hopeless (and therefore assisting in the abuse), or believing it is not hopeless (and therefore incompetent) or not caring whether it is hopeless (and therefore guilty of recklessness or gross negligence). In any of these cases the conduct of the advocate warrants action being taken by the court”).

Hypothetically ascribing benevolent, even altruistic, motives to Mashishi’s attorney serves to underscore the importance for the practitioner to determine the relative values and interests at play in his unique context. If the Labour Court was functioning optimally, surely we would not want practitioners to be sceptical of client claims, and we would indeed encourage creativity in legal argument that might be in the best interests of the administration of justice in the long run (see Webb 1999 *VUWLR* 297). However, and as set out in the introduction above, this is not the situation in which the Labour Court operates. In a situation where the institution itself is under severe strain, and where this threatens the administration of justice in worthy cases, Simon would require that a practitioner assume more direct responsibility for substantive justice – and in the *Mashishi* case, this would probably mean not taking the matter on. Indeed, prior to the applicant employee in *Mashishi* finding a practitioner who would take on his matter, four previously-approached attorneys were unaccommodating (*Mashishi v Mdlala supra* par 3–4). (Mashishi terminated the mandate of the first attorney after he took no steps to pursue the matter, as was the case with the second attorney. The third attorney declined to take up Mashishi’s mandate. The fourth attorney told Mashishi that they were no longer prepared to pursue the case, and that they were going to close the file.) This suggests that there are at least some lawyers who do not take on hopeless cases, certainly in the labour context where resources are so scarce.

Simon’s vision of lawyering has come under some criticism, not least because it is argued to be too ambitious and unrealistic. For example, Woolley and Wendel ask whether Simon’s theory is “the equivalent of wanting basketball players who are 12 feet tall” (Woolley and Bradley “Legal Ethics and Moral Character” 2010 23 *Geo J Legal Ethics* 23 32). Obviously, we cannot expect lawyers to be perfect, but as Luban (quoting Kant’s famous maxim) states: “ought” implies “can” (Luban “How Must a Lawyer Be? A Response to Woolley and Wendel” 2010 23 *Geo J Legal Ethics* 1101 1103). In other words, conceiving of the legal practitioner’s duty as being context-driven, implies that legal practitioners can take this stance. Simon is not alone in being criticised for being unrealistic; Dworkin has received criticism equally for expecting every judge to be Hercules (Sinclair “Hercules, Omniscience, Omnipotence, and the Right Answer Thesis” 2003 22 *NYL Sch J Int’l & Comp L* 77. In South Africa, Davis has criticised Dworkin’s Hercules of promising an Einsteinian elephant and instead producing an intellectual mouse who can do no more than express beliefs regarding the

veracity of a particular political ideology. This is a more nuanced argument about the ability of Hercules to find “one true answer” – an issue outside the parameters of this paper, but of interest nonetheless. See Davis “Integrity and Ideology: Towards a Critical Theory of the Judicial Function” 1995 112 *SALJ* 104 127). Simon has answered his critics, however, by arguing that when a lawyer is operating under time or resource constraints, she must fall back on “presumptive responses to broad categories of situations” (Simon *The Practice of Justice* 157). This means that where legal practitioners lack the capacity to reason out the relative values and interests against the contextual realities of the situation – a complex undertaking – they must fall back on a default position that has already been thought through for them. In *Mashishi*, for example, the lawyer almost certainly would have had time to think about whether the representation was just; but if not, a “presumptive response” might be that taking on severely out-of-time matters cannot be consistent with the “speedy dispute resolution” imperative of the LRA – unless exceptional circumstances exist. Even with such a presumption, the analysis of legal justice is not a trivial exercise; but it certainly cannot be described as complex decision-making out of the reach of a practitioner who is familiar with the South African labour law context (Luban 2010 *Geo J Legal Ethics* 1104). As a result, we believe that Simon’s theory is not easy, but it certainly does not require the impossible of the legal practitioner. At a minimum, it does not relieve a lawyer of the obligation to try to figure out what substantive legal justice requires in their specific and unique contexts – even if they get it wrong (Luban 2010 *Geo J Legal Ethics* 1104; similar to Dworkin, Simon requires legal practitioners to be deliberative in their practice; see Atkinson 1999 *Virginia Law Review* 1516).

Perhaps the most compelling requirement of Simon’s approach is that legal practitioners should not reduce the subject of legal ethics to “lawyer regulation” – particularly in the form of “coercive law enforcement”. In the *Mashishi* case, this danger is expressed by the court’s threat to impose punitive cost orders, and to make orders that fees be forfeited if practitioners pursue hopeless cases on behalf of their clients (Simon *The Practice of Justice* 195). It would, however, be a sad day if legal practitioners in the Labour Court acted merely as the proverbial Holmesian “bad man”, interested only in knowing the likelihood and severity of sanctions against themselves (Oliver Wendel Holmes famously proposed that if you want to ask what the law is, you should ask a bad man; see Holmes “The Path of Law” 1897 *Harvard Law Review* 457 459–462), instead of acting in accordance with the values of the legal system of which they are part. An unintended danger of the threat of sanctions against practitioners who bring hopeless cases to court could be that it will have a chilling effect on access to justice. Judge Owen Rogers considers there to be such a danger if a bar council disciplines advocates for taking on unethical cases in “all but the clearest cases”. He adds that the test for such misconduct should be subjective (Rogers 2017 *Advocate* 51). Practitioners may be reluctant to take on cases that are unusual or that require new boundaries to be set and explored. There should be more required of legal practitioners operating in institutional settings such as the Labour Court in South Africa. Lawyers should actively consider “justice” in any particular case. This is, in essence,

what Atkinson calls “conscientious lawyering under modern conditions” (Atkinson 1999 *Virginia Law Review* 1516).

4 Conclusion

Ultimately, a legal practitioner representing a client may conceivably adopt a range of interpretative attitudes toward the law (Wendel “Government Lawyers in the Trump Administration” 2017 69 *Hastings Law Journal* 275 278). The significant normative question then concerns what interpretative attitude he or she ought to take in the context of a resource-scarce institution like the Labour Court. This is the value of Simon’s theory for legal practitioners. While we find the test proposed by Justice Owen Rogers (and endorsed by the Labour Court in the *Mashishi* case) to be persuasive, it does not highlight – at least *prima facie* – the discretion of the practitioner (internal merits) and the context in which the practitioner finds him or herself (relative merits). It will be recalled that Rogers’s test requires that a practitioner must be able:

“to formulate a coherent argument consisting of a sequence of logical propositions for which there is reasonable foundation in the facts and on the law and which, if they are all accepted by the court, will result in a conclusion favourable to the client. [The practitioner] may properly act even though she thinks one or more of the essential links are likely to fail. But if she is quite satisfied that one or more of them will fail, the case is hopeless [and she must not pursue it.] ... [t]here is an ethical obligation to ensure that only genuine and arguable issues are ventilated ...” (Rogers 2017 *Advocate* 50)

A legal practitioner adopting Simon’s theory may find that it does not mean that a case must be considered hopeless just because it is weak. Simon’s theory is more robust than the categorical reasoning implied in the above quote. Simon explicitly states:

“The preference for reasoning in the lawyering context reflects nothing more than a failure to carry through to the lawyering role the critique of formalism, mechanical jurisprudence, and categorical reasoning that has been applied to the judicial role throughout this century.” (Simon 1988 *Harvard Law Review* 1091)

Rather, Simon requires that the practitioner be convinced that the case will not advance justice – considering all the angles. In other words, the legal practitioner must be constantly aware of the link between the obligation not to take on hopeless cases and the proper administration of justice:

“[I]f the court is pre-occupied with hopeless points, possibly meritorious cases where there are properly arguable issues will be delayed at best and may not receive the attention they deserve.” (*Sumodhlee v State of Mauritius* [2017] UKPC 17 par 23)

David Ipp says further:

“In the light of modern conditions it has been recognised that the overburdened legal system must also take into account the need to do justice to those many persons waiting for their cases to be heard ... While the duty to take every possible point might be a duty owed by lawyers to the client, the paramount duty to the court is to advance only points that are reasonably

arguable. Lawyers should indeed act as a screen so as to exclude unreasonable or hopeless arguments.” (lpp 1998 *Law Quarterly Review* 99)

In *Mashishi's* case, given the context of a resource-scarce institution, and in line with Simon's approach, the practitioner should err on the side of protecting the institution of speedy dispute resolution, the Labour Court, and of shielding the overburdened and backlogged court from applications for review that seem destined to fail. We also believe that Rogers's contention (accepted by the court) that the Uniform Rules of Professional Conduct (URPC) “do not contain rules which expressly *or even by necessary implication* preclude counsel from advancing a hopeless case” (authors' own emphasis) may be unduly formalistic. It will be recalled that Rule 3 requires that:

“According to the best traditions of the Bar, an advocate should, while acting with all due courtesy to the tribunal before which he is appearing, fearlessly uphold the interests of his client without regard to any unpleasant consequences either to himself or to any other person. Counsel has the same privilege as his client of asserting and defending the client's rights and of protecting his liberty or life by the free and unfettered statement of every fact, and the use of every argument and observation, that can *legitimately, according to the principles and practice of law*, conduce to this end; and any attempt to restrict this privilege should be jealously watched.” (authors' own emphasis)

There is every reason to suggest that the highlighted words “*legitimately, according to the principles and practice of law*” may preclude counsel from pursuing a hopeless case, considering the context. It is admittedly possible to make out a coherent argument for the granting of condonation in almost any case. For example, one could emphasise that it is a decision based on the exercise of discretion and entailing a delicate balancing of competing interests and the weighing of relevant factors – including the extent of the delay and the explanation given for it, the prospects of success on the merits, the respective prejudice to the parties should the application be either granted or not, and the overall interests of justice. However, it may not be *legitimate* to argue for condonation in a particular matter given the *principles and practices of law* – having looked at the internal and relative merits of a matter.

Notwithstanding these two points of difference, we believe that the judgment in *Mashishi* has come at a crucial time in our democracy. While we could focus on the warning of punitive costs for legal practitioners who pursue hopeless cases, we prefer to focus on the opportunity that the case presents for legal practitioners to rethink and reimagine their position as enablers of speedy and effective justice.

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