

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JR2364/22

In the matter between:

ONE NATION SUPER STORE CC

Applicant

and

MANDLA ERNEST MBONGWA

First Respondent

CCMA-JOHANNESBURG

Second Respondent

NTHABISENG NGWANE N.O

Third Respondent

SHERIFF SANDTON NORTH

Fourth Respondent

Heard: 05 December 2023

Delivered 1 March 2024

This judgment was handed down electronically by emailing a copy to the parties. The date for hand-down is deemed to be 1 March 2024.

JUDGMENT

MAFA-CHALI, AJ

Introduction

[1] On 5 February 2020, the Third Respondent (Commissioner), acting under the auspices of the Commission for Conciliation, Mediation and Arbitration (CCMA) issued an arbitration award under case no GAEK274-20 in terms of which she found the dismissal of the First Respondent (employee) to be procedurally and

substantively fair and ordered the Applicant, One Prince Store (employer) to pay the employee compensation in the amount of R41 568.00 on or before 21 February 2020.

[2] The employer subsequently lodged an application for rescission of the arbitration award with a condonation application on 5 February 2021. The same Commissioner who issued the arbitration award entertained the condonation and rescission applications and issued a rescission ruling on 21 May 2021. The Commissioner refused the condonation application and found that the rescission application automatically fell to be dismissed. The award and the rescission ruling were issued with the employer cited as One Prince Store. The same Commissioner issued a variation ruling changing the name of the employer from One Prince Store to One Nation Super Store.

[3] The employer has launched these proceedings in terms of Section 145 of the Labour Relations Act¹ (LRA) to review and set aside the arbitration award of the Commissioner, seeking an order that the relief of 12 months compensation awarded in favour of the employee in the amount of R41 568.00 be stayed pending the conclusion of its condonation and review applications. The review application is unopposed, although the employee, Mandla Ernest Mbongwa, was in attendance at Court.

Background facts

[4] The employee was employed by the company from 2008 to 2019. In November 2019, the employee reached 60 years, which is a common cause issue. However, the parties differed in terms of how the employee's services were terminated; the employee alleged that he was dismissed whilst the employer submitted that the employee retired during Christmas time of 2019.

[5] The employee however alleged that after he advised his employer that he wanted to go on pension, Mr De Sousa, the business owner, told him that he should

¹ Act 66 of 1995, as amended.

resign but he refused to do so and he reported for duty on 6 January 2020 to work as normal but Mr De Sousa told him to leave the company premises.

Arbitration proceedings

[6] The employee referred an unfair dismissal dispute to the CCMA challenging the fairness of his dismissal. The dispute was scheduled as a con/arb process on 30 January 2020 and arbitrated in the absence of the employer. The Commissioner issued an arbitration award in favour of the employee finding that the employee's dismissal was unfair both substantively and procedurally. Compensation in favour of the employee was ordered in the amount of R41 568.00.

[7] The evidence presented by the employee was that he refused to sign the resignation form as instructed by the employer because he was due to go on pension and it is apparent from the employee's evidence during the arbitration proceedings that the employer refused him to work on 6 January 2020 because he refused to sign the resignation form.

The award

[8] The Commissioner found that the employee was dismissed for unknown reasons and had referred a dispute in terms of section 192(1) and (2) of the LRA, as well as the Code of Good of Practice: Dismissal, Schedule 8. The Commissioner held that, according to the employee's testimony, he did not know the reason for his dismissal, but that, when he refused to resign from work, he was dismissed by De Sousa. The Commissioner further made a finding that the dismissal of the employee was unfair as the employer had failed to prove that the reason for the dismissal was for a fair reason related to the employee's conduct, capacity or the employer's operational requirements and that it was not effected in accordance with a fair procedure.

The condonation application

[9] The review application was filed outside of the six weeks' time period and the employer seeks condonation for the late filing of the review application. If condonation is not granted, then this Court lacks the necessary jurisdiction to consider the review application and it stands to be dismissed. I will deal with the condonation application first.

[10] The Commissioner's award was issued on 5 February 2020. Condonation application was filed with a review application to this Court on 4 November 2022. The company, through De Sousa's affidavit, contended that the award came to its attention on 11 January 2021, when the sheriff appeared at its premises and attached some equipment and stock worth R70 000.00; therefore the application was 29 months late. It was also submitted by De Sousa that the company believed that the matter was settled as Shadrach, whom he did not know his surname but engaged on the advice of a friend as a labour expert, told him so, until the employee tried to enforce the award; and the sheriff failing to take further steps after attaching the company's property on two occasions.

[11] Regarding prospects of success, it was submitted by the company that the merits of the case clearly show that the Commissioner's award was defective as she exceeded her powers to award compensation that exceeded more than 12 months' remuneration of the employee calculated at the employee's rate of remuneration on the date of dismissal.² Further that, at the time of the employee's alleged dismissal, he earned a basic salary of R1 600.00 per month as well as commission, but the Commissioner used an amount of R3 464.00 per month to calculate the total of the award whereas no evidence was led to the salary received by the employee other than the incorrect amount of R400.00 mentioned in the referral form.

[12] It was submitted on prejudice by the company that the employee will not be prejudiced as he has the benefit of a government pension, which he will receive due to the company changing the UIF form as requested to state that he had retired, which was the exact desired outcome of the employee to the alleged dismissal. It was also submitted that the employee will not suffer great prejudice if the execution

² Section 194 (1) of the LRA.

of the award is taken through by the sheriff soon as the value of the attachment far outweighs the award and is excessive as the goods attached are of significant value and vital to the company's operations and business. Furthermore, it was submitted that the sheriff has already attached the company's property to the value of R175 000.00 and the company will clearly be able to satisfy the award should the review application fail. A prayer was made to stay the enforcement process pending the outcome of the review application.

Applicable legal principles

[13] The principles applicable in an application for condonation are trite. In accordance with the provisions of section 191(11) (b) of the LRA, the Court may, on good cause shown, condone the non-observance of the time frames. Good cause was explained in *Melane v Santam Insurance Co Ltd*³ in the following terms:

'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, for that would be a piecemeal approach incompatible with a true discretion, 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 for prospects of success which are not strong. Or the importance of the issue and strong prospects may tend to compensate for a long delay. And the respondent's interests in finality must not be overlooked.'

³ 1962 (4) SA 531 (A) At 532B – F.

[14] In applying the principles in *Melane*, the Court in *Academic and Professional Staff Association v Pretorius NO and Others*⁴ (*Academic and Professional Staff Association*), summarised the factors for consideration as follows:

[17] The factors which the court takes into consideration in assessing whether or not to grant condonation are: (a) the degree of lateness or non-compliance with the prescribed time frame; (b) the explanation for the lateness or the failure to comply with time frame; (c) prospects of success or bona fide defence in the main case; (d) the importance of the case; (e) the respondent's interest in the finality of the judgment; (f) the convenience of the court; and (g) avoidance of unnecessary delay in the administration of justice...

[18] It is trite law that these factors are not individually decisive but are interrelated and must be weighed against each other. In weighing these factors for instance, a good explanation for the lateness may assist the applicant in compensating for weak prospects of success. Similarly, strong prospects of success may compensate the inadequate explanation and long delay.'

[15] The Court in *Foster v Stewart Scott Inc*⁵, also emphasised the same principles as stated in *Melane* and *Academic and Professional Staff Association*. The Labour Appeal Court (LAC) in *NUM v Council for Mineral Technology*⁶ also said the following:

'The approach 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 therefore, the prospects of success and the importance of the case. These facts are interrelated; they are not individually decisive. What is needed is an objective conspectus of all the facts. A slight delay and a good explanation may help to compensate for prospects of success which are not strong. The importance of the issue and strong prospects of success may tend to compensate for a long delay. There is a further principle which is

⁴ [2007] ZALC 118; (2008) 29 ILJ 318 (LC) at paras 17 - 18.

⁵ (1997) 18 ILJ 367 (LAC).

⁶ (1999) 3 BLLR 209 (LAC) at para 10.

applied and that is that without 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.'

[16] In *A Hardrodt (SA) (Pty) Ltd v Behardien and Others*⁷, the LAC restated the guidelines laid down in *Queenstown Fuel Distribution CC v Labuschagne NO and Others*⁸ *inter alia* that there must be good cause for condonation in the sense that the reasons tendered for the delay have to be convincing. In other words, the excuse for non-compliance with the six-week time period must be compelling. The onus is on the applicant for condonation to satisfy the Court that condonation should be granted.

[17] In this Court, the principles have long been qualified by the rule that where there is an ordinate delay that is not satisfactorily explained, the applicant's prospects of success are immaterial. The general principle applicable to deciding applications for condonations apply even more stringently when it comes to review applications as explained in *National Union of Metalworkers of SA on behalf of Thilivali v Fry's Metals (Pty) Ltd (A Division of Zimco Group) and Others*⁹ (*Thilivali*) as follows:

'What is clear from the judgment in *Hardrodt* is that general principles applicable to condonation applications are even more stringently applied where it comes to a condonation application for the late filing of a review application. In review condonation applications, the explanation that needs to be submitted must be compelling and the prospects of success need to be strong. Where it comes to the issue of prejudice, the applicant in fact has to show that a miscarriage of justice will occur if the applicant's case is not heard. The reason for these more stringent requirements is that review applications occur after the parties have already been heard, presented their respective cases and a finding has been made. Under such circumstances, considerations of justice, fairness and expedition require that challenges of

⁷ (2002) 23 ILJ 1229 (LAC) at para 3.

⁸ (2000) 21 ILJ 166 (LAC).

⁹ (2015) 36 ILJ 232 (LC) at para 22.

such findings must not be delayed and must be completed as soon as possible.’

[18] The Court in *Thilivali*¹⁰ added the following consideration when evaluating condonation application in reviews:

‘It must also always be considered that the applicant for condonation actually bears the onus to prove good cause for condonation to be granted in terms of the principles set out above. There is, however, an additional consideration which applies in employment disputes in determining whether an applicant for condonation has discharged this onus. This is the fundamental requirement of expedition. The Constitutional Court has, as a matter of fundamental principle, confirmed that all employment law disputes must be expeditiously dealt with and any determination of the issue of good cause must always be conducted against the back drop of this fundamental principle in employment law’.

[19] The Courts have also held and emphasised that, in an application for reviews to set aside arbitration awards, an applicant must act with the necessary degree of diligence required by the rules of this Court¹¹ and the Practice Manual¹², giving effect to the statutory imperative of expeditious dispute resolution. Condonation for delays in labour litigation is not simply there for the taking but the applicant seeks an indulgence and bears the onus to show good cause and a proper case should be made out before the indulgence could be granted.

Evaluation

The delay

[20] The employer knew about the award for the first time on 11 January 2021 already when the sheriff came to the company’s premises to attach some equipment and stock. The review application was lodged on 4 November 2022, some 22 months later.

¹⁰ Ibid at para 25.

¹¹ GN 1665 of 1996: Rules for the Conduct of Proceedings in the Labour Court.

¹² Practice Manual of the Labour Court of South Africa, effective 2 April 2013.

[21] It is clear from the CCMA documents that the award was issued on 5 February 2020, and was varied. Enforcement of an award was issued by the CCMA on 2 July 2020 and the award was varied on 14 August 2020. A rescission application accompanied by a condonation application was then lodged by the employer on 5 February 2021. The rescission ruling was issued by the Commissioner on 6 May 2021, four months later, dismissing the condonation for the late filing of the rescission application. The review application was lodged on 4 November 2022, some 18 months after the rescission ruling was issued. The review application in this case was filed excessively late and there must be a good explanation to account for such an excessive delay.

The explanation

[22] According to De Sousa, the explanation for delay was that the employer was advised by a labour specialist called Shadrach, whom he engaged his services on the advice of a friend, and the said Shadrach misled the company that the matter was settled. It was also submitted that Shadrach advised De Sousa that he had engaged with the employee and the real issue was with the pension that the employee wanted and Shadrach advised the company to change the UIF forms to reflect that the employee had retired and not resigned, which the employer did making it possible for the employee to receive his pension from the government.

[23] It was further submitted for the employer that when the sheriff came back on 7 September 2021 to again attach some goods to the value of R87 000.00, Shadrach advised the company that it was an error and he would sort it out with the CCMA, but the sheriff came again on 26 September 2022 to attach goods to the value of R 175 000.00. That is when the employer realised that Shadrach must have been taking advantage of the inexperience of the employer with regard to labour matters and hence approached the current legal representatives who advised to review the award.

[24] The above explanation is not acceptable. On 5 February 2021, the employer lodged a condonation for the late filing of the rescission application and stated the

reason for the delay was that the labour consultant assisted with the proceedings of the case and awaited response. This is in contradiction to the submission made that the labour consultant Shadrach advised and misled the company that the matter was settled by changing the UIF form for the employee to retirement.

[25] Based on this material contradiction in the submissions made by the company, I find that there is a lack of a reasonable explanation for the delay, under the circumstances of this case with such an excessive delay. There cannot be a *bona fide* mistaken belief that the matter is settled in the circumstances where the sheriff has visited the company premises and attached the goods of so much value on almost three occasions and still the employer believed that the matter is settled. Any reasonable employer would have acted diligently to ensure that it acted promptly in the light that there was already non-compliance with the statutory time-frames after the rescission application was dismissed on 6 May 2021 and the sheriff having visited the employer for attachment of goods on 7 September 2021 and again on 22 September 2021. There was an obligation on the employer to have acted with caution under the circumstances of pending attachments and execution processes by the sheriff already.

[26] On the issue of the advice of the employer's representative misleading the applicant that the matter had been settled, the Court in *Saloojee and Another NO v Minister of Community Development*¹³, stated the following in relation to a lack of diligence on the part of an attorney in respect of condonation applications:

'I should point out, however, that it has not at any time been held that condonation will not in any circumstances be withheld if the blame lies with the attorney. There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court. Considerations *ad misericordiam* should not be allowed to become an invitation to laxity. In fact, this Court has lately been burdened with an undue and increasing number of applications for condonation in which the failure to comply with the Rules of this Court

¹³ 1965 (2) SA 135(A) at 141C-E.

was due to neglect on the part of the attorney. The attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a Rule of Court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are.’

Similarly, in this case, the employer must be held accountable for the lack of diligence on the part of its representative, the labour specialist whom it selected to advise in the matter. It appears like the employer left everything in the hands of the labour specialist and therefore to that end, there is no reason for the employer to be absolved from the tardiness of their chosen representative.

[27] The employer’s argument, that the review application was brought within six weeks, is totally misplaced. In the end, the explanation proffered by the employer for the delay in lodging the review, taking into account that there is no good explanation in the condonation application for the delay after the CCMA issued the rescission ruling on 6 May 2021 is not acceptable and not compelling at all.

[28] It is required that the company must account for the whole duration of the delay. It is trite that an application for condonation must be filed without delay and as soon as the applicant becomes aware of the need to do so. This is in accordance with the important principle that labour disputes must be resolved expeditiously as held in *Food and Allied Workers Union obo Gaoshubelwe v Pieman’s Pantry (Pty) Limited*¹⁴:

‘Our courts have, on occasion, pronounced on the importance of labour disputes to be conducted with expedition. For example, in *National Research Foundation* the Labour Court held:

“It is trite that there exists a particular requirement of expedition where it comes to the prosecution of employment law disputes.”

[29] In *Steenkamp and Others v Edcon Limited*¹⁵, the Constitutional Court placed emphasis on the fact that expeditious resolution of labour disputes is one of the primary objects of the LRA. The Court referred with approval to the judgment of

¹⁴ [2018] 6 BLLR 531 (CC) at para 187.

¹⁵ [2019] 11 BLLR 1189 (CC) at para 39.

*Toyota SA Motors (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and others*¹⁶ which stated as follows:

‘Time periods in the context of disputes are generally essential to bring about the timely resolution of the disputes.’

The further points made by the courts include that the labour dispute by their nature require speedy resolution and that any delay in the resolution of labour disputes undermines the primary object of the LRA.

[30] The Constitutional Court has unanimously endorsed the approach of the Labour Courts in these matters, which expressly contemplates what may be described as a more restrictive approach to the granting of condonation because of the vital importance of expeditious dispute resolution in the dispute resolution system established by the LRA.

[31] In *NUM*¹⁷, it was held that in considering whether good cause has been shown, and notwithstanding the well-known approach that all factors to be considered are interrelated as enunciated in *Melane*¹⁸, 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 the delay, an application for condonation should be refused.

Prospects of success

[32] I have however, noted that on prospects of success, the employer argued that the Commissioner exceeded her powers in awarding compensation which exceeded 12 months’ remuneration at the date of the employee’s alleged dismissal and that there is no evidence by the employee that he earned below the National Minimum Wage Act¹⁹.

[33] The interests of justice must be determined with reference to all relevant factors. However, some factors may justifiably be left out of consideration in certain

¹⁶ 2016 (3) BCLR 374 (CC) at para 1.

¹⁷ *NUM* at para 15.

¹⁸ *Melane supra* at para 13.

¹⁹ Act 9 of 2018.

circumstances, for example, where the delay is unacceptably excessive and there is no explanation or reasonable explanation for the delay, there may not be a need to consider the prospects of success. Despite the presence of reasonable prospects of success, condonation may be refused where there is an excessive delay, the explanation is non-existent and granting the condonation would prejudice the other party.

[34] I am satisfied that the above properly summarizes what I am required to consider when exercising my discretion on whether or not to grant condonation for the late filing of the review application and what constitutes a proper basis upon which this court should decide condonation.

[35] The Applicant has failed to advance a compelling explanation for the full duration of the delay. What the applicant has provided does not constitute a reasonable, acceptable and satisfactory explanation. The absence of such an explanation will be fatal to the condonation application irrespective of the applicant's prospects of success when the length of delay is excessive.

[36] The Courts have endorsed the principle that failure to provide a reasonable and acceptable explanation for the delay renders prospects of success immaterial. In the light of the aforesaid authorities and given that the applicant has not provided a comprehensive, compelling or convincing explanation for the delay, when the delay is very excessive, the prospects of success are immaterial and thus need not be considered.

Conclusion

[37] A proper case must be made out for condonation. In my view, on an overall conspectus of all the facts, good cause has not been shown for the granting of condonation and it will not be in the interests of justice to grant condonation in a matter that has clearly not been prosecuted with the required degree of diligence as it will affect the employee's right to certainty and the statutory purpose of expeditious dispute resolution. Condonation is not there for the mere asking but must be filed

without delay and each part of the delay must be explained, and such explanation must be reasonable and acceptable.

Costs

[38] In terms of the provisions of section 162(1) of the LRA, which regulates orders for cost in this Court, I have a discretion when it comes to the issue of costs, having regard to the requirements of law and fairness after taking into account all of the relevant facts and circumstances. In my view, to the extent that the application for condonation is to be dismissed for the reasons given, I do not consider it appropriate to make a costs order as the review application is also unopposed.

[39] In the premises, I make the following order:

Order

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

G. Mafa-Chali

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

J D Crawford of Crawford & Associates Attorneys

For the First Respondent:

Mandla Ernest Mbongwa