

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case no: JR931/23

In the matter between:

SAMUEL MAKHONYA MOTLOUT

Applicant

and

GODFREY RAMOTHATA N.O.

First Respondent

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

Second Respondent

TSEBO FACILITY SOLUTIONS

Third Respondent

Heard: In Chambers

Delivered: 6 May 2024. This judgment was handed down electronically by emailing a copy to the parties. The 6th May 2024 is deemed to be the date of delivery of this judgment.

Summary: Application for leave to appeal. No prospects of success.
Application dismissed

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

DANIELS J

Introduction

[1] For ease of reference the first respondent is referred to as "the commissioner" and the second respondent will be referred to as "the CCMA". The applicant seeks leave to appeal against the order issued by this court on 27

February 2024 in which it dismissed the application to review and set aside the ruling by the commissioner in which the commissioner dismissed the application for condonation of the late referral to the CCMA.

Background facts

[2] The applicant was employed by the third respondent as a technician.

[3] On 1 October 2020 the third respondent advised the applicant that it would have to reduce his salary by 50% because of financial difficulties, presumably arising from the COVID19 pandemic and its consequences. In addition, the applicant was advised that he would no longer be employed as a technician, but would be employed as an artisan aid.

[4] The applicant referred an unfair labour practice dispute to the CCMA more than *sixteen months later* on 6 February 2022. He applied for condonation more than *twelve months later*, on 22 February 2023.

[5] On 20 March 2023, the commissioner issued a ruling dismissing the applicant's application for condonation.

[6] To the extent that it is legible, the applicant's explanation for the lengthy delay is:

"becose (sic) I have being trying to talk to the HR and they told me to wait cause (sic) they are investigating to the matter, so I have to wait and I feel like I have being waiting for long cause (sic) ...responding to my emails"

[7] The commissioner regarded the delay in making the referral as excessive. The commissioner treated the referral as having been properly made from the date when the applicant applied for condonation on 22 February 2023.

[8] On 9 June 2023, the CCMA notified the applicant that it had filed the record with the Labour Court. It is unclear when, or if, the Registrar notified the applicant that the record of the proceedings had been filed at the Labour Court.

Review application

[9] On 12 June 2023, the applicant filed a notice in terms of Rule 7A(8)(b) indicating he stands by the notice of motion and does not intend to supplement his papers. Thereafter, despite its earlier notice that it would not supplement its papers, the applicant filed a supplementary affidavit.

[10] In its supplementary affidavit, the applicant offered up facts and details which were not before the commissioner. It goes without saying that the court cannot take these facts into account. In any event, all these facts demonstrate is that the applicant followed up with Human Resources, regarding his grievance, during November and December 2022.

[11] In his review application, the applicant contended that:

11.1 The commissioner failed to apply his mind properly,

11.2 The commissioner's decision was unreadable (sic),

11.3 The commissioner had regard to a letter dated 1 October 2020 from the employer, without permitting the applicant an opportunity to respond.

[12] In addition, in the review, the applicant contended that the dispute was only referred to the CCMA two months and 29 days late. This was clearly incorrect when the applicant himself stated in the referral form that the dispute arose when his salary was cut during October 2020.

[13] The referral to the CCMA was made on 6 February 2022 but condonation was only applied for on 22 February 2023.

[14] In his condonation application, the applicant basically offers a single line explanation – he was waiting for management to respond to his grievance.

Legal analysis

Leave to appeal

[15] In *J & L Lining (Pty) Ltd v National Union of Metalworkers of SA and Others* (2)¹ this Court summarized the legal position when seeking leave to appeal as follows:

‘Leave to appeal is not there for the asking. When deciding whether to grant leave to appeal to the Labour Appeal Court, the Labour Court must determine whether there is a reasonable prospect that another court would come to a different conclusion to that of the court a quo, or in other words, whether the appeal would have a reasonable prospect of success. This was summarised in SA Clothing & Textile Workers Union & others v Stephead Military Headwear CC, as follows:

‘It is trite that for an application for leave to appeal to be successful, it is required of the party seeking such leave to demonstrate that there are reasonable prospects that another court, in this instance, the Labour Appeal Court, would come to a different conclusion to that reached in the judgment that is sought to be taken on appeal.’ (Own emphasis)

[16] As to the meaning of ‘reasonable prospects of success’, the Court in *Member of the Executive Council for Health, Eastern Cape v Mkhitha and another*² said:

‘Once again it is necessary to say that leave to appeal, especially to this Court, must not be granted unless there truly is a reasonable prospect of success. Section 17(1)(a) of the Superior Courts Act 10 of 2013 makes it clear that leave to appeal may only be given where the judge concerned is of the opinion that the appeal would have a reasonable prospect of success; or there is some other compelling reason why it should be heard.

¹ (2019) 40 ILJ 1303 (LC) at para 5.

² [2016] JOL 36940 (SCA) at paras 16 – 17.

An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal.'

[17] The applicant has, rather dismally, failed to advance a proper basis for leave to appeal.

[18] In his written submissions seeking leave to appeal, the applicant contends, for the first time, that the unfair labour practice was continuing and condonation is either not required or the referral was only 25 days late. This is inappropriate, and I do not accept the submission. The applicant was required to make its case for condonation, in its founding affidavit, when it applied for condonation. It cannot be permitted to shift the goal posts in this manner.

Condonation application before CCMA

[19] The decision in *Melane v Santam Insurance Co (Pty) Ltd*³ is generally regarded as the *locus classicus* on condonation. Holmes JA held as follows:

*"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 therefore, 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."*⁴ (Own emphasis)

[20] Accordingly, the test for condonation involves a weighing up of all the relevant facts, so that, for example, a good explanation for the delay may compensate for weaker prospects of success.

³ 1962 (4) SA 531 (A) at 532C-D

⁴ At 532C-D. This test has been repeatedly endorsed by our courts.

[21] Our courts have repeatedly endorsed the principle that *“in the absence of a full and reasonable (acceptable) explanation for the delay, the prospects are immaterial, and if there are no prospects of success the application for condonation should be refused even if there is a good explanation for the delay.”*⁵

[22] In *Grootboom v NPA and another*⁶ the Constitutional Court held that the primary criterion is the “interests of justice” which was explained as follows:

*“...the standard for considering an application for condonation is the interests of justice. However, the concept “interests of justice” is so elastic that it is not capable of precise definition. As the two cases demonstrate, it includes: the nature of the relief sought; the extent and cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the importance of the issue to be raised in the intended appeal; and the prospects of success. It is crucial to reiterate that both *Brummer* and *Van Wyk* emphasise that the ultimate determination of what is in the interests of justice must reflect due regard to all the relevant factors but it is not necessarily limited to those mentioned above. The particular circumstances of each case will determine which of these factors are relevant.”* (Own emphasis)

[23] In this matter, the delay is so extensive and the explanation so deficient that it amounts to no explanation at all. On the authorities, the prospects of success are immaterial where there is no explanation for the delay. Here, explanation was so deficient that it amounted to no explanation at all. In the circumstances, there is no need to consider prospects of success.

Conclusion

[24] In the result, the application for leave to appeal is dismissed.

⁵ *NUM v Council for Mineral Technology* (1998) 3 LCD 448 (LAC); *Chetty v Baker McKenzie* (2022) 43 ILJ 1599 (LAC) at para 10

⁶ (2014) 35 ILJ 121 (CC)

RN Daniels

Judge of the Labour Court of South Africa

LABOUR COURT