

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT CAPE TOWN**

Case Number: C 746/06

In the matter between:

CAROL ANN BEZUIDENHOUT

APPLICANT

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

FIRST RESPONDENT

THUTHUZELA NDZOMBANE N.O

SECOND RESPONDENT

CLUTTONS SA (PTY) LTD

THIRD RESPONDENT

JUDGMENT

MOLAHLEHI J

Introduction

[1] The Applicant seeks an order to review and set aside the ruling issued by the Second Respondent (the Commissioner) under case number WE12001-06, dated 27th September 2006. In terms of the ruling the Second Respondent

ruled that the First Respondent did not have jurisdiction to entertain the dispute of the Applicant.

Factual Background

- [2] The Applicant who was employed by the Third Respondent from 19th January 2005, as financial manager resigned on the 24 April 2005, and thereafter lodged a constructive dismissal dispute with the First Respondent (CCMA).
- [3] The Applicant testified that during April 2006, the receptionist placed an order for ink cartridges with Frost-Byte Computers. At some point and on or about the same period Josephine Books of Frost-Byte Computers called to confirm the order. The Applicant advised her to contact the receptionist who was responsible for placing the order.
- [4] The owner of Frost-Byte Computers, Mr Frost, thereafter contacted the Applicant and enquired about payment of the order, which the Third Respondent had placed with them. An argument ensued between the Applicant and Mr. Frost as to whether the terms of the payment were based on a 30 (thirty) or 14 (fourteen) day's period. The Applicant then agreed to

effect payment with immediate effect and also advised that the services of Frost-Byte computers would no longer be used.

- [5] It would appear from the version of the Applicant that later that day she was confronted by Mr. Smith who accused her of exceeding her authority, being dishonest, and of having been involved in illegal behaviour. The Applicant testifies that she was :

“totally dismayed and distraught over this irresponsible allegation. I could no longer tolerate this abuse.”

Because of this confrontation the Applicant did not report for work the following day and then submitted her resignation letter on the 24 April 2006.

- [6] The Applicant referred the constructive dismissal dispute to the CCMA on 23 August 2006. This referral was late and accordingly the Applicant had to apply for condonation.

- [7] The Third Respondent denied that the Applicant was dismissed but that she resigned without notice after she was notified of an investigation concerning

her misconduct related to her unauthorized payment to a supplier who was her boyfriend.

Grounds for review

[8] The Applicant challenged the ruling on the basis that the Commissioner committed a misconduct and gross irregularity in that she failed to assist her in the following regard: (a) to apply for a postponement so that she could secure legal representation, (b) to the presenting and leading proper evidence during the condonation application, (c) by failing to inform her of the procedure in presenting her case. The Applicant further contended that the Commissioner failed to properly assess her prospects of success. Furthermore the Applicant contended that the conclusion arrived at by the Commissioner in denying her condonation, was unreasonable to such a degree that it was indefensible on any legitimate ground.

[9] It is common cause that the Applicant was 79 (seventy-nine) days late in her referral of the dispute to the CCMA. In her analysis of the evidence, the Commissioner found that the Applicant's resignation was triggered by the investigation that had been instituted against her. Even though the explanation

for the lateness was accepted as reasonable, the Commissioner dismissed the Applicant's application on the basis of absence of prospects of success.

Evaluation

Failure to assist in applying for postponement

[10] The case of the Applicant as set out in her pleadings is that the Commissioner ought to have known from her objection to legal representation that she would have desired a postponement and should therefore have assisted her in an application for a postponement.

[11] In support of her argument the Applicant relied on the case of *Cher Technology (Pty) Litto v Musi & Others* (2000) 7 BLLR 778 (LC), where the Court held that the Commissioners should after introducing themselves at the beginning of the arbitration proceedings outline to the parties the process they would follow in conducting the proceedings. They should also at that stage ensure that the parties are aware *inter alia* of the format of the proceedings. The Applicant also relied on the decision in the case of *East Cape Agricultural Co-operative v Du Plessis and Others* (2000) 9 BLLR

1027(LC), where the Court held that where Commissioners are dealing with laypersons they need to give clear directions and assist the parties.

[12] In terms of section 138(1) of the LRA, Commissioners have powers to conduct an arbitration hearing in a manner they consider appropriate in order to determine the dispute fairly and quickly but must deal with the substantive merits of the dispute with minimum legal formalities.

[13] It is indeed correct that Commissioners should in arbitration proceedings assist lay-persons, particularly where it is apparent that they have difficulties in dealing with issues related to procedural aspects of the proceedings. Where the need to assist arises the Commissioner should intervene in a manner that such intervention does not amount to advancing the case of one of the litigants. The Commissioner should also not intervene in a manner which may lead to a perception of bias on the part of the other party or parties. The nature and extent to which a Commissioner may be required to assist will depend on the circumstances of each case.

[14] It is apparent that at the beginning of the proceedings in the present case the Commissioner recognized and was alive to the fact that the Applicant was a lay-person who needed some assistance. In this regard the record reveals the Commissioner having stated (at page 5 line 20 of the record) that:

“I’m just going to guide the applicant on the basis that she is, I suspect that she is a layperson and she is not represented and then if you can just take our Application for Condonation and then we look at the reasons for lateness, if you can dress me on the reasons for lateness.”

[15] The perusal of the record of the proceedings also reveals that the Commissioner conducted the proceedings in a fair and transparent manner. In my view the Commissioner cannot be faulted for denying any of the parties the opportunity to fairly present their respective cases. The Commissioner guided the Applicant through the proceedings on the essential aspects of the condonation application. In this regard the record (at page 7 line 18) reveals the following off:

“Ms BEZUIDENHOUT: I therefore feel that there can be no objection to the Condonation on this basis.

COMMISSIONER: those are the reasons?

Ms BEZUIDENHOUT: Those are the reasons why I feel the Condonation must be, I must be entitled to the Condonation.

COMMISSIONER: Okay and then if we look at the prospects of success?

Ms BEZUIDENHOUT: I do, do hope to be successful, yes.

COMMISSIONER: No, address me in terms of prospects of success. Can you look at the?

Ms BEZUIDENHOUT: At my, my Application?

COMMISSIONER: "Ja," a thought should I take that this has been submitted for the purposes of

Ms BEZUIDENHOUT: I do feel that that it has been

COMMISSIONER: There is nothing else that you are going to add in terms of

Ms BEZUIDENHOUT: No, I'm not going to add anything other than what is already on my

COMMISSIONER: On your Affidavit?

Ms BEZUIDENHOUT: Yes.

COMMISSIONER: Okay, no problem and then your prejudice, say?

Ms BEZUIDENHOUT: Correct, other than that, there's additional Affidavit to from Andrew Smith, which also supports the Condonation."

The record later on (at page 19 line 17) reveals:

“Ms BEZUIDENHOUT: I felt that I had just put in very salient points and I didn’t go into as much detail and I’d like to make some more details.”

[16] The above is illustrative of the extent to which the Commissioner assisted and guided the Applicant in presenting her case and more importantly as concerning the requirements for an application for condonation.

[17] As concerning assistance for a postponement, it has to be mentioned firstly that the Applicant never applied for a postponement in order to secure legal representation. There is secondly no evidence that suggests that the situation was such that it ought to have been obvious to the Commissioner that the Applicant was not coping and therefore there was a need to postpone the case in order to afford her the opportunity to secure legal representation.

[18] Whilst it is evidently clear that the Applicant is a lay-person, the reading of the record projects her as an educated person who presented the papers and conducted her case during the proceedings in an eloquent and clear manner. On a number of occasions when offered an opportunity to expatiate on the

case, she indicated that she was satisfied with what she had presented in her papers. For instance when asked by the Commissioner about the degree of lateness she explain that it was because the parties engaged in some negotiations to try and settle the matter. She went further to say:

“All my reasons for lateness, are actually supported by the three Affidavits- myself, my own one, Mr. Stewart Maxwell’s and also Mr. Andrew Smith’s. I therefore fell that the degree of lateness needs to be accepted by the CCMA and I want to specifically point to Mr. Andrew Smith’s Affidavit. His paragraph 5.1.”

Failure to assist in leading evidence

[19] Contrary to the answer which the Applicant gave when the Commissioner enquired from her about prospects of success and prejudice, and what appears in her CCMA 7.11 form, the Applicant states in her founding affidavit that she had no idea about the concepts of prospects of success and prejudice. It is evidently clear from the reading of the record that this averment cannot be sustained. If indeed this was the case, why did the Applicant not enquire from the Commissioner what the meaning and import of these concepts were?

[20] The argument that the Applicant came to know about to the requirements for the application for condonation is also unsustainable regard being had to the fact that there is no evidence that the Applicant was assisted in filling in the CCMA 7.11 form. The assumption is therefore that the Applicant filled in the form on her own. There is nothing in the form that suggests that the Applicant had difficulties with the concepts. In this regard the Applicant states in the form under the heading, “ *Prospects of Success*”:

“The ex- employer constructively and summarily. At the beginning of 2006 Andrew Smith (hereinafter Smith), a director at the company, made it clear to me in unequivocal terms that he intended to "get rid of me". Summarily dismissed me without disciplinary procedure or any attempt at seeking alternative course (sic) to action, by virtue of the fact that they made the continuation of my employment intolerable, unilaterally changed working conditions and authorities.”

[21] In my view the above evidence does not project the Applicant as a person who had no idea about the concepts, but even if that was the case she had all the opportunities to inquire first from the CCMA before submitting the form and also at the stage when she submitted the form. She also had the

opportunity to inquire about the concepts during the hearing when the Commissioner asked her to address her (the Commissioner) about the concepts.

The legal principles applicable to application for condonation

[22] In terms of the principles governing the granting or refusal of condonation a Court or a Commissioner has a discretion which is to be exercised judicially after taking into account all the facts before him/her. The factors which the Court or Commissioner 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 (c) bona fide defence or prospects of success in the main case; (d) the importance of the case, (e) the respondent's interest in the finality of the case, (f) the convenience of the court; prejudice to the other party and (g) avoidance of unnecessary delay in the administration of justice. See *Foster v Stewart Scott Inc* (1997) 18 ILJ 367 (LAC).

[23] The authorities are in agreement with the principle which was enunciated in *Melane v Santam Insurance Co Ltd*, 1962 (4) SA 531 (A) at 532C-F, 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. In this regard Myburg JP in the case of *NUM V Council for Mineral Technology* (1999) 3 BLLR 209 (LAC) said:

“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 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 (cf Chetty v Law Society, Transvaal 1985 (2) 756 (A) at 765A–C; National Union of Mineworkers & others v Western Holdings Gold Mine (1994) 15 ILJ 610 (LAC) at 613E).”

[24] In *Queenstown Fuel Distributors CC v Labuschadne NO & (2000) 21 ILJ 166*, Conradie JA said:

“[24] It follows, however, from what I have said above, that condonation in the case of disputes over individual dismissals will not readily be granted. The excuse for non-compliance would have to be

compelling, the case for attacking a defect in the proceedings would have to be cogent and the defect would have to be of a kind which would result in a miscarriage of justice if it were allowed to stand.

[25] By adopting a policy of strict scrutiny of condonation application in individual dismissal cases I think that the Labour Court would give effect to intention of the legislature to swiftly resolve individual dismissal disputes by means of a restricted procedure, and to the desirable goal of making a successful contender, after the lapse of six weeks, feel secure in his award.”

[25] I have earlier indicated that the Commissioner accepted the explanation for the lateness but dismissed the application because there were no prospects of success.

[26] The burden to prove the existence of the prospects of success rests with the Applicant. The burden entails having to show that the Applicant stands a chance in discharging its burden of proving that the resignation was as a result of the employer having made the working conditions unbearable. In the present case, the Applicant has to prove that but for the intolerable conditions

created by the employer she would have remained in her employment and not resigned. An objective test is used to determine the existence of constructive dismissal. See *Smith Kline Beecham (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2000) 21 ILJ 988 (LC).

[27] The Commissioner in concluding that there was no prospects of success in the present case reasoned that the fact that the Applicant had worked after the resignation shows that the situation was not intolerable. The Commissioner further found that the resignation was triggered by the investigation instituted against the Applicant by the respondent. The circumstances that led to the resignation are set out in the founding affidavit of the Applicant as follows:

“11. At the beginning of 2006 Andrew Smith (hereinafter Smith), a director at the company, made it clear to me in unequivocal terms that he intended to "get rid of me".

12. Shortly thereafter my problems with Third Respondent began and entailed numerous variations of the following:

12.1 Smith would request me to falsify figures, or would demand that I performed acts which were illegal, unethical, and unprofessional for someone in my

profession. For example adjusting financial figures and statements to reflect what he desired.

12.2 Smith unilaterally changed my status by removing my authority on larger financial payments.

12.3 Smith continuously failed to supply essential information which I required to prepare and produce proper financial reports, budgets, and other documents and then accused me when they were late.

12.4 Smith continually subjected me to undue and uncorroborated criticism in a manner that was humiliating and belittling. He would continually undermine me which affected my confidence.

12.5 Smith would overrule agreements made and instructions given by the collective body of directors/partners creating immense frustration and confusion.

12.6 On more than one occasion Smith decided to make sudden, last minute structural changes that made it extremely difficult for me to do my job properly as he took away key staff members.

12.7 Smith continuously addressed me with an aggressive attitude and intimidated me.”

[28] The papers presented by the Applicant before this Court do not take the case of the Applicant further than those which were before the Commissioner when the condonation was considered at that stage. As stated earlier it is common cause that the referral of the dispute to the CCMA was 79 (seventy-nine) days late. The explanation for this delay was in essence according to the Applicant due to the negotiations in which she attempted to resolve the issue amicably with the respondent.

[29] It is apparent that the negotiations process, deadlocked on or about 3 May 2006, when the Applicant indicated by e-mail that: *“by 17h00 on Wednesday, 3 May 2006 I shall proceed with the CCMA (sic) claims and a criminal charge against you”*. The Applicant’s papers do not explain the delay after this period. The supporting affidavit of Mr. Maxwell which was attached to the Applicant’s application at the CCMA suggests that the negotiations failed on the 28 July 2006. However the Applicant does not explain why the referral was only filed more than 20 (twenty) days thereafter. In the heads of argument the Applicant argues that the negotiations fell through on the 12th August 2006. No explanation however is proffered as to what happened for

10 (ten) days thereafter. In my view in these circumstances the delay in referring the dispute was excessive.

[30] In my view the Commissioner cannot be faulted in so far as the manner in which he conducted the hearing and treated both parties in particular with regard to the issues relating to assistance to the Applicant.

[31] In so far as the Applicant challenges the condonation ruling of the Commissioner, the test to be applied is whether the decision reached by the Commissioner is a decision that a reasonable decision-maker could reach. See in this regard the decision of the Constitutional Court in *Sidumo v Rustenburg Platinum Mines Limited* (2007) 28 ILJ 2406 (CC), *Fidelity Cash Management Services v Commission for Conciliation, Mediation and Arbitration* (Unreported case No: DA10/05) and *Phalaborwa Mining Limited v Reuben Hlokwe & Others* (Unreported Case No: JA 07/2006).

[32] In the light of the above considerations I am unable to fault the decision of the Commissioner. Regard being had to the evidence and the circumstances of the case the decision of the Commissioner was reasonable. I also find that both on

the papers which were before the Commissioner and those before this Court, the Applicant has not been able to show the existence of a chance of proving constructive dismissal if the main case was to be heard.

[33] Accordingly, the Applicant's application stands to be dismissed.

[34] I see no reason why in fairness to the Third Respondent, the costs should not follow the result.

[35] In the premises the application is dismissed with cost.

MOLAHLEHI J

Date of Hearing : 26 September 2007

Date of the Order : 11 January 2008

Date of the Judgment: 24 January 2008

APPEARANCES

For the Applicant : B Guy of Guy & Associates

For the Respondent: R Lagardien of Smith Tabata Buchanan Boyes Inc.