

IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

NOT REPORTABLE

CASE NO: JR1153/08

In the matter between:

PADAYACHE BIANCA ODELIA

APPLICANT

AND

MUNNIK BASSON DAGAMA ATTORNEYS

1ST RESPONDENT

THE COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

2ND RESPONDENT

ROBERT MUDAU N.O.

3RD RESPONDENT

JUDGMENT

Molahlehi J

Introduction

[1] This matter concerns two review applications that have been filed by both parties respectively. The first review application which was filed by first respondent in the present matter is not before this court for consideration. The matter that is before this court for consideration is the counter review application filed by the applicant.

[2] The present review application for which the applicant is seeking condonation for its late filing is confined to seeking an order reviewing and setting aside the arbitration award issued under case number GAJB32185-07 dated 21st April

2008, in terms of which the third respondent (the commissioner) found the dismissal of the applicant to have been substantively fair but procedurally unfair.

Background facts

- [3] The applicant is the former employee of the first respondent, a firm of attorneys. Prior to her dismissal the applicant was employed as a letter's administrator in the debt collecting department of the first respondent.
- [4] On the 7th September 2007, the employee was charged with misconduct consisting of 4 (four) charges relating to failure to comply with certain specific duties relating to proof reading and activation of bulk letters of demand on the employer's IT system.
- [5] On the 2nd day of the three day disciplinary hearing the employer successfully sought an amendment categorizing the misconduct of the applicant as gross negligence. The employee opposed the amendment. Before proceedings with the hearing after granting the amendment the chairperson of the disciplinary offered both parties an adjournment to consider their positions and if necessary to present further evidence that may be relevant in relation to labelling of the charges as gross negligence. Both parties chose to continue with the hearing. The employee was found guilty of 2 (two) of the 4 (four) charges of misconduct and was dismissed.

The reasons for the delay

- [6] It is common cause that the delay in filing the counter review application was over 8 (eight) weeks outside the prescribe 6 (six) weeks period as prescribed by section 145 of the Labour Relations Act 66 of 1995. The reasons for the delay

according to the applicant is that after receipt of the arbitration award she approached her current attorneys of record and sought their legal advice on the issue of the finding of the commissioner that her dismissal was substantively fair. At that stage according to her the attorneys advised that she had two options in dealing with the matter, -one being to resist the first respondent's review application and the second being to launch the counter review application in which she would challenge the substantive fairness of the award.

[7] As concerning the payment of the fees the attorneys advised that the applicant could enter into a contingency fee arrangement with them or pay the fees directly herself. She opted for the option of having to pay the fees directly. She however had difficulties in raising the funds to cater for the fees, resulting in the delay in instructing the attorneys to file this application. She managed to raise the required funds at the end of December 2008.

[8] As concerning the prospect of success the applicant contended that the commissioner in his award made no reference to her version which was presented during the arbitration proceedings. She in this respect further contended that the commissioner's finding that the dismissal was substantively fair is not supported by the evidence and was accordingly unjustifiable in that it bears no rationale connection whatsoever to the evidence that was properly before him.

[9] Before dealing with the analysis and evaluation of the condonation application, it is also important to deal with the background information relating to the review application which was filed prior to this application.

- [10] The first respondent being unhappy with the finding of the commissioner that the dismissal was procedurally unfair filed a review application on the 13th June 2008. The applicant responded to that application by filing an intention to oppose on the 3rd July 2008.
- [11] On the 10th July 2008, the applicant's attorneys addressed a letter to the first respondent's attorneys indicating that the applicant intended to bring a counter-review application in order to set aside that part of the arbitration award in which the commissioner found that the dismissal of the applicant was substantively fair. In the same letter the applicant indicated that the counter-review application would be included in the answering affidavit to the first respondent review application.
- [12] Thereafter, and on the 25th August 2008 the first respondent filed its notice in terms of Rule 7(A) (6) and 7(A)(8) of the Labour Court Rules wherein it delivered the record of arbitration proceedings including its supplementary affidavit.
- [13] The applicant delivered her answering affidavit in response to the review application on the 8th September 2008, which contrary to what was indicated in the letter referred to earlier did not include the counter-review application.
- [14] On the 23rd October 2008, the attorneys of the applicant addressed a letter to the first respondent's attorneys indicating that the applicant still intended to institute a counter-review application. The first respondent's attorneys responded to this letter by indicating to the applicant that they believed that the time limits to bring a review application had already lapsed and that any such application including its application for condonation would be opposed.

[15] The applicant's attorneys addressed a further letter on the 14th January 2009 again indicating that the applicant still intended to bring a counter review application.

The legal principles governing condonation

[16] In order to succeed in persuading the Court that he or she deserves the indulgence for the non compliance with the time frames provided for in the rules or the law, the applicant must show the following: (a) the degree of lateness or non compliance with the prescribed time frames is not excessive, (b) provide a full explanation of every aspect of the period the lateness or the failure to comply with the time frames, (c) show that there are prospects of succeeding or that there exists a bona fide defence when the matter is to be considered in the main case, (d) show the importance of the cases, (e) show that the delay was not due to the fact that the applicant was not interest in the finality of the matter. See *Forster v Steward Cott Inc* (1997) 18 ILJ 367 (LAC) and also *Gaoshubelwe and others v Pie Man's Pantry (Pty) Ltd* (2009) 30 ILJ 347 (LC).

[17] In *Van Wyk v UNITAS Hospital and Another (Open Democratic Advice Centre As Amicus Curiae)* 2008 (2) SA 472 (CC), the Court in dealing with an application for condonation held at paragraph 22:

“[22] An applicant for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of delay. And, what is more, the explanation given must be reasonable.”

- [18] The Court in that case found that the explanation which was proffered by the applicant fell short of the requirements for condonation. It was further found in that case that the explanation for the inordinate delay (the period was 11 months delay) was superficial and unconvincing. And more importantly the Court found that the financial affordability to bring the application within the time frame is not a compelling reason for a delay.
- [19] In the often quoted decision of *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532 C-F the Court held that without a reasonable and acceptable 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. Another important consideration whether or not to grant condonation is the steps that the applicant took as soon as it became aware that he or she was late in terms of the required time frames. In other words the applicant should bring the application for condonation as soon as he or she becomes aware of the lateness of his or her case.
- [20] In *NUM v Council for Mineral Technology* [1999] 3 BLLR 209 (LAC), the Court held that:

“The approach is that the Court has discretion to be exercised judicially upon the consideration of all facts, and in essence it is the matter of fairness to both parties. Amongst the facts usually relevant are the degree of lateness, the explanation thereof, 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. As slight delay and a good explanation may help to compensate for

the prospects of success which are not strong. The importance of the issue and strong prospects of success may turn to compensate for a long delay. There is a further principle which is applied and that is without a reasonable and acceptable explanation for the delay, the prospects of success, no matter how good the explanation for the delay an application for condonation should be dismissed.”

[21] As indicated earlier part of the delay as explained by the applicant was due to lack of funds. This issue has received attention of this Court in the case of *Gaoshubelwe and others v Pie Man’s Pantry (Pty) Ltd* (2009) 30 ILJ 347 (LC). In that case the Court in dealing with the issue of whether or not lack of funding could be a reasonable explanation observed as follows:

“[35] I now proceed to consider the explanation of the delay after the applicants became aware of the outcome of the review application. The explanation for this period is as indicated earlier that, firstly, Mr Gaoshubelwe, had to find the other applicants and also seek funds to pay an attorney to assist them in processing their claim. I align myself to the view expressed by Ncamu AJ in *Mabunda’s* case that it is not in every case where the delay is occasioned by the applicant seeking funds that the application for condonation should be dismissed. The explanation based on lack of funds has to be evaluated within the context of the facts and the circumstances of a given case.”

[36] *In my view there is no rule that the explanation that the delay was occasioned by lack of funds should automatically lead to the dismissal of the application for condonation. If this was to be the case then in my view the court would be ignorant of the economic reality that in most instances faces unrepresented dismissed employees. I do however agree that as a general approach the lack of funds should not on its own constitute a reasonable explanation.”*

[22] In the present instance the applicant has, in my view, failed to make out a case for the condonation of the late filing of her counter review application. The explanation proffered by the applicant is wholly unsatisfactory and in the circumstances also totally unreasonable. In this respect the applicant fails to deal with certain significant aspects of her delay in particular fails to explain why the counter-review application was not filed with her opposing papers to the first respondent’s review application.

[23] The applicant states in her founding affidavit to the condonation application that the reason for the delay was because she did not have sufficient funds to pay for her attorneys’ fees to prosecute her review application. She states that she only managed to raise the required funds at the end of December 2008, after eventually managing to rearrange her financial affairs. She does not in this respect indicate in what way she managed to rearrange her financial affairs neither she indicates why she could not have done the same earlier. Put differently she does not take the Court into her confidence to explain why it took 8 (eight) months to rearrange her financial affairs in order to be able to

challenge the arbitration award. Of importance also in this regard is that the applicant in her replying affidavit does not in a satisfactory manner deal with the averments contained in the answering affidavit of the first respondent. In its answering affidavit and at paragraph 34 of the answering affidavit the first respondent avers as follows:

“34. In addition, the employment status of the Applicant was discussed at the arbitration which took place on the 8th and 9th April 2008. I represented the First Respondent at the arbitration and I specifically recall that it was common cause between the parties that the applicant was already employed at the time that the arbitration took place. The only issue in dispute regarding the Applicant’s employment status was length of time it took for her to find new employment after her dismissal.”

[24] The applicant in her replying affidavit respondent as follows:

“6.1.1 AD PARAS’ [31]-[35]

I reiterate the contents of the paragraph [13] to [16] of my Founding Affidavit. In my respectful review, the issue of lack of funds is not something I could have disclosed to the First Respondent. It was a matter between me and my attorneys, and had nothing to do with the First Respondent.”

[25] In my view the case of the applicant is one of those cases envisaged by Zondo JP in the case of *Moiloa v Shai N.O. and Others* (2007) 28 ILJ 1028 (LAC), when he said:

“If ever there was a case in which one can conclude that good cause has not been shown for condonation, without even considering the prospects of success, then this is it. Where, in an application for condonation the delay is excessive and no explanation has been given for what the delay or explanation has been given but such ‘explanation’ amounts to no explanation at all, I do not think that it is necessary to consider the prospects of success.”

[26] There can be no doubt that the period of 8 (eight) months is excessive regard being had to the facts and the circumstances of this case. Accordingly, the applicant’s application for condonation for the late filing of the counter review application stand to be dismissed for this reason alone.

[27] The applicant’s application for condonation would still be not sustainable even the prospects of success were to be considered. The prospects of success are extremely weak, if they exist at all. In this respect, the view that the commissioner’s award does meet the standard set out in the *Sidumo and Another v Rustenburg Platinum Mines and Others* [2007] 12 BLLR 1097 (CC).

[28] The attack on the arbitration award is based on the finding by the commissioner that:

“3.2 Evidence was led that the applicant failed to activate letters and also failed to approve samples. These facts were not disputed during the arbitration proceedings, and it is what led to the dismissal. I do not have the reason not to accept the respondent’s submission that this were serious offences and that the dismissal was appropriate under the circumstances.”

- [29] In my view this attack bears no merit and fails to set out any of the grounds provided for under section 145 of the LRA for reviewing an arbitration award. The commissioner arrived at the above conclusion after considering evidence presented before him including that of the applicant. Accordingly, the applicant's application stands to be dismissed. I see no reason in the circumstances of this case why even though the applicant is an individual costs should not follow the results.
- [30] In the premises the applicant's application for the condonation of the late filing of her review is dismissed with costs.

Molahlehi J

Date of Hearing : 11th September 2009

Date of Judgment : 26th January 2010

Appearances

For the Applicant : Mr N Voyi of Ndumiso P. Voyi Attorneys

For the Respondent: Adv A L Cook

Instructed by : Edward Nathan Sonnenbergs Inc