



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR 663/05

In the matter between:

EDWIN DICHABE

Applicant

and

DEPARTMENT OF LOCAL GOVERNMENT

First Respondent

AND HOUSING (NORTH WEST)

BAROLONG BOORA TSHIDI TRIBAL AUTHORITY

Second Respondent

(NORTH WEST)

Heard: 15 December 2011

Delivered: 20 April 2012

JUDGMENT

KUMALO AJ

Introduction

- 1] The applicant in this matter filed a statement of case in terms of which he contended that his contract of employment was unilaterally terminated and that he should for that reason be reinstated into his previous position.
- 2] The referral was filed out of the prescribe time period and accordingly the applicant filed an application to have the late referral of the statement of case condoned.
- 3] The issue before this court at this stage concerns only whether or not the late filing of the statement of case should be condoned.

Background facts

- 4] The applicant in his statement of case states he was prior to his dismissal employed as a tribal policeman by the Department of Local Government Housing, Planning and Development, North West Province, stationed at Ratshidi Tribal Authority¹.
- 5] The applicant further states that in August 1996 his employment with the department was unilaterally terminated in that he was advised by the department that he had been re-employed following the intervention of and agreement with the Public Protector.
- 6] The applicant says he did not pursue the issue of his unilateral termination of his employment until the 1st of October 2001 when he received his salary advice without any deductions. He says he cannot find that salary advice but attaches a similar one dated 31 October 2001². When he raised the matter

1 Paragraph 3 of the indexed bundle

2 Annexure "D" page 14 of the indexed bundle

with the department, he was informed that he was no longer a permanent appointee but a temporary one³. This change of employment status he says was never discussed with him.

- 7] In trying to resolve his problem with the respondents the applicant approached a number of institutions for assistance and these include, the department of labour, the Ombudsman and the Public Protector, and the Human Resources Management office of the department of local government and housing.
- 8] According to him the response he received was that he had resigned. An enquiry form from the department, dated 25 March 2003, gives his date of resignation as 31 October 2001⁴. However, the respondents according to him failed to produce a copy of the resignation letter. He then referred the matter during October 2003 to the Commission for Conciliation Mediation and Arbitration (the CCMA). The matter could not be resolved at conciliation and accordingly the certificate of outcome was issued on 9 March 2004.
- 9] During August 2004 the applicant engaged the services of KJ Ketse Attorneys to act on his behalf. When his attorneys raised the matter with the Office of the Premier they were advised that the applicant was not a “public servant” but rather an employee of the Barolong Boo Ratshidi Traditional Council⁵.
- 10] The applicant then filed his statement of case which as stated earlier was filed late in terms of the prescribe time period for filing the same. The statement of case was filed on the 26th of May 2005. The applicant states that he could not file the statement of case earlier because he did not have funds to brief attorneys to represent him.⁶
- 11] On the 1st of August 2005, the Registrar of the Labour Court informed the applicant by fax transmission that the matter could not be enrolled in the

3 Annexures “E” and “F” pages 15, 16 of indexed bundle dated 6 April 1999 and 13 October 1999 respectively

4 Annexure “G” page 17 of the indexed bundle

5 Annexure “H” page 18

6 Paragraph 8 Affidavit page 8

Labour Court until the following directions had been complied with; namely, the original documents must be filed; proof of service on all interested parties by way of affidavit in terms of Rule 4 was required; proof by way of an affidavit that the CCMA gave notice of the arbitration award to respondent prior to this application being brought to the Labour Court; the parties have held a pre-trial conference in terms of Rule 6(4); and the record of the CCMA proceedings must be filed.

12] In my view, for the reasons set out below the applicant's application for condonation stands to fail.

13] In the case of *FAWU v Foodtown Incorporated (Pty) Ltd*⁷ the delay in filing application for leave to appeal was out of time by some 7 months. The Court dismissed the application for condonation on the basis that significant delays had not been accounted for. In doing so he took into account the practical difficulties of joining a large number of some 67 individual applicants; that the trade union they belonged to would have to consider to what extent it would be willing and financially able to continue to act on their behalf; the applicants were lay people in a poor financial situation; they had to fundraise in order to finance the litigation. Those were all factors that the learned Judge took into account in their favour.

14] The Court further held that:⁸

“Nevertheless, there are periods on the papers in which delay goes unexplained. It is necessary, and the courts have repeatedly stressed this, to set down in the founding affidavit a proper chronicle with the requisite explanation, presenting excuses where necessary, of precisely what happened at each stage in the proceedings. The founding papers do not do that with sufficient clarity to enable me to be confident as to why delays which were identifiable, occurred. There is no point in my considering each of the delays in turn and the extent to

⁷ 12 BLLR 1269 (LC)

⁸ Paragraph [12] page 1271

which they have been the subject of explanation. Suffice it to say that at the very least from the period some time during January to the time when the application was launched, there is a hiatus of some - at best for the applicants - some seven weeks that goes completely unexplained and that should have been explained in the circumstance. The Courts repeatedly stress that the question of the explanation for the delay must be weighed in the balance with the prospects of success on the merits, the stronger the prospects of success the weaker can be the explanation for the delay and the more culpability of the parties in relation to the delay, will be excused.”

15] He concluded that had the prospects of success been strong he would have been inclined to grant condonation, but he could not conclude that they were strong and declined to condone the late filing of the application for leave to appeal.

16] In *Queenstown Fuel Distribution CC v Labuschagne NO and others*⁹ the Court in dealing with condonation in the context of late filing of a review application held that the late filing of a review application can be condoned on good cause shown.

17] In the leading often quoted case of *Melane v SANTAM Insurance Co Ltd*,¹⁰ the Court held that:

“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 of success may tend to compensate for a long delay. Exceptionally, the degree of non-compliance may be so gross and the explanation therefore so inadequate, that the court may be moved to refuse condonation, regardless of the prospects of success in the main proceeding [My emphasis]”

9 [1999] 3 BLLR 268 (LC)

10 [1962 \(4\) SA 531](#) (A), at 532 E

18] In the applicant's case the delay in applying for condonation is so gross that condonation ought not to be granted. The notice of application for condonation and accompanying affidavit were filed at court on 15 July 2010 and the application was finally heard on 15 December 2011. The statement of claim in support of reinstatement is dated 29 April 2005 and has a court stamp dated 26 May 2005. The certificate of outcome is dated 9 March 2004. This is some nine months after the certificate of outcome was issued and more than six years after the conciliation process was concluded. This is a massive delay that grossly prejudices the first respondent and cannot be condoned by the court.

19] In so far as the applicant places reliance for establishing the fact of dismissal in terms of Section 186 (1)(a)(b) (unilateral termination of employment, which is unfair; an offer to renew a fixed term contract on less favourable terms.), the applicant misconceives the applicability of the cases decided under this section, as well as sections 185 and 188 of the Labour Relations Act of 1995 and Sec 23 of the Constitution. In the *Van Niekerk v Medicross Health Care Group (Pty) Ltd*¹¹, the issue there was not whether the applicant was employed by the respondent. There was already an employment relationship between the parties. It was the demotion from a managerial position to a clerical status, an inferior position without consultation or counseling that was in issue. In these particular circumstances there was a dismissal which was held to be unfair. Similar considerations apply in *Van der Riet v Leisument t/a Health Racquet Clubs*¹²; *Visser v Vodacom (Pty) Ltd*¹³; *Van Wyk v Albany Bakeries and Others*.¹⁴

20] The applicant's case is also unsustainable even when prospects of success are considered. The applicant has in this regard failed to show that he has a chance of succeeding when the main case is considered, in particular as concerning the issue of whether he was dismissed by the respondents.

11 [1998] a BALR 38 CCMA.

12 [1997] 6 BLLR 721 (LAC).

13 [2002] 10 BLLR 1031.

14 [2003] 12 BLLR 1274.

21]The respondent had asked for dismissal of the application with costs. Given the unacceptable and unreasonable delays ostensibly caused by lack of funds of the applicant, I am of the view that such an order would not be appropriate in this case.

22]Accordingly, I make the following order:

1. The application for condonation is dismissed;
2. The applicant's claim is dismissed
3. Each party to pay its own costs.

Kumalo AJ

APPEARANCES:

FOR THE APPLICANT: Advocate N L Skibi.

FOR THE RESPONDENT: Advocate K M Molemoeng.

