



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR838/2011

In the matter between:

**T D SIBIYA**

**Applicant**

and

**CCMA MPUMALANGA**

**First Respondent**

**GLEN CORMACK N.O**

**Second Respondent**

**SOUTH AFRICAN REVENUE SERVICES**

**Third Respondent**

**Heard: 01 November 2012**

**Delivered: 06 December 2012**

**Summary: Review application. Condonation for the late filing of review.**

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JUDGMENT

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MOLAHLEHI, J

Introduction

- [1] This is an application to review and set aside the arbitration award made under case number MP 4958-09 dated 5 August 2010, in terms of which the

second respondent (the Commissioner) found the dismissal of the applicant to have been unfair and ordered compensation. In the review application, the applicant challenges the award of the Commissioner on the basis that, having found the dismissal to have been substantively unfair, the Commissioner ought to have ordered that she be reinstated.

- [2] The applicant has also applied for condonation for the late filing of a review application. The third respondent has opposed the condonation application.
- [3] The respondent was also late in filing the answering affidavit for which an application for condonation has been filed. Having regard to the principles discussed later in this judgment relating to consideration of condonation, I am satisfied that the respondent has made out a case for condonation of the late filing of the answering affidavit.

#### Background facts

- [4] The applicant, who at the time of her dismissal was employed as a member of the anti-smuggling unit by the respondent was responsible for customs control at the Lebombo border post. She was charged and dismissed for the misconduct concerning the allegation of 40 cartons of smuggled cigarettes that had been seized and handed in for safekeeping.
- [5] The evidence of the various witnesses that testified on behalf of both parties respectively had been summarised by the Commissioner in his arbitration award and I therefore do not deem it necessary to repeat the same in this judgment, in particular, having regard to the fact that the issue in the review application relates only to the question of whether the Commissioner ought to have ordered reinstatement.

#### The grounds of review and the arbitration award

- [6] The essence of the applicant's challenge in this application is that the arbitration award is not justifiable nor reasonable considering the evidence which was placed before the Commissioner. This as mentioned earlier relates to the failure by the Commissioner to order reinstatement.

- [7] The Commissioner in his arbitration award after summarising the evidence which was before him finds that the dismissal of the applicant by the respondent on the charge of theft and dishonesty was substantively unfair and as stated earlier ordered the respondent to compensate her in the amount equivalent to 6 months salary.
- [8] In her explanation for the delay, the applicant blames her previous attorneys in filing the review application outside the prescribed period and says that the review application was six months and three weeks late. She says that when she enquired from her erstwhile attorney about progress in the matter, she was informed that he was waiting for an opinion from an advocate. She further stated that it was only in February 2011 that the attorney informed her that he was not able to obtain the legal opinion as promised. According to her, the attorney further advised that she had no prospects of succeeding with the matter.
- [9] The applicant then approached the current attorneys of record who according to her "immediately launched this application."
- [10] The applicant contends in the condonation application that this matter is important because it would clear her name and 'I will again be marketable in the workplaces across the Republic and elsewhere.'
- [11] The third respondent in its answering affidavit disputes the period of the delay as stated in the founding affidavit of the applicant. The respondent contends that the delay is seven months and two weeks and is therefore excessive when regard is had to the explanation tendered by the applicant.

#### Principles governing condonation

- [12] The principles governing the requirement for granting or refusal of condonation are well established in our law. In terms of these principles the court or an arbitrator has a discretion which is to be exercised judicially after taking into account all the facts before it. 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 frames,
- (c) prospects of success or *bona fide* defense 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. See *Foster v Stewart Scott Inc*<sup>1</sup>

[13] 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 the long delay.

[14] In an application for condonation, good cause is shown by the applicant giving an explanation that shows how and why the default occurred. There is authority that the court could decline the granting of condonation if it appears that the default was wilful or was due to gross negligence on the part of the applicant. In fact, the court could on this ground alone decline to grant an indulgence to the applicant.

[15] Prospects of success or *bona fide* defence on the other hand mean that all what needs to be determined is the likelihood or chance of success when the main case is heard. See *Saraiva Construction (Pty) Ltd v Zulu Electrical and Engineering Wholesalers (Pty) Ltd*<sup>2</sup> and *Chetty v Law Society*.<sup>3</sup>

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<sup>1</sup> 1997 18 ILJ 367 (LAC).

<sup>2</sup> 1975 (1) SA 612 (D) at 613C-G.

<sup>3</sup> 1985 (2) SA 756 (A) at 765A-C.

- [16] Another important principle which the courts repeatedly stated 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. See *Melanie v Santam Insurance Co Ltd*.<sup>4</sup> It has also been held by the courts that the applicant should bring the application for condonation as soon as it becomes aware of the lateness of its case.
- [17] Proper explanation entails an explaining for each period of the delay and the disclosure of all the details relevant to the delay. And more importantly the applicant needs to take the court into his or her confidence.

### Evaluation

- [18] In the present instance, it is clear that the applicant has failed to provide a reasonable and satisfactory explanation. In addition, the applicant has failed to take the court in her confidence to explain in full all the aspects related to the period of the delay. Reading the applicant's founding and replying affidavit, the impression that stands out therefrom is that the attitude of the applicant is that the condonation is there for the taking.
- [19] The applicant does not explain the period between February 2011, when her erstwhile attorney advised her that she did not have prospects of succeeding with her case and May 2011 when the review application was filed. The applicant has also failed to explain the gap between 15 April 2011 when the notice of motion was signed by her attorneys of record and her signing the founding affidavit on 28 April 2011.
- [20] The applicant blames her erstwhile attorneys for the delay. She does not however indicate the name of those attorneys and also the dates that she approached them to enquire about progress of her case. Furthermore, the applicant says that she went back to her union and was referred to the current attorneys of record. There is no indication which union advised her to

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<sup>4</sup> 1962 (4) SA 531 (A) at 532C-F.

approach the current attorneys of record nor is there any indication as to the date that the union advised her to approach the current attorneys of record.

- [21] In light of the above, I find that the applicant has failed to present credible evidence to make out a case for condonation for the late filing of the review application. I further find that the applicant has failed to provide evidence as to the specific dates relating to the material aspects of her condonation application which would have assisted the court in arriving at a fair and just decision in adjudicating the condonation application.
- [22] Whilst the applicant blames her erstwhile attorney for the delay as indicated above, she has not made out a case proving that the delay was as result of the attorneys. As indicated earlier not only has she failed to specify who the attorneys are but she has also failed to provide the dates which are critical in relation to consulting with them and obtaining the advice about the prospects of success.
- [23] In conclusion and in the circumstances of this case, it seems to me that the only reasonable finding to make is that the delay was excessive and the explanation, if it exists at all, was so poor that I do not deem it necessary to consider the prospects of success.

#### Order

- [24] In the premises, the application to review the arbitration award made under case number MP 495809 dated 5 August 2010 is dismissed with costs.

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Molahlehi J

Judge of the Labour Court of South Africa

## APPEARANCES:

For the Applicant: Mr Shongwe of Shongwe Attorneys

For the Third Respondent: Advocate S Collet

Instructed by: Eversheds Attorneys

LABOUR COURT