



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Case no: JR 1152/12

In the matter between:

LOUISAH EMILY MATHOBELA

Applicant

and

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

First Respondent

COMMISSIONER E HARMSE.

Second Respondent

QUINTILES CLINDERPHARM (PTY) LTD

Third Respondent

Heard: 09 January 2014

Delivered: 13 May 2014

Summary: Commissioner failing to address the need for condonation with regard to third respondent's late filing of answering affidavit. Commissioner misunderstanding what an inquiry into prospects of success entails. Ruling set aside.

JUDGMENT

NAIDOO AJ

Introduction

- [1] This is an application to review and set aside the second respondent's (Commissioner) ruling under case number GATW 271-12, delivered on 30 March 2012 wherein the applicant's condonation application was dismissed.
- [2] The applicant first sought condonation for the late filing of its supplementary affidavit. The third respondent did not persist in opposing condonation. Having regard to the relevant legal principles I am of the view that it would be in the interest of justice that condonation under these circumstances be granted.

Background

- [3] The applicant was dismissed for reasons relating to incapacity on 20 January 2012 and referred an unfair dismissal dispute to the first respondent on 23 February 2012. The first respondent set the matter down for an *in limine* hearing, heard on 28 March 2012.
- [4] The matter came before the commissioner who delivered a ruling, dated 30 March 2012, dismissing the applicant's condonation application. It is this ruling that forms the subject matter of these proceedings.
- [5] A relevant portion of the letter advising the applicant of her dismissal reads;
- 'The dismissal will be effective from 20 January 2011(termination date). You will be paid for one month *in lieu* of notice and this payment together with any other monies due to you will be paid to you by 29 February 2012.'

Condonation hearing

- [6] At the hearing the applicant's representative raised the point that the third respondent's opposing answering affidavit was filed fourteen days (14) outside the prescribed time period. The third respondent's representative took the view that on a reading of the first respondent's rules, more specifically Rule 31 (5) (a), there is

no obligation on it to file its answering affidavit when opposing the applicant's condonation application. In the alternative the representative argued that condonation should be granted under the circumstances.

- [7] In explaining why the applicant was late in filing her dispute, the applicant's representative argued that it was initially taken, from a reading of the letter of dismissal, that the applicant's date of dismissal was 29 February 2011, in which they would need to refer the applicant's dispute on or before 29 March 2011. The applicant and attorney worked on this premises until such time as they realised the date of dismissal was 20 January 2011, after which the applicant immediately filed her dispute with the first respondent.
- [8] With regard to the issue of prospects of success the applicant argued that the third respondent failed to examine whether her duties could be adapted to accommodate her illness, failed to examine alternative positions before dismissing her and further failed to act consistently in that the third respondent accommodated other employees whose health effected their ability to perform their duties.

Ruling

- [9] In her ruling, the commissioner acknowledges the *in limine* raised by the applicant but went further to find that Rule 31(10), allowed her to deal with the process in a manner she deemed fit and on the strength of this, stated that she would allow the third respondent's representative to make oral submissions as to why it was late in filing its answering affidavit.
- [10] As to the reason for delay, the commissioner notes that the applicant was three (3) days late in referring her dispute and that while such delay was not excessive, she did not accept the reason tendered as one that is reasonable. On this point the commissioner states that she was not persuaded by the misinterpretation relied upon by the applicant's representative. The letter of dismissal, according to the commissioner, clearly stated that the applicant was dismissed on 20 January 2012 and further goes on to advise the applicant that she had thirty days from such date to refer her matter to the first respondent. In addition the applicant had been duly

represented by an attorney before her dismissal and as such should have been advised of the prescribed time period in which to refer her matter. From this assessment the commissioner found the applicant had not vigorously perused her case.

- [11] Addressing the issue of prospects of success, the commissioner records that the applicant worked 19 years in the position she was dismissed from, yet it was the conditions associated with this position which were not conducive to her health. The commissioner further accepts that while the third respondent held an incapacity hearing, which spanned over a number of days and took into account various medical reports on the applicant's health, there was no alternate position it could have placed the applicant in and for these reasons the applicant had failed to establish a prima facie case.

Grounds on review

- [12] The applicant attacks the commissioner's findings on two grounds;
- (a) Firstly in the absence of the third respondent making out an application for condonation, the commissioner should not have considered its evidence and should have continued the matter on the basis that its application for condonation remained unopposed.
 - (b) The second ground attacks the commissioner's finding on the issues of reason for delay and prospects of success. The applicant argued the commissioner was unreasonable not to have accepted her reason for delay and committed a gross misconduct in finding the applicant approached the matter in a dilatory manner when there was no proof to this effect before the commissioner. On the issue of prospects of success, the commissioner took it upon herself to decide the merits of the matter which she was not called to do. Furthermore, the applicant raised arguments which remained unchallenged and if established at arbitration, would render her dismissal unfair. For this reason the applicant argues she did establish a prima facie case before the commissioner.

Evaluation

- [13] While the applicant is correct in that a party opposing a condonation application must file an answering affidavit within fourteen days of receiving the application, the first respondent's Rule 31(10) does allow a commissioner to deal with an application in a manner he or she deems fit. In this case the commissioner found that she could hear oral submissions with regard to the late filing of the third respondent's answering affidavit. I cannot fault the commissioner for taking this view. In terms of s138 of the LRA, a commissioner must conduct proceedings in a manner that gives effect to the primary objectives of the LRA that being an effective resolution of labour disputes. Had the commissioner not adopted this view she would have had to postpone proceedings, allow the third respondent to file its condonation application, give the applicant an opportunity to oppose same and only then the matter would be ripe for hearing. It cannot be said that this option would lend credence to the aforementioned objective of the LRA.
- [14] However, on a reading of the transcript, it is clear that despite the commissioner adopting the approach described above, she failed thereafter to address the issue of the third respondent's condonation. The transcript nor the commissioner's award makes no reference to why the third respondent was late in filing its answering affidavit, or any other further consideration associated with a condonation application. Her failure to do so meant that the third respondent's submissions were not properly before her. A commissioner cannot simply dispense with the requirements of condonation, especially if it was an issue raised by one of the party's.

Reason for delay

- [15] It is trite that this court, on review, should guard against substituting its own findings on the evidence that was before a commissioner but rather to assess whether the commissioner's finding falls within the ambit of what is considered reasonable.

The commissioner did not consider the applicant's reason for delay as plausible. She found the letter of dismissal clear and unambiguous in relation to the date of

dismissal. Further to this, the commissioner took into consideration the fact that the applicant was, at all material times, being assisted by an attorney. While I might not agree with the commissioner's findings on this point, I am nevertheless not of the view that no other commissioner, acting reasonably, would not come to the same conclusion on this issue.

Prospects of success

[16] In *SA Democratic Teachers Union v Commission for Conciliation, Mediation & Arbitration & others*¹ (2007) 28 ILJ 1124 (LC) the court said;

'A commissioner in considering prospects of success does not have to pronounce on the merits of the case. All that the commissioner needs to do is to investigate whether on the averments made by the applicant there is a *prima facie* case, that there is a chance of succeeding when the main case is heard. In other words to establish whether there is a reasonable prospect of success on the merits, it suffices if an applicant can show a *prima facie* case through setting out averments which, if established at the proceedings of the main case, would entitle the applicant to some relief. The applicant need not deal fully with the merits of the case

[17] In considering the applicant's prospects of success the commissioner was faced with a dispute of fact on material issues, amongst these were whether the third respondent investigated alternate positions to place the applicant in and whether the applicant's duties could have been accommodated in consideration of her health. Having only the submissions of each party before her, the commissioner accepted the third respondent's version in finding the applicant had no prospects of success. The commissioner was not required to make this determination.

In addition, the applicant's argument before the commissioner included the allegation that the third respondent had in the past accommodated other employees under similar circumstances as what the applicant found herself in. This remained unchallenged.

¹ (2007) 28 ILJ 1124 (LC) at para 38

Having regard to the principle laid down in SA Democratic Teachers Union (*supra*) it is clear that the averments made by the applicant, if established would have entitled her to the relief claimed. In light of the factual dispute an arbitrator would have been better placed to deal with these issues at arbitration. It is clear that the commissioner did not understand what was required of her when determining whether or not the applicant had any prospects of success.

- [18] I am satisfied that the irregularities committed by the commissioner with regard to her failure to address the third respondent's need for condonation and in dealing the issue of prospects of success, has a direct bearing on the reasonableness of her ruling. For these reasons, it becomes necessary to set aside the commissioner's ruling. There is sufficient information placed before this Court to further substitute the commissioner's ruling with a finding that condonation should be granted.

Order

- [19] In the premises the following order is made:

- 19.1 The applicant's late filing of her supplementary affidavit is condoned.
- 19.2 The second respondent ruling under GATW 271-12 is set aside and replaced with a finding that the applicant's condonation application be granted.
- 19.3 The first respondent is directed to set the matter down for arbitration before a commissioner other than the second respondent.
- 19.4 There is no order as to costs.

Moksha Naidoo

Acting Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant: Pieter Strydom : Instructed by JJR Incorporated

For the Respondent: Mr A Hinds

LABOUR COURT