



**REPUBLIC OF SOUTH AFRICA**

**THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH**

**JUDGMENT**

Not Reportable

Case No: P548/12

In the matter between:

**MAXWELL MKOKELI.**

**Applicant**

and

**COMMISSION FOR CONCILIATION**

**MEDIATION AND ARBITRATION**

**First Respondent**

**COMMISSIONER THERESA MALGAS**

**Second Respondent**

**IBI EASTERN CAPE**

**Third Respondent**

**Heard: 1 August 2013**

**Delivered: 30 July 2014**

**Summary: The commissioner's failure to apply the correct legal principles for the determination of a condonation application may result in an unreasonable condonation ruling which is susceptible to review.**

**Review of a condonation ruling.**

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**JUDGMENT**

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LALLIE, J

### Introduction

- [1] This is an application to review and set aside a ruling of the second respondent (“the commissioner”) refusing the applicant’s application for condonation of the late referral of his unfair dismissal dispute to the first respondent.

### Factual background

- [2] The applicant was employed by the third respondent. He was dismissed for misconduct on 23 July 2012 and referred an unfair dismissal dispute to the first respondent on 3 October 2012. As his dispute was referred outside the 30 day period prescribed in section 191(2) of the Labour Relations Act 66 of 1995 (‘the LRA’) he applied for condonation using the first respondent’s standard form. The hearing of the condonation application was scheduled for 30 October 2012 in Humansdorp. Pursuant to listening to arguments, the commissioner issued the ruling, the applicant seeks this court to review and set aside.

### The condonation ruling

- [3] In her ruling, the Commissioner relied on *National Union of Mine Workers and Others v Western Holdings Goldmine*<sup>1</sup> where it was held that the factors to be considered in determining whether the applicant has shown good cause for condonation are the period of the delay, the explanation for the late referral, the applicant’s prospects of success, the importance of the case, and the balance of prejudice. She added that as a commissioner she was obliged to be fair to both parties. She further relied on *Mziya v Putco Ltd*<sup>2</sup> where it was held that:

‘...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

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<sup>1</sup> (1994) 15 ILJ 610 (LAC)

<sup>2</sup> [1999] 2 BLLR 103 (LAC) at para 10.

are immaterial, and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused’.

- [4] The commissioner found that the referral was late by 41 days. She was not satisfied with the applicant’s explanation for the delay that he had faxed a letter of appeal to the third respondent and decided to approach the first respondent when he received no response. She took into account the third respondent’s submissions that the reason for the delay was unreasonable as the applicant was aware of the 30 days’ requirement as he had lodged disputes with the first respondent in the past. She was convinced that the applicant did not pursue his matter diligently. The applicant was found not to have furnished enough explanation from the date of his dismissal to the date of the referral of his dispute to the first respondent.
- [5] The applicant submitted that he had good prospects of success as his appeal was neglected. The commissioner accepted the third respondent’s version that the applicant was charged with and found guilty of serious acts of misconduct and had valid warnings on dismissal. She found nothing unusually important about the matter but expressed the view that it was important to the parties. She made no finding on the issue of prejudice and dismissed the application.

#### Grounds for review

- [6] The applicant submitted that the commissioner committed gross irregularities by unreasonably failing to apply her mind to relevant evidence. She failed to attach weight to the applicant’s evidence and failed to play an inquisitorial role to determine whether the applicant’s version was plausible. The Commissioner consequently reached an irrational conclusion. The commissioner unreasonably concluded that he lacked prospects of success as a result of her failure to apply her mind to his evidence. She failed to apply the relevant legal principles for determining condonation.

- [7] The third respondent denied the existence of valid grounds to review and set aside the award and submitted that the applicant sought to rely on evidence which was not tendered before the commissioner.
- [8] In determining the review application, I am enjoined to consider whether the decision the commissioner reached is a decision a reasonable decision maker could not reach on the evidence before the commissioner. See *Sidumo and Another v Rustenbergurg Platinum Mines Ltd and Others*<sup>3</sup>. I am further required to establish whether the commissioner dealt with the primary issue, considered the matter before her and reached a reasonable decision. See *Goldfields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA*<sup>4</sup>. Part of this test includes establishing whether the commissioner applied the correct legal principles in reaching the decision which is the subject of the review.
- [9] The commissioner could grant condonation had the applicant shown good cause as envisaged in section 191 (2) of the LRA. The application of the relevant legal principles in determining whether good cause was shown is therefore relevant in determining this application. In *Siegelaar v Minister of Safety and Security*<sup>5</sup> the Court dealt with condonation as follows:

‘[35] In other words, in determining whether the delay in bringing the proceedings is unreasonable the court is obliged to exercise a judicial discretion taking into account all the relevant circumstances. Guidance can also be sought from cases dealing with applications for condonation for special leave to appeal. In *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others*<sup>6</sup> the Constitutional Court stated:

‘This court has held that an application for leave to appeal will be granted if it is in the interests of justice to do so and that the existence of prospects of success, though an important consideration in deciding whether to grant leave to appeal, is not the only factor in the determination of the interests of justice. It is appropriate that an application for condonation be considered on the same basis and that such an application should be granted if that is in the interests of

<sup>3</sup> 2008 (2) SA 24 (CC).

<sup>4</sup> [2014] 1 BLLR 20 (LAC).

<sup>5</sup> (2005) 26 ILJ 133 (LC) at 143 C-G

<sup>6</sup> 2000 (2) SA 837 (CC)

justice and refused if it is not. The interests of justice must be determined by reference to all relevant factors, including the nature of the relief sought, the extent and cause of the delay, the nature and cause of any other defect in respect of which condonation is sought, the effect on the administration of justice, prejudice and the reasonableness of the applicant's explanation for the delay or defect.'

[36] In other words, the interests of justice are a central consideration in deciding whether to grant condonation for an unexplained delay. So too is the observance of appropriate standards in the administration of justice. Applications for condonation must be properly made in the appropriate manner in order to ensure they can be effectively adjudicated'.

[10] The commissioner found that the applicant did not furnish enough explanation for the lateness of his referral. She considered the applicant's version that he faxed a letter of appeal to the respondent and after he received no response he decided to approach the CCMA. Although the commissioner was required to give brief reasons for decision she had a duty to do more than just state the applicant's version. Section 191 (1) (b) of the LRA requires a referral to be made within 30 of the date of dismissal or within 30 days of the employer making a final decision to dismiss or uphold the dismissal. The outcome of an appeal falls within the realm of making a final decision to dismiss or uphold a dismissal. When the applicant faxed a letter of appeal, he expected the employer to deal with his appeal and decide whether to dismiss or uphold it. The 30 day period would have started from the date of the outcome of the appeal. The third respondent's submissions that the commissioner considered to the effect that the applicant was aware that he should have referred his dispute within 30 days as he had lodged several disputes with the first respondent in the past does not deal with the issue of waiting for a response to the letter of appeal. The Commissioner could not reasonably reach the conclusion that she was not satisfied with the applicant's explanation for the delay without dealing with the issue of the appeal.

[11] In reaching the finding that the applicant had no prospects of success, the commissioner considered that the applicant was found guilty of serious charges which were detrimental to the third respondent and destroyed the

relationship of trust. She also took into account the applicant's warnings for similar misconduct which were still valid on dismissal. The test for prospects of success goes further than the gravity of the misconduct which led to an employee's dismissal and his or her disciplinary record. In determining whether the applicant had prospects of success, the commissioner should have considered whether the applicant had made averments which could have resulted in his success if proved. The applicant submitted that his appeal was neglected and the accusations against him were not proved at the disciplinary hearing. The applicant phrased his prospects of success as follows 'My appeal was neglected and no proof was given to me on my hearing to prove their accusations'. The applicant is a lay person. The only reasonable inference which can be drawn from his submission is that the third respondent failed to discharge the onus of proving his guilt at the disciplinary hearing. In the event of the third respondent's failure to discharge the onus of proving that the applicant committed the acts of misconduct he was dismissed for, the applicant could be successful.

[12] The Commissioner did not deal with the issue of prejudice at all. The interests of justice are the over-arching principle in condonation applications and require that all relevant factors be considered. When the award is considered in its totality, it shows that the commissioner committed gross irregularities which rendered her award reviewable. The Commissioner failed to apply the test for condonation correctly and made omissions which led her to reach an unreasonable conclusion on the condonation application. She failed to deal with the evidence on the reasons for lateness leading her to conclude that the applicant provided no reasonable explanation for the delay. Her failure to apply the correct test for prospects of success led her to conclude that the applicant had none. Her ruling did not stand the test for review.

[13] In the premises, the following order is made:

13.1 The condonation ruling issued by second respondent under case number ECPE 4345-12 is reviewed and set aside.

13.2 The matter is remitted to the first respondent for the condonation application to be determined *de novo* by a commissioner other than the second respondent.

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Lallie J

Judge of the Labour Court of South Africa

## APPEARANCES

For the Applicant: Mrs Van Staden of the Justice centre

For the Respondent: Mr Unwin of Chris Unwin Attorneys

LABOUR COURT