



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR772/2014

In the matter between:

POPCRU obo CONSTABLE X FENI

Applicant

And

M. A. NOZIGQWABA N.O.

First Respondent

THE SAFETY AND SECURITY SECTORAL

BARGAINING COUNCIL

Second Respondent

SOUTH AFRICAN POLICE SERVICES

Third Respondent

Heard: 18 December 2014

Delivered: 13 February 2015

Summary: Application for condonation for the late

filing of a review application. Application dismissed.

JUDGMENT

LE ROUX, AJ

- [1] This matter concerns an unopposed application in terms of section 158(1)(g) of the Labour Relations Act, 66 of 1995 (“LRA”) to review and set aside a ruling made by the first respondent to the effect that he and the second respondent did not have jurisdiction to consider an unfair dismissal dispute referred to it by the applicant.
- [2] The ruling is based on a finding made by the first respondent that the reason for the dismissal was the applicant’s participation in an unprotected strike.
- [3] When the matter was called, I requested the applicant’s legal representative to address me on the issue of condonation.
- [4] From the papers, it appears that the ruling is dated 5 August 2013. The founding affidavit indicates that the applicant came to know of this ruling on the same date.
- [5] The notice of motion requesting this Court to set aside the ruling is dated 16 April 2014 and it was filed on 23 April 2014. This means that a period of some 37 weeks lapsed between the date of the ruling and the filing of the application. The LRA does not prescribe a time period within which applications in terms of section 158(1)(g) must be lodged. However, decisions such as *SACCAWU obo Manzana and Others v Pick ‘n Pay, Kimberley and Others*¹ and *Weltevrede Kwekery (Pty) Ltd v CCMA and Others*² have indicated that such an application should be launched with a reasonable time and that the six week time period set for applications in terms of section 145 constitutes a guideline in this regard.
- [6] In my view a period of 37 weeks constitutes an unreasonable delay. The applicant was, therefore, correct in seeking condonation for the late filing of this application.
- [7] The approach adopted by the then Appellate Division with regard to condonation applications in *Melane v Santam Insurance Co Ltd*³ has been accepted and adopted in numerous decisions of the Labour Court and the Labour Appeal Court. This is set out in the following excerpt from the decision:

¹ [2003] 10 BLLR 1065 (LC).

² (2006) 27 ILJ 182 (LC).

³ 1962 (4) SA 531 (A).

‘In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. 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. And the respondent's interest in finality must not be overlooked. I would add that discursiveness should be discouraged in canvassing the prospects of success in the affidavits. I think that all the foregoing clearly emerge from decisions of this Court, and therefore I need not add to the ever growing burden of annotations by citing the cases.’⁴

- [8] The founding affidavit deals with three of the factors mentioned in the above excerpt. It accepts that the application is late but states that this delay amounts to some 24 weeks. By my calculation this is incorrect. As indicated above, the period of time that elapsed is some 37 weeks. If one accepts, as the Applicant seems to accept, that a reasonable period for the launching of a review application is 6 weeks, the application is some 31 weeks late. This is, in my view, extremely late.
- [9] The explanation for the delay seems to be twofold. The first is that the applicant first sought to rescind the award. In a ruling dated 6 January 2014 the First Respondent, correctly in my view, refused to rescind the award on the basis that no ground for rescission set out in section 144 of the LRA had been established.
- [10] The applicant then instituted review proceedings. The notice of motion is dated 16 April 2014 and it was filed with this Court on 23 April 2014. The founding affidavit states that the applicant briefed their attorneys of record to assess the merits of a potential review application on 19 March 2014. The attorney briefed to deal with the

⁴ *Ibid* at 532 C-F.

matter was travelling overseas and was only able to attend to the matter on his return on 3 April 2014. This is given as the second reason. However, a boarding pass dated 27 March 2014 is annexed to the affidavit indicating that the attorney concerned returned to South Africa on 27 March 2014.

- [11] I have significant concerns with these reasons. Firstly, no reason is given why it was regarded as appropriate or necessary to first launch a rescission application. There was clearly no legal basis for such an application. I note that the affidavit in this matter, as well as that in the rescission application, was attested to by a “Legal Advisor at National Level” of the applicant union and not one of the other union officials. Such a legal advisor would or should understand the difference between reviews and rescissions and the time periods involved. In addition, even if one thought that this was an appropriate course of action, no information is provided as to when this application was launched and how it progressed.
- [12] Even more importantly, no reason is given as to why it took so long to brief an attorney to review the matter. The ruling in which the rescission application was rejected is dated 6 January 2014. It was more than two months later that attorneys were briefed. One would have thought that by this date, the applicant’s legal advisor would have been concerned about the delay that had already been incurred and would have taken steps to at least attempt to expedite the matter. In addition, the explanation for the delay of a further month from the date that attorneys were briefed until the application was filed is unacceptable. No explanation is provided as to why, when it became apparent that the relevant attorney would not be available, no steps were taken to utilise another attorney, from the same firm or another firm. By this stage, the applicant’s officials must have realised that any application to review would be extremely late and no effort is made to explain why steps were not taken to try to expedite the matter. No effort is made to explain why the attorney could only deal with the matter on 3 April 2014 when the founding affidavit indicates that the attorney arrived back in South Africa in 27 March 2014. Even if one accepts that the first occasion on which the attorney could deal with the matter was 3 April 2014, it still took 21 days to file the papers. No explanation is provided as to why this further delay occurred. No sense of urgency to deal with an application which was already very late can be discerned from the papers.

[13] There is clear authority for the view that where the delay is excessive and there is no acceptable reason provided for the delay the prospects of success as a factor to be taken into account when considering condonation is immaterial. See in this regard *NUM v Council for Mineral Technology*⁵ where the following is stated:

‘[10] 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 are immaterial, and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused (cf *Chetty v Law Society, Transvaal* 1985 (2) 756 (A) at 765A–C; *National Union of Mineworkers and Others v Western Holdings Gold Mine* (1994) 15 ILJ 610 (LAC) at 613E). The courts have traditionally demonstrated their reluctance to penalise a litigant on account of the conduct of his representative but have emphasised that there is a limit beyond which a litigant cannot escape the results of his representative’s lack of diligence or the insufficiency of the explanation.’⁶

[14] I am also mindful of the fact that the Courts have repeatedly stressed that the LRA gives high priority to the expeditious finalisation of disputes.

[15] Nevertheless, I am called upon to consider all relevant factors and to exercise a considered judicial discretion in this regard. I have, therefore, considered the applicant’s prospects of success

[16] The first respondent’s ruling is based on a finding that the reason for the dismissal was that the applicant participated in a strike and that, in the absence of an agreement as envisaged in section 141(1) of the LRA, the matter had to be adjudicated by the Labour Court.

[17] The law in this context, as I understand it, is that the starting point for determining jurisdiction is the allegation made by the applicant when he or she refers a dispute to the CCMA. Clearly, when the employee gives as a reason for dismissal one which will result in any dispute being referred to the Labour Court after conciliation

⁵ [1999] 3 BLLR 209 (LAC) at para 10.

⁶ See also, for example, *Colett v Commission for Conciliation, Mediation and Arbitration and Others* [2014] 6 BLLR 523 (LAC) and *Thompson v National Health Laboratory Services* [2009] JOL 24319 (LAC).

has failed, this will mean that the CCMA or a bargaining council will not have jurisdiction to deal with the matter. However, if the employee provides a reason for dismissal which will result in the CCMA or bargaining council having jurisdiction to arbitrate the dispute (or alleges that he or she does not know the reason for the dismissal) and the employer challenges this reason and states that the reason for the dismissal was one which would result in the matter having to be adjudicated by the Labour Court, the position is more difficult. Here, the CCMA will have “provisional” jurisdiction to consider the matter and to decide what the real reason for the dismissal was. The arbitrator’s finding in this regard will determine whether the CCMA or a bargaining council, or the Labour Court accepts jurisdiction.⁷

- [18] As indicated above, in this matter the first respondent made a finding that the reason for the dismissal was that the employer was of the view that the employee participated in an unprotected strike and that this finding deprived him of jurisdiction. There was also no agreement in terms of section 141(1) of the LRA giving him jurisdiction to arbitrate the dispute.
- [19] The founding affidavit does not set out in any detail what the precise ground for reviewing this ruling is. In paragraph 12, reference is made to the arbitrator committing misconduct and a gross irregularity. Paragraph 18 seems to argue that there was no evidence on which the first respondent could have relied to justify such a ruling. Unfortunately, the founding affidavit does not deal with this in any detail. Apart from one allegation to the effect that that no evidence was led to show that a strike took place and that the applicant took part in a strike, the applicant does not indicate what evidence was placed before the first respondent in this regard and by whom, what evidence the first respondent failed to take into account or what evidence should he not have considered. The issue is not dealt with in a supplementary affidavit when the record was available to the applicant. On this basis, the applicant has failed to make out a case on its papers.
- [20] Whilst the matter is undoubtedly of importance to the applicant as an individual, the matter does not deal with any issue of public policy importance. The employee

⁷ See in this regard *Wardlaw v Supreme Moulding (Pty) Ltd* (2007) 28 ILJ 1042 (LAC) and *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA and Others* [2009] 12 BLLR 1214 (LC).

deals with the prejudice that he will suffer if condonation is not granted but this must be weighed against the prejudice that the employer will suffer if it is called upon to deal with a matter after the lapsing of a considerable period of time. The employer has an interest in this matter being brought to finality. The prejudice suffered by the employee is largely that of his own making or at least that of his representatives.

[21] Taking all these factors into account, I have come to the conclusion that condonation for the late filing of the review application should not be granted and that the application should be dismissed.

Order

I make the following order:

1. Condonation for the late filing of the review application is refused.
2. The application is dismissed.

Le Roux, AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

For the Third Respondent: