



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT, JOHANNESBURG

Not Reportable

Case no: JR 1546/14

In the matter between:

SIBONGILE ROTO

Applicant

And

THE COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

First Respondent

MAKHOKHA-USIBISI, M N.O

Second Respondent

DIS-CHEM PHARMACIES

Third Respondent

Heard: 19 November 2014

Delivered: 05 March 2015

**Summary: Application for condonation – late filing of the review application –
The principle governing condonation application restated.**

Judgment

Molahlehi J

Introduction

- [1] This is an application in terms of which the applicant seeks a review of the ruling made by the second respondent (“the Commissioner”) under case number GAJB22/13 dated 11 February 2013. In terms of that ruling the Commissioner dismissed the applicant’s application for condonation of the late referral of the dispute to the first respondent (“the CCMA”). The applicant also seeks condonation for the late filing of the review application.

Background

- [2] The applicant was dismissed on 14 November 2012, following charges of dishonesty, fraud, forgery and alteration of records relating to issuing a letter to his creditor on the third respondent’s letterheads.
- [3] The dispute was referred to the CCMA on 24 December 2012, some nine days late. As a result the preliminary point which the Commissioner had to consider first was the condonation application which was refused and accordingly the applicant’s claim was dismissed. The applicant was unhappy with the outcome of his condonation application and consequently instituted the present proceedings. The review application is also late by about 18 weeks. The application is opposed by the third respondent.

Condonation for the late filing of the review application.

- [4] The applicant says that the review application is 4 months late and the first reason for the delay is that after receiving the arbitration ruling and not knowing what to do he went back to the CCMA, where he raised with them the fact that there was another referral which was timeously made. He thought having brought this to their attention they would change their decision and conclude that there was no need for condonation.
- [5] According to the applicant he was told by the CCMA that he needed to go back to his attorney and obtain “copies of proof that there was another referral that

was made in time.” He went to the offices of Mr Gqaza, the person who he had thought was an attorney but discovered later that he was not. He was told at his offices that he was away on leave and would be back after three weeks.

[6] After three weeks when he returned to the offices of Mr Gqaza he was told that he moved to Sandton. He went repeatedly over a period of five weeks looking for him in Sandton to no avail.

[7] After giving up on Mr Gqaza the applicant approached the *pro bono* office on 17 July 2013, where he was advised that he needed to review the ruling of the CCMA.

[8] The applicant contends in his founding affidavit that he would suffer prejudice if condonation was refused and that refusal would not serve the interest of justice and fairness. He further contends that he has good prospects of success when regard is had to the review application. The grounds of review which are set out in the applicant’s founding affidavit reads as follows:

“6.1 The Second Respondent did not apply her mind to the issues placed before her and has thus committed gross irregularity in that;

6.1.1 Had she looked at the referral made on the 14th December 2012 she should have realized that the condonation application was not necessary – infact my application was on time.

7. In the light of the above, I submit that prospects of success are strong in my matter as it is patently clear that the Commissioner perused the files(s) selectively. She was not even supposed to deal with condonation application.”

Legal principles

[9] The test to apply in determining whether to grant or refuse condonation application has been stated by the Constitutional Court in *Grootboom*,¹ in the following terms:

“50 In this Court the test for determining whether condonation should be granted or refused is the interests of justice. If it is in the interests of justice that condonation be granted, it will be granted. If it is not in the interests of justice to do so, it will not be granted. . .

51. The interests of justice must be determined with reference to all relevant factors. However, some of the factors may justifiably be left out of consideration in certain circumstances. For example, where the delay is unacceptably excessive and there is no explanation for the delay, there may be no need to consider the prospects of success. If the period of delay is short and there is an unsatisfactory explanation but there are reasonable prospects of success, condonation should be granted. However, despite the presence of reasonable prospects of success, condonation may be refused where the delay is excessive, the explanation is non-existent and granting condonation would prejudice the other party. As a general proposition the various factors are not individually decisive but should all be taken into account to arrive at a conclusion as to what is in the interests of justice.”

[10] The interest of justice is determined by having regard to the following factors: (a) the degree of lateness or the extend of 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

¹ *Grootboom v National Prosecuting Authority and Another* (2013) 34 ILJ 282 (LAC).

judgment, (f) the convenience of the court; and (g) avoidance of unnecessary delay in the administration of justice.²

[11] In conducting the enquiry into whether condonation application should be granted or be refused the following broad principles must be born in mind:

- a. the Court has a discretion which is to be exercised judicially after taking into account all the facts and the circumstances of the case before it.
- b. that the factors which are taken into account in conducting the enquiry in the interest of justice, the relevant factors are not individually decisive but are interrelated and must be weighed against each other- the strong compensating for the weak.
- c. the applicant has to give an explanation that shows how and why the default occurred.
- d. 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.
- e. 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.³.

² See *Foster v Stewart Scott Inc* (1997) 18 ILJ 367 (LAC).

³ See *Melane v Santam Insurance Co Ltd*, 1962 (4) SA 531 (A) at 532C-F. The 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 Zululand Electrical and Engineering Wholesalers (Pty) Ltd* 1975 (1) SA 612 (D) and *Chetty v Law Society, Transvaal* 1985 (2) SA at 765A-C. It is however not good enough for the applicant to make bald averment that there are prospects of success in his or her case. See *Rustenburg GearBox Centre v Geldmaak Motors* 2003 (5)SA 468 (T). In dealing with the approach to adopt when dealing with prospects of success and the explanation Zondo J in *Grootbom* had the following to say: '[51]. . . where the delay is unacceptably excessive and there is no explanation for the delay, there may be no

- f. that the applicant should bring the application for condonation as soon as it becomes aware of the lateness of its case.⁴

Evaluation

- [12] It is trite that in an application for condonation the applicant must provide full explanation of all the aspects of the delay. In other words as it is usually put, condonation is not there for the taking.
- [13] In the present instance according to the applicant the delay was occasioned first by having to obtain the referral document which was with his representative. The applicant does not state what these documents were. It seems to me, that on the applicant's version, the relevant documents that the CCMA may have required would relate to the first referral which is alleged to have been made on time. These are the documents which the applicant refers to in his founding affidavit as being attached to the review application. Except for stating that the documents are attached to the review application the applicant does not state where and when did he find them.
- [14] The applicant says he approached the pro-bono office on the advice of an unidentified acquaintance on 17 July 2013 and the review application was filed on 25 July 2013; about a week later.
- [15] The Court stamp in the notice of motion indicates that the condonation application was filed on 11 February 2015, some six months and about three weeks since the filing of the review application.

need to consider the prospects of success. If the period of delay is short and there is an unsatisfactory explanation but there are reasonable prospects of success, condonation should be granted. However, despite the presence of reasonable prospects of success, condonation may be refused where the delay is excessive, the explanation is non-existent and granting condonation would prejudice the other party'.

⁴ This means that the applicant in a condonation application has a duty to explain also the delay in filing the condonation application if that is the case. Failure to provide an explanation for the delay in filing a condonation application could be fatal to the application. See *Allround Tooling (Pty) Ltd v NUMSA and Others* [1998] 8 BLLR 847 (LAC) at *para* 8 and *NEHAWU v Nyembezi* [1999] 5 BLLR 463 (LAC).

- [16] It is clear in our law that condonation application must be made as soon as the applicant becomes aware of the need for it. It follows that in a condonation application the applicant is required to indicate the time when he or she became aware of the need to make an application for condonation. In the case of the late filing of the condonation application the applicant is required to explain such a delay.
- [17] In my view the period of the delay in filing the review application is material and that of the condonation application is itself excessive. In the absence of the explanation for the delay in the filing of the condonation application the applicant's applications stands to fail for that reason alone.
- [18] The applicant contends that the Court should assume on the basis that the document attached to his review papers, confirming the extension of the 30 day period is proof that the first referral was made on time. There is no evidence, however, that this was before the Commissioner at the time the condonation application was considered. There is also no evidence that the document confirming the consolidation of the two matters served before the Commissioner.
- [19] In the condonation application in the CCMA, the applicant stated that the reason for the failure to comply with the 30 days requirement was because:
- "I was not (of) aware of the 30 day period I was only notified when I arrived at the CCMA."
- [20] In my view the explanation proffered by the applicant for the late filing of the review application is unsatisfactory and unacceptable. Taking into account the unsatisfactory explanation and the failure to explain the delay in relation to the filing of the condonation application, I am of the view that it is not necessary to consider the prospects of success.
- [21] In the premises the applicant's application for condonation of the late filing of his review application stands to fail. It follows therefore, that the review application also stands to be dismissed. I do not believe that it would be proper to allow costs to follow the result.

Order

[22] In the premises the applicant's application for the condonation of the late filing of his review application is dismissed with no order as to costs.

E Molahlehi

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: D. Tlau of SASLAW

For the Respondent: N. Preston of Cliffe Dekker Hofmeyr Inc.