



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR 523/13

INDUSTRIAL DEVELOPMENT CORPORATION

Applicant

And

COMMISSION FOR CONCILIATION, MEDIATION

& ARBITRATION

First Respondent

NTHABISENG PULE MANTSHULE NO

Second Respondent

MSINGATHI MACDOWELL MYENGEZA

Third Respondent

Heard: 16 April 2015

Delivered: 5 May 2015

JUDGMENT

TLHOTLHALEMAJE, AJ

Introduction:

- [1] This is an opposed application to review and set aside a condonation ruling issued by the second respondent (Commissioner) under case number GAJB 33476/12 and dated 5 March 2012. The applicant further seeks an order that the matter be referred back to the first respondent for a hearing *de novo* before a commissioner other than the second respondent, or alternatively, for the Court to substitute the condonation ruling with an order that condonation is refused.

Background

- [2] The applicant is a National Development Finance Institution set up to promote Economic Growth and Industrial Development. It is owned by the South African Government under the supervision of the Department of Economic Development.
- [3] The third respondent was employed by the applicant as Senior Manager – Project and Corporate Finance. During October 2012 he was charged with acts of misconduct pertaining to causing the applicant to incur fruitless and wasteful expenditure and breaching his employment contract. He was subsequently dismissed on 13 November 2012, and on 19 December 2012 referred a dispute to the first respondent (the CCMA).
- [4] The dispute was scheduled for a con/arb hearing on 23 January 2013. The applicant had lodged an objection to the con/arb process and the parties had appeared before Commissioner N Raffee. At those proceedings, the applicant had objected to the jurisdiction of the CCMA in that the referral was lodged late and not accompanied by an application for condonation. Commissioner Raffee had agreed that the referral that was lodged out of time, and had accordingly issued a ruling to the effect that the third respondent should apply for condonation.
- [5] The third respondent had immediately and on the same day being 23 January 2013, filed an application for condonation. An *in limine* hearing was scheduled for 18 February 2013.
- [6] It was common cause that the applicant had not filed an opposing affidavit, but had merely opposed the application from the bar, having been represented in those proceedings by an attorney. On 5 March 2013, the second respondent (Commissioner) had issued a ruling today effect that the third respondent's late referral of the dispute was condoned.

The submissions made at the in limine hearing and the ruling:

- [7] The Commissioner had noted that the referral was late by six days, and that the delay was minimal. Having taken into account the explanation given by the third respondent, the Commissioner held that he should be given the benefit of the doubt as his actions demonstrated that he always had an interest and intention of filing a dispute. The Commissioner further took into account the third respondent's submissions in regard to the reason for his alleged unfair dismissal and his allegations that a fair procedure was not followed.
- [8] The Commissioner concluded that the third respondent had demonstrated that he had reasonable prospects of success with his claim, and that the decision to condone the late referral would not prejudice the applicant more than it would the third respondent as he had shown good cause.

The Grounds of review:

- [9] The grounds of review were as follows;
- 9.1 The Commissioner had committed gross irregularity and or misconduct and reached a decision which was unreasonable and had therefore committed a reviewable irregularity in terms of the LRA.
- 9.2 The degree of the delay in defending the dispute was 35 days, and therefore the finding by the Commissioner that the delay was only six days was unreasonable and not supported by evidence. In this regard it was argued that the finding failed to take into account the principle that the explanation for the delay should be fully made and should be for the entire period until the application for condonation is made. On the grounds that the Commissioner had found that the delay was only six days the ruling should be reviewed and set aside on that ground alone, as the Commissioner had failed to apply her mind to the facts and/or the evidence before her.
- 9.3 The finding by the Commissioner that the third respondent had prospects of success was not supported by evidence, as he did not submit any proof to substantiate his allegations of the alleged unfair

dismissal despite his promises to do so. In this regard it was submitted that the Commissioner had made a speculative finding about prospects of success, when none existed.

- 9.4 The Commissioner failed to take into account that the granting of the condonation would prejudice the applicant, and further that the Commissioner miscomprehended or ignored a further principle that without a proper explanation for the delay the prospects of success are immaterial.

The legal framework:

[10] The test to apply in a review application is that of a reasonable decision maker¹. The test entails an enquiry into whether the decision reached by the Commissioner is one that a reasonable decision maker could not have reached on the material placed before him. An application for condonation is always equated to seeking an indulgence for non-compliance with stipulated time frames. Whilst it is accepted that condonation is not there for taking, in the end, its consideration involves the exercise of a wide discretion².

[11] In exercising a discretion, a Commissioner should take into account all the relevant factors, and in particular, the well-established legal principles set out in *Melane v Santam Insurance Co. Ltd*³, where it was held that;

'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, 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

¹ *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* 2008 (2) SA 24 (CC)

² *Motloi v SA Local Government Association* [2006] 3 BLLR 264 (LAC) para [16]

³ 1962 (4) SA 531 (A) at 532B-E

explanation may help to compensate prospects which are not strong. Or the importance of the issue and strong prospects may tend to compensate for a long delay. And the Respondent's interests in finality must not be overlooked"

- [12] Further legal principles to be taken into account in exercising the discretion is that an application for condonation should be filed without delay as soon as a party to litigation becomes aware of the need to file such an application⁴. To enable the Commissioner or the court for that matter to properly exercise a discretion, a party seeking condonation must set out all the facts and circumstances relating to the delay, and most importantly, must provide a satisfactory explanation and account for each period of the delay. Any period of delay that is unaccounted for, may result in an indulgence being refused⁵.

Evaluation:

- [13] In this case, and as already indicated, the application at the *in limine* hearing was opposed from the bar, and it is accepted that the Commissioner was enjoined by the provisions of Rule 31 (10) of the CCMA rules to determine the application in the manner that she deemed fit.

The extent of the delay and the explanation thereof:

- [14] The applicant took issue with the fact that the Commissioner did not apply her mind to the actual extent of the delay in view of the referral having been lodged on 19 December 2012 when the dismissal had taken place on 13 November 2012. In this regard, it was contended that after the third respondent's dismissal, he was advised immediately that his appeal would not be entertained and that he should refer a dispute to the CCMA. It was further pointed out that the applicant was legally represented at the internal disciplinary enquiry and should thus have been aware of the time periods. Other than the delay having been six days when the referral was initially lodged, it was argued that following the ruling of Commissioner Raffee on 23 January 2013, at the time that the applicant filed an application for

⁴ See *Meintjies v HD Combrinck (Edms) Bpk* 1961 (1) SA 262 (A) at 263 H-264B.

⁵ See *NUMSA and another v Hillside Aluminium* [2005] 6 BLLR 601 (LC)

condonation, the referral was now 35 days out of time, which delay the applicant had failed to give an explanation to.

- [15] In explaining the delay, as considered by the Commissioner, the third respondent had in his affidavit, apportioned blame on the CCMA officials who had advised him when he initially applied for condonation after his dismissal that he had completed incorrect condonation forms. From the record of proceedings, the applicant had also informed the second respondent that after his dismissal, he had enquired from a Mr. Seema of the applicant as to what was the next process he should follow, and this individual could not give him an answer. He had then made his own enquiries from the CCMA website and had discovered condonation forms which he had downloaded and completed even though at the time he was not certain whether his referral was late. Having handed in the forms at the CCMA, he was then informed that he had completed an incorrect form and was advised that his referral was within the time periods. This was after he had also informed the CCMA officials of the date his internal appeal was turned down. He was then informed to complete the Form 7.11 which he had done.
- [16] It was common cause that the third respondent had lodged an appeal on 16 November 2012. The applicant contends that on the same date that the appeal was lodged, the third respondent was informed that it would not be entertained. The third respondent however refuted this, and contended that the response to his appeal was instead received on 20 November 2012. In this regard, he had referred the Court to page 19 of the indexed pleadings, which was a response to his appeal via e-mail from the applicant's Seema on 20 November 2012, confirming that his appeal had been rejected.
- [17] It was nevertheless argued on behalf of the applicant that the date on which the appeal is finalised does not change the date of the dismissal. This approach finds support in *Edgars Stores Ltd v SACCAWU*⁶, where the Labour Appeal Court held that a dismissal dispute arose on the date when the original dismissal was communicated to the employee, and confirmed in *SACCAWU v*

⁶ (1998) 19 ILJ (LAC)

*Shakoane*⁷. It is doubted however whether this issue is settled in the light of Zondo JP's unanimous decision in *Fidelity Guards Holdings (Pty) Ltd v Epstein & Others*⁸ where he had quoted with approval, Pillemer AJ's sentiments expressed in *Fidelity Guards Holdings (Pty) Ltd v Epstein & Others*⁹ in the following terms:

"It seems to me to be absurd that an applicant who pursues an internal appeal procedure would be precluded from utilizing the dispute resolution procedure provided in s 191 of the Act if the decision on his appeal is delivered more than 30 days after the date of dismissal because he believes he was dismissed on the day he is notified that he has lost his appeal. It is also ridiculous in my view for an applicant to have to proceed against his employer in the CCMA while an appeal is pending or the result thereof is awaited, when to do so may well sour the relationship and/or affect the result of the appeal. The Act prescribes the date of the dismissal (s 190). The absurd consequence may be a procedural requisite in cases such as the present one. Condonation in such a case must inevitably be granted and, furthermore, it is perfectly reasonable for the employee to believe that the date the dispute arose is the date he is told finally that his appeal against his dismissal has been refused.."

- [18] The pertinent issue however in respect of the delay in this case is that its extent was six days, which the applicant contends was unexplained. To however suggest that the delay is in fact 35 days, and that the third respondent was expected to account for the latter delay is far-fetched. This is so in that a referring party that genuinely believes that a dispute was referred on time, and without having been made aware by the CCMA of the fact that this was not the case, cannot be expected to proffer any other reasonable explanation for the delay he or she was not aware of, other than that he or she was not aware of the need to apply for condonation. Having realised the folly of its argument in this regard, and further having made reference to the decision in *Weltevrede Kwekery (Pty) Ltd v CCMA & Others*¹⁰, the applicant

⁷ (2000) 21 ILJ 1963 (LAC).

⁸ (2000) 21 ILJ 2382 (LAC) at para 21

⁹ (2000) 21 ILJ 2009 (LC) at para [18]

¹⁰ 2006 (7) BLLR 706 (LC) at paras [16 – 17] where the court held that the Commissioner's mind must be directed to the lateness of the referral and not the condonation application.

had correctly abandoned that line of argument pertaining to the delay being 35 days.

[19] The applicant did not take issue with the Commissioner's conclusions that a delay of six days was minimal. I however fail to appreciate the applicant's attack on the conclusions made by the Commissioner that the third respondent's explanation should be given the benefit of the doubt as he had always demonstrated an intention to file a dispute. This conclusion in my view is unassailable on the facts, as the third respondent's contention that he had enquired from the applicant's Seema as to what the next step should be without being given an answer. The fact that the applicant was legally represented in the internal disciplinary enquiry cannot be held against him in view of the fact that on his version, and after his application was not entertained on 20 November 2012, he had made his own means of what steps to take. It cannot be correct as contended on behalf of the applicant that the third respondent's intention to file the dispute was not relevant. This is even pertinent where upon being informed that he needed to file an application for condonation, the third respondent had immediately done so on the same date.

[20] The Commissioner's reasoning that the third respondent should be given the benefit of the doubt in the light of the explanation he had given pertaining to conflicting messages he had received from CCMA officials cannot in my view be regarded as unreasonable. As at 19 December 2012 when he approached the CCMA, and in view of having informed the CCMA officials that his appeal was finalised on 20 November 2012, the third respondent could not be blamed for assuming that his referral was within time on the advice of CCMA officials, and the Commissioner was correct in giving his explanation a benefit of the doubt and accepting it.

Prospects of success:

[21] In *Production Institute of South Africa (PTY) Ltd v CCMA & others*¹¹, Molahlehi J in dealing with the issue of prospects of success held that these

¹¹ Case No: JR1974/2009 at para 12

did not entail an applicant having to prove on a balance of probabilities that he or she would succeed when the merits of the case are heard. He further held that;

“... What an applicant needs to do is to provide a basis that shows that he or she has a good chance of succeeding when the matter is considered on its merits. It is however not good enough for the applicant to make a broad and sweeping statement that he or she has good prospects of success. An averment that there are prospects of success or bona fide defense must be substantiated and backed by facts”.

[22] In *Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd*¹² this Court held that:

*“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 756 (A) at 765 (A-C).”*

[23] In regards to the third respondent's prospects of success, the Commissioner had concluded that in the light of his submissions that his dismissal was unfair and that the applicant had not followed a fair procedure, he had demonstrated that he had reasonable prospects of success with his claim. The applicant however takes issue with the fact the Commissioner's conclusions in this regard were not supported by evidence, and further that the Commissioner did not even know the charges with which the third respondent was dismissed.

[24] The difficulty with the applicant's case at the *in limine* hearing is that it chose to oppose the application for condonation from the bar. In the light of the mere submissions made at that hearing in opposing the application, as opposed to the third respondent's affidavit and substantiation of his averments in the hearing, I fail to appreciate the reason it was expected of the Commissioner to place more weight on the oral submissions made from the bar rather than an affidavit filed in support of the application. The material facts leading to the

¹² 2009 30 ILJ 347 (LC) at para 27

dismissal as suddenly pleaded in this review application and as further encapsulated in the written heads of arguments were not matters placed before the Commissioner by way of evidence. Inasmuch as the applicant contended that the Commissioner's conclusions were not supported by evidence from the third respondent, it also did not place any evidence other than mere oral submissions before the Commissioner to support its case that there were no prospects of success. To this end, the Commissioner's conclusions that the third respondent had prospects of success on the merits can equally not be deemed to be unreasonable in the light of the material placed before her.

Prejudice:

- [25] In the written heads of argument, the applicant had submitted that the Commissioner was addressed on the question of prejudice it would suffer, and that the Commissioner in her ruling had stated that her decision to condone the application would not prejudice the applicant more than it would prejudice the third respondent as he had shown good cause. The applicant took issue with these conclusions on the basis that the Commissioner miscomprehended the issue of prejudice in that showing good cause cannot be an indication of the absence of prejudice.
- [26] In *Balmer & others v Reddam (Bedfordview) (Pty) Ltd*¹³ this Court per Molahlehi J held that in deciding prejudice, a party seeking condonation must show in what way the other party would not suffer prejudice if condonation were granted. In his application for condonation before the Commissioner, the third respondent did not properly address the issue of prejudice and had merely made reference to the fact that Seema had lied when he informed him he was not aware of the CCMA procedures and Rules whilst allowing him to file an appeal. He had also raised the issue pertaining to the blame the CCMA should take in the late referral. As his application did not clearly address this issue, and further having been implored by the Commissioner¹⁴ to elaborate further on the issue, his ultimate contention was that even though he did not

¹³ (2011) 32 ILJ 2121 (LC) at para 10

¹⁴ Page 11-12 of the Record of Proceedings

know what prejudice the applicant would suffer, as far as he knew, there was no prejudice the applicant would suffer if condonation were granted.

- [27] On the other hand, the submissions made on behalf of the applicant in regards to the issue of prejudice were even more inarticulate as the focus was more on the allegation that the merits were sketchy and/or the explanation for the delay was sketchy¹⁵. In my view, and based on the submissions made in this regards at the hearing before the Commissioner, I fail to appreciate the reason that it could have been expected of the Commissioner to conclude that the applicant stood to suffer more prejudice if condonation was to be granted. No comprehensible material was placed before the Commissioner in regards to what prejudice the applicant would suffer if condonation were to be granted. It might be correct that the Commissioner may have miscomprehended the concept of prejudice in the light of the reasoning. This however does not imply that the ultimate discretion exercised and decision arrived at is unreasonable as a whole, especially in the light of the extent of the delay in referring the dispute.

Conclusions:

- [28] The fervent manner with which this application was pursued by the applicant in the light of the minimal nature of the delay in referring the dispute is perplexing in the extreme. I do not think that a delay of six days in the referral of the dispute is such that the applicant would be prejudiced in meeting that case in the ordinary course. On the whole, and further having taken account of the material before her, there is no basis for a conclusion to be reached that in exercising her discretion and granting the application for condonation, the Commissioner had arrived at a decision that no other reasonable Commissioner could have arrived at. There is therefore no basis for this Court to interfere with that ruling.

¹⁵ Page 18 -20 of the Record

Order:

- i. The application to review and set aside the ruling issued by the second respondent under case number GAJB 33476-12 and dated 5 March 2013 is dismissed.
- ii. The first respondent is ordered to set down the dispute for arbitration on an expedited basis.
- iii. There is no order as to costs.



Tlhotlhemaje, AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv. N Muvangua

Instructed by: Maserumule INC

For the Respondent: In Person

LABOUR COURT