



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case No: JR 1027/13

In the matter between:

PORTAPA t/a SUPABETS

Applicant

and

COMMISSIONER T MOODLEY N.O

First Respondent

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

Second Respondent

JUDITH LENGWATI

Third Respondent

Heard: 07 October 2015

Delivered: 05 November 2015

Summary: Review application. Condonation application. Principle governing condonation.

JUDGMENT

MOLAHLEHI, J

Introduction

- [1] This is an application to review and set aside the arbitration award made by the first respondent (“the Commissioner”) under case number GAJB7648-12 dated 15 November 2012 in terms of which the dismissal of the third respondent (hereinafter referred to as “the employee”) was found to have been unfair.
- [2] The applicant has also applied for condonation for the late filing of the review application. The application for condonation is considered later in this judgment.

The background facts

- [3] The third respondent was, prior to her dismissal, an employee of the applicant and was dismissed for reasons related to poor work performance. The dispute was set down for arbitration hearing on 26 October 2012 but was on that date postponed to 2 November 2012. The matter was postponed due to the unavailability of the Third Respondent’s witness. The parties agreed to meet on 30 October 2012 to discuss a possible settlement of the dispute.
- [4] On 2 November 2012, the applicant applied again for the postponement of the hearing on the basis that its understanding was that the parties would appear before the CCMA to finalise the agreement. The applicant contends that the employee had initially indicated willingness to accept a settlement of reinstatement but insisted that it be signed at the CCMA.
- [5] According to the applicant, the employee changed her view on the day of the hearing by indicating that she was no longer interested in reinstatement but rather a financial compensation for the alleged unfair dismissal. In his application for the postponement of the matter, the applicant indicated that its understanding was that the settlement agreement based on reinstating would be signed on the

day of the hearing. It was for this reason that it made no arrangement to have its witnesses present at the hearing.

- [6] The applicant further indicated that it was unable to obtain a mandate for a financial settlement as the person responsible was overseas.
- [7] The Commissioner refused to grant the postponement on the basis that he was not persuaded that the reasons advanced by the applicant warranted a second postponement. After the refusal of the postponement, the representative of the applicant left the arbitration proceedings. The Commissioner then proceeded with the hearing and, thereafter, issued a default award in favour of the employee as indicated earlier.

The grounds of review

- [8] The applicant contends that the refusal to grant the postponement was unreasonable as its application was *bona fide* and was not made as a “tactical maneuvers” for delaying the finalization of the matter. The applicant further contends that the Commissioner failed to consider that:

‘The employee would not suffer any prejudice if postponement was granted and any prejudice that would have been suffered by the employee could have been cured by a cost order. Refusal to grant a postponement did not serve the interests of justice and fairness.’

The condonation application

- [9] The condonation application forms part of the review application. It is dealt with under the hearing and “CONDONATION” and in its totality reads as follows:

‘7.1 As has been pointed out in paragraph 5.13 above, the applicant erroneously lodged an Application for Rescission of the Default Arbitration Award on or about 14 March 2013 at the Third Respondent. However, upon receipt of the rescission ruling the applicant sought legal advice on 6 May 2013 and was advised of the correct procedure to follow an in the

correct forum. The review application was prepared as expeditiously as possible one (sic) the applicant was advised of the correct process to follow.

- 7.2 The Applicant therefore humbly submits that it should not be prejudiced by its lack of knowledge and/or understand of the Rules and Procedures of the Third Respondent and the above Honourable Court.
- 7.3 It is submitted that the review application is approximately 56 days out of time. It is humbly submitted that the Third Respondent has not been prejudiced by the late filing of the review application. This coupled with the Applicant's prospects of success is a matter where condonation ought to be granted.
- 7.4 Accordingly, and should condonation be required, I humbly submit that the Applicant has made out a strong case for condonation to be granted.'

The principles governing condonation

[10] The test to apply in considering whether condonation should be granted or refused is the interest of justice as stated in *Grootboom v National Prosecuting Authority*.¹ The interest of justice is determined by having regard to the following factors: (a) the degree of lateness or the extent 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 judgment, (f) the convenience of the court; and (g) avoidance of unnecessary delay in the administration of justice.

[11] In *Grootboom*, Zondo, J held that:

'51 ... 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,

¹ 2014 (1) BCLR 65 (CC) at para 22.

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.”

[12] In dealing with the approach to adopt when dealing with prospects of success and the explanation tendered for the delay, Zondo, J had the following to say:

‘[52] 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 prospective of success, condonation may be refused where the delay is excessive, the explanation is non-existent and granting condonation would prejudice the other party.’²

[13] In *Rustenburg GearBox Center v Geldmaak Motors*,³ it was held that it is not good enough for the applicant to make bald averment that there are prospects of success in his or her case.

[14] Similar to the present matter, in *eThekweni Municipality and Ingonyama Trust*,⁴ where the explanation furnished did not cover the entire period and part of the delay was unexplained, the Constitutional Court held that:

‘As stated earlier, two factors assume importance in determining whether condonation should be granted in this case. They are the explanation furnished

² Ibid at para 52.

³ 2003 (5) SA 468 (T) at 471C.

⁴ 2013 (5) BCLR 497 (CC) at para 28.

for the delay and prospects of success. In a proper case these factors may tip the scale against the granting of condonation. In a case where the delay is not a short one, the explanation given must not only be satisfactory but must also cover the entire period of the delay. Thus in *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)*, this Court said in this regard:

“An applicant for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of delay. And, what is more, the explanation given must be reasonable. The explanation given by the applicant falls far short of these requirements. Her explanation for the inordinate delay is superficial and unconvincing.”

[15] In the *eThekweni Municipality* case, the Constitutional Court held that an explanation for a period of delay that was unexplained was necessary and, therefore, concluded that the appellant has failed to establish that its non-compliance with the relevant Rule was pardonable.

[16] It has repeatedly been stated in various court cases that condonation is not a mere formality and is, therefore, not a mere asking. A proper full explanation of the period of the delay need to be provided by the applicant.⁵

[17] In *NUM v Council for Technology*,⁶ Myburgh, JP stated:

‘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.’⁷

[18] In *SA Post Office Ltd v Commission for Conciliation, Mediation and Arbitration and Others*⁸ where Waglay, DJP, as he then was, said the following:

⁵ In *High Tech Transformers (Pty) Ltd v Lombard* (2012) 33 ILJ 919 (LC) at para 11 and *NUMSA and Another v Hillside Aluminium* [2005] 6 BLLR 601 (LC) at para 11.

⁶ [1999] 3 BLLR 209 (LAC).

⁷ Ibid at para 10.

⁸ (2011) 32 ILJ 2442 (LAC) at para 18.

'The degree of delay and the reason therefor complement each other. While the degree of delay is a mere arithmetic calculation, it is significant in relation to the expeditiousness with which the matter was required to be resolved. Hence, in matters where importance is placed upon the speedy and expeditious resolution of a dispute, even a short delay may not be excusable unless an explanation is proffered that sets out the reasons for the delay which the court finds acceptable. With the factor of delay, go the prospects of success, Where it is evident that the party seeking condonation has no prospects of succeeding in its principal claim or opposition, no purpose is served in granting condonation and the court must in such circumstances refuse to grant condonation irrespective of the degree of delay or the explanation provided, Where the prospects of success are reasonably good or even fair then, depending on the delay and the explanation, consideration must be given to the prejudice that the parties may suffer before the discretion can be exercised on whether to grant the indulgence sought, The factor of prejudice plays a role only when the delay is substantial.'

[19] In *Darries v Sheriff, Magistrate's Court, Wynberg and Another*,⁹ Plewman JA held:

'Condonation of the non-observance of the Rules of this Court is not a mere formality. In all cases some acceptable explanation, not only of, for example, the delay in noting an appeal, but also, where this is the case, any delay in seeking condonation, must be given. An appellant should whenever he realizes that he has not complied with a Rule of Court apply for condonation as soon as possible. Nor should it simply be assumed that, where non-compliance was due entirely to the neglect of the appellant's attorney, condonation will be granted. In applications of this sort the appellant's prospects of success are in general an important though not decisive consideration. Where non-observance of the Rules has been flagrant and gross an application for condonation should not be granted, whatever the prospects of success might be.'

⁹ 1998 (3) SA 34 (SCA) at 40H-41E.

Consideration

- [20] The arbitration award was issued on 15 November 2012. The applicant says that it received the arbitration award on 7 March 2013. In its condonation application, the applicant does not state as to when it filed the review application. The Court stamp of the review application indicates that the review was filed on 14 June 2013, some 54 days after the expiry of the six weeks period prescribed in terms of s145 of the LRA.
- [21] The reasons for the delay as appears from the founding affidavit is that the applicant adopted an incorrect approach in seeking to address its complaint regarding the outcome of the arbitration proceedings. It unsuccessfully sought the rescission of the default arbitration award which has been issued against it.
- [22] The rescission ruling was made on 2 April 2013. The applicant says that it then sought legal advice on 6 May 2013. As indicated earlier, the review application was filed 14 June 2013, about 30 days after the rescission ruling.
- [23] It is apparent from the founding affidavit that the applicant's explanation for the delay is limited to the period prior to receiving advice that the approach of seeking to have the default arbitration award set aside by way of a rescission application was incorrect. There is no explanation as to the delay after obtaining the legal advice. Mr Hutchinson, for the applicant, conceded during the debate that there was a need to explain this period. He could not, however, provide any explanation as to why this period is not explained.
- [24] The 30 days delay in the context of the review application is a significant period. It was thus necessary for the applicant to explain in full what the cause of the delay was after obtaining the legal advice. The absence of an explanation for the period of the delay has to be regarded as being reprehensible. The extent of the delay and the failure to tender an explanation for it, carries, in my view, such a significant weight that the need to consider prospects of success has become irrelevant.

[25] In my view, the failure by the applicant to explain the delay subsequent to receiving legal advice is fatal to the condonation application. In the circumstances of this case, I see no reason why costs should not follow the result.

Order

[26] In the premises, I make the following order:

1. The condonation application for the late filing of the review application is refused.
2. The Court lacks jurisdiction to entertain the review application.
3. The applicant is to pay the costs of the third respondent.

Molahlehi, J

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv. WJ Hutchinson

Instructed by: Fluxmans Inc.

For the Respondent: Adv. MJ Maleka

Instructed by: M Seleka of Seleka Attorneys