



**IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

**JUDGMENT**

Not Reportable

Case no: JR 1502/15

In the matter between:

**INDEPENDENT MUNICIPAL AND ALLIED**

**TRADE UNION (IMATU) OBO M MALEKE**

**Applicant**

and

**EMFULENI LOCAL MUNICIPALITY**

**First Respondent**

**M LEGODI N.O.**

**Second Respondent**

**SOUTH AFRICAN LOCAL GOVERNMENT**

**BARGAINING COUNCIL**

**Third Respondent**

**Heard: 25 August 2016**

**Delivered: 29 March 2017**

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**JUDGMENT**

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MAHOSI AJ

## Introduction

- [1] This is an application in terms of section 158(1)(g) read with section 145 of the Labour Relations Act (LRA)<sup>1</sup> for an order to review and set aside a condonation ruling made by the second respondent dated the 2<sup>nd</sup> of June 2015, under the auspices of the third respondent under case number GPD021511. In his ruling, the commissioner granted the condonation for the late charging of the employee.
- [2] The applicant is the Independent Municipal & Allied Trade Union (IMATU), a trade union duly registered as such in terms of section 96 of the LRA, acting on behalf of Mr Mojalefa ("employee") who is its registered member and is currently employed by the first respondent.
- [3] The first respondent is Emfuleni Local Municipality ("the Municipality"), a municipality established in terms of the Local Government legislation of the Republic of South Africa, with its principal place of business at corner Klasie Havenga and Frikkie Meyer Boulevard, Vanderbijlpark, Gauteng.
- [4] The second respondent is Ms. M Legodi ("the commissioner"), an adult female duly appointed and acting as an arbitrator under the auspices of the third respondent. The commissioner issued the condonation ruling which is the subject of this review application.
- [5] The third respondent is the South African Local Government Bargaining Council ("SALGBC"), a bargaining council duly registered in terms of section 29 of the LRA.

## Factual background

- [6] The material facts giving rise to this application are not in dispute and may be summarised thus. On the 1<sup>st</sup> of June 2014, the Municipality employed the

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<sup>1</sup> Act 66 of 1995.

employee as a HIV-AIDS coordinator. The Municipality established that the employee did not resign from his previous employer prior to accepting employment with it. On the 26<sup>th</sup> of January 2015, the Municipality charged the employee with misconduct as follows:

**'Charge 1**

**MISPRESENTATION**

*You mis-conducted yourself in that on or about the 01 JUNE 2014 you unlawfully accepted employment with Emfuleni Local Municipality whereas you are still employed at Clinix Naledi-Nkanyezi Private Hospital. This charge is brought to you in terms of clauses 1.2.8, and 2.7.5 read with clause 2.7.10 of the Collective Agreement.*

**ALTERNATIVE CHARGE**

**GROSS DISHONESTY**

*You mis-conducted yourself in that on or about 01<sup>st</sup> June 2014 you accepted other employment outside of normal working hours without the prior permission of the Department Head or Municipal Manager.*

*This charge is brought to you in terms of clause 1.2.8, and 2.7.5 read with clause 2.7.10 of the Collective Agreement.'*

- [7] The Municipality served the charge sheet on the employee on the 26<sup>th</sup> of January 2015. The charge sheet invited the employee to a disciplinary hearing scheduled to commence on the 30<sup>th</sup> of January 2015. On the 30<sup>th</sup> of January 2015, the hearing did not start due to the chairperson's unavailability. On the 2<sup>nd</sup> of February 2015, the applicant trade union alerted the first respondent in writing that it would challenge the lawfulness of the disciplinary hearing against the employee as a result of a contravention of clause 6.3 of the Disciplinary Procedure and Code Collective Agreement ("Collective Agreement").
- [8] In view of the fact that there was a delay in instituting a disciplinary hearing against the employee, the Municipality brought the condonation application as

required by the Collective Agreement. The condonation application was heard by the second respondent on the 29<sup>th</sup> of May 2015. The second respondent issued a ruling in terms of which he granted the said condonation application. Dissatisfied with the ruling the applicant launched this review application.

#### The condonation application

- [9] In its application for condonation, the Municipality submitted that it became aware of the misconduct on the 15<sup>th</sup> of September 2014 and that the employee was made aware of the alleged misconduct on the 22<sup>nd</sup> of September 2014. The reason for the delay in instituting the disciplinary hearing was stated as follows:

*'The matter involves misrepresentation, therefore the investigations were involving another employee which was supposed to give us information relating to misrepresentation of the accused employee.'*

- [10] On the prospect of success, the Municipality submitted that it believes that it has good prospects of success because the matter involves misrepresentation and gross dishonesty which amounts to serious misconduct that can lead to dismissal. The Municipality further submitted that the employee wrote a letter of apology after being made aware of the alleged misconduct.
- [11] It was the Municipality's submission that if condonation was not granted, it would be prejudiced as it would lead to a situation where all employees in the health profession would be involved in acts of moonlighting. Furthermore, the Municipality submitted that the employee would not be prejudiced by the granting of the condonation application as he is not on suspension and further that he would be given an opportunity to answer to the allegations against him.

#### The condonation ruling

- [12] The commissioner found that the Municipality was approximately one month late in instituting the disciplinary hearing. This was based on the premise that the employee was made aware of the misconduct on the 22<sup>nd</sup> of September

2014 and the charge sheet was drafted and served on him on the 26<sup>th</sup> of January 2015. According to the commissioner, the three months' period would fall on the 22<sup>nd</sup> of December 2014.

- [13] As aforesaid, the disciplinary hearing was scheduled to commence on the 30<sup>th</sup> of January 2015. However, it was postponed as the chairperson was not available. The commissioner noted that the Municipality delayed to reschedule the disciplinary hearing until it was prompted by the applicant. According to the commissioner, the disciplinary hearing was set to proceed had the chairperson shown up. The commissioner found nothing before her to suggest that the union wanted to raise a point in terms of clause 6.3 of the Collective Agreement. She found that there was no need for the Municipality to apply for condonation on the 19<sup>th</sup> of February 2015 as the matter had been postponed earlier. The commissioner was further of the view that the Municipality succeeded in showing good cause for wanting the employee to answer the allegation of misconduct. She also found the degree of delay not to be excessive. She was of the opinion that granting the condonation would serve the interest of justice.

#### Grounds for review

- [14] The applicant challenged the commissioner's ruling on the basis that she failed to exercise her discretion judiciously when considering the condonation application, which led her to arrive at an unreasonable conclusion.
- [15] The applicants' ground of review was essentially that the commissioner misconstrued the fact that the Municipality (according to its own condonation application) had become aware of the alleged misconduct on the 15<sup>th</sup> of September 2014 and not on the 22<sup>nd</sup> of September 2014. The applicant further took issue with the commissioner's finding that the three months' period as envisaged by clause 6.3 of the Collective Agreement is interrupted by the service of the charge sheet.
- [16] The second ground of review was that the commissioner acted unreasonably when she stated that there was nothing before her to suggest that the applicant wanted to raise a point in terms of clause 6.3. of the Collective

Agreement on the 30<sup>th</sup> of January 2015. What is not clear to the applicant is what weight the commissioner placed on this consideration.

- [17] The third ground of review was that the commissioner committed a gross irregularity by ignoring the fact that the explanation for the delay was so poor that it amounted to no explanation at all. Further, that she found that the Municipality had established good cause for the delay without giving reasons for her finding. The fourth ground of review was that the commissioner failed to consider whether the Municipality had established prospects of success on a *prima facie* basis.
- [18] The fifth ground of review was that the commissioner committed a gross irregularity when she failed to consider whether the first respondent was barred from disciplining the employee in light of the provisions of annexure “B” of the Collective Agreement, which issue was raised in the answering affidavit that was placed before her.

#### The applicable law and analysis

- [19] The jurisprudence for review of condonation rulings is well established and has been expressed in numerous cases of this Court and the Labour Appeal Court. It is trite that condonation is a discretionary remedy.<sup>2</sup> The proceedings before the SALGBC are governed by the Collective Agreement on Rules for the Conduct of Proceedings. Rule 35 thereof requires the applicant for condonation to show good cause as to why condonation must be granted. “On good cause shown” or “sufficient cause shown” was examined by the Supreme Court of Appeal in *Melane v Santam Insurance Co Ltd*<sup>3</sup> where it was stated as follows:

“In deciding whether good 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 is the degree of lateness, the explanation thereof, the prospects of success, and the importance of the case. Ordinarily these

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<sup>2</sup> *Hardrodt (SA) (PTY) Ltd v Behardien and Others* (2002) 23 ILJ 1229 (LAC) at para 5.

<sup>3</sup> 1962 (4) SA 531 (SA) 532B-F.

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 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 the discursiveness should be discouraged in canvassing the prospect of success in the affidavits. I think that all the foregoing clearly emerges from the decisions of this Court, and therefore I need not add to the overgrowing burden of annotations by citing the cases."

[20] In *Portapa t/a Supabets v Moodley N. O. and Others*,<sup>4</sup> Molahlehi J restated a principle that was laid down in the judgment of *Grootboom v National Prosecuting Authority and Another*<sup>5</sup> in which the court stated that the test to be applied when considering an application for condonation is the interest of justice. In that case, Zondo J delivered a minority judgment and stated as follows:

'[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. The factors that are taken into account in that inquiry include:

- (a) The length of the delay;
- (b) The explanation for, or cause for, the delay;
- (c) the prospects of success for the party seeking condonation;
- (d) the importance of the issue(s) that the matter raises;
- (e) the prejudice to the other party or parties; and

<sup>4</sup> (JR 1027/13) [2016] ZALCJHB 103 (15 MARCH 2016).

<sup>5</sup> 2014] 1 BLLR 1 (CC)

- (f) the effect of the delay on the administration of justice.

Although the existence of the prospects of success in favour of the party seeking condonation is not decisive, it is an important factor in favour of granting condonation.

[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.'

- [21] It has been accepted by the courts that the exercise of the discretion to grant or refuse condonation can only be assailable on review where the commissioner failed to exercise his discretion judiciously and fairly.<sup>6</sup> In *Collet v Commission for Conciliation, Mediation and Arbitration and Others*,<sup>7</sup> the LAC stated as follows:

'[29] A court of appeal will not lightly interfere with the exercise of a judicial discretion by a lower court. An appellant who challenges the exercise of a judicial discretion will have to show that such discretion was not exercised judicially. More specifically the appellant will have to show that the court *a quo* either:

- 29.1 failed to bring an unbiased judgment to bear on the matter;
- 29.2 did not act for substantial reasons;
- 29.3 exercised its discretion capriciously or arbitrarily;

<sup>6</sup> *Wood v Potane NO and Others* [2004] 7 BLLR 722 (LC) at paras 7-8.

<sup>7</sup> [2014] 6 BLLR 523 (LAC).

29.4 exercised its discretion upon wrong principle;

29.5 committed a misdirection of such a serious nature and degree as to justify a conclusion that it acted improperly or unreasonably.

[30] The legal position was summarised as follows by the Constitutional Court:

“It is trite law that a court considering whether or not to grant condonation exercises a discretion. The discretion must, of course be exercised judicially on a consideration of all the facts and ‘in essence it is a matter of fairness to both sides.’ It is clear that the SCA may decide an application for condonation without considering the merits of the case, though it does so only where there is a gross and flagrant failure to comply with the rules. Ordinarily, the approach of an appellate court to the exercise of such a discretion is that it will not set aside the decision of the lower court ‘merely because the court of appeal would itself, on the facts of the matter before the lower court, have come to a different conclusion; it may interfere only when it appears that the lower court had not exercised its discretion judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles” [Footnotes Omitted]’

[22] In this case, it is common cause that the parties are bound by the Collective Agreement. Its purpose is provided for in clause 4 which reads as follows:

‘The purpose of the Disciplinary Code is to “establish a fair, common and uniform procedure for the management of employee discipline”. The Code records that it is the product of collective bargaining concluded in the Bargaining Council and that its application is peremptory and deemed to be a condition of service.’

[23] The procedure to be followed in instituting the disciplinary hearing of an employee is provided for in Clause 6 of the Collective Agreement which reads as follows:

‘6.1 An accusation of misconduct against an employee shall be brought in writing before the municipal manager or his authorised representative for investigation.

6.2 If the municipal manager or his authorised representative is satisfied

that there is prima facie cause to believe that an act of misconduct has been committed, he may institute disciplinary proceedings against the employee concerned.

6.3 The employer shall proceed forthwith or as soon as reasonably possible with a disciplinary hearing but in any event not later than three months from the date upon which the employer became aware of the alleged misconduct. Should the employer fail to proceed within the period stipulated above and still wish to pursue the matter, it shall apply for condonation to the relevant division of the SALGBC.’

[24] Clause 6.10 of the Collective Agreement requires that the disciplinary hearing should commence within a reasonable time from the date of service of the Notice of Misconduct and that it should take place not earlier than five (5) days and not later than fifteen (15) days from the date of service of the Notice of Misconduct. The commissioner was required to determine whether the Municipality should be granted condonation to discipline the employee outside the three-months period as provided for in clause 6.3 of the Collective Agreement. In considering the condonation application, the commissioner was required to exercise her discretion judiciously. In doing so, she had to take into consideration all the facts, which include but are not limited to the degree of lateness, the explanation thereof, the prospects of success in the main case, the importance of the case and the interest of justice.<sup>8</sup>

[25] The applicant’s view that the commissioner was duty-bound to consider prospects of success when determining whether to grant condonation is inaccurate. As aforesaid, it is accepted that the interests of justice must be determined with reference to all relevant factors. However, in certain circumstances some of the factors may justifiably be left out of consideration. On the question of whether the second respondent committed a gross irregularity when she failed to consider whether the first respondent was barred from disciplining the employee, the applicant relied on the provisions of annexure “B” of the Collective Agreement which require that the disciplinary hearing should take place within a reasonable period but not exceeding six

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<sup>8</sup>*Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 at 532C-E; *Seatlolo and Others v Entertainment Logistics Service (A Division of Gallo Africa Ltd)* (2011) 32 ILJ 2206 (LC) at para 7.

months calculated from the first day the employer became aware of the alleged misconduct up to and including the first day of disciplinary hearing. According to the applicant, the six months' period expired on the 15<sup>th</sup> of March 2015. Taking into consideration that the condonation application was filed on the 19<sup>th</sup> of February 2015, which was before the lapse of the six months' period, it cannot be said that the commissioner committed a material error of law, which constitute gross irregularity.<sup>9</sup>

- [26] On the degree of lateness, the three months' period as prescribed by clause 6.3 of the Collective Agreement must be calculated from the date upon which the employer became aware of the alleged misconduct. It is apparent from the condonation application that the Municipality became aware of the misconduct on the 15<sup>th</sup> of September 2014. However, the commissioner calculated the three months' period from the 22<sup>nd</sup> of September, which is the date upon which the employee became aware of the charges. It is my view that the commissioner misdirected herself by making an error in the interpretation of 6.3. Her flawed interpretation of clause 6.3 resulted in the incorrect finding that the first respondent was approximately one month late.
- [27] The Municipality had until the 15<sup>th</sup> of December 2014 to proceed with the disciplinary hearing. It was common cause that the disciplinary hearing was scheduled to be heard on the 30<sup>th</sup> of January 2015 and that it was postponed due to the chairperson's unavailability. Although the commissioner found that the Municipality delayed to reschedule the disciplinary hearing, she found that there was no need for the Municipality to apply for the condonation application on the 19<sup>th</sup> of February 2015. Her interpretation was that, the three-month period prescribed by clause 6.3 of the Collective Agreement was interrupted by the scheduling the disciplinary hearing, which did not proceed on the scheduled date.
- [28] It is my view that the commissioner misconstrued clause 6.3, which provides that "the employer *shall proceed* forthwith or as soon as reasonably possible with a disciplinary hearing but in any event not later than three months from

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<sup>9</sup> *Motor Industry Staff Association and Another v Silverton Spraypainters & Panelbeaters (Pty) Lt and Others* (2013) 34 ILJ 1440 (LAC) at para 59.

the date upon which the employer became aware of the alleged misconduct".<sup>10</sup> I agree with the applicant that the three months period envisaged in clause 6.3 is not interrupted by the scheduling of the disciplinary hearing. It is interrupted by the commencement of a disciplinary hearing. Although the Municipality scheduled the disciplinary hearing within 15 days from the date of service of the notice of misconduct, it failed to proceed with the disciplinary hearing within the time limit provided for in clause 6.3 of the Collective Agreement. The degree of lateness should have been calculated by taking into consideration the date on which the Municipality became aware of the alleged misconduct and the date of the condonation application. The Municipality's delay in instituting the disciplinary hearing against the employee was, therefore, just over two months.

[29] As such, the commissioner erred in her findings that the degree of lateness was approximately one month and that there was no need for the first respondent to apply for the condonation application on the 19<sup>th</sup> of February 2015. However, it is my view that the said errors do not constitute misdirection of such a nature that they would warrant interference with her discretion. In exercising her discretion the commissioner considered the facts before her and found that, although the Municipality failed to furnish good reasons for the delay, granting condonation would serve the interest of justice. She also found the degree of lateness not to be excessive

[30] It is my view that the applicant did not show that the commissioner acted capriciously, or on wrong principle, or in bad faith, or unfairly, or that in exercising her discretion she reached a decision that a reasonable decision-maker could not reach. As such, there is no reason for this Court to interfere with her discretion. With regard to costs, I am of the opinion that the requirements of law and fairness dictate that there should be no order as to costs.

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<sup>10</sup> *Imatu Obo Greyvenstein v Ekurhuleni Metropolitan Municipality and Others* (JR 1697/14) [2015] ZALCJHB 190 (2 July 2015).

Order

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

- (i) The application for an order to review and set aside a condonation ruling made by the second respondent dated the 2<sup>nd</sup> of June 2015, under the auspices of the SALGBC under case number GPD021511 is dismissed.
- (ii) There is no order as to costs.

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Mahosi AJ

Acting Judge of the Labour Court

## APPEARANCES:

FOR THE APPLICANTS:

Mr. V.G. Mkwibiso, IMATU official.

FOR THE THIRD RESPONDENT:

Adv. M.Z. Makoti,

Instructed by Leepile and Mbewe  
Incorporated

LABOUR COURT