



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR1459/15

In the matter between:

MANDLENKOSI DONALD NTSELE

Applicant

and

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

First Respondent

MUSILWA RAPALANE N.O.

Second Respondent

**CREDIT GUARANTEE INSURANCE OF
SOUTH AFRICA LTD**

Third Respondent

Heard: 10 May 2017

Delivered: 16 May 2017

JUDGMENT

TLHOTLHALEMAJE J

Introduction and background

- [1] This is an opposed application to review and set aside a condonation ruling issued by the second respondent (Commissioner) dated 9 July 2015, issued under case number GAJB4056-14. The applicant's application for condonation in respect of a late referral of a dispute for arbitration was dismissed by the Commissioner.
- [2] The background facts to this dispute to the extent that they are not seriously disputed are summarised as follows:
- a) On 20 January 2014, the applicant had approached the CCMA with a referral of an alleged unfair labour practice dispute pertaining to the failure by the third respondent (employer) to promote him.
 - b) The matter was set down for a con/arb hearing on 6 March 2014. The employer had objected to that process, and the dispute was only conciliated. When conciliation failed, a certificate of outcome was duly issued.
 - c) The applicant resigned from his position in February 2015 by giving one month's notice.
 - d) On 20 April 2015, the applicant had then referred the initial unfair labour practice dispute for arbitration, together with an application for condonation, which the employer had opposed.
 - e) The matter was set-down for an *in limine* hearing on 25 June 2015 after being initially postponed on 4 June 2015 at the request of the applicant.
- [3] Having heard the parties, the Commissioner held that the delay in referring the dispute for arbitration was extremely excessive, and that the applicant's explanation for the delay was 'unreasonable and unjustifiable'. The Commissioner also found that since the applicant resigned in February 2015, his prospects of success on the merits were poor.

- [4] The applicant has since launched this application, to review the condonation ruling. The matter initially came before Van Niekerk J on the pre-enrolment roll on 30 August 2016, and condonation for the late filing of the record of proceedings, and the late filing of the employer's heads of argument was granted.

The grounds of review and evaluation

- [5] The applicant attacked the condonation ruling on a variety of grounds, including that the Commissioner failed to fully apply the correct legal principles for determination of condonation applications. He contended that the Commissioner failed to take account of other factors pertinent to a consideration of condonation applications such as his prospects of success, the issue of prejudice, the importance of the matter and the interests of justice. The ruling was also attacked on the basis that the Commissioner failed to deal with the issue of jurisdiction as raised by the employer at the *in limine* hearing, where the latter had alleged that the CCMA lacked jurisdiction to consider the application on the basis that the applicant was no longer an employee when he referred the dispute for arbitration.
- [6] The employer opposed the review application on the basis that the alleged unfair labour practice dispute referred to the CCMA had no merit as the applicant was not the best candidate for the position initially advertised and thereafter interviewed for. It was further contended that the referral to the CCMA was late by some 321 days; that the applicant had not fully explained the delay and that he had no prospects of success as he had resigned prior to requesting that the dispute initially referred be arbitrated.
- [7] It was further submitted on behalf of the employer that the grounds of review as set out by the applicant had no merit, and did not state the basis upon which it could be concluded that the Commissioner had not applied the

correct legal principles, as the applicant had not fully discussed the delay, the reasons therefore, his prospects of success and the prejudice to the parties because of the delay.

The legal framework and evaluation

- [8] The legal principles pertaining to applications for condonation are trite. The Court in *Melane v Santam Insurance Co. Ltd*¹ identified the factors to be considered in applications for condonation as follows:

“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 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.”

- [9] In this case, the Commissioner commented that the delay was extremely excessive, and the applicant had correctly also conceded that this was the case. The Commissioner further had regard to the reasons for the delay, which he regarded as central to the decision regarding condonation. It is trite that in order to assist an arbitrator in properly exercising his or her discretion in such matters, a party seeking condonation must set out all the facts and circumstances relating to the delay, and most importantly, must provide a

¹ 1962 (4) SA 531 (A) at 532B-E.

satisfactory explanation for each period of the delay. Any period of delay that is unaccounted for, will result in condonation being refused.²

- [8] The applicant's explanation for the delay as correctly pointed out by the Commissioner was inadequate. As per the applicant's application before the Commissioner, he had merely stated that:

"Employer has failed to adhere to the proposal agreed upon as a consequence of discussions we had and secondly it will have been pre-mature to refer the matter without giving the employer an opportunity to rectify the unfair practice in the absence of job vacancies."

- [9] The transcribed record of proceedings further indicate that the Commissioner afforded the applicant an opportunity to make further submissions in regard to his application, and by implication, the reasons for the delay, and the applicant chose not to.³ It is apparent from the reasons proffered by the applicant that they are lacking in detail, and did not account at all for each period of the delay. Even if the applicant had 'afforded the employer and opportunity to rectify the unfair practice' during his period of employ, there is further no explanation for the delay after his resignation until the date that he decided to refer the dispute. Therefore, the applicant's explanation amounted to 'no explanation at all'⁴, and the Commissioner was correct as deeming it as unreasonable and unacceptable.

² See *NUMSA and Another v Hillside Aluminium* [2005] 6 BLLR 601 (LC).

³ Page 6 line 13 of the transcribed record.

⁴ See *Moila v Shai N.O. and Others* (2007) 28 ILJ 1028 (LAC); [2007] 5 BLLR 432 (LAC) (*Moila*) at para 34 where it was held that:

"I do not have the slightest hesitation in concluding that this is a case where the period of delay is excessive and the appellant's purported explanation for the delay is no explanation at all. I accept that the case is very important to the appellant. However, the weight to be attached to this factor is too limited to count for anything where the period of delay is as excessive as is the case in this matter and the explanation advanced is no explanation at all. If ever there was a case in which one can conclude that good cause has not been shown for condonation without even considering the prospects of success, then this is it. Where, in an application for

- [10] In regard to prospects of success, the Labour Appeal Court in *NUM v Council for Mineral Technology*⁵ held 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.”

- [13] In the light of the excessive delay in referring the dispute, and further in the light of the unsatisfactory explanation proffered for the delay, it would not have been necessary for the Commissioner to deal with the applicant's prospects in respect of the main claim. The applicant's contention that the Commissioner committed an irregularity by failing to consider the merits of his claim since the factors for consideration in such applications are interrelated is misplaced, as this is not always the case. The principle that it might not always be necessary to consider other factors pertinent to applications for condonation as enunciated in *Moila* was further emphasised by the Constitutional Court in *Grootboom v National Prosecuting Authority and Another*,⁶ where Zondo J held that:

“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.

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

condonation, the delay is excessive and no explanation has been given for that delay or an “explanation” has been given but such “explanation” amounts to no explanation at all, I do not think that it is necessary to consider the prospects of success.”

⁵ 1999 3 BLLR 209 (LAC) at para 10.

⁶ (2014) 1 BLLR 1 (CC); 2014 (2) SA 68 (CC); 2014 (1) BCLR 65 (CC); (2014) 35 ILJ 121 (CC). (*Grootboom*)

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.”⁷

- [14] Even though the Commissioner in this case was not required to determine the prospects of success in view of the excessive nature of the delay and a lack of a satisfactory explanation in that regard, he had nevertheless done so. The Commissioner considered that the applicant had already resigned at the time that the dispute was referred for arbitration and accordingly his prospects of success were poor. He had not considered the merits of the applicant’s alleged unfair labour practice, and correctly so in my view.
- [15] To the extent that the issue was whether the applicant was an employee as at the time that he had referred the alleged unfair labour practice dispute, that issue pertained to the jurisdiction of the CCMA, and it is trite that if there is no employment relationship between the two parties to the dispute, then the CCMA would have no jurisdiction to determine the matter, and consequently there could not have been an unfair labour practice as contemplated by section 186(2) of the LRA.
- [16] In this case however, irrespective of the jurisdictional point raised, the issue nevertheless remained whether the main alleged unfair labour practice dispute was properly before the CCMA. It is accepted that when the dispute was initially referred for conciliation in January 2014, the applicant was still an employee. The dispute as to whether he was an employee or not at the time that he had referred the matter for arbitration could only be considered after it

⁷ Id at paras 50-1.

was determined that the main dispute was properly before the CCMA, i.e., that it was referred within the time periods stipulated. To the extent that this was not the case in the light of the excessive delay and no explanation in that regard, the issue of the employment relationship became academic in my view.

[17] The applicant correctly pointed out that ultimately, it is the considerations of the interest of justice that determines whether condonation should be granted or not.⁸ It is however trite that a consideration of the interests of justice calls for an evaluation of the interest of both parties, and it cannot be doubted that inordinate delays in litigation by either party invariably damages the interest of justice. As pointed out by Zondo J in *Grootboom*,⁹ 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, taking into account the pertinent factors.

[18] In this case, and based on the applicant's own averments as per his application before the Commissioner, there is no basis for reviewing or setting aside the condonation ruling. In essence, the applicant's application for condonation had not established good cause as to why the late referral ought to have been condoned. In the light of the factors considered and conclusions reached in that regard, the interests of justice, *albeit* not specifically referred to by the Commissioner, dictated that the application for condonation ought to be dismissed.

[19] I have had regard to the considerations of law and fairness and the circumstances of this case, and hold the view that a cost order is not warranted.

⁸ See *Brummer v Gorfil Brothers Investments (Pty) Ltd* [2000] (2) SA 837 (CC) at 839 F.

⁹ *Grootboom* above n 6 at para 50.

Order

[20] In the premises, the following order is made:

1. The application to review and set aside the second respondent's condonation ruling is dismissed.
2. There is no order as to costs

E. Tlhotlhemaje

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: In Person

For the Third Respondent: Ms. N Moni of Moni AH Inc.

LABOUR COURT