



IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

Case no: C 1026/15

In the matter between:

YASMIN BIBI MAHOMED ABDUL AHMED

Applicant

and

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

First Respondent

COMMISSIONER ORLANDO MOSES N.O

Second Respondent

WOOLWORTHS (PTY) LTD

Third Respondent

Heard: 1 June 2016

Delivered: 06 June 2017

JUDGMENT

TLHOTLHALEMAJE, J.

Introduction:

- [1] The Applicant seeks an order reviewing and setting aside a ruling issued by the Second Respondent (Commissioner) under case number WECT714830-

15 dated 26 October 2015, in terms of which her application for condonation for the late referral of a dispute to the First Respondent (CCMA) was dismissed. The Third Respondent (Woolworths) opposed the application.

Background:

- [2] The Applicant commenced her employment with Woolworths in June 2010. At the time of the termination of the employment relationship on 24 August 2015, she was employed as Facilities Manager. She was suspended from duty on 26 May 2015, and a disciplinary enquiry was held on 25 June 2016 in respect of allegations of misconduct levelled against her.
- [3] At the conclusion of the disciplinary enquiry and prior to issuing a sanction, the chairperson of the enquiry had given the Applicant an option of either a dismissal or early retirement. It was common cause that she had opted for early retirement on 24 August 2015. Her last day at work was 31 August 2015.
- [4] On 1 October 2015, the Applicant despite having made her election then referred a dispute to the CCMA, claiming unfair dismissal, 'unfair labour practice', 'severance pay', and 'unfair suspension'. In the LRA Form 7.11 referral, she also alleged that her suspension was procedurally unfair, and that the dispute arose on 25 May 2015. She also alleged that her dismissal on 31 August 2015 was procedurally and substantively unfair on a variety of grounds.
- [5] Woolworths had objected to the con/arb proceedings as set down on 16 October 2015. At the commencement of the conciliation process however, the Commissioner had indicated to the parties that the referral was lodged one day out of time. Attached to the Applicant's referral form was an application for condonation, which Woolworths had contended it had not received. The Commissioner had nevertheless proceeded to hear the application, and had also afforded the parties an opportunity to make oral submissions in respect of the application.

The grounds of review and evaluation:

- [6] Amongst the grounds of review raised on behalf of the Applicant in these review proceedings was that to the extent that the Commissioner had raised the issue of condonation at the commencement of the conciliation proceedings, he should have postponed the matter and afforded the Applicant an opportunity to get legal representation.
- [7] The submissions raised in regard to whether the Commissioner should have postponed the proceedings simply to afford the Applicant an opportunity to secure legal representation are without merit, particularly since Woolworths was also not legally represented. Furthermore, it is not the Commissioner that had raised the issue of condonation as there was already an application before him. A commissioner cannot simply postpone *in limine* proceedings to allow parties to secure legal representation as the provisions of Rule 31 (10) of the CCMA Rules enjoins that Commissioner to determine such applications in any manner that it is deemed fit, provided that the parties are informed of how the process will be conducted and are given an opportunity to be heard.
- [8] In my view, and as can be gleaned from the record of proceedings, the Commissioner in this case not only had regard to the written application, but also painstakingly explained and guided the parties through the approach and process and afforded them an opportunity to substantiate their respective cases in regard to that application.
- [9] The principles applicable in applications for condonation as articulated in *Melane v Santam Insurance Co. Ltd*¹ are well-established. I am satisfied from the reading of the award that the Commissioner was well-aware of these

¹1962 (4) SA 531 (A) at 532B-E, 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 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'

principles, and had in the course of the proceedings and the ruling itself, applied them accordingly to the facts as they were before him.

- [10] In regard to the lateness of the referral, the Commissioner accepted that the employment relationship was terminated on 31 August 2015, and that the referral was only one day late. He accepted that the delay was *'not a long period and favours granting condonation'*.
- [11] The Applicant however takes issue with regards to the Commissioner's analysis and reasoning in respect of the explanation proffered for the delay. In her application, the Applicant had attributed the delay to her ill-health, which she contended was precipitated by her suspension. She further alleged that she was seen by a Psychiatrist and was booked off for a month. She was also seen by a Clinical Psychologist.
- [12] During the condonation hearing proceedings, the Applicant upon being asked by the Commissioner for further submissions had repeated her contention that she was not well after the 'dismissal' and had to get medical treatment. She had further submitted that she was not sure about the dispute having to be referred within 30 days from her dismissal.
- [13] The Commissioner had regard to the reasons proffered by the Applicant in respect of the delay and Woolworths' responses thereto, and concluded that they were not acceptable. The basis of his conclusions was that the Applicant had not supported her contentions that she was ill, and had accepted that she was aware that she could refer her dispute within 30 days.
- [14] The Commissioner further took into account that the application for condonation was filed on 30 September 2015 (the last day of the 30-day *dies*), and that there was no explanation as to the reason the referral could not have been submitted on the same day. He found that the delay ultimately was as a consequence of the Applicant's negligence. It was submitted on behalf of the Applicant that the conclusion by the Commissioner that she was negligent had no basis, in that as a result of her ill-health, she was unable to submit the referral on time.

- [15] It is trite that an applicant seeking condonation must give a full account of the delay in question. In this case, even though the referral was one day late, and clearly insignificant, at the very least, it was required of the Applicant to satisfy the Commissioner that there was a reasonable and/or acceptable explanation for the delay. I agree with the submissions made on behalf of the Applicant that there was no basis for the Commissioner to conclude that the Applicant was negligent purely based on the fact that she was able to submit her condonation application within the thirty days whilst she could not so in respect of the referral.
- [16] The Commissioner's findings however that the Applicant was fully aware that she ought to have referred the dispute within 30 days can nevertheless not be faulted, as it is apparent from the letter that she had signed confirming the acceptance of her early retirement that she was advised that could refer a dispute (in the event of a dismissal) within the said time frames. Even if in my view the Commissioner had found the explanation not to be reasonable, in the light of the insignificant delay, this factor on its own was not central to the dismissal of the application, and even if it did, this can hardly lead to a conclusion that the ruling as a whole is reviewable in the light of other factors to be considered below.
- [17] In regard to her prospects of success, the Applicant had in her application, averred that she was not given an opportunity to cross-examine the employer's witnesses; that her suspension was procedurally unfair as it took the employer one month to advise her of the charges; and that the charges were broad and vague. The Applicant had also submitted during the hearing of the condonation application that she was only given two days to prepare for the enquiry and was unable to properly prepare for it. She had further contended that she was forced into early retirement, and was accordingly disadvantaged, as she was deprived of other benefits and an opportunity to earn a further salary for the years she could have still worked.
- [18] As is apparent from the record of proceedings, Woolworths had refuted the Applicant's allegations and contended that;

- a) in terms of its disciplinary code and procedure, employees were given 48 hours' notice of the enquiry, and the Applicant therefore had sufficient time to prepare;
- b) the Applicant was advised of the charges against her and her rights when the notice of suspension was issued;
- c) the enquiry was at some point postponed as the Applicant was ill.
- d) the applicant was afforded an opportunity to call her witnesses and cross-examine the employer's witnesses during the disciplinary enquiry, and at no stage had she indicated that she did not understand the charges against her.
- e) The Applicant was charged with various offences pertaining to dishonesty, bringing the company's name into disrepute, and breach of trust, which were dismissible;
- f) chairperson of the enquiry had afforded the Applicant a choice between a dismissal and early retirement after taking into account the mitigating and aggravating circumstances, and her age (the Applicant was 57 at the time);
- g) the Applicant made her choice of early retirement after the chairperson of the enquiry had also afforded her an opportunity to reflect and consult on the choices to be made;
- h) prior to making a choice, the Applicant had consulted with the HR department, other people and her attorney. She was therefore not forced into early retirement nor was she dismissed

[19] The Commissioner having had regard to the above concluded that the Applicant's prospects of success were poor on the basis that;

- a) The Applicant confirmed that she was given an option of early retirement or a dismissal;

- b) She had confirmed that she had consulted various parties prior to accepting early retirement rather than a dismissal;
- c) She was a senior employee, not unsophisticated, and could not have made life altering decision without taking into account all relevant factors;
- d) On her own account, she was not dismissed, and the possibility of her establishing a dismissal was poor

[20] It needs to be pointed out that upon serving her Rule 7A (8) Notice on 17 February 2016, the applicant had also indicated that she stood by her notice of motion. She had nonetheless on 04 April 2016 filed her replying affidavit, and also sought condonation for its late filing.

[21] The grounds upon which condonation was sought for the late filing of the replying affidavit was that Counsel for the Applicant was not available between 29 February and 11 March 2016 due to other work commitments, and also that she (Applicant) travelled to Mecca between 15 March 2016 and 30 March 2016, and was only able to see her Counsel on 31 March 2016.

[22] I am prepared to accept the second part of the explanation for the delay whilst I deem the first one to be wholly unsatisfactory. A delay in complying with the time frames set in regard to pleadings cannot be justified on the basis that Counsel was busy with other work. The Applicant nonetheless relied on the provisions of clause 11.4.2 of this Court's Practice Manual² in contending that the Replying Affidavit should be allowed despite being filed out of time.

[23] As per annexure 'YBM E2' to the Replying Affidavit, Woolworths had upon the Applicant's request, refused to grant her an extension to file her Replying Affidavit out of time. Woolworths had however not filed a Notice of Objection

² Which provides that;

'11.4.2 Where the respondent or the applicant has filed its opposing or replying affidavits outside the time period set out in the rules, there is no need to apply for condonation for the late filing of such affidavits unless the party upon whom the affidavits are served files and serves a Notice of Objection to the late filing of the affidavits. The Notice of Objection must be served and filed within 10 days of the receipt of the affidavits after which time the right to object shall lapse.'

as envisaged in clause 11.4.2 of the Practice Manual, and to this end, I am prepared to allow the late filing of the Replying Affidavit.

- [24] Coming back to the reasoning of the Commissioner in regards to the Applicant's prospects of success, it is further common cause that the options given to the Applicant followed upon full process of a disciplinary enquiry, and the chairperson of the enquiry had indicated that the penalty in the light of the all the evidence was that of a dismissal.
- [25] To the extent that it was common cause that the Applicant had elected early retirement rather than being dismissed, it was not necessary for the Commissioner to consider the issue of the charges in determining her prospects of success. The Applicant in any event conceded in her Replying Affidavit that any averments in her founding affidavit in regards to these charges were not issues placed before the Commissioner at the hearing. In this regard therefore, not much weight can be attached to them. To this end, it was therefore reasonable for the Commissioner in the context of a determination of prospect of success, to merely consider whether the Applicant would have been in a position to establish the existence of a dismissal.
- [26] The conclusions reached by the Commissioner that the Applicant on her own version was not dismissed, and that the possibility of her establishing the existence of a dismissal were poor are conclusions that fall within a band of reasonableness. This is so in that if indeed it was the Applicant's case that she was coerced into the option of early retirement, the hurdles she would have faced proving that fact, or her contention that she was dismissed would have been insurmountable.
- [27] First, amongst the reasons she gave in her affidavit for making the election in question was that she did not want a dismissal on her CV in the light of her status in the industry. If indeed she was of the view that she was treated unfairly, and that the charges against her were spurious, nothing prevented her from telling the chairperson to dismiss her, and then refer a dispute to the CCMA

- [28] Second, and as further alluded to by the Commissioner, the Applicant, despite her contentions that she was not given sufficient time to reflect on the options given to her, had also conceded that she had made her election after consultations with the HR and her attorneys. There can therefore be no basis for a conclusion that she had not properly reflected on the choices to be made.
- [29] It is accepted that there may be instances where an employee in the face of serious charges and prior to a full disciplinary hearing, is given an option of early retirement or some other form of mutual termination of the employment relationship, or be told that he or she was to be dismissed. It is accepted that in some of these instances, there may be cause to believe that an employee was coerced into making uninformed choices, and thus there may be a basis for an allegation of unfair dismissal.
- [30] It cannot however be similarly concluded that there is cause for a basis of an alleged unfair dismissal where the employee had the benefit of a full disciplinary enquiry, and where she was told that she would be dismissed given the evidence presented and where that employee makes an informed decision. In this case, the election of early retirement given the circumstances under which it was made can hardly constitute a dismissal. The Applicant essentially made her choice.
- [31] It is accepted that the standard for considering an application for condonation is the interests of justice³. As to what is in the interests of justice must clearly take due regard to all the relevant factors, and the particular circumstances of each case. It cannot in my view, be in the interest of justice to grant condonation in circumstances where a party's prospects of success are remote, even if the delay is insignificant or where there is a plausible explanation for that delay. Thus were it is evident that a party seeking condonation has no prospects of succeeding in its principal claim or opposition, it would not be in the interests of justice to grant condonation, nor

³ See *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others* [2000] ZACC 3; 2000 (2) SA 837 (CC); 2000 (5) BCLR 465 (CC) at para 3; and *Grootboom v National Prosecuting Authority and Another* (CCT 08/13) [2013] ZACC 37; 2014 (2) SA 68 (CC); 2014 (1) BCLR 65 (CC); [2014] 1 BLLR 1 (CC); (2014) 35 ILJ 121 (CC) (21 October 2013)

would there be any purpose served in granting condonation⁴. This factor is also aligned to the consideration of prejudice to the parties. Thus, to the extent that condonation were to be granted in circumstances where a party did not have prospects of success, it would be prejudicial to the respondent party to have to defend a matter that has no merit, and in these circumstances the interests of justice would dictate that condonation should not have been granted, and the ruling is therefore unassailable.

[32] To conclude then, I am satisfied that the review application has no merit, and that the conclusions and decision reached by the Commissioner falls within a band of reasonableness. I have also considered the requirements of law and fairness and hold the view that a cost order is not warranted in this case.

Order:

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

1. The application to review and set aside the condonation ruling issued by the Second Respondent is dismissed.
2. There is no order as to costs

E. Tlhotlhemaje

Judge of the Labour Court of South Africa

⁴ *Kerradam Properties (PTY) LTD t/a Cabanga Conference Centre v Sonica Matthee* Case no: JA 72/2010 at para 5

Appearances:

For the Applicant:

Adv. PJ van Staden

Instructed by:

Loretta Hayward Attorneys

For the Third Respondent:

MMH Titus of Macgregor
Erasmus Attorneys

LABOUR COURT