

IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT CAPE TOWN)

CASE NUMBER: C576/2017

DATE: 19 September 2017

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In the matter between:

MUSHTAQ EBRAHIM 1st Applicant

NAZIA PEER 2nd Applicant

and

10 **COMMISSION FOR CONCILIATION,**

MEDIATION AND ARBITRATION 1st Respondent

MAUREEN DE BEER 2nd Respondent

VUYISEKA MPAMBANI 3rd Respondent

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JUDGMENT

STEENKAMP, J:

This is an urgent application, set down on one day's notice, to stay a con-arb proceeding in the CCMA set down for tomorrow, 20 September 2017, pending an application to review a condonation ruling by Commissioner Maureen de Beer handed down on 31 August 2017, three weeks ago. This application was brought on less than one day's notice to the employee, Ms Mpambani, who is cited as the third respondent.

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Although the ruling was handed down 1 August, the employers then attempted to ascertain from the CCMA whether further proceedings would be put on hold, pending a possible review.

5 Although it is trite law that a review application does not automatically stay an arbitration ruling, the CCMA in any event responded by 14 September to make that clear. Nevertheless the applicants waited until yesterday, 18 September, to launch this application, as I say, on less than one day's notice; and
10 notice was only given to the employee by way of email.

Regardless of that apparent self-created urgency and the non-compliance with the rules of this Court relating to service, I will deal with the merits of the application.

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Firstly, the applicants have to set out why they have a clear right, or at best for them -- if this is seen as an interim application pending the review -- a *prima facie* right for the relief sought.

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In this regard Ms *Foster*, who appears for the applicants, has argued that it would save the parties "time and expense" if the con-arb were stayed, pending an application to review the condonation ruling. In my view the exact opposite applies.

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The aim of the Labour Relations Act (Act 66 of 1995), as set out in section 1, is to promote the effective resolution of labour disputes. Its further aim is to provide for expeditious and cheap dispute resolution. That is what the conciliation and arbitration process is designed for. Should this application be granted, it would mean that the con-arb proceedings for tomorrow, which will take no longer than a day, are postponed until sometime next year, pending a review application of an interim condonation ruling.

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There are two problems with that sequence of events. Firstly, it would be contrary to the aim of the LRA of expeditious dispute resolution. Secondly, the time and expense that Ms *Foster* complains of, would affect the employee, who is now an unemployed mother of a young baby, for at least a year, when the alternative is that she could have a hearing and an outcome, either in her favour or against her, as soon as tomorrow.

20 The Act was also recently amended to provide in section 158(1)(b) that this Court may not review any decision or ruling made during conciliation and arbitration proceedings before the issue in dispute has been finally determined, unless the Court finds that it is just and equitable to do so.

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A ruling is described as a decision on a limited issue, usually made at the conclusion of interlocutory proceedings, as set out by the learned authors in Du Toit *et al*, *Labour Relations Law: A Comprehensive Guide*, 6th Edition, at page 164. Examples
5 include specifically a decision on condonation. The authors further point out (at page 190) that the Labour Appeal Court has held that the Labour Court has jurisdiction to interdict any unfair conduct, also in the context of incomplete proceedings, but that such intervention should only be made in exceptional
10 cases.

Among the factors to be considered is whether failure to intervene would lead to grave injustice or whether justice might be attained by other means. In this case I therefore
15 have to consider whether the refusal to intervene at this interlocutory stage would lead to grave injustice to the applicants. I think not. They will have a full opportunity to have the case heard on the merits tomorrow and the matter can be resolved then and there, rather than waiting another year and
20 spending a lot more “time and expense”, to quote Ms *Foster*. And even then the applicants would have to persuade another Court that the condonation ruling is reviewable in circumstances where the arbitrator took into account all the evidence and submissions before her and tested that against
25 the test set out in the well-known case of Melane v Santam

Insurance Company Limited 1962 (4) SA 531(A).

She took into account, firstly, that the degree of lateness was very short -- only seven days. The reasons for lateness she
5 found to be sufficient, mainly that the employee, or the former employee, was not aware of the steps to be taken within the time period of 30 days.

On the issue of prospects of success, the Arbitrator accepted
10 that at this interim stage the employee "may have prospects of success if her allegations prove to be correct." That, of course, is something that can only be tested in oral evidence.

The Arbitrator also took into account that the prejudice to the
15 employers was not substantial, especially considering the short delay.

On the face of, it the employers will have a hard time persuading a Court that that conclusion, based on a discretion
20 exercised by the Arbitrator, is so unreasonable that no other arbitrator could have come to the same conclusion. In the context of this case, the short delay, as opposed to the excessive delay that will be occasioned by granting the relief sought, must be considered in the context of the balance of
25 convenience.

The balance of convenience clearly favours the employee. Whether her case has any merit or not, it can and should be heard tomorrow, in line with the aims of the Act of expeditious
5 dispute resolution, rather than this matter having to be postponed until sometime next year for the review of an interlocutory ruling.

The applicants have not set out any exceptional circumstances
10 why the relief should be granted. In any event, they have an alternative remedy, which is to simply attend the con-arb tomorrow, lead oral evidence and show that there was no unfair dismissal.

15 There is also no apprehension of irreparable harm to the applicants. Any harm that they suffer in the short period from today until tomorrow, can be rectified when the matter is heard tomorrow, rather than waiting until next year for a review application with, in my view, slim prospects of success.

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In those circumstances the urgent application for the relief sought in part A of the notice of motion is dismissed.

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STEENKAMP, J

For the applicants: Ms J R Foster

Instructed by Clyde & Co.