



THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

Not Reportable

Case no: PR 61/17

In the matter between:

JOHNY BARENDSE

Applicant

and

BARGAINING COUNCIL FOR CIVIL ENGINEERING

INDUSTRY

First Respondent

COMMISSIONER THEMBA MANGANYI

Second Respondent

PENNY FARTHING ENGINEERING (PTY) LTD

Third Respondent

Heard: 12 October 2017

Delivered: 02 November 2017

JUDGMENT

MAMOSEBO. AJ

- [1] An unfair dismissal dispute should, in terms of the Labour Relations Act¹ (the LRA) be referred to the Commission for Conciliation, Mediation and Arbitration (CCMA) or the relevant Bargaining Council within a period of 30 days of the date of a dismissal or, if it is a later date, within 30 days of the employer making a final decision to dismiss or uphold the dismissal.² The applicant should have referred his dispute on or before 01 December 2016, however, he only did so on 10 January 2017, 40 days out of time.
- [2] On 01 March 2017 the second respondent, commissioner Themba Manganyi, of Bargaining Council for Civil Engineering Industry (BCCEI), the first respondent, heard the application for the condonation of the late referral of the dispute. He issued a ruling on 04 March 2017 to this effect:
- ‘This applicant did not make out a good case to show good cause for referring his dispute late. Therefore, this application is not granted.’
- [3] Following the BCCEI proceedings, the applicant approached this Court for an order in the following terms:
- 3.1 Reviewing and setting aside or correcting the condonation ruling by the commissioner;
 - 3.2 Directing the BCCEI to hear the condonation application *de novo* before a commissioner other than the second respondent;
 - 3.3 In the alternative, substituting the ruling of the second respondent with an order condoning the late referral and directing the BCCEI to enrol the matter for arbitration *de novo* before a commissioner other than the second respondent.

¹ Act 66 of 1995 as amended.

² S 191 (1)(b) (i) of the LRA as amended.

- [4] In resisting the application, the third respondent submitted that the applicant's employment contract came to an end on 01 November 2016 because he worked on a project basis. This is gainsaid by the applicant who maintained that he was employed on a permanent basis.
- [5] Essentially the grounds for the review of the commissioner's ruling were the following: First that the applicant alleged that he did not know about the CCMA. Secondly, he waited for the employer to pay him his December 2016 salary before he could seek relief at the CCMA. Lastly, he contended that the CCMA offices in Humansdorp were closed after 15 December 2016.
- [6] In refusing to grant condonation the commissioner was of the view that the CCMA offices closed on 24 December 2016. He was not convinced by the applicant's explanation for the delay which he also found to be contradictory.
- [7] Ms Van Staden, for the applicant, contended:
- 7.1 that the commissioner's conclusion that the CCMA offices only closed on 24 December 2016 was his subjective view not raised by any of the parties in their papers. The rejection by the commissioner of the case made out by the applicant that offices of the CCMA in Humansdorp had been closed without taking into account that this was a satellite office was unreasonable. The explanation proffered for the delay was probable and is persuasive.
- 7.2 Regard being had to the fact that the applicant was indigent he could not be blamed for saying that he "waited for the money in December". There was an obligation on the commissioner to seek clarification of the statement from the applicant. This may have meant that the applicant lacked funds to approach the CCMA and could only do so upon receipt of the payment in December, the argument went.

- [8] It is trite that condonation is not to be had merely for the asking. In *Melane v Santam Insurance Co Ltd*³ the Court laid down the following guiding principles when considering the application for condonation:

“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, for that will 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 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 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”

- [9] The commissioner did not at all consider the applicant's prospects of success with his unfair dismissal dispute. It is trite that each case must be judged on its own merits. Apparent from the factual matrix sketched, the dismissal is in dispute. The applicant's averment is that he was employed on a permanent contract and not on a fixed term contract as alleged by his employer, the third respondent. The purported fixed term contract appears not to have been signed by the applicant. Ms Van Staden argued that the applicant was dismissed without a hearing and for no valid reason. In light of all these, I am of the view the applicant has an arguable case fit for arbitration. Although the 40 days' delay in the filing of the applicant's dispute is inordinate, in my view, the applicant has good prospects of success which compensates the delay. It was important for the commissioner to approach the application holistically and to have regard to the explanation offered for the delay. He did not do so. The

³ 1962 (4) SA 531 (A) at 532C –F.

degree of lateness assessed in isolation could not have produced a fair and reasonable outcome considering the *dies non* between 24 December 2016 and arguably 09 January 2017.

[10] On the above conspectus, it was unreasonable for the commissioner to find, without substantiating facts, that the specific satellite CCMA at Humansdorp, where the applicant resides, was not closed. The commissioner misconstrued the nature of the enquiry he was enjoined to undertake. It follows that the review application should succeed.

[11] It would unnecessarily delay this matter if I were to remit it for the hearing of the application for condonation afresh. As already alluded to, the applicant has good prospects of success. His application for condonation ought to have been upheld.

[12] In the result, the following order is made:

Order

1. The condonation ruling dated 04 March 2017 issued under case number ECPE 291/17 by commissioner Themba Manganyi, the second respondent, is reviewed and set aside;
2. Condonation for the late referral of the applicant's dispute is granted;
3. The matter is remitted to the Bargaining Council for Civil Engineering Industry (BCCEI), the first respondent, for arbitration *de novo* before a commissioner other than the second respondent.

MC Mamosebo

Acting Judge of the Labour Court of South Africa

Appearances

For the applicant: Ms E van Staden

Instructed by: Justice Centre, Port Elizabeth

For the respondents: None

LABOUR COURT