



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR237/2016

In the matter between:

UCIMESHAWU obo MOSES MAKWE &

51 OTHERS

Applicants

and

COMMISSIONER TIMOTHY BOYCE N.O

First Respondent

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION

Second respondent

JOBURG MARKET

Third Respondent

Heard: 29 August 2018

Delivered: 18 September 2018

JUDGMENT

TLHOTLHALEMAJE, J:

Introduction:

- [1] UCIMESHAWU represents the individual applicants who had referred an alleged unfair dismissal dispute to the Commission for Conciliation Mediation and Arbitration (CCMA) on their own, following the termination of their services by the third respondent (Joburg Market) on 13 March 2015. It was common cause that the individual applicants were employed in terms of fixed term contracts, which Joburg Market refused to renew upon their expiry on 31 March 2015.

- [2] It was further common cause that the applicants' referral to the CCMA was out of time, and that they were subsequently granted condonation in that regard. The matter was then referred for arbitration and came before the first respondent (Commissioner) on 2 July 2015. The Commissioner issued an arbitration award on 13 October 2015 in terms of which the individual applicants' claim was dismissed, on the basis that they had not established a reasonable expectation to be retained in employment by Joburg Market on an indefinite basis within the meaning of section 186(1)(b) of the Labour Relations Act (LRA).¹
- [3] On 24 February 2016, the applicants launched an application to review the arbitration award dated 13 October 2015. Joburg Market had on 26 February 2016, objected to the late filing of the review application. It was only on 18 April 2016 that the applicants had filed an application for condonation, which Joburg Market had opposed.

Applicable principles:

- [4] It is trite that an application for condonation is akin to seeking an indulgence from a court for non-compliance with applicable time frames. The Court within its discretion, may grant an indulgence upon good cause being shown. The principles enunciated in *Melane v Santam Insurance Co. Ltd*² have over the years been consistently applied in courts where condonation is sought. The Constitutional Court in *Brummer v Gorfil Brothers Investments (Pty) Ltd* in an endorsement of those principles has also since pointed out that an application for condonation should be granted if it is in the interests of justice and refused

¹ Act 66 of 1995 (as amended)

² 1962 (4) SA 531 (A) At 532b-E, where the Court 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'

if it is not. The interests of justice must be determined by reference to all relevant factors, including the nature of the relief sought, the extent and cause of the delay, the nature and cause of any other defect in respect of which condonation is sought, the effect on the administration of justice, prejudice and the reasonableness of the applicant's explanation for the delay or defect³.

- [5] Significant with a determination of applications of this nature is that condonation cannot be had for the mere asking, and that a party is required to make out a case entitling it to the court's indulgence by showing sufficient cause, and by giving a full, detailed and accurate account of the causes of the delay⁴. In the end, the explanation must be reasonable enough to excuse the default.⁵ Even more significant is the trite principle that a party must seek condonation as soon as the need for such an application becomes apparent.

Evaluation:

The delay and the explanation:

- [6] The period of delay in launching the review application is about 292 days, which contrary to the applicants' contentions, is excessive in the extreme. A further delay that needs to be explained relates to the period between 26 February 2016 when Joburg Market informed the applicants that condonation was required, and 18 April 2016 when the application was ultimately launched⁶.

³ 2000 (5) BCLR 465 ; 2000 (2) SA 837 (CC) at para 3; See also *Ndlovu v S* 2017 (10) BCLR 1286 (CC); 2017 (2) SACR 305 (CC) (15 June 2017) at paras 22 – 23; *Van Wyk v Unitas Hospital (Open Democratic Advice Centre as amicus curiae)* 2008 (2) SA 472 (CC) at 477A-B; *SA Post Office Ltd v CCMA* [2012] 1 BLLR 30 (LAC) at para [23], where Waglay DJP (as he was then) stated that;

'In my view, each condonation application must be decided on its own facts bearing in mind the general criteria. While the rules are there to be applied, they are not inflexible but the flexibility is directly linked to and apportioned in accordance with the interests of justice; prejudice; prospects of success; and finally, degree of delay and the explanation thereof. The issue of delay must be viewed in relation to the expedition with which the law expects the principal matter to be resolved'

⁴ *Mulaudzi v Old Mutual Life Assurance Company (South Africa) Limited* 2017 (6) SA 90 (SCA) at para 6

⁵ *Ndlovu v S* at para 31 *supra* at fn 3

⁶ See *All Round Tooling (Pty) Ltd v NUMSA* (1998) 8 BLLR 847 (LAC); *Rennie V Kamby Farms (Pty) Ltd* 1989 (2) SA 124 (A) At 129G where it was held:

'whenever an appellant realises that he has not complied with a rule of court he should apply for condonation without delay.'

See also *Mulaudzi* at para 26

- [7] Moses Makwe, one of the applicants had deposed to the founding affidavit and averred that they only approached UCIMESHAWU on 14 November 2015 for assistance as they did not belong to a trade union. A letter was then despatched to Joburg Market on 3 December 2015 to seek a meeting with a view of amicably resolving the dispute. Furthermore, it was submitted that the delay was occasioned by the fact that the applicants were not familiar with the Court's Rules.
- [8] It was submitted on behalf of Joburg Market that ignorance of the law was not an excuse, and that to the extent that the individual applicants did not belong to a trade union, nothing prevented them from approaching any organisation that offered free legal assistance. To this end, it was contended that the applicants have not tendered a compelling explanation for their non-compliance with the rules of this Court.
- [9] I fully agree with the submissions made on behalf of Joburg Market that the explanation for the delay proffered by the applicants is wholly inadequate, as it is lacking in detail, and does not cover each period of the delay. Worst still, no attempt was made by the applicants to explain the delay after they were advised of the need to file an application for condonation having launched their review application. In a nutshell, the explanation proffered by the applicants amount to no explanation at all.
- [10] In the light of the excessive delay and lack of an adequate explanation in that regard, ordinarily, this would have been the end of the matter. However, having had regard to the principles set out in *Grootboom v National Prosecuting Authority and Another* that the interests of justice should be determined with reference to all relevant factors⁷, I will proceed to deal with them as below.

Prospects of success:

- [11] The issue for consideration is whether the applicants have established reasonable prospects of success that are sufficient to outweigh the failure to

⁷ (2014) 1 BLLR 1 (CC); 2014 (2) SA 68 (CC); 2014 (1) BCLR 65 (CC); (2014) 35 ILJ 121 (CC) at paragraphs 50 - 51

explain the delay in launching the review application. Thus, all that is required is a demonstration of the likelihood or chance of success when the main case is heard⁸. In this regard, it is expected of the applicants to set forth briefly and succinctly such essential information as may enable the court to assess the prospects of success⁹.

- [12] The applicants contend that they have reasonable prospects of success since Joburg Market failed to follow procedures when terminating their contracts of employment, in that they were not served with proper notices of termination. They further contended that some of them had long service, which factor was not taken into account when the contracts were terminated. It was further submitted that during arbitration proceedings, the applicants had represented themselves and were thus not familiar with contractual disputes.
- [13] Joburg Market in opposing the application contended that no submissions were made in terms of the test for review; that the applicants failed to show whether the Commissioner conducted himself in a manner by which he had either abused his powers or committed an error in the adjudication of the dispute; and that the applicants were merely disputing the reason for the dismissal and not the conduct of the Commissioner. It was further submitted that the review application is in a guise of an appeal, as the applicants were merely unhappy with the Commissioner's award, and not because the Commissioner had committed some or other irregularity or misconduct.
- [14] The submissions made on behalf of the applicants in regards to their prospects of success on the merits of the review application are sketchy and at worst, do not come close to demonstrating any likelihood that the Commissioner's arbitration award is susceptible to a review. I have further had regard to the founding affidavit in support of the review application. In less than half a page¹⁰, Makwe's contentions boil down to a summary of the evidence presented by two of the individual applicants. It was further

⁸ *Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd* 2009 30 ILJ 347 (LC) at para 27; *Seatlholo & others v Entertainment Logistics Service (A division of Gallo Africa Ltd)* (2011) 32 ILJ 2206 (LC) para 24

⁹ *Supra* fn 5 at para [34]

¹⁰ Pages 17 – 18 of Index to Pleadings/ Pages 5 -6 of 'Index and Paginations'

contended that the applicants challenge Joburg Market's decision to employ them on fixed term contracts; that the termination of the contracts when some of the applicants had longer service gave rise to an automatically unfair dismissal, and a prayer that they should be reinstated. Nowhere in the application is it indicated on what grounds contemplated under either section 145 or section 158 of the LRA is the arbitration award of the Commissioner challenged.

- [15] I have also had regard to the award of the Commissioner. In his analysis, the Commissioner had pointed out most or all of the individual applicants were employed at varying periods on fixed terms contracts between August 2014 and March 2015. The Commissioner concluded, having heard the evidence, that the applicants had 'dismally' failed to show any reasonable expectation that they would be permanently employed upon the expiry of their fixed term contracts. The Commissioner had summed up the applicants' basis of any expectation as spurious, as they knew that the contracts would come to an end in March 2015. In the Commissioner's words, the applicants had nothing more than hope that the fixed term contracts would be renewed or that they would be retained on a permanent basis.
- [16] It is only in the written heads of argument that any reference was made by the applicants to 'irregularities', and even then, it is not pointed out in what respects it was contended that the Commissioner had committed any irregularity, or why the award of the Commissioner should be deemed to be one that a reasonable decision maker could not have made.
- [17] As at the hearing of these proceedings, a supplementary affidavit or a notice in terms of Rule 7A(8)(b) of the Rules of this Court had still not been filed despite a record of proceedings having been filed. In the light of a case for a review of the Commissioner's arbitration award not having been made out on the applicants' own pleadings, it follows that there is no basis for a conclusion to be reached that they have demonstrated any prospect of success in respect of the merits of the main application.

Other considerations and conclusions:

[18] Joburg Market contends that it would suffer prejudice if condonation were to be granted because of the lengthy period it had taken for the applicants to comply with the Rules of this Court, particularly since some of its witnesses who had testified in the arbitration proceedings have since left its employ. The applicants merely alleged that they would suffer prejudice. However, no basis is laid for that contention.

[19] Having had regard to all factors to be considered in this application, it is my view that in circumstances where the delay in bringing the review application was excessive in the extreme; where the applicants further failed to correct the defect timeously when made aware of it; the grossly inadequate explanation proffered for the delay; the patently weak prospects of success, and obvious prejudice to Joburg Market, it would neither be in the interests of justice nor the interests of the effective administration of justice to grant condonation.

[20] In respect of costs, it is trite that this Court takes into account the requirements of law and fairness. Having considered the circumstances of this case and those of the individual applicants, I do not deem it appropriate to make any order as to costs.

[21] Accordingly, the following order is made;

Order:

1. The application for condonation for the late filing of the applicants' application for review is dismissed.
2. The applicants' application for a review of the arbitration award issued under case number GAJB9285/15 by the first respondent dated 13 October 2015 is dismissed.
3. There is no order as to costs.

E Tlhotlthalemaje

Judge of the Labour Court of South Africa

LABOUR COURT

APPEARANCES:

For the Applicants:

Mr JM Mthembu of UCEMISHAWU

For the Third Respondent:

Mr E Kobese of Clyde & Co

LABOUR COURT