**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

Not reportable

Case no: JR74/17

In the matter between:

**CAROLINE MADZHIE** **Applicant**

and

**GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL** **First Respondent**

**PM NGAKO *N.O*** **Second Respondent**

**DEPARTMENT OF COMMUNICATIONS** **Third Respondent**

**Heard:** **31 October 2019**

**Delivered:** **08 November 2019**

**Summary:** **Condonation application – time is of the essence in individual dismissal disputes – extensive delay ensuing from lack of funds to pay attorneys' legal fees – claim of lack of funds on its own cannot constitute reasonable explanation for the delay – the applicant has to provide more than a mere claim that the reason for the delay is lack of funds – coupled with poor prospect of success, the applicant failed to show good cause for the grant of condonation.**

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**JUDGMENT**

NKUTHA-NKONTWANA, J

Introduction

[1] In this application, the applicant seeks, firstly, an order condoning the late filing of the review application. Secondly, she seeks an order reviewing and setting aside the arbitration award issued by second respondent (arbitrator) under case number GPBC 29/2015, dated 19 September 2016. The arbitrator found that the applicant failed to prove that she was constructively dismissed.

[2] There are other two ancillary applications, one dealing with the late filing of the record and the other with the substitution of the third respondent by the National Minister of Communications. The third respondent, Department of Communications, is only opposing the condonation and review applications. I deal first with the application for condonation.

Degree of lateness and the explanation for the delay

[3] The applicant served and filed the review application 10 weeks late and the reason for the delay is attributed to lack of funds.

[4] The applicant asserts that her attorney of record received the award on 26 September 2016. On 28 September 2016, her attorney advised her that the award is bad and that she had an option of launching a review application within six weeks of the receipt of the award. Also, she was advised that a legal opinion be sought from counsel on the prospects of success.

[5] At that time, she had an outstanding account of R29 239.36 due to her attorney. Despite having negotiated a fee of R11 400. 00 for the opinion, her attorney was not prepared to take responsibility for counsel's fees. She then requested to pay counsel's fees directly into the attorney's trust account and

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settled the attorneys outstanding account of R29 239.36 before he could brief counsel. She could not afford to settle the outstanding account as she had not secured formal employment and her financial situation was dire.

[6] The applicant further asserts that after perusing the award and the fact that the arbitrator found that she had voluntarily resigned, she resolved to review that award. It was then that she tried all means necessary to source the funds to pay her attorney and counsel before the expiry of six weeks without success.

[7] It was only on 2 December 2016 that she managed to secure an amount of R29 239.36. She then negotiated with her attorney to pay the costs of counsel from the same amount and he was agreeable. Counsel was briefed and a consultation with him took place on 9 December 2016. The attorney and counsel went on December holiday on 13 December 2016. The attorney reopened on 10 January 2017 and only to discover that counsel had emailed the legal opinion on 3 January 2017. The attorney could only attend to the drafting and settling of the review application on 12, 13 and 16 January 2017.

[8] The third respondent poke holes in the explanation proffered by the applicant. Firstly, it disputes the fact that the applicant did not have funds to settle the attorney's outstanding account as she had testified during the arbitration proceedings that she was self-employed. Secondly, she failed to open up to the Court as to how she ultimately secured the funds and what was the source of her funds. Thirdly, there was no need for a legal opinion because her attorney had already opined that the award was bad in law. Finally, that the delay in launching the review application is self-created as her attorney is experienced in labour law and had been involved with the matter from the beginning. As such, he could have drafted the review application without seeking any legal opinion.

[9] In turn, the applicant tried to close the gaps identified by the third respondent in her replying affidavit. She asserts, firstly, that as a self-employed person, she earned less than what she earned when she was in the employ of the third respondent; secondly, that the funds were secured by her husband through a loan from two friends; and, lastly, she denies that her attorney is an experienced labour lawyer and could have drafted the papers without waiting for a legal opinion.

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Legal principles and application

[10] In *Steenkamp and Others v Edcon Limited,*[1] the Constitutional Court endorsed the factors that must be considered in determining whether it is in the interest of justice to grant condonation as set out in *Grootboom v National Prosecuting Authority.*[2] It was stated:

> '[36] Granting condonation must be in the interests of justice. This Court in Grootboom set out the:
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> '[T]he standard for considering an application for condonation is the interests of justice. However, the concept 'interests of justice' is so elastic that it is not capable of precise definition. As the two cases demonstrate, it includes: the nature of the relief sought; the extent and cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the importance of the issue to be raised in the intended appeal; and the prospects of success. It is crucial to reiterate that both *Brummer and Van Wyk* emphasise that the ultimate determination of what is in the interests of justice must reflect due regard to all the relevant factors but it is not necessarily limited to those mentioned above. The particular circumstances of each case will determine which of these factors are relevant.
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> It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or court's directions. Of great significance, the explanation must be reasonable enough to excuse the default.
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> 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 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

[1] 2019 (7) BCLR 826 (CC); (2019) 40 ILJ 1731 (CC).
[2] 2014 (2) SA 68 (CC); 2014 (1) BCLR 65 (CC).

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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.'

[37] All factors should therefore be taken into account when assessing whether it is in the interest of justice to grant or refuse condonation.'[3] (Emphasis added)

[11] It is also a well-accepted principle that in an application for condonation, the applicant is seeking the indulgence of the court and thus has to take the court into her confidence in providing an explanation and that is done by ensuring that all the relevant facts and circumstances relating to the delay are disclosed to the courts. In *South African Post Office Ltd v Commission for Conciliation Mediation and Arbitration and Others,*[4] also pertinently stated:

'[21] As stated earlier in cases of individual dismissal, time is of the essence and a substantial delay even where the delay is explained is not itself sufficient to obtain condonation. Another obstacle to overcome is the decisions of this Court, that state that an applicant seeking condonation cannot rely on the negligence of its legal representatives as a reason for not complying with the prescribed time periods. In *Waverly Blankets*[5] this Court went on to say that even where an attorney's neglect of his client's affairs may be inexcusable and "despite the blamelessness of the client" condonation could still be refused.'[6] (Emphasis added)

[12] Clearly, the LAC emphasised the importance of timeous action when it comes to disputes over individual dismissals and, as such, condonation will not readily be granted. Also, the delay resulting from the ineptness of legal representatives or the internal procedures of trade unions may not constitute a compelling reason for the grant of condonation even though the client or member is not culpable.[7] These labour law specific factors and considerations

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[3] The factors expounded in *Grootboom* clearly accords with the principles outlined in *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532- E.

[4] [2012] 1 BLLR 30 (LAC); (2011) 32 ILJ 2442 (LAC) at para 22.

[5] [1999] 11 (BLLR) 1143 (LAC) at 1145 I-J; see also *NUM v Council for Mineral Technology* [1999] 3 (BLLR) 209 (LAC) at para 21.

[6] *Supra* n 7 at para 21.

[7] See: *National Education, Health & Allied Workers Union and Others v Vanderbijlpark Society for the Aged* [2011] 7 BLLR 690 (LC); (2011) 32 ILJ 1959 (LC) at para 9.

are trite and have since been sanctioned by the Constitutional Court in *Steenkamp.*[8]

[13] Turning to the matter at hand, a delay of 10 weeks is not inconsequential and the explanation tendered is seriously inadequate.[9] The applicant attributes the delay to the lack of funds. In *Du Plessis v Wits Health Consortium (Pty) Ltd,*[10] this Court, as per Molahlehi J, stated the following:

> '[16] It is clear … that a claim of lack of funds on its own cannot constitute reasonable explanation for the delay. In other words, when pleading lack of funds as the cause of the delay, the applicant needs to provide more than a mere claim that the reason for the delay is lack of funds. In this respect, the applicant has to take the Court into his or her confidence in seeking its indulgence by explaining "when" not only that he or she finally raised funds to conduct the case but also how and when did he or she raise those funds. The "when" aspects of the explanation is important as it provided the Courts with the information as to whether there was any further delay after raising the funds and whether an explanation has been provided for such a delay'.

[14] The applicant's assertions in the founding affidavit lack detail in relation to when she raised the funds and the cause of further delays, if at all. In essence, the applicant failed to place before the Court exceptional circumstances that would justify granting condonation. Firstly, she was not open about the fact that she was self-employed and had some form of income. Secondly, she was not upfront about when and from whom did she secure the funds. Lastly, no explanation was proffered as to why her income was not sufficient to cover her outstanding legal bills.

[15] Mr De Bruyn, the applicant's attorney, summited that, despite being an experienced labour lawyer and had already opined that the award was reviewable, sought counsel's legal opinion because he thought his opinion was not objective given the fact that he represented the applicant during arbitration. I am not convinced that it was a prudent move since his client was

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[8] *Supra* n 4 at para 41.
[9] See the unreported matter in *Michael Mkhize v CCMA and Others* Case no. D95/2011 [2013] ZALCD (13 June 2013), where the court stated that a delay of 5 weeks to launch a review application was substantial and excessive.
[10] [2013] JOL 30060 (LC) at para 36.

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strapped for cash. Ultimately, it was Mr De Bruyn who attended to the drafting and settling of the application and not counsel.

[16] It is disquieting that despite a clear advice to the applicant by Mr De Bruyn that the referral of her matter was subject to the statutory time frame of six weeks and that no further steps would be taken until the outstanding account is settled, she did not make means to refer the matter on her own. In my view, attorneys should start advising clients to approach the Court on their own in the event that they have no funds to pay for the legal services. To the extent that the litigants have no necessary knowledge, this Court has various *pro forma* court documents (such as affidavits, statement of case, notice of motion, etc.) that are easy to complete or adapt. So far, they have been utilised by less sophisticated, unrepresented litigants with great success.

[17] Accordingly, in my view, the explanation for the delay is patently unsatisfactory. Given the significant delay and the unsatisfactory explanation, there is no need to consider the prospects of success. However, I deem it appropriate to do that for completeness sake.

<u>Prosects of success</u>

[18] The applicant was employed by the former Minister of Communications, Minister Faith Muthambi (Minister Muthambi), as her Personal Assistant with effect from 1 June 2014. She was placed at salary level 13 and earning a total package of R819 126.00 per annum plus an allowance of R5 090.00 per month. Her employment was linked to Minister Muthambi's term of office which was for five years.

[19] Before her employment with the third respondent, she had worked for the University of Venda for 30 years as a librarian. After leaving the University of Venda, she became a sales agent for a company called Capri Exclusive Homeware and also had her own company that was selling linen and homeware.

[20] She was offered employment directly by Minister Muthambi upon her appointment as the Minister of Communications. Minister Muthambi enquired from the applicant's husband as to what she was doing at that time. She then offered the applicant employment as her Private Secretary. Minister Muthambi

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assured the applicant that her lack of qualification was not an issue as she only need someone who was reliable and prayerful. She was also promised training to enable her to perform her duties.

[21] The applicant was reporting to Mr Freddy Mamuremi (Mr Mamuremi), the Chief of Staff in the office of Minister Muthambi. She only received a job description during September 2014. In October 2014, her reporting lines changed as she had to report to the newly appointed Office Manager, Dr Mochadi. The scope of her work changed henceforth. Also, on 19 November 2014, Ms Benedictor Makhubela (Ms Makhubela) was appointed and she effectively took over her work.

[22] On 20 November 2014, the applicant received a letter from Mr Mamuremi where he proposed that the applicant be relocated to a lower position as she was not coping with her work. She replied to that letter on 24 November 2014 recording her displeasure regarding the proposed demotion but was unequivocal that she was prepared to move as long as her salary scale and notch were protected. In the response to the letter dated 26 November 2014, Mr Mamuremi was resolute that her salary would be in line with the level of her responsibility in terms of the new position. He then indicated that she would be placed to level eight as a Receptionist with effect from 1 December 2014.

[23] On 9 December 2014, the applicant responded by refuting the allegation that she was incompetent and that she had misconducted herself. In essence, she rejected the offer of demotion. That very same evening, Minister Muthambi called the applicant's husband informing him that the applicant refused an instruction to be demoted from level 13 to level eight with a view to seek his intervention to convince the applicant to accept the demotion.

[24] On 10 December 2014, the applicant arranged a meeting with Mr Mamuremi to discuss the turn of events. Mr Mamuremi then informed her that Minister Muthambi instructed him to suspend the applicant because she did not accept the demotion. During the meeting, Mr Mamuremi took a call from Minister Muthambi and the applicant overheard the Minister saying to Mr Mamuremi: '*I told you to suspend that woman*'. Consequent to hearing what Minister Muthambi said, she concluded that she had no option but to resign as she

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would not have been able to fight Minister Muthambi whom she perceived to be 'irredeemably prejudiced against her'.

[25] She tendered her resignation letter wherein she states:

> 'After careful consideration of the letter date 26 November 2014, I have decided to terminate my services with the Department of Communications in the interest of the Department and my health.
>
> I will therefore terminate my services with the Department with effect from the 1st of January 2015.
>
> I wish to thank the Department of Communications for offering me a job since the 1st of June 2014. I have learnt a lot. I have come to a point where I have realised that my contribution to the Ministry has reached a ceiling.
>
> I hope my termination of service will be gladly received by the Department.'

[26] Upon receipt of the applicant's resignation letter, the third respondent advised her that in terms of the third respondent's Employment Policy, she had seven days to withdraw her resignation should she wish to do so, subject to the said withdrawal being accepted by the third respondent. She was also advised that she had to complete the exit interview questionnaire.

[27] On 19 December 2014, the applicant submitted a letter titled: 'Exit letter: Explanation of my resignation…' where she stated for the first time that she was constructively dismissed.

[28] The arbitrator clearly and properly conceived the enquiry and was on point in terms of the legal issue and the applicable pertinent *dicta* of this Court and the Labour Appeal Court (LAC) referred to in the award. It is well accepted that in order to succeed in a claim of constructive dismissal, the following three requirements that must be established:

> '(1) a termination of employment by the employee;
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> (2) intolerability of continued employment; and
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> (3) the intolerability was the fault of the employer.'[11]

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[11] See: *Solid Doors (Pty) Ltd v Commissioner Theron and Others* (2004) 25 ILJ 2337 (LAC)*; Conti Print CC v Commission for Conciliation, Mediation and Arbitration and Others [2015] 9 BLLR 865 (LAC) Strategic Liquor Services v Mvumbi NO and Others* [2009] 9 BLLR 847 (CC).

[29] In *Asara Wine Estate and Hotel (Pty) Ltd v Van Rooyen and Others,*[12] the court referred with approval to the LAC judgment in *Jordaan v CCMA*[13] where it is stated that:

> '…constructive dismissal is not for the asking. With an employment relationship, considerable levels of irritation, frustration and tension inevitably occur over a long period. None of these problems suffice to justify constructive dismissal. An employee, such as appellant, must provide evidence to justify that the relationship has indeed become so intolerable that no reasonable option, save for termination is available to her.'

[30] In the matter at hand, similarly, the applicant failed to establish that the employment relationship had become so intolerable that there was no reasonable option other than her resignation. In fact, as correctly held by the commissioner, the applicant was willing to accept a relocation to a demotive position save for the salary adjustment. The reason for her resignation is basically that she overheard Minister Muthambi telling Mr Mamuremi to suspend her. Well, if the instruction to suspend the applicant was effected, she could have availed herself to the internal grievance procedures of the third respondent. Better still, she also had a recourse in terms of the unfair labour practice machinery of the LRA.

[31] Strangely, despite the applicant's insistence that her resignation was not voluntary, she shunned the opportunity to reconsider her resignation offered by the third respondent and later by Mr Konaite, the Labour Relations Officer, who had a discussion with her after receiving her exit interview letter. Mr Konaite testified that he tried to dissuade the applicant from resigning because the issues she was raising in her exit interview letter were very serious and had never been brought to the attention of Human Resources (HR). He advised the applicant to consider following the internal procedures by lodging a grievance.

[32] Also, Mr Mantsha, the third respondent attorney of record, submitted that the applicant's claim of constructive dismissal in untenable in the light of the tone of her resignation letter and paragraph 7 of her exit interview letter where she clearly state that:

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[12] (2012) 33 ILJ 363 (LC) at para 32.
[13] [2010] 12 BLLR 1235 (LAC) 1239 B-E.

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> 'In anyway, I really enjoyed working with a lot of people I have met within the Department. I wish to thank the Minister for giving me the opportunity to serve in her office and I will be prepared to work in this Department if I am given another opportunity. I wish to thank the Chief of Staff who according to me is a very capable man. For these months I have learnt a lot from him. I am in particular impressed by the efficiency of the HR Department.'[14]

[33] It is clear from the contents of the above paragraph that Mr Mamuremi could not have bullied the applicant out of her employment as submitted by Mr De Bruyn. The applicant expressed her gratitude to Mr Mamuremi for what he had taught her learned during her employment with the third respondent. I am not convinced that there was ill feeling between the two. In fact, it was the applicant's evidence that she continued communicating with Mr Mamuremi up until her last day of employment.

[34] The applicant also conceded during her cross-examination that she was never pushed out of her office to sit on the passage. Instead, she was requested to perform the receptionist function. It was also her evidence that even after tendering her resignation, she still travelled with Minister Muthambi and Mr Mamuremi. During that time there was a discussion about giving her a position of protocol officer.[15]

[35] In my view, the arbitrator's finding that the applicant failed to prove that she was constructively dismissed is correct and accordingly unassailable.

[36] By the same token, the review application has no prospect of success.

<u>Conclusion</u>

[37] In the circumstances, the application for condonation stands to be dismissed. In the light of the dipositive nature of the finding on condonation, it is superfluous to deal with all the other issues that arose in this matter.

<u>Costs</u>

[38] Typically, this Court is slow in granting costs against the individual litigants in keeping with the dictates of law and fairness. In this instance, I am not

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[14] See: Pleadings bundle page 51 at para 7.
[15] Transcript page 455 lines 21 -25 and page 456 lines1 – 16.

convinced that the conduct of the applicant was unreasonable so as to be to saddled with costs, let alone on a punitive scale as submitted by Mr Mantsha.

[39] In the circumstances, I make the following order:

Order

1. The application for condonation is dismissed.

2. There is no order as to costs.

P Nkutha-Nkontwana

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr B De Bruyn of Deon de Bruyn Attorneys

For the Respondent: Mr LD Mantsha of Lungisa Mantsha Attorneys

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