

IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

Not Reportable

Case No: PR95/18

In the matter between:

GERSHON MASIMLA

Applicant

and

NATIONAL BARGAINING COUNCIL FOR

THE CHEMICAL INDUSTRY

First Respondent

COMMISSIONER BOTHA JD SELLO

Second Respondent

FRESENUIS - KABI (PTY) LTD

Third Respondent

Heard: 20 August 2019

Delivered: 20 December 2019

JUDGMENT

LALLIE J

- [1] The applicant was employed by the respondent until he was dismissed for misconduct on 7 February 2017. He was a member of CEPPWAWU (the trade union) which referred a dispute of unfair dismissal to the first respondent (the bargaining council) on his behalf. The dispute was referred outside the statutory 30 day period and the trade union filed an application for

condonation. The application was opposed by the third respondent. It was determined by the second respondent (the commissioner) who issued a ruling refusing condonation. In this application the applicant seeks an order reviewing and setting the condonation ruling aside. The review application was also filed late prompting the applicant to seek condonation for the delay. Both the review and condonation applications are opposed by the third respondent.

Condonation

- [2] It is trite that in exercising the discretion whether to condone the late filing of a review application the Court has to consider the extent of the delay, its explanation, prospects of success, prejudice which will be suffered by the parties as a result of granting or refusing condonation¹, interests of justice² and other facts that may be relevant to the determination of the condonation application.
- [3] The review application was filed 6 weeks late. The extent of the delay is substantial. The explanation proffered for the delay is that subsequent to his dismissal, the applicant obtained a new job in Joubertina. He feared jeopardizing his job security by absenting himself from work in order to seek assistance from the Legal Aid Office in Port Elizabeth. Another factor which contributed to the delay was that he did not receive the first letter from the Legal Aid Office which invited him to a consultation on 22 January 2018.
- [4] The third respondent attacked the reasonableness of the explanation given by the applicant on a number of grounds including the absence of the explanation for the failure by the applicant's trade union to file the review application on time. Notwithstanding the attacks, the explanation for the delay was not refuted. Each case is determined on its own merits. In the circumstances of the matter before me fear of losing a job an employee obtained shortly after his or her dismissal from another is real and reasonable.

¹ See: *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A)

² See: *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others* 2000 (2) SA 837 (CC).

The applicant should not be penalised for a delay which resulted from his reasonable efforts to protect his new job.

- [5] The applicant has made averments which will result in his review application succeeding should they be proved. He will also suffer more prejudice than the third respondent in the event of the refusal of condonation. I have taken into account that in *Van Wyk v Unitas Hospital and Another*³ the Constitutional Court expressed the view that the effects of the delay on the respondent in condonation applications should not be under-estimated. In *Grootboom v National Prosecuting Authority and Others*⁴, however, the explanation for the delay is considered to be of significance.
- [6] A consideration of all the relevant factors point to the conclusion that it is in the interests of justice that condonation be granted because the applicant has given a reasonable explanation for the delay. He has good prospects of success on review and will suffer more prejudice that the respondent should condonation be refused as he will lose the right to have his review application heard. For these reasons condonation is granted.

Review

- [7] The applicant was dismissed for sexual harassment/intimidation for wilfully spreading serious sexually explicit material via social media to co-employees about another employee, namely, his wife. The applicant's main grounds for review are that the commissioner's decision refusing his condonation application is unreasonable. It resulted from the commissioner's gross irregularities which include drawing conclusions which are disconnected from evidence and misconstruing the nature of the enquiry he had to conduct. The applicant also attacked the ruling based on the commissioner's failure to consider his replying affidavit. The applicant further submitted that the commissioner failed to consider the prejudice he stood to suffer as a result of the refusal of condonation. He assessed prospects of success and the

³ 2008 (2) SA 472 (CC).

⁴ *Grootboom v National Prosecution Authority* [2014] 1 BLLR 1 (CC).

explanation for the delay incorrectly. He erred in refusing condonation having accepted that he did not abandon the matter and that he always wanted to pursue it.

[8] The third respondent argued, correctly, that as the applicant seeks an order reviewing and setting aside a condonation ruling the correct test is whether the commissioner's decision falls within bounds of reasonableness⁵. The reasonableness of an award is determined on the totality of the evidentiary material which was presented at arbitration⁶. The applicant attempted to rely on facts which were not part of the arbitration proceedings. That approach is impermissible.

[9] The applicant sought to rely on gross irregularities made by the commissioner. The third respondent argued, correctly so, that the correct test is as enunciated in *SA Library for the Blind v CCMA and Others*⁷:

‘to succeed with a review on the basis of flaws in the reasoning of an arbitrator, the applicant must demonstrate not only that flaws existed but that the outcome of the arbitration would necessarily have been altered if those flaws did not exist.’

[10] The commissioner was required, in terms of section 138 (7) of the Labour Relations Act⁸ (the LRA), to give brief reasons for his decision. An assessment of the totality of the evidentiary material placed before the commissioner as well as a reading of the ruling under review reflects that the commissioner fulfilled his obligations in terms of section 138 (7) of the LRA. The commissioner applied the correct test for condonation. It is common cause that the extent of the delay was 89 days. The commissioner cannot be faulted for finding it inordinate. The commissioner considered prospects of success and found none on the basis that the applicant admitted to have sent the ‘unsavoury’ material of his wife to his fellow employees.

⁵ *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 28 ILJ 2405 (CC).

⁶ *Herholdt v Nedbank* [2013] 11 BLLR 1074 (SCA).

⁷ (2019) 40 ILJ 422 (LC) at para 22

⁸ Act 66 of 1995, as amended.

[11] The commissioner rejected the explanation proffered for the delay. The only inference that can be drawn from his putting the word 'mistakenly' in the explanation for the delay in parenthesis is that he rejected the allegation that the conduct constituted a mistake. He further expressed a dim view of the applicant's failure to provide proof that he pursued the matter during the intervening period from April to October 2014. The commissioner therefore found the applicant's failure to take steps to pursue his case after it had been referred by his trade union unacceptable. He did not make a finding that the explanation for the delay was reasonable in accepting that the applicant did not abandon the matter. A wish to pursue a dispute on its own does not constitute valid grounds to grant condonation.

[12] The applicant did not establish that the decision reached by the commissioner is disconnected from the evidentiary material before him. The totality of the record supports the third respondent's version instead as it proves that the decision is based on the evidentiary material presented. The applicant failed to prove that the commissioner committed irregularities which resulted in him reaching an unreasonable decision. The commissioner's decision not to condone the excessive delay for which no reasonable explanation has been given is reasonable. His omission to deal with prejudice in his ruling did not render his decision unreasonable because the prejudice the applicant sought to rely on, namely, that his name would be viewed in a negative light by the society falls outside the realm of the prejudice the commissioner had to consider in reaching his decision.

[13] In the premises the following order is made:

Order:

1. The application for condonation of the late filing of the review application is granted.
2. The review application is dismissed.

Z. Lallie

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Ms Van Staden of the Justice Centre

For the Respondent: Advocate Grogan

Instructed by: Joubert Galpin Searle