

IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH**Not Reportable****CASE NO: PR196/18****In the matter between:****THE STANDARD BANK OF SOUTH AFRICA LIMITED****Applicant**

and

EDWIN JULYAN**First Respondent****THE COMMISSION FOR CONCILIATION****MEDIATION AND ARBITRATION****Second Respondent****COMMISSIONER F SAULS N.O****Third Respondent****Heard: 22 August 2019****Delivered: 20 December 2019**

JUDGMENT

LALLIE J

- [1] The first respondent was employed by the applicant as a Business Banking Account Executive. He resigned on 8 September 2014 after 30 years of service. The reasons for his resignation were ill-health and his desire to spend

time with his family. On 31 July 2018 he referred a dispute to the CCMA and filed an application for condonation of the late referral of his dispute. The condonation application was determined by the third respondent (the commissioner) who issued a ruling on 6 September 2018 condoning the late referral of the dispute. In this application the applicant seeks an order to have the condonation ruling reviewed and set aside. The application is opposed by the first respondent.

- [2] The applicant's main ground for review is that the commissioner committed gross irregularities in the conduct of the arbitration which resulted in his reaching an unreasonable decision. Notwithstanding opposition by the first respondent, the applicant established the validity of its grounds for review. A ruling may be reviewed and set aside when it is unreasonable in that it constitutes a decision a reasonable decision-maker could not reach¹.
- [3] The applicant relied on errors made by the commissioner in the conduct of the arbitration. The test for the review therefore is firstly, whether the commissioner misconceived the dispute by undertaking the wrong enquiry or by undertaking the correct enquiry incorrectly. Secondly, whether the commissioner reached an unreasonable decision².
- [4] The applicant illustrated that the commissioner misconceived the enquiry he had to undertake and reached an unreasonable decision. The commissioner conducted the correct enquiry in that he identified the test he had to apply in deciding whether the late referral of the first respondent's dispute should be condoned but applied it incorrectly. The commissioner identified the relevant factors for the test for condonation which include the extent of the delay, its explanation, prospects of success, prejudice to the parties in the event of condonation being granted or refused and the interest of justice. It is trite that the factors should be considered collectively and balanced against each other. Absence of a valid reason and prospects of success are, however, sufficient for refusing condonation.

¹ *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 28 ILJ 2405 (CC).

² *Herholdt v Nedbank* (2019) 40 ILJ 422 (LC)

[5] The extent of the delay is 3 years and nine months. It is common cause that the explanation proffered by the first respondent did not cover the entire period of lateness. The explanation given by the first respondent was that he had referred his matter to various government and legal institutions to establish whether the correct procedures had been followed in his case. The institutions include SARS, SA Treasury, Office of the Tax Ombud, the Public Protector, International Labour Organisation, World Health Organisation, the Commissioner for Conciliation, Mediation and Arbitration, Legal Aid SA and the Department of Labour.

[6] The result he required from the CCMA is recorded as follows:

- '1. Re-assess the matter and ensure that I receive the benefits that I lost which includes:
 - Compensation Fund
 - Unemployment Insurance Fund
 - Medical Aid portion of pension fund.
 - Reverse the tax implication of pension fund.
 - Medical Aid.
 - Loss of income from leaving the bank until normal retirement age.
2. Seeing that I still have a number of years that I can work I shall even consider taking a job, that does not require travelling, at the salary previously earned if it is close by.
 Change the reason from "Resignation" to "Incapacity/III-Health" enabling me to claim UIF that I was entitled to.
 Payment of Medical Aid portion of pension Fund.
 Reversed tax paid on pension fund.'

[7] The applicant correctly argued that the first respondent made the first enquiries about the manner in which the employment relationship was terminated on 16 October 2015, over a year after his resignation. The commissioner erred in not attaching the appropriate weight to the first respondent's omission to provide an explanation for the period. It will be illustrated later in this judgment that the error had an impact on the reasonableness of the commissioner's decision.

[8] I accept the applicant's argument that the commissioner erred in granting condonation in the absence of prospects of success. The first respondent resigned. A dispute he can refer to the CCMA against the applicant which arises from the resignation is constructive dismissal as envisaged in section 186 (1)(e) read with section 191 of the Labour Relations Act³. Section 186 (1)(e) defines as dismissal the employee's conduct of resigning from work because the employer made continued employment intolerable. The reasons the first respondent gave the applicant for his resignation are ill-health and his desire to spend time with his family. He did not complain about the applicant's conduct. The result the first respondent seeks from the CCMA falls outside the realm of its jurisdiction. He made no submissions in respect of prospects of success relating to re-employment. The commissioner's error of granting condonation is the absence of a reasonable explanation and prospects of success rendered his condonation ruling unreasonable.

[9] The applicant sought an order substituting the condonation ruling. For the reasons already given, the delay of three years and nine months most of which has not been explained and the lack of prospects of success point to the conclusion that it is in the interest of justice that the first respondent's delay in referring the dispute to CCMA not be condoned.

[10] In the premises, the following order is made:

Order:

1. The condonation ruling issued by the third respondent under case number ECPE5251-16 dated 6 September 2018 is reviewed and set aside and substituted with the following:

- 1.1 The application for condonation of the first respondent's late referral of the dispute to the second respondent is dismissed.

³ Act 66 of 1995 as amended

Z. Lallie

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr Cithi of Mervyn Taback Inc

For the Respondent: Mr E Julyan In person

LABOUR COURT