



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JR1982/24

In the matter between:

KENNY JOHNSON SEUNANE

Applicant

and

SOUTH AFRICAN POLICE SERVICE

First Respondent

COMMISSIONER ZINZISWA GUMEDE N.O

Second Respondent

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

Third Respondent

Heard: 28 January 2025

Delivered: 5 March 2025

JUDGMENT

TSHISEVHE, AJ

Introduction

[1] The Applicant seeks to review and set aside a jurisdictional ruling issued by the Second Respondent on 24 August 2024, under case number PSSS803-22/23. The application is unopposed.

[2] In the ruling, the Commissioner refused an application for condonation due to the Applicant's failure to explain the degree of lateness (200 days late filing) and lack of prospects of success therein.

[3] Dissatisfied with the arbitrator's decision, the first respondent launched a review application against the ruling. He contended that the Second Respondent committed gross irregularities in the conduct of the arbitration proceedings.

[4] In the main, this court is called upon to decide whether the decision of the Second Respondent in refusing the Applicant's condonation for late referral of his dismissal dispute was wrong, and if so, I ought to correct such finding, otherwise, the application stands to fail.

Background

[5] The Applicant stated in his founding affidavit that he was employed as a police Constable since 2013 attached to Yeoville Police Station, Gauteng Province.

[6] The Applicant was charged with misconduct viz.

"Charge 1 : Regulation 5 (3) (t) [conducts himself or herself in an improper, disgraceful and unacceptable manner] of the SAPS Regulations 2016, in that on 2021-05-21 at Yeoville SAPS you demanded and received +- R800.00 cash and also received +-R950 sent to you through e-wallet from the complainant by the name of John Masamba in exchange of you releasing his children from custody. You pay back the money after the complainant requested the CAS number and you informed him that the case was not registered. Such conduct is unacceptable and dishonest.

Charge 2: Regulation 5 (3) (u) [contravenes any prescribed Code of Conduct of the Service or the Public Service, whichever may be applicable to him/her]

of the SAPS Regulations 2016, in that on or around 2021-05-21 at Yeoville SAPS you make an oath that you are going to uphold the Constitution and the law but you did the opposite when you committed the act of corruption.”

[7] Aggrieved by the dismissal, on 8 December 2022, the Applicant referred the matter to the Safety and Security Sectoral Bargaining Council (SSSBC) 200 days out of time (before its accreditation was suspended) with the Second Respondent as a Commissioner, challenging the fairness of his dismissal.

[8] Due to the late referral, the Applicant also attached an application for condonation in terms of section 191 (2) of the Labour Relations Act¹ (LRA). The matter was scheduled for a condonation hearing on 22 August 2023 and was dealt with on papers.

[9] The Second Respondent refused an application for condonation indicating that there is no sufficient explanation for the delay as well as lack of prospects of success.

The test for jurisdictional review

[10] It is trite that the dispute to be resolved determines the test to be applied. As a result, in a review for a jurisdictional dispute, the correctness test must be applied instead of the ‘reasonableness test’ which applies in review applications.

[11] The Labour Appeal Court (LAC) in the matter of *SA Rugby Players Association and others v SA Rugby (Pty) Ltd and others*,² held that:

‘The CCMA is a creature of statute and is not a court of law. As a general rule, it cannot decide its own jurisdiction. It can only make a ruling for convenience. Whether it has jurisdiction or not in a particular matter is a matter to be decided by the Labour Court ...’

¹ No. 66 of 1995, as amended.

² (2008) 29 ILJ 2218 (LAC) at para 40.

[12] In the case of *Jonsson Uniform Solutions (Pty) Ltd v Brown and others*,³ the court said the following:

‘[33] The generally accepted view is that we have a bifurcated review standard viz reasonableness and correctness.” The test for reasonableness of a decision was stated in *Sidumo and another v Rustenburg Platinum Mines Ltd* and others as follows: “Is the decision reached by the commissioner one that a reasonable decision maker could not reach”.

‘[34] In assessing whether the CCMA or Bargaining Council had jurisdiction to adjudicate a dispute, the correctness test should be applied. The court of review will analyse an objective fact to determine whether the CCMA or bargaining council had the necessary jurisdiction to entertain the dispute.’

[13] Therefore, when reviewing a condonation ruling, the test is whether the Commissioner was right or wrong in their application of the test for condonation.

Commissioner’s condonation application ruling

[14] The facts are recorded in the papers and there is no need to burden this judgment with a repetition of the factual background. The Applicant’s application for condonation before the Second Respondent was in the main as follows:

Explanation for the delay

[15] It is sufficient to record that the Applicant was dismissed on 22 April 2022 and referred the matter to SSSBC on 8 December 2022, a period of some 200 days or eight months late.

[16] The applicant submits that he was discharged from the Traditional Healer’s compound on 28 November 2022 and it is only then that he referred the dispute to SSSBC on 8 December 2022.

³ (DA10/2012) [2014] ZALCJHB 32 (13 February 2014) at paras 33 and 34.

[17] However, the Second Respondent found that the sick note provided indicates that the Applicant visited the Traditional Healer on 27 April 2022 and not 23 April 2022 as the Applicant alleged.

[18] On the other hand, the sick note is dated 28 November 2022, and it makes no mention of the Applicant being admitted for treatment from 23 April to 28 November 2022 or for any period for that matter.

[19] In addition to the above, the Applicant was required to demonstrate prospects of success in the main application.

Prospects of success

[20] The Applicant contended that he has a good prospect of success because he did not commit the alleged misconduct as outlined in the charges above.

[21] However, his defence is just a bare denial even though the employer alleged that he committed dishonest conduct and corruption where money was given to him in cash and through e-wallet (cardless banking system).

[22] He never tried to explain or provide details of his defence, but just stated that the money paid to him was not a bribe hence he returned it and if it was a bribe he was not going to return it. He failed to state what the money sent to him through e-wallet was meant for, let alone to denying any knowledge of the complainant.

Prejudice

[23] The Applicant contends that the late referral will not cause any prejudice to the First Respondent.

[24] Whilst it might be correct that the Applicant stands to suffer more prejudice should an applicant for condonation fail to satisfy all the requirements for condonation such application stands to fail.

Analysis of review application

[25] The Applicant took issue with the fact that the Commissioner refused his condonation application. However, he failed to provide any explanation for the period of delay which is extra ordinarily excessive.

[26] In explaining the delay, as considered by the Commissioner, the Applicant had in his affidavit, stated that he was admitted by the Traditional Healer but failed to explain before the Second Respondent the anomaly on the sick note. There was no confirmatory affidavit from the Traditional Healer attached to confirm that he was admitted.

[27] The Applicant's legal representative attempted to provide an explanation from the bar, which I do not accept, where he tried to apportion blame on the Traditional Healer's lack of formal education.

[28] An application for condonation is always equated to seeking an indulgence for non-compliance within stipulated time frames. Whilst it is accepted that condonation is not there for the taking, in the end, its consideration involves the exercise of a wide discretion.

[29] One of the purposes of the LRA is speedy resolution of disputes. Therefore, when a party is dilatory in instituting or referring a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) they are sort of defeating the purpose of the LRA, which in the end frustrates the opponent in the matter.

[30] To enable the Commissioner or the Court for that matter to properly exercise a discretion, a party seeking condonation must set out all the facts and circumstances relating to the delay, and most importantly, must provide a satisfactory explanation and account for each period of the delay. Any period of delay that is unaccounted for, may result in an indulgence being refused.

[31] In exercising a discretion, a Commissioner should take into account all the relevant factors, and in particular, the well-established legal principles set out in

Melane v Santam Insurance Co. Ltd (Melane).⁴ The approach which the Labour Court and the Labour Appeal Court have followed in determining whether good cause has been shown is often referred to the passage enunciated by Holmes JA in *Melane*:

‘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, is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefore, the prospects of success, and the importance of the case. Ordinarily these facts are inter-related; they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion...’

[32] In applying the *ratio* in *Melane*, the Court in *Academic and Professional Staff Association v Pretorius SC NO and Others*,⁵ summarised the principles for consideration as follows:

“The factors which the court takes into consideration in assessing whether or not to grant condonation are: (a) the degree of lateness or non-compliance with the prescribed time frame; (b) the explanation for the lateness or the failure to comply with time frame; (c) prospects of success or *bona fide* defence in the main case; (d) the importance of the case; (e) the respondent's interest in the finality of the judgment; (f) the convenience of the court; and (g) avoidance of unnecessary delay in the administration of justice... It is trite law that these factors are not individually decisive but are interrelated and must be weighed against each other. In weighing these factors for instance, a good explanation for the lateness may assist the applicant in compensating for weak prospects of success. Similarly, strong prospects of success may compensate the inadequate explanation and long delay.”⁶

[33] In this Court, the principles have long been qualified by the rule that where there is an inordinate delay that is not satisfactorily explained, the applicant's prospects of success are immaterial.

⁴ 1962 (4) SA 532 (A) at 532 E.

⁵ (2008) 29 ILJ 318 (LC).

⁶ See also: *Minister of Public works and infrastructure v GPSSBC and others* [2024] JOL 65513 (LC).

[34] In the matter in *casu*, the Applicant through his legal representative argued that the Second Respondent on 23 April 2022, after his dismissal, became seriously ill that he could not even speak. His traditional healer admitted him while he was also treating him.

[35] The Applicant's legal representative submitted that the Applicant could not explain the anomaly on papers simply because the application was not opposed, a reason that I found meritless as the reasons for the delay were supposed to have been made before the Second Respondent. However, it should be noted that this Court is only limited to issues canvassed by the Applicant during the condonation application. It will be irregular for this Court to entertain new submissions which were not presented before the Commissioner.

[36] In *Foster v Stewart Scott Inc.*,⁷ his Lordship Mr Justice Frowman (as he then was) stated that:

'It is well settled that in considering applications for condonation the court has a discretion, to be exercised judicially upon a consideration of all the facts. Relevant considerations may include the degree of non-compliance with the rules, the explanation therefor, the prospects of success on appeal, the importance of a case, the Respondent's interest in the finality of the judgment, the convenience of the court, and the avoidance of unnecessary delay in the administration of justice, but the list is not exhaustive. These factors are not individually decisive, but are inter-related and must be weighed one against the other. A slight delay and good explanation for the delay may help to compensate for prospects of success which are not strong. Conversely, very good prospects of success on appeal may compensate for an otherwise perhaps inadequate explanation and long delay.'

[37] In *Colett v Commission for Conciliation, Mediation and Arbitration*⁸ the LAC confirmed that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial and without good prospects of success, no

⁷ (1997) 18 ILJ 367 (LAC) p. 369 B.

⁸ (2014) 35 ILJ 1948 (LAC).

matter how good the explanation for the delay, an application for condonation should be refused. The onus is on the Applicant to satisfy the Court that condonation should be granted.

[38] Obviously, without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused. In this regard, in *NUM v Council for Mineral Technology*,⁹ the Court held as follows:

‘The approach is that the court has a discretion, to be exercised judicially upon a consideration of all facts, and in essence, it is a matter of fairness to both parties. Among the facts usually relevant are the degrees of lateness, the explanation therefore, the prospects of success and the importance of the case. These facts are interrelated; they are not individually decisive. What is needed is an objective conspectus of all the facts. A slight delay and a good explanation may help to compensate for prospects of success which are not strong. The importance of the issue and strong prospects of success may tend to compensate for a long delay. There is a further principle which is applied and that is that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused’

[39] Once again, in order for this Court to make a determination whether the Second Respondent’s decision in refusing the application for condonation was wrong, the applicant must highlight all reviewable conduct committed by the Second Respondent, otherwise, there will be no reason for this Court to interfere with the decision of the Second Respondent.

[40] The applicant for condonation must therefore provide a satisfactory explanation for each period of delay. The Court in the case of *NUMSA and another v*

⁹ [1999] 3 BLLR 209 (LAC) at para 10.

Hillside Aluminium,¹⁰ where Murphy AJ held that an unsatisfactory explanation for any period of delay will normally be fatal to an application, irrespective of the applicant's prospects of success.

[41] On the other hand, the Applicant's founding affidavit does not point to any reviewable conduct committed by the Second Respondent with regard to his finding on the sick note, which sick note is his main explanation for the delay.

Is it in the interest of justice to grant condonation?

[42] The Constitutional Court pointed out in *Brummer v Gorril Brothers Investments (Pty) Ltd and others*,¹¹ that an application for condonation should be granted if it is in the interest of justice and refused if it is not. The Constitutional Court went on to say that the interests of justice must be determined by reference to all relevant factors outlined in *Melane supra*¹², including the nature of the relief sought, the nature and cause of any other defect in respect of which condonation is sought, and the effect of the delay on the administration of justice.

Condonation is not there merely for the asking

[43] Significant with a determination of such applications is that condonation cannot be had merely for the asking, and a party is required to make out a case entitling it to the court's indulgence by showing sufficient cause, and giving a full, detailed and accurate account of the causes of the delay. In the end, the explanation must be reasonable enough to excuse the default.

[44] I cannot fault the Second Respondent's ruling. The explanation provided is not sufficient at all, more especially in that, the period of delay is unreasonably long.

¹⁰ [2005] 6 BLLR 601 (LC).

¹¹ 2000 (2) SA 837 (CC).

¹² Id fn 4.

[45] In the case of *Chetty v Law Society, Transvaal*,¹³ the Court held that a *bona fide* defence and good prospects of success are not sufficient in the absence of a reasonable explanation of the delay. This principle has been interpreted *NUM v Council for Mineral Technology*¹⁴ as follows:

‘There is a further principle which is applied and that is that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused.’

[46] In *Queenstown Fuel Distributors CC v Labuschagne N.O and others*,¹⁵ it was held that:

‘Condonation in the case of disputes over individual dismissals will not readily be granted. The excuse for non-compliance will have to be compelling, the case for attacking the defect in the proceedings would have to be cogent and the defect would have to be of a kind which will result in a miscarriage of justice if it were allowed to stand.’

[47] As indicated by the Second Respondent, despite his failure to explain the delay, I am also equally not convinced that the Applicant has any prospects of success on merits.

[48] It is therefore my considered view that the Second Respondent’s decision in refusing condonation was correct in that the degree of lateness is excessive and not explaining the delay is fatal to the application.

[49] If one has regard to the nature of the relief sought and the effect of the delay on the administration of justice, which is unreasonable in the context of unreasonably delaying a referral of the dispute to the SSSBC, it can easily be said that the granting of condonation is not in the interest of justice.

¹³ 1985 (2) SA 756 (A) at 765.

¹⁴ *Id* fn 9 at para 10.

¹⁵ [2000] 1 BLLR 45 (LAC) at para 24.

Conclusion

[50] In all the circumstances, I am not convinced that the Applicant has made out a case that the Second Respondent's ruling should be reviewed and set aside. I therefore agree with the Second Respondent that the CCMA lacks jurisdiction to arbitrate a dismissal dispute where the Applicant failed to explain the reason for delay and/or where there are no prospects of success.

[51] Pursuant to the above, it is therefore clear that the Commissioner was right in his application of the test for condonation.

[52] In the premise, the following order is made:

Order

1. The application to review and set aside the Second Respondent's jurisdictional ruling is dismissed
2. There is no order as to costs.

N Tshisevhe
Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr MV Sehunane of Sehunane Inc Attorneys

For the Respondent: No Appearance