

SOUTH AFRICA / JUDGMENT

Borotho v Commission For Conciliation, Mediation and Arbitration and Others (JR 539/13) [2014] ZALCJHB 250 (10 July 2014)

[2014] ZALCJHB 250**COURT**

Labour Court Johannesburg

BEFORE

Seedat

CASE / FILE NUMBER

JR 539/13

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REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case No JR 539/13

In the matter between:

NALEDI BOROTHO.....Applicant

and

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION.....First Respondent

MATJI, KHOMOTJO DANIEL.....Second Respondent

ROYALSERVE CLEANING (PTY) LTD.....Third Respondent

Heard: 8 July 2014

Delivered: 10 July 2014

Summary: Condonation for the late referral of a review application. The delay was excessive and the applicant did not give a satisfactory

application for the delay. Application for condonation refused.

SEEDAT AJ

Introduction

- [1] The applicant seeks condonation for the filing of the notice of motion and the statement of claim in support of his review application outside the statutorily prescribed period.
- [2] Though it would have been convenient and practical to hear the condonation application in tandem with the review application, it was agreed that because the record of the arbitration proceedings was incomplete, I should only consider the application for condonation.
- [3] The applicant, a senior manager, was dismissed by the third respondent for operational reasons on 13 May 2011.
- [4] The applicant challenged the dismissal as both being without a fair reason and procedurally defective.
- [5] In an award dated 13 December 2011, the second respondent (the commissioner) concluded that applicant did not have an employment

relationship with the third respondent and accordingly, the first respondent lacked jurisdiction.

- [6] On 21 December 2011, the applicant filed a claim 'based on the same cause of action as that which served before the arbitration

proceedings'[1] with the Labour Court (the first case).

- [7] The Labour Court dismissed the matter on 23 January 2013.[2]

- [8] The applicant only then lodged an application to review the commissioner's award on 27 March 2013.

The condonation application

- [9] On the applicant's own version, the application to review the commissioner's award was 419 days outside of the six weeks prescribed in s 145(1)(a) of the Labour Relations Act, 66 of 1995 (LRA).
- [10] Effectively, the reason for this delay is attributed by the applicant to lack of legal representation.
- [11] This court and the appeal court have restated the broad principles for the determination of condonation as enunciated in *Melane v Santam Insurance Co Ltd*[3]. These principles include the degree of delay, the reasons for the delay, the prospects of success, and the prejudice the parties will suffer if condonation is granted or refused.
- [12] The Constitutional Court in *Mohlomi v Minister of Defence*[4] said:

‘Rules that limit the time during which litigation may be launched are common in our legal system as well as many others. Inordinate delays in litigating damage the interests of justice... such rules prevent procrastination and those harmful consequences of it. They thus serve a purpose to which no exception in principle can cogently be taken.’

[13] Bosielo AJ sitting in the Constitutional Court in *Grootboom v National Prosecuting Authority & another*[5] remarked:

‘I need to remind practitioners and litigants that the rules and courts’ directions serve as a necessary purpose. Their primary aim is to ensure that the business of our courts is run effectively and efficiently. Invariably this will lead to the orderly management of our courts’ rolls, which in turn will bring about the expeditious disposal of cases in the most cost effective manner.’[6]

The learned justice said that ‘[n]on-compliance [with rules of court or directions] has bedevilled our courts at various levels for a long time’[7] and that it ‘is axiomatic that condoning a party’s non-compliance with the rules of court or directions is an indulgence. The court seised with the matter has a discretion whether to grant condonation’[8] on the ‘facts of that particular case’.[9] He continued:

‘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 the court’s directions. Of great significance, the explanation must be reasonable enough to excuse the

default.’[10]

[14] The granting of condonation is the exercise of a discretion by a court.[11]

[15] Molahlehi J in *Sishuba v National Commissioner of the SA Police Service*[12] noted:

‘The issue of delays in prosecuting disputes in the Labour Court has become an issue of concern and judges have expressed their concern at a trend that seems to have emerged in this regard. The trend seems to be developing into a practice or a norm in cases involving reviews of arbitration awards.’

[16] Conradie JA in *Queenstown Fuel Distributors CC v Labuschagne NO & others*[13] wrote:

‘...condonation in the case of disputes of individual dismissals will not be readily granted. The excuse for non-compliance will have to be compelling, the case for the defect would have to be the kind which will result in a miscarriage of justice if it were allowed to stand’.[14]

[17] Waglay DJP (as he then was) remarked in *SA Post Office Ltd v Commission for Conciliation, Mediation & Arbitration & others*: [15]

‘Where the matter deals with an individual dismissal, this court must be cautious before exercising a discretion in favour of the indulgence sought, because there is an imperative placed upon the speedy and expeditious resolution of such disputes.’

The period of delay

[18] The application for review was made 419 days outside of the statutorily prescribed period. The delay is excessive.

[19] Kennedy AJ in *Mothibel v Western Vaal Metropolitan Substructure*[16] remarked that ‘substantial delay itself may undermine’[17] the ‘fair and meaningful resolution of labour disputes’.[18] The court was not ‘impressed’ with the applicant’s claim of lack of financial resources and the fact that he had initially referred the dispute to another tribunal.[19]

The reasons for the delay

[20] The applicant asserts that the contributing factor to the delay in referring a review application was ‘his limited understanding

of the legal procedures required to deal with matters involving complex jurisdictional issues as I had no legal assistance when I filed the referral application’.

[21] Though the applicant may not have legal qualifications, his knowledge of the labour laws is profound and he has shown impressive skills in drafting the various processes including heads of argument.

[22] In fact, in his answering affidavit in the first case, the applicant submits that ‘this Honourable Court has jurisdiction to review and set aside the decision of the Honourable Commissioner K.D.Matji dated 13 December 2011’[20] and prays for the award to ‘be reviewed and set aside’. The applicant was certainly aware of the correct procedure but chose to embark on another cause of action.

[23] He gives no reasons as to why he did not instruct attorneys when he elected to launch a dispute to this court in the first case. He does mention his ‘ill-health and lack of financial resources’. He did however, instruct attorneys on 3 March 2012 while the first case was pending in the Labour Court. Indeed, counsel appeared on his behalf when that matter was first called in this court.[21]

[24] He also cites the delay in the finalisation of the first case as a further reason for not acting timeously and that ‘he was not aware that the review application could be launched concurrently with the other cases’. But, he was alive to the need to review the commissioner’s award.[22] And, in that period, he had legal representation though there is the insinuation that he did not have ‘proper legal advice’

which perhaps implies negligence on the part of attorneys.

[25] It is established law that a party cannot escape the negligence of his representative.[23]

- [26] In SA Post Office[24] the learned judge confirmed that in an application for condonation, a party cannot use the negligence of its legal representative as a reason for failing to adhere to the statutory time period.
- [27] Thus, the applicant cannot even rely on the tardiness of his representatives to justify the delay.
- [28] The explanation for the delay is neither acceptable nor plausible. The applicant has shown himself to be a man proficient in the workings of the labour laws, adept at drafting notices of motion and supporting affidavits and heads of arguments. Even though aware of the review process, the applicant elected to embark on an incorrect procedure immediately after receiving the commissioner's award.
- [29] The applicant has not given a satisfactory explanation for the late filing of his statement of claim that would justify the court exercising its judicial discretion in his favour.[25] This should be enough to refuse the application for condonation.[26]

ORDER

1. The application for condonation is dismissed.
2. There is no order as to costs.

Seedat AJ

Acting Judge of the Labour Court of South Africa

Appearances

Applicant: N. Maharaj

Respondent: Mark Thompson

[1]

Judgment

of the Labour Court case no JS 1138/11 dated 23 January 2013 para 11

- [2] From the judgment it appears that the court only concerned itself with an application by the third respondent to make the arbitration award an order of the Labour Court and the application by the applicant to join a party to the proceedings, both of which applications were dismissed.

[3] 1962

(4) SA 531 (A)

[4]

[1996] ZACC 20; 1997

(1) SA 124 (CC) at para 11

[5] (2014) 35 ILJ 121 (CC); see eThekweni Municipality v Ingonyama Trust 2013

(5) BCLR 497 (CC)

[6] At para 32

[7] Para 21

[8] Para 20

[9] Para 35

[10] Para 23

[11] Grootboom v National Prosecuting Authority & another (2014) 35 ILJ 121 (CC) at para 20; A Hardrodt (SA) (Pty) Ltd v Behardien & others (2002) 23 ILJ 1229 (LAC) at para 5

[12] (2007) 28 ILJ 2073 (LC) para 8

[13] (2000) 21 ILJ 166 (LAC) para 24

[14] see Moroka v National Bargaining Council for the Chemical Industry & others (2011) 32 ILJ 667 (LC)

[15] (2011) 32 ILJ 2442 (LAC) para 20

[16] [2000] 1 BLLR 85 (LC)

[17] Para 7

[18] Para 5

[19] Para 11

[20] Para 7.9 on page 362 of the bundle.

[21] The attorneys withdrew as his representatives shortly after this.

[22] See para 18 above.

[23] Saloojee v Minister of Community Development 1964

(2) SA 135 (AD); Xayiya v African National Congress [2000] 4 BLLR 477 (LC); First National Bank v CCMA [2000] 12 BLLR 1429 (LC); A Hardrodt (SA) (Pty) Ltd v Behardien (2002) 23 ILJ 1229 (LAC); Superb Meat Supplies CC v Maritz (2004) 25 ILJ 96 (LAC); GIWUSA obo Hyeneke v Klein Karoo Korporasie Bpk

(2005) 26 ILJ 1083 (LC)

[24] Supra note 7 para 21

[25] Balmer & others v Reddam (Bedfordview) (Pty) Ltd (2011) 32 ILJ 2121 (LC) para 13

[26] SA Post Office supra note 7 para 22

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