

SOUTH AFRICA / JUDGMENT

CWU obo Lekota v Telkom SA SOC Ltd (JS214/21) [2021] ZALCJHB 413 (25 October 2021) [2021] ZALCJHB 413

COURT

Labour Court Johannesburg

BEFORE

F. Coetzee

CASE / FILE NUMBER

JS214/21

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IN

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

Reportable

Not

of interest to other judges

Case

no: JS 214-21

In

the matter between:

CWU

obo THABO

LEKOTA Applicant

and

TELKOM SA SOC

LTD Respondent

Heard: 22

October 2021

Delivered: This

judgment was handed down electronically by circulation to the parties' representatives by email and release to SAFLII.

The

date and time for hand-down is deemed to be 10h00 on 25 October 2021.

Summary:

Condonation

JUDGMENT**COETZEE AJ**

- [1] The applicant seeks condonation for the late referral of his dispute to the Labour Court. While CWU ostensibly brings the matter to Court on behalf of the individual, the individual is cited as the only applicant, and he is referred to as such in this judgment.
- [2] The respondent raised a point in limine that the application for condonation is fatally defective as it is not accompanied by a notice of motion.
- [3] The applicant complied materially with the rules and the respondent has filed an opposing affidavit and has not raised any prejudice caused thereby.
- [4] The point in limine is dismissed.
- [5] The applicant was disciplined for failing to carry out a reasonable instruction and sanctioned with a final written warning and unpaid suspension for 10 days.
- [6] The applicant referred a dispute to the CCMA for an alleged unfair labour practice and the dispute was arbitrated and on 7 August 2020. The commissioner held that the respondent did not commit an unfair labour practice. That award now is the subject of a review application ("the review").
- [7] The applicant thereafter referred a dispute in terms of section 4 and 5 of the Labour Relations Act, 66 of 1995 ("the LRA") which is the current dispute that was unsuccessfully conciliated on 29 May 2020.

Degree of lateness

- [8] The delay is 184 days.

The explanation

- [9] The first delay has been caused by the wording of the Certificate of Non-resolution of 29 May 2020 that stated that the nature of the dispute was unfair discrimination that should be referred for arbitration.
- [10] The applicant referred the dispute for arbitration on 24 August 2020.
- [11] According to the applicant, before the arbitration on 14 October 2020 the Commissioner issued a jurisdictional ruling that the nature of the dispute was victimisation, and the CCMA could not adjudicate the dispute.
- [12] The respondent explained that the Commissioner noticed that the applicant made an allegation in the referral that he was victimised. The applicant agreed and on that basis the arbitration did not proceed.

- [13] The applicant said he only received the jurisdictional ruling on 11 December 2020 and the time period should be calculated from 11 December 2020.
- [14] The respondent denied this. According to the respondent the Commissioner on 14 October 2020 made it clear that the ruling would be issued by 15 October 2020 and the ruling was indeed issued on 14 October 2020 and served upon the parties on 16 October 2020. In support of its contention the respondent attached a copy of the email correspondence to the applicant and contends that the ruling was sent by fast mail of which it also attached a copy.
- [15] The applicant sent the ruling to the Communication Workers Union ("the union") on 12 December 2020 for purposes of the union to instruct attorneys. CWU's offices closed from 15 December 2020 to 11 January 2021. The union has not explained why an attorney was not briefed prior to 15 December 2020.
- [16] The offices of the legal representatives only reopened 18 January
2021. The legal representative collected the applicant's documents relating to the victimisation case and those relating to another dispute that the applicant had referred as an alleged unfair discrimination matter.
- [17] According to the applicant, CWU was under the erroneous belief that the victimisation and unfair discrimination matters were intrinsically linked and therefore it was not necessary to refer the dispute to the Labour Court. For that reason, the union did not instruct an attorney to refer the matter to the Labour Court. The union has not confirmed this.
- [18] The respondent disputed that there could have been a confusion, on the basis that by then the award in the unfair labour practice had long been issued.
- [19] The applicant maintains that he could not consult virtually due to network problems until 2 February 2021 when he travelled from Bloemfontein to consult with his legal representative. He was advised that the referral of the victimisation case to the Labour Court would not impact upon his unfair discrimination arbitration.
- [20] The respondent challenged this on the basis that a telephone consultation was possible, and the applicant has failed to explain why a telephone consultation was not possible. The applicant has not filed a reply to explain why not.
- [21] The Covid 19 restrictions were eased to level 1 on Sunday 28 February 2021 which allowed the applicant to travel to Pretoria to physically consult with the attorney on 2 March 2021 and sign the documents for submission to the Labour Court.

Prospects of success

- [22] The applicant submits that the legal question to be determined is of great importance. The question, according to the applicant, is whether an employer may take disciplinary action against a shop steward after the latter had lodged a grievance in respect of the same dispute.

- [23] The applicant also alleged that the respondent breached the fundamental right of a shop steward to act in accordance with his union's mandate.
- [24] The respondent disputes the prospects of success. The applicant was a fulltime shop steward and had to submit to his employer monthly reports on his activities, the same as the other full time shop stewards. He refused and was given a direct instruction to comply, which again he refused.
- [25] The applicant refused because he maintained that the union had taken a decision that the applicant should not render a monthly report as instructed by his employer.
- [26] The respondent informed the union of its intention to discipline the applicant and did so. The applicant filed a grievance against his superior for harassing him to file the reports. The grievance was resolved against the applicant.
- [27] The applicant then referred his alleged unfair labour practice to the CCMA and in the arbitration it was found that the respondent acted fairly. Eight months later he took that award on review.
- [28] The respondent contended that the unfair labour practice dispute and the current dispute, are about the same

issues.

Prejudice

- [29] The applicant alleged that the respondent would not suffer any prejudice.
- [30] Respondent alleges that it has already suffered prejudice in incurring costs to defend the case.

Analysis

- [1] The relevant legal principles to be applied in an application for condonation are well established. This Court is required to exercise a discretion, having regard to the extent of the delay, the explanation for that delay, the prospects of success and the relative prejudice to the parties that would be occasioned by the application being granted or refused. The interest of justice will ordinarily reflect regard to all these factors.
- [2] The respondent relies upon NUM v Council for Mineral Technology[1] where the LAC said the following:

" The approach is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it 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. 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."(own emphasis)

[3] In *Melane v Sanlam Insurance Co Ltd*[2] it was held that:

"... 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 interrelated, they are not individually decisive, for that would be a piecemeal approach

incompatible with a true discretion, save of course that if there are no prospects of success there will be no point in granting

condonation. What is needed is an objective conspectus of all the facts."

[4] In *A Hardrodt (SA) (Pty) Ltd v Behardien and others*[3] (Behardien) the Labour Appeal Court (LAC) restated the guidelines laid down in *Queenstown Fuel Distributors CC v Labuschagne NO and others*[4] inter alia that there must be good cause for condonation in the sense that the reasons tendered for the delay have to be convincing. In other words, the excuse for non-compliance with the six-week time period must be compelling. The onus is on the applicant for condonation to satisfy the Court that condonation should be granted.

[5] 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.

[6] The general principles applicable to deciding applications for condonation apply even more stringently where it comes to review

applications. In *National Union of Metalworkers of SA on behalf of Thilivali v Fry's Metals (A Division of Zimco Group) and others*[5] the Court held that:

'What is clear from the judgment in *Hardrodt* is that general principles applicable to condonation applications are even more stringently applied where it comes to a condonation application for the late filing of a review application. In review condonation applications, the explanation that needs to be submitted must be compelling and the prospects of success need to be strong. Where it comes to the issue of prejudice, the applicant in fact has to show that a miscarriage of justice will occur if the applicant's case is not heard. The reason for these more stringent requirements is that review applications occur after the parties have already been heard, presented their respective cases and a finding has been made. Under such circumstances, considerations of justice, fairness and expedition require that challenges of such findings must not be delayed and must be completed as soon as possible.'

[7] The court in *Thilivali* added the following consideration when evaluating condonation applications in reviews:

'It must also always be considered that the applicant for condonation actually bears the onus to prove good cause for condonation to be granted in terms of the principles set out above. There is, however, an additional consideration which applies in employment disputes in determining whether an applicant for condonation has discharged this onus. This is the fundamental requirement of expedition. The Constitutional Court has, as a matter of fundamental principle, confirmed that all employment law disputes must be expeditiously

dealt with and any determination of the issue of good cause must always be conducted against the backdrop of this fundamental principle in employment law.'

[8] In *Toyota SA Motors (Pty) Ltd v CCMA and others*[6] the Constitutional Court emphasised that one of the fundamental purposes of the Labour Relations Act[7] (LRA) was to establish a system for the simple, quick, cheap, and informal adjudication of labour disputes. When it assesses the

reasonableness of a delay, the Court must not lose sight of this purpose.

[9] Condonation for delays in all labour law litigation is not simply there for the taking. The starting point is that an applicant in an application such as the present, seeks an indulgence and bears the onus to show good cause and a proper case should be made out before the indulgence could be granted.

[1] In *Du Plessis v Wits Health Consortium (Pty) Ltd*[8] the Court held as follows:

"It is clear from the above and other judgments 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 are important, as it provided the courts with information as to whether there was any further delay after raising the funds and whether an explanation has been provided for such a delay."

[2] In *Balmer and others v Reddam (Befordview) (Pty) Ltd*[9] the Court said:

"In the present instance the explanation of the applicants that they did not have funds to pay their lawyer is unsatisfactory in that he does not explain why, when the facts of this case are so straightforward, they did not file the statement of case on their own. . . There is no evidence that they took any effort to enquire as to what other resources were available for assistance which suggests that they were less interested in ensuring that the dispute was speedily resolved."

[10] In *Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd* [10] it was held that a consideration of prospects of success merely implies a determination of the likelihood or chance of success when the main case is heard. A similar approach was followed in *Seatlholo & others v Entertainment Logistics Service (A division of Gallo Africa Ltd)*[11], where it was held that

the test is whether the applicants would succeed in the main action if the facts pleaded by them in their condonation application were established at trial. Equally so, the prospects of success do not entail an applicant having to prove on a balance of probabilities that he or she would succeed when the merits of the case are heard[12].

- [11] It is in this context that the application for condonation stands to be determined.
- [31] The applicant is a fulltime shop steward who probably is aware of the process to refer a dispute to the Labour Court.
- [32] His calculation of the delay from 11 December 2020 is dubious in view of the fast mail and email proof that the respondent provided. The applicant did not use the opportunity to file a replying affidavit to counter this statement.
- [33] The delay should be calculated from 29 May 2020 when the certificate was issued. At best for the applicant the delay commenced from 14 October 2020 when he was informed that the CCMA had no jurisdiction and the matter had to go to the labour Court. That adds another 60 days to the delay.
- [34] There can be no doubt that the delay is inordinate.
- [35] The explanation for the delay between 14 October 2020 and 12 December 2020 is not reasonable. The Commissioner had explained to the applicant that it was a matter for the Labour Court. That was the reason that the arbitration did not commence. It was unreasonable to wait for the jurisdictional ruling, which in any event most probably reached the applicant on 16 October 2020. The applicant elected not to file a replying affidavit to deny this allegation.
- [36] The delay to February 2021 is also thin. He could easily by telephone have followed up with the union and the attorney. He did not explain why he did not.
- [37] The explanation that the union was confused by the two referrals does not make sense. The unfair labour practice arbitration had been completed. There was only this matter to attend to. The union has not confirmed this explanation of the applicant.
- [38] The explanation for the inordinate delay is not reasonable or sufficient.
- [39] There is no need to even consider the prospects of success.
- [40] The applicant's prospects of success, even considered in view of the Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd decision are insufficient [13]
- [41] He was charged with misconduct and found guilty. He has lost his arbitration on the same facts. The applicant may have prospects but not sufficient to save the condonation application. He did not comply with a direct instruction. During the disciplinary inquiry he produced the reports and received leniency. He never in the inquiry or the arbitration produced the alleged union resolution.

[42] It is astonishing to argue that the employee must not render a report on his activities at work as a fulltime shop steward because his union may have a different view. The applicant never challenged the reasonableness of the instruction, only that the union decided he should not. The other fulltime shop stewards of the same union throughout submitted their reports.

[43] It is in the interests of justice that this matter should not proceed. There is a long delay with a poor explanation and minimal prospects of success.

[44] All parties submitted that costs should follow the result. The respondent submits that the referral was frivolous and vexatious, so also the application for condonation. The applicant submits that there is still an employment relationship between the parties.

[45] This is not a matter that justifies a cost order.

Order

[46] I make the following order:

1. The point in limine is dismissed.
2. The application for condonation is dismissed

F. Coetzee

Acting Judge of the Labour Court of South Africa

Appearances

For the applicant: Richard Sithi

Of: Richard

Sithi Attorneys

For the Respondent: Tshepo Makamu

Of: Maserumule

Inc

[1]

[1999] 3 BLLR 209 (LAC) at para 10

[2] 1962 (4) SA 531 (A) at 532 C - F.

[3]

(2002) 23 ILJ 1229 (LAC).

[4] (2000) 21 ILJ 166 (LAC).

[5] (2015) 36 ILJ 232 (LC).

[6]

(2016) 37 ILJ 313 (CC).

[7] Act 66 of 1995 as amended.

[8] [2013] JOL 30060 (LC) at para 16.

[9]

(2011) 32 ILJ 2121 LC at para [15].

[10] 2009 30 ILJ 347 (LC) at para 27.

[11]

(2011) 32 ILJ 2206 (LC) para 24.

[12] Production Institute of South Africa (PTY) Ltd v CCMA and others (Case No: JR1974/2009) at para 12; See also SA Democratic Teachers Union v Commission for Conciliation, Mediation and Arbitration and others

(2007) 28 ILJ 1124 (LC) at para 38, where it was held that; ‘A commissioner in considering prospects of success does not have to pronounce on the merits of the case. All that the commissioner needs to do is to investigate whether on the averments made by the applicant there is a prima facie case, that there is a chance of succeeding when the main case is heard. In other words to establish whether there is a reasonable prospect of success on the merits, it suffices if an applicant can show a prima facie case through setting out averments which, if established at the proceedings of the main case, would entitle the applicant to some relief. The applicant need not deal fully with the merits of the case’.

[12] Production Institute of South Africa (PTY) Ltd v CCMA and others (Case No: JR1974/2009) at para 12; See also SA Democratic Teachers Union v Commission for Conciliation, Mediation and Arbitration and others

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[13] 2009 30 ILJ 347 (LC) at para 27.

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