

SOUTH AFRICA / JUDGMENT

# Fourie v Commission for Conciliation, Mediation and Arbitration and Others (JR1757/14) [2017] ZALCJHB 30 (20 January 2017) [2017] ZALCJHB 30

COURT

Labour Court Johannesburg

BEFORE

Cook AJ

CASE / FILE NUMBER

JR1757/14

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## Source record

THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

reportable

Case

no: JR1757/14

In

the matter between:

STEPHANUS  
JACOBUS FOURIE  
Applicant  
and  
THE  
COMMISSION FOR CONCILIATION  
MEDIATION  
AND  
ARBITRATION  
First Respondent  
BERNARD  
VAN ECK N.O  
Second Respondent  
CUTHBERT  
EVANS MAVUSO  
Third Respondent  
Date  
heard: 06 July 2016

Delivered:

20 January 2017

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Summary: The commissioner ought to have considered the prospects of success when determining the rescission application.

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## JUDGMENT

COOK AJ

### Introduction

- [1] This is an opposed application in terms of Section 158(1)(g) of the Labour Relations Act,[1] (LRA) to review the rescission ruling dated 9 June 2014 handed down by the commissioner on 14 July 2014 in which the commissioner refused to grant an application for rescission of a default award (“the ruling”).
- [2] The ruling was handed down by the commissioner on 22 June 2013 (“the default award”).
- [3] The Applicant also seeks a stay of enforcement of the default award pending finalisation of the review proceedings as well as an order that the dispute be remitted to the Commission for Conciliation, Mediation and Arbitration (CCMA) for arbitration de novo.

Applicant’s

### submissions

- [4] It is submitted that the rescission ruling failed the test of reasonableness in the following respects:
- 4.1. In finding that the Applicant had failed to provide a satisfactory and adequate explanation for his delay in launching the rescission application.
- 4.2. In finding that the degree of lateness was extremely excessive and that the Applicant had decided that the matter was not important.
- 4.3. In refusing to consider the remainder of the application (i.e. its merits) or the application for condonation for the late filing of the rescission application.[2]

Relevant case law

- [5] In *Colett v Commission for Conciliation, Mediation and Arbitration and Others*[3] in unanimous judgment of Musi AJA dismissing a review application for want of diligent prosecution, held:

*“[38] There are overwhelming precedents in this Court, the Supreme Court of Appeal and the Constitutional Court for the proposition that where there is a flagrant or gross failure to comply with the rules of court condonation may be refused without considering the prospects of success. In NUM v Council for Mineral Technology [1999] 3 BLLR 209 (LAC) at paragraph [10], it was pointed out that in considering whether good cause has been shown the well-known approach adopted in Melane v Santam Insurance Co Ltd 1962 (4) SA 531(A) at 532(C-D) should be followed but -*

*‘[T]here 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 good prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused.’*

[39] The submission that the court a quo had to consider the prospects of success irrespective of the unsatisfactory and unacceptable

explanation for the gross and flagrant disregard of the rules is without merit.”

[6] In the matter of Grootboom v National Prosecuting Authority and Another the court held as follows[4]

*“22. I have read the judgment by my colleague Zondo J. I agree with him that, based on Brummer<sup>12</sup> and Van Wyk, the standard for considering an application for condonation is the interests of justice. However, the concept “interests of justice” is so elastic that it is not capable of precise definition. As the two cases demonstrate, it includes: the nature of the relief sought; the extent and cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the importance of the issue to be raised in the intended appeal; and the prospects of success. It is crucial to reiterate that both Brummer and Van Wyk emphasise that the ultimate determination of what is in the interests of justice must reflect due regard to all the relevant factors but it is not necessarily limited to those mentioned above. The particular circumstances of each case will determine which of these factors are relevant.*

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

50. In this Court the test for determining whether condonation should be granted or refused is the interests of justice. If it is in the interests of justice that condonation be granted, it will be granted. If it is not in the interests of justice to do so, it will not be granted. The factors that are taken into account in that inquiry include:

- (a) the length of the delay;
- (b) the explanation for, or cause for, the delay;

- (c) the prospects of success for the party seeking condonation;
- (d) the importance of the issue(s) that the matter raises;
- (e) the prejudice to the other party or parties; and
- (f) the effect of the delay on the administration of justice.

Although the existence of the prospects of success in favour of the party seeking condonation is not decisive, it is an important factor in favour of granting condonation.

51. The interests of justice must be determined with reference to all relevant factors. However, some of the factors may justifiably be left out of consideration in certain circumstances. For example, where the delay is unacceptably excessive and there is no explanation

for the delay, there may be no need to consider the prospects of success. If the period of delay is short and there is an unsatisfactory explanation but there are reasonable prospects of success, condonation should be granted. However, despite the presence of reasonable prospects of success, condonation may be refused where the delay is excessive, the explanation is non-existent and granting condonation would prejudice the other party. As a general proposition the various factors are not individually decisive but should all be taken into account to arrive at a conclusion as to what is in the interests of justice.

52. Although the main judgment includes the prospects of success among the factors to be taken into account, it does not say whether there are reasonable prospects of success in favour of the respondents, nor does it take this factor into account in its assessment of whether it is in the interests of justice to grant or refuse condonation.”

## Analysis

- [7] Although the explanation in this matter leaves much to be desired, it cannot be said that it is unacceptable. Further, it cannot be said that there has been a gross and flagrant disregard of the Rules.
- [8] In this matter the delay is lengthy but not excessive and the explanation is poor but it cannot be said that there is no explanation. In the circumstances the finding of the commissioner that there is no need to consider the prospects of success is not a finding that a reasonable commissioner should have made. Accordingly, the commissioner ought to have considered the prospects of success.
- [9] In respect of the allegation that the employee was employed by the close corporation and not by the Applicant personally, in the answering affidavit the employee states::

*“Save to state that I am a layman and always believed that I was employed by the Applicant, I admit the remainder of the allegations in these paragraphs.”*

- [10] It would accordingly appear that the Applicant has good prospects of success in that if it is proven at arbitration that the employee was employed by the close corporation and not the Applicant in his individual capacity on a project specific basis, then he has a bona fide defence.
- [11] In the circumstances, I agree that the rescission ruling failed to test for reasonableness by refusing to consider the merits.
- [12] Having considered all the relevant factors, and I am of the view that the interests of justice is that rescission ought to have been granted. In this matter, the prospects of success tip the scales in favour of the Applicant and outweigh the poor explanation and long delay in this matter.

Costs.

- [13] The Court is of the view that the Applicant ought not to have relied upon what was stated in the conciliation process.
- [14] Furthermore the opposition to the application was reasonable and it is apparent from the remuneration earned by the employee that he is not a wealthy man. In addition, in light that the Court is of the view that the explanation proffered was poor, the Court will not grant costs in this matter.

Order

- [15] The Court accordingly makes the following order:

15.1 The rescission ruling dated 9 June 2014 under case number GAEK2126-13 is reviewed and set aside and replaced with the ruling that rescission is granted.

15.2 The dispute between the Applicant and the Third Respondent under case number GAEK2126-13 is remitted to the Second Respondent for arbitration.

15.3 There is no order as to costs.

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Cook AJ

Acting Judge of the Labour Court of South Africa

Appearances.

For the Applicant : Advocate S J Mushet

Instructed by

: Attorney R C Christie

For the Respondent : David Morgan

Instructed by

: In person

[1] Act 66 of 1995.

[2] paragraph 27, page 14 of the Applicant's heads of argument

[3] (2014) 35 ILJ 1948 (LAC).

[4] (2014) 1 BLLR 1 (CC).

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