

SOUTH AFRICA / JUDGMENT

Kgobe v Commission for Conciliation Mediation and Arbitration and Others (JR1988/17) [2018] ZALCJHB 228 (20 June 2018) [2018] ZALCJHB 228

COURT

Labour Court Johannesburg

BEFORE

Van Niekerk

CASE / FILE NUMBER

JR1988/17

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THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

CASE NO: JR1988/17

In the matter between:

PAULINA KGOBE Applicant

and

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION First Respondent

COMMISSIONER L. SHEAR N.O Second Respondent

TLHOKOMELO DROP-IN CENTRE Third Respondent

Application heard: 19 June 2018

Judgment

delivered: 20 June 2018

VAN NIEKERK J

[1] This is an application to review and set aside an arbitration award issued by the second respondent (the arbitrator'). In his award, the second respondent held that the applicant's dismissal was substantively unfair, and ordered the third respondent

to pay her the equivalent of three months remuneration. It is not in dispute that the quantification of the amount of compensation in the initial award was incorrect; the arbitrator issued a variation ruling on 5 February 2017 when this was corrected. The total amount awarded to the applicant was R 24 600.

[2] The applicant seeks only to review the quantum of the compensation awarded. In her application, she stated in her opinion, she ought to be awarded the sum between six and 12 months remuneration.

[3] The application for review was filed late. In support of what amounts to an application for condonation, the applicant states that the late submission of the review application was not intentional. She annexed a copy of a letter dated 22 February 2017 addressed to the arbitrator by her legal representative, in which the CCMA was advised of the applicant's instructions to seek a review of the award as varied. It was noted that the applicant would formally apply for the review. The applicant states that during April 2017, she was scheduled to attend meetings with her legal representative, which were postponed. She was under the impression that the review was being dealt with by her representative. On 5 August 2017 she went to the CCMA to enquire about the review application and was informed that no review application had been submitted. At that stage, the applicant sought the assistance of the pro bono clinic. As I have mentioned, the application was filed only on 18 October 2017.

[4] The court has a discretion, to be exercised judicially, to grant condonation. Among the factors usually relevant for consideration are the degree of lateness, the explanation therefor, the prospects of success, the prejudice that parties will suffer if condonation is granted or refused, and the importance of the case. None of these factors are individually decisive and the court must consider all the facts. In the final analysis, it is a matter of fairness to the parties. Condonation applications require a court to balance various interests and factors, having regard to all of them with none of them being decisive. (See *Melane v Santam Insurance Co. Ltd* 1962 (4) SA 531 (A) at page 532; *NEHAWU obo Mafokeng and Others v Charlotte Theron Children's Home* [2004] 10 BLLR 979 (LAC).

[5] The principles were also summarised in *South Africa Post Office Ltd v CCMA & Others*

[2012] JOL 28463 (LAC). In this case, the court recognised that ultimately the test is whether it is in the interests of justice to grant condonation. The court accepted that in matters where importance is placed upon the speedy and expeditious resolution of a dispute, even a short delay may not be excusable, unless an explanation is proffered that sets out the reasons for the delay which the Court should find acceptable. The court further held that:

Where it is evident that the party seeking condonation has no prospects of succeeding in his principal claim or opposition, no purpose is served in granting condonation and the Court must in such circumstances refuse to grant condonation irrespective of the degree of delay or the explanation provided.

[6] In *National Union of Mineworkers v Council for Mineral Technology* [1998] (2) ZALAC 22, the LAC established the principle that given the extent of the delay and the poor explanation for the delay, it was not necessary to consider the applicant's prospects of success in the main application. This was affirmed more recently in *Collett v Commission for Conciliation, Mediation & Arbitration* [2014] 6 BLLR 523 (LAC) where the court stated as follows:

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 para 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:

'There is a further principle which is applied and that is 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.'

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."

[7] To the extent that the applicant blames the conduct of their previous attorney, solely for the delay in the late filing of the review application. It is trite that a litigant cannot hide behind the tardiness of his representative. In *Saloojee and another v Minister of Community Development* 1965 (2) SA 135 (A) at paragraph 141C-E, the court said "there is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered . . ."

[8] In *Mngomezulu and Another v Mulima NO and Others* (JR2744/12) [2017] ZALCJHB 415 (7 November 2017) the court stated the following, at paragraph 12:

... In *National Union of Metal Workers vs Kroon Gietary and Staal* the court refused a condonation application wherein the deponent attributed the delay to his representative. The court quoted in approval the case of *Regal v African Superstate (Pty) Ltd* where the court held that there is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence

or the insufficiency of the explanation tendered. A litigant is not entitled to hand over his matter to his attorney and wash his hands of it.

- [9] The applicant has left periods of the delay unexplained. It is trite that condonation is not a mere formality and there for the taking; rather, the applicant for condonation must provide a proper and full explanation for the period of the delay.
- [10] In *Independent Municipal and Allied Trade Union on behalf of Zungu v SA Local Government Bargaining Council and Others* (2010) 31 ILJ 1413 (LC) at para 13, the court held:

In explaining the reason for the delay it is necessary for the party seeking condonation to fully explain the reason for the delay in order for the court to be in a proper position to assess whether or not the explanation is a good one. This in my view requires an explanation which covers the full length of the delay. ...”

- [11] In *eThekweni Municipality v Ingonyama Trust* 2013 (5) BCLR 497 (CC) at para 28, the court said the following where the explanation furnished did not cover the entire period and part of the delay was unexplained:

As stated earlier, two factors assume importance in determining whether condonation should be granted in this case. They are the explanation furnished for the delay and prospects of success. In a proper case these factors may tip the scale against the granting of condonation. In a case where the delay is not a short one, the explanation given must not only be satisfactory but must also cover the entire period of the delay. Thus in *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)*, this Court said in this regard:

“An applicant for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of delay. And, what is more, the explanation given must be reasonable. The explanation given by the applicant falls far short of these requirements. Her explanation for the inordinate delay is superficial and unconvincing.”

- [12] Strictly, according to the applicable authorities, in the absence of a satisfactory explanation for an unreasonable delay, it is not necessary for the court to embark on an inquiry into the prospects of success. (See *Collett v Commission for Conciliation, Mediation & Arbitration* (supra).
- [12] The review application ought to have been filed by 19 March 2017; the delay is therefore some seven months. That is a substantial delay. The explanation for the delay does not extend to the whole period of the delay, and amounts to little more than the assertion that the applicant did not intend to delay the filing of the application. Even if I accept that the applicant’s explanation for the delay is satisfactory, in my view, the prospects of success are not such that they ought to compensate for the extent of the delay. Within the relevant statutory constraints, CCMA commissioners are afforded a broad discretion in relation to the remedies that they afford. In the present instance, the arbitrator recorded that it was ‘quite evident’ that the relationship between the parties had irretrievably broken down.

Given that breakdown, which the arbitrator found ‘partly due’ to the applicant’s conduct, in his view, an award of three months compensation was just and equitable. The applicant’s papers in the present application discloses no more than what amounts to her dissatisfaction with the quantum awarded. She believes that she is entitled to more; at least the equivalent of six months’ remuneration. The applicant’s dissatisfaction with the quantum of compensation is obviously not a basis for review. On the face of the award, the commissioner exercised a discretion and took into account the evidence before him, including his finding that the applicant had not been entirely innocent in the events that led ultimately to her dismissal.

[13] As I have indicated above, the award discloses that the arbitrator afforded the parties a full opportunity to have their say, identified the primary issue in dispute, understood the nature of the dispute and dealt with the substantial merits of the dispute. I cannot find on the papers that the decision to which the arbitrator came was so unreasonable that no reasonable decision-maker could have come to it. In the face of a lengthy delay and poor prospects of success, condonation for the late filing of the review application thus stands to be refused.

I make the following order:

1. Condonation for the late filing of the review application is refused.
2. The review application is dismissed.

André van Niekerk

Judge

REPRESENTATION

For the applicant: In person

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