

SOUTH AFRICA / JUDGMENT

Khan v GPSSBC and Others (JR1260/20) [2023] ZALCJHB 349 (28 December 2023)

[2023] ZALCJHB 349**COURT**

Labour Court Johannesburg

BEFORE

Whitcher

CASE / FILE NUMBER

JR1260/20

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Source record**IN****THE LABOUR COURT OF SOUTH AFRICA****(HELD****IN JOHANNESBURG)****Case****no: JR 1260/20****Not****Reportable****In**

the matter between:

ZAKARIYA
KHAN
Applicant
And
GPSSBC
First Respondent
DOROTHY
KHOSA
Second Respondent
GAUTENG
DEPARTMENT OF COOPERATIVE
GOVERNANCE
AND TRADITIONAL AFFAIRS
Third Respondent

Heard:

17 October 2023

This

judgment was delivered electronically to the parties by email. The date and time for hand-down is deemed to be 28 December 2023.

JUDGMENT**WHITCHER J**

- [1] This is an application to review and set aside the condonation ruling made by the first respondent under case number GPBC 554/2020.
- [2] Given that this is a review application, the relevant background facts and submissions are those that were set out in the condonation application. They are summarised below.
- [3] The applicant was employed by the third respondent (the Department) as Deputy Director: Finance on 30 June 2006.
- [4] In October 2009, the applicant applied for temporary incapacity leave. The Department granted the applicant six (6) months temporary incapacity leave.
- [5] However, the applicant's medical condition did not improve. He was diagnosed first with pulmonary tuberculosis and then Multi-Resistant Tuberculosis and various other ailments.
- [6] As a result, in addition to and subsequent to the six (6) months leave of absence granted by the Department, the applicant was booked off work by various doctors for months at a time.
- [7] In June 2012, the Department referred the applicant for a medical assessment (a PHS assessment). According to the applicant he was not furnished with the outcome report.
- [8] In June 2015, the Department referred the applicant for a further medical assessment (the ICAS medical assessment). According to the applicant he was not furnished with this outcome report as well.
- [9] In the month of March 2016, the Department informed the applicant that his employment will be terminated on 31 March 2016 on account of incapacity.
- [10] According to the applicant, in terms of his Contract of Employment he would have qualified for certain benefits, namely a monthly annuity and medical aid had his employment endured until 31 June 2016 because by then he would have been in the employ of the Department for a period of ten (10) years. The consequence of the termination his employment on 31 March meant that he did not qualify for the said benefits on the termination of his employment.
- [11] Grieved by the loss of the said benefits, in June and August 2019 respectively the applicant referred to the CCMA and then the SALGBC an unfair labour practice dispute relating to the provision of benefits. He was advised by the forums that he had referred his dispute to the wrong forums. He then referred the dispute to the GPSSB in August 2019. The GPSSBC (incorrectly in my view) considered this an irregular referral because the applicant had cited two disputes, namely an unfair dismissal and an unfair labour practice at the same time and instructed the applicant to file a fresh referral, which he did on 25 February 2020 citing only an unfair labour practice dispute relating to benefit. I will therefore consider that he

correctly referred his dispute to the GPSSBC in August 2019.

[12] Since the referral was some three (3) years and one month late, the applicant filed a condonation application, but only in May 2020.

[13] He averred in his condonation application that the inordinate delay was caused by various factors. He initially referred his dispute to the wrong forums; he was very ill; and he had to file a court application to secure the above mentioned medical reports from the Department which he needed for his case, after which he had to consult lawyers regarding his referral. He also claimed that the lateness of his referral was caused by the Covid-19 lockdown.

[14] As to his prospects of success, the applicant contended that:

‘Taking into account the fact that the [employer] contemplated terminated my contract on the basis of incapacity, the [employer] could have taken my ill health into account and should have allowed me to finish the 10 years long service with the [employer] in order to access these benefits.’

[15] In other words, because of his ill health, the employer ought to have endured his long standing incapacity for a further three months in order for him to qualify for the benefits in issue.

[16] He further submitted that paragraph 55(4)(b) of the Public Service Regulations had required the Department to allow him as a TB patient to complete his treatment and in this regard the employer should have but failed to consider Dr S Bhana’s timeline for his treatment, which was 1 July 2015 to June 2016.

[17] Paragraph 55(4)(b) of the Public Service Regulations stipulates that in respect of TB Screening, “a head of department shall take all reasonable steps to facilitate TB screening as well as support to complete treatment for eligible employees.”

[18] He further submitted that he was not given an opportunity to state his case prior to the dismissal.

[19] In accordance with the provisions of section 191 of the LRA, the Bargaining Council may on good cause shown condone the non-observance of the time frames stipulated for referring disputes to the Bargaining Council.

[20] ‘Good cause’ was explained in *Melane v Santam Insurance Co. Ltd*[1] in the following terms:

‘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 it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success and the importance of the case. Ordinarily these facts are interrelated, they are not individually decisive, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion.

What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate prospects which are not strong. Or the importance of the issue and strong prospects may tend to compensate for a long delay. And the Respondent's interests in finality must not be overlooked"

[21] According to the Constitutional Court an application for condonation should be granted if it is in the interests of justice and refused if it is not. The interests of justice must be determined by reference to all relevant factors, including the nature of the relief sought, the extent and cause of the delay, the nature and cause of any other defect in respect of which condonation is sought, the effect on the administration of justice, prejudice and the reasonableness of the applicant's explanation for the delay or defect.[2]

[22] The Commissioner found the applicant's explanation for the delay "unpersuasive" and took particular note that there had been a delay of another year after the applicant had received the medical reports.

[23] This is not a finding that no reasonable arbitrator could reach. The lateness of the referral, namely more than 3 years in the context of the prescribed 90 day period, was extraordinary and therefore required a good explanation. I found no evidence of this in the condonation application. The explanation

was articulated in general terms and vague on time periods. I also note that there was a further delay of one year after the applicant

received the medical reports. I also note that the delay caused by the referrals to the wrong forum accounted for only about two to three months of the three year delay, and, importantly, the Covid-19 lockdown occurred long after the referrals.

[24] It appears that the Commissioner did not apply her mind to the Applicant's prospects of success, presumably because she (reasonably so) found that the applicant had not provided a reasonable explanation for the inordinate delay.

[25] In any event, the condonation application did not demonstrate reasonable prospects of success, it being a trite principle of our law that without prospects of success, condonation is to be refused.

[26] In this regard, the applicant did not aver and put forward facts in his application that the decision taken to dismiss him on 31 March 2016 [as opposed to 31 June or thereafter] was actuated by reasons other than the bona fide rationale that he was then incapacitated: that is, that the decision was actuated mala fide or with the specific intention to deprive him of the benefits in issue. Nor did he point to a right in the Code of Good Practice which entitled him to be consulted on the date of his dismissal to essentially prolong his incapacity at work in order to access the benefits in issue. Lastly, the Regulation he relies on does not prohibit a dismissal on the grounds of incapacity.

[27] In the result, the review application falls to be dismissed.

Order

1. The review application is dismissed.

Benita Whitcher

Judge of the Labour Court of South Africa

REPRESENTATION:

For the Applicant: N. Rambachan-Naidoo, instructed by A J Venter & Associates

[1] 1962(4) SA 531 (A) at 532B-E.

[2] *Brummer v Gorfil Brothers Investments (Pty) Ltd* [2000] ZACC 3; 2000 (5) BCLR 465; 2000 (2) SA 837 (CC) at para 3.

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