

SOUTH AFRICA / JUDGMENT

Makume v Commission for Conciliation Mediation and Arbitration and Others (JR 1587/20) [2022] ZALCJHB 199 (28 July 2022)

[2022] ZALCJHB 199

COURT

Labour Court Johannesburg

BEFORE

D Mahosi

CASE / FILE NUMBER

JR 1587/20

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IN

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

Reportable

CASE

NO: JR 1587/20

In

the matter between:

THEMBEKA
MAKUME
Applicant
and
COMMISSION
FOR CONCILIATION,
MEDIATION
AND ARBITRATION
First Respondent
ZANELE
SIBIYA
N.O
Second Respondent
MMG
SOUTH AFRICA MANAGEMENT
PROPRIETARY
LIMITED
Third Respondent

Heard:

26 July 2022

Delivered: In view of the measures implemented as a result of the Covid-19 outbreak, this judgment was handed down electronically by circulation to the parties' representatives through an email. The date for hand-down is deemed to be 28 July 2022.

JUDGMENT

MAHOSI. J

Introduction

- [1] The applicant, Thembeke Makume (the employee), brought an application in terms of section 158(1)(g) of the Labour Relations Act[1] (LRA) to review and set aside the condonation ruling issued on 21 September 2020 by the second respondent (the commissioner) under the auspices of the first respondent, the Commission for Conciliation, Mediation and Arbitration (the CCMA), under case number GAJB 17361-20.
- [2] The application is opposed by the third respondent, MMG South Africa Management Proprietary Limited (the employer).

Background

- [3] The employee commenced employment with the employer on 03 December 2018 as a Sourcing and Contracting Specialist. On 30 June 2020, she was dismissed for alleged poor work performance.
- [4] Aggrieved by the employer's decision to dismiss her, the employee referred an unfair dismissal dispute on 08 September 2020. However, her referral was 40 days out of the prescribed 30 day period. As a result, she filed an application to condone her late referral. This application was opposed by the employer.
- [5] The condonation application served before the commissioner. Having considered the parties' submission, the commissioner issued a ruling in terms of which she dismissed the condonation ruling on the basis that the delay was significant and that the reasons for the delay were neither sound nor acceptable. It is this ruling that is the subject of this application.

Condonation

ruling

[6] In her analysis, the commissioner noted that in terms of section 191(1)(b)(i) of the LRA, a dispute that concerns an alleged unfair dismissal must be referred to the CCMA or Council with jurisdiction within 30 days of the date of the dispute.

[7] The commissioner further referred to the judgment in MEC for Education, North West Province v MP Rasutha and others[2] in which the Court stated that:

[15] The law in respect of condonation applications in this Court is well-established. It is trite that condonation is not simply there for the taking. This Court is required to exercise its discretion in regard to applications for condonation, taking account the extent of the delay and the reasons thereof, the prospects of success and the prejudice occasioned by granting or refusing the application.

[16] In making the above determination, the well-known case of Melane v Santam Insurance Co. Ltd provides the following additional guidance:

“[t]here 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 delay, an application for condonation should be refused.”

[17] The need for expedition in the resolution of labour disputes is similarly well established. The promulgation of the Practice Manual in this Court as well as various amendments the LRA in 2015 have placed renewed emphasis on the obligations of litigants in this Court.

[18] Recently, in Makuse v Commission for Conciliation, Mediation & Arbitration & Others, this Court indicated that as part of the overall scheme of ensuring effective and expeditious resolution of labour disputes it will subject applications for condonation to strict scrutiny. This is particularly true of review applications concerning the dismissal of an individual employee. In this regard the Court made reference to the following dictum of the Labour Appeal Court in Queenstown Fuel Distributors CC v Labuschagne NO & Others:

“[24] ... In principle, therefore, it is possible to condone non-compliance with the time-limit. It follows, however, from what I have said above, that condonation in the case of disputes over individual dismissals will not readily be granted. The excuse for non-compliance would have to be compelling, the case for attacking a defect in the proceedings would have to be cogent and the defect would have to be of a kind, which would result in a miscarriage of justice if it were allowed to stand.

[25] By adopting a policy of strict scrutiny of condonation applications in individual dismissal cases I think that the Labour Court would give effect to the intention of the legislature to swiftly resolve individual dismissal disputes by means of a restricted procedure, and to the desirable goal of making a successful contender, after the lapse of six weeks, feel secure in his award.” (Emphasis added).”

[8] Having had regard to the submissions, the Court further found as follows:

‘[29] The Labour Appeal Court has held on several occasions that in the absence of a reasonable explanation, the applicant’s prospects of success are immaterial. In the circumstances, I do not believe it necessary to consider the prospects of success in determining the application for condonation. The application for condonation accordingly falls to be dismissed and, consequently, the application for review along with it.’

[9] It is apparent from the above that the Court found that the condonation application that was more than four months late ought to be dismissed on the basis that the delay was substantial and that the explanation was neither compelling nor reasonable and that it was unnecessary to consider the prospects of success. Nevertheless, the Court proceeded with caution to consider the prospects of success and found that the applicant had poor prospect of succeeding in the review application. For the above reasons, the Court dismissed the condonation application.

[10] In this case, the commissioner found that the 40-day delay was substantial and that the explanation was vague and therefore, unreasonable. The basis for her finding appear in the part of her award that reads as follows:

‘19 The Applicant vaguely averred that she could not refer the matter timeously for the best [part] July and beginning of August 2020, as she was preoccupied with her ailing mother who was admitted in hospital. On 17 August 2020 she [contacted] her legal representative, and could only secure an appointment for 4 September 2020. She was of the view that law firms and the CCMA were not operational. She was made to believe that law firms were not operational when she called numerous law firms.

20. It is my humble view that the Applicant is making lame excuses. In her hunt for a legal representative, she made no attempt to call the CCMA, where she could have been advised that the CCMA offices were operational as of 18 May 2020 even before her dismissal. She made no mention that she was not aware of the 30-day rule, meaning she knew about it but choose to ignore it. When she contacted her legal representative on 17 August 2020, the legal representative should have advised her of the importance of the 30-day rule. If really the Applicant indeed was so assisted by the said legal representative who contributed to the delay, it is strange that the legal representative did not submit anything to justify their involvement in the delay of this application. The applicant failed to provide a reasonable and acceptable explanation for the delay.’

[11] Having found that the delay was significant and that the employee’s explanation for the delay was neither sound nor acceptable, the commissioner found that the prospect of success was immaterial and dismissed the application.

Grounds for review

[12] In challenging the ruling, the employee submitted that:

12.1 The commissioner failed to consider the point she raised in her replying affidavit in which she challenged the authority of Bridget Hunter, who deposed to the employer's answering affidavit.

12.2 The commissioner erred in concluding that the employee knew about the 30 day rule because she did not state that she was not aware of it as she indicated in her replying affidavit, filed in the condonation application, that she did not know the processes of the CCMA.

12.3 The commissioner erred in deciding that she was precluded from or not required to consider the prospects of success.

12.4 The commissioner failed to apply her mind to the question of prejudice, balance of convenience and the importance of the case.

12.5 The commissioner failed to apply her mind or adequately consider the applicant's explanation.

The employer's submissions

- [13] The employer submitted that the employee was aware of the fact that Bridget Hunter was appointed as its Human Resource Operations Development for Africa and was properly mandated to deal with its human resource operations, including deposing to its answering affidavits. This, according to the employee, was confirmed by the employee in her founding affidavit that was filed in this application.
- [14] According to the employer, the fact that the employee did not know the CCMA processes was inconsequential, not a reasonable ground for review and would not have affected the commissioner's decision as her application was substantially late and was an afterthought. Further that, in her own version, by the time she approached her attorneys on 17 August 2020, the employee's referral was late and yet she failed to treat this matter with urgency.
- [15] The employer submitted that the employee's delay was more than double the statutory deadline, which is egregious by any standards and that she failed to provide any adequate explanation for her delay. Further that it was well established that in circumstances where the delay has not been sufficiently explained, there would be no reason to consider the prospects of success.
- [16] Furthermore, the employer submitted that the employee merely stated out her reasons for disagreeing with the commissioner's findings and that her reasons do not constitute grounds for review.

The applicable law and

analysis

[17] The jurisprudence for the review of condonation rulings is well established and has been expressed in numerous cases of this Court, the Labour Appeal Court and the Constitutional Court. It is trite that condonation is a discretionary remedy.[3] The time periods within which the unfair dismissal and unfair labour practice must be referred are governed by section 191 of the LRA. Section 191(1) provides as follows:

‘(a) If there is a dispute about the fairness of a dismissal, or a dispute about an unfair labour practice, the dismissed employee or the employee alleging the unfair labour practice may refer the dispute in writing to –

- (i) a council, if the parties to the dispute fall within the registered scope of that council; or
- (ii) the Commission, if no council has jurisdiction.

(b) A referral in terms of paragraph (a) must be made within –

- (i) 30 days of the date of a dismissal or, if it is a later date, within 30 days of the employer making a final decision to dismiss or uphold the dismissal;
- (ii) 90 days of the date of the act or omission which allegedly constitutes the unfair labour practice or, if it is a later date, within 90 days of the date on which the employee became aware of the act or occurrence.’

[18] In this case, the applicant referred an unfair dismissal dispute. Accordingly, the dispute had to be referred within 30 days of her dismissal. Section 191 (2) requires the applicant for condonation to show good cause as to why condonation must be granted.[4] “On good cause shown” or “sufficient cause shown” was examined by the Supreme Court of Appeal in *Melane v Santam Insurance Co Ltd*[5] where it was stated as follows:

“In deciding whether good 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 is the degree of lateness, the explanation thereof, 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 would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden 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 for prospects of success, which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent’s interest in finality must not be overlooked. I would add that the discursiveness should be discouraged in canvassing the prospect of success in the affidavits. I think that all the foregoing clearly emerges from the decisions of this Court, and therefore I need not add to the overgrowing burden of annotations by citing the cases.”

[19] In *Portapa t/a Supabets v Moodley N. O. and Others*, [6] Molahlehi J restated the principle that was laid down in the judgment of *Grootboom v National Prosecuting Authority and Another* [7] in which the Court stated that the test to be applied when considering an application for condonation is the interest of justice. In that case, Zondo J delivered a minority judgment and stated as follows:

‘[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.’

[20] It is trite that the exercise of the discretion to grant or refuse condonation can only be assailable on review where the commissioner failed to exercise his discretion judiciously and fairly. [8] In *Collet v Commission for Conciliation, Mediation and Arbitration and Others*, [9] the Labour Appeal Court (LAC) stated as follows:

‘[29] A court of appeal will not lightly interfere with the exercise of a judicial discretion by a lower court. An appellant who challenges the exercise of a judicial discretion will have to show that such discretion was not exercised judicially. More specifically the appellant will have to show that the court a quo either:

29.1 failed to bring an unbiased judgment to bear on the matter;

29.2 did not act for substantial reasons;

29.3 exercised its discretion capriciously or arbitrarily;

29.4 exercised its discretion upon wrong principle;

29.5 committed a misdirection of such a serious nature and degree as to justify a conclusion that it acted improperly or unreasonably.

[30] The legal position was summarised as follows by the Constitutional Court:

“It is trite law that a court considering whether or not to grant condonation exercises a discretion. The discretion must, of course be exercised judicially on a consideration of all the facts and ‘in essence it is a matter of fairness to both sides.’ It is clear that the SCA may decide an application for condonation without considering the merits of the case, though it does so only where there is a gross and flagrant failure to comply with the rules. Ordinarily, the approach of an appellate court to the exercise of such a discretion is that it will not set aside the decision of the lower court ‘merely because the court of appeal would itself, on the facts of the matter before the lower court, have come to a different conclusion; it may interfere only when it appears that the lower court had not exercised its discretion judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles”

[Footnotes Omitted]

[21] In casu, the employee challenged the commissioner’s ruling on the basis that she ignored to determine the point that the employer’s Human Resource Operations Development for Africa had no authority to depose to the opposing affidavit, erred in deciding that she was precluded from or not required to consider the prospect of success, failed to apply her mind to the question of prejudice, balance of convenience and the importance of the case and failed to apply her mind or adequately consider the applicant’s

explanation.

[22] It is apparent from the aforementioned authorities that the commissioner has, upon a consideration of all the facts, the discretion to grant or refuse to grant condonation. Firstly, the fact that the commissioner failed to make a determination on the authority of employer’s Human Resource Operations Development

for Africa to depose to an opposing affidavit does not amount to a misdirection of such a serious nature and degree as to justify a conclusion that she acted improperly or unreasonably. This is so, because the employee has failed to show that her condonation application was dismissed because of the employer’s opposition. Put differently, had the employee’s point been upheld by the commissioner and the condonation application remained unopposed, there is no indication that the commissioner would have granted it.

[23] Secondly, the employee effectively submitted that the commissioner exercised its discretion based on wrong principles. This is clear from her submission that the commissioner erred in deciding that she was precluded from or not required to consider the prospect of success,

failed to apply her mind to the question of prejudice, balance of convenience and the importance of the case and failed to apply her mind or adequately consider the applicant's explanation.

There is no merit to these grounds.

[24] As aforementioned, the commissioner considered the employee's submissions and the need for expedition in the resolution of labour disputes before finding that the 40 day delay was substantial.

[25] The commissioner further found that the employee's reasons for the delay were vague and unreasonable. This is a fair proposition because the employee submitted that the best part of July and beginning of August 2020 she was preoccupied with her ailing mother who was admitted in hospital. However, there is no explanation on the extent of her preoccupation and what prevented her from referring the dispute timeously.

[26] The employee further submitted that she sought legal advice on 17 August 2020 and was able to secure an appointment with her attorney on 04 September 2020 without explaining why she only sought legal advice on 17 August 2020 when she was dismissed on 30 June 2020 and without explaining the period between the day of her dismissal and the day she sought legal advice.

[27] Furthermore, the employee submitted that she believed that the CCMA and the law firms were not operational due to the National Lockdown, but there is no indication or submission that the employee made an attempt to call or find out in any other way available whether the CCMA or law firms were operational. Had she done so, she would have known that the CCMA, the Courts and the law firms were operational and she would have known the period within which she was required to refer her dispute. Moreso, because she is not an illiterate employee. She is a Procurement Specialist with a B Tech degree in Procurement

and a National Diploma in Procurement and Supply.[10] All that the employee did, was to rely on her belief. There is even no submission made to substantiate what informed her belief when the country was not on a hard lockdown.

[28] It is apparent from the employee's submissions that the extent of delay was not sufficiently explained. She clearly failed to place the full explanation for every period of the delay and did not convince the commissioner to excuse her default. Having found that the employee's explanation was unreasonable and unacceptable, the commissioner took the view that the prospects of success were immaterial. This approach cannot be faulted as it was confirmed by the LAC in *Chetty v Baker McKenzie*[11], where it was stated as follows:

'However, the further principle applicable in conjunction with the broad approach of Melane is that in the absence of a full and reasonable (acceptable) explanation for the delay, the prospects of success are immaterial, and that if there are no prospects of success an application for

condonation should be refused even if there is a good explanation for the delay. It is important that the explanation for the delay, considered objectively, must be “sufficiently cogent to warrant a consideration of the prospects of success.” There are those explanations that do not meet the objective standard. In such cases the court would be justified in not considering the prospects of success, because they are immaterial, unless issues are raised that would justify the Court’s interference. The explanation for the delay must thus be full and reasonably clear, logical and convincing to excuse the default.’

[29] In light of the above authority, it cannot be said that the commissioner acted capriciously, on a wrong principle, in bad faith, unfairly, or that in exercising her discretion she reached a decision that a reasonable decision-maker could not reach.

[30] In the premise, the employee has failed to state the grounds on which this Court should review and set aside the commissioner’s ruling. There is, therefore, no reason for this Court to interfere with her discretion.

Costs

[31] With regard to costs, I am of the opinion that the requirements of law and fairness dictate that there should be no order as to costs.

[32] Accordingly, the following order is made:

Order

1. The applicant’s review application is dismissed.
2. There is no order as to costs.

D Mahosi

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Advocate F. Mahome

Instructed by:

Maroane Attorneys

For the third Respondent:

Advocate F. Venter

Instructed by:

Cowan-Harper-Madikizela Attorneys

[1] Act 66 of 1995 as amended.

[2] (JR689/14)

[2018] ZALCJHB 299 (28 September 2018).

[3] A Hardrodt (SA) (Pty) Ltd v Behardien and Others

(2002) 23 ILJ 1229 (LAC) at para 5.

[4] Section 191(2) provides that “If the employee shows good cause at any time, the council or the Commission may permit the employee to refer the dispute after the relevant time limit has expired.”

[5] 1962

(4) SA 531 (SA) 532B-F.

[6] (JR 1027/13) [2016] ZALCJHB 103 (15 MARCH 2016).

[7] [2014] 1 BLLR 1 (CC)

[8] Wood v Potane NO and Others

[2004] 7 BLLR 722 (LC) at paras 7-8.

[9] [2014] 6 BLLR 523 (LAC).

[10] Index: Pleadings and Affidavits p 6 para 1.1 of the Founding affidavit.

[11]

(2022) 43 ILJ 1599 (LAC) at para 10

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