

SOUTH AFRICA / JUDGMENT

Mkhonza v Masenye .O and Others (JR1726/2021) [2024]

ZALCJHB 14 (9 January 2024)

[2024] ZALCJHB 14

COURT

Labour Court Johannesburg

BEFORE

Phakedi

CASE / FILE NUMBER

JR1726/2021

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IN THE LABOUR COURT OF
SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR1726/2021

In the matter between:

TRUELOVE
MKHONZA
Applicant
and
COMMISSIONER DIDA
MASENYE N.O.
First Respondent
NATIONAL BARGAINING
COUNCIL FOR THE ROAD Second
Respondent
FREIGHT AND LOGISTICS
INDUSTRY
SEQUENCE LOGISTICS
(PTY) LTD
Third Respondent

Heard:

06 December
2023

Delivered:

09 January 2024

JUDGMENT

PHAKEDI, AJ

Introduction

[1] The applicant seeks to review and set aside the condonation ruling dated 19 June 2021. In terms of section 158(1)(g) of the Labour Relations Act[1] (LRA), the Labour Court may, subject to section 145, review the performance or purported performance of any function provided for in the LRA on any grounds that are permissible in law. The application is not opposed by any of the Respondents.

[2] The condonation ruling is dated 29 June 2021 and the Applicant allegedly received it on 29 June 2021. The application to review and set aside the condonation ruling was served and filed on 17 August

2021. In terms of section 158(1)(g), I am satisfied that this application was brought within a reasonable time.

[3] I will now proceed to consider the applicant's review application on the merits thereof, starting with the setting out of the relevant factual background.

The relevant background

[4] The Applicant was called to attend a disciplinary hearing on 22 and 29 October 2020 on the following charge:

"Unauthorized absence / Abscondment and/or breach of Company Policy and Procedure in that from 22nd August 2020 to 10 September 2020 you were absent from work without authorization or permission and without a valid reason. You further failed to inform the Company of your absence as per the Company policy".

[5] He was only notified on 29 October 2020 that his disciplinary hearing was proceeding on that same day and he declined to attend the hearing because his witnesses and representative were not available as they had been working night shift. The hearing proceeded in his absence and he was dismissed.

[6] The Applicant lodged an appeal and he succeeded. On 12 November 2020, the chairperson of the appeal hearing recommended that he should be granted a new disciplinary hearing for the following reason:

"The chairperson took into consideration the Applicant's right to call witnesses during a disciplinary hearing as per the Code of Good Practice and therefore believes that the Appellant should be afforded the opportunity to present his case so that a finding can be made by balancing probabilities and selecting a conclusion which seems to be more natural, or plausible, amongst several conceivable ones, even though that conclusion may not be the only reasonable one".

- [7] The second disciplinary hearing was reconvened on 24 November 2020 and the Applicant was dismissed on 27 November 2020. The Applicant did not refer his matter to the Bargaining Council within the period prescribed in section 191(1)(b)(i) of the LRA.[2] The dispute was submitted to the Bargaining Council on 12 April 2021 and on 13 April 2021 the Applicant was directed to file a condonation application. The Applicant duly served and filed a substantive application for condonation on 29 April 2021 alleging that the dispute is three months and 16 days late.
- [8] Mr Voyi submitted on behalf of the Applicant that he consulted with a certain Ms Nellie Ntuli on 11 December 2020. Ndumiso Voyi Incorporated moved offices on 15 December 2020 and his file was misplaced during the process of moving. He was only able to contact Mr Voyi on 29 March 2021 to enquire on the progress of his matter and they attended a consultation on 31 March 2021. The Respondent will not suffer any prejudice should condonation be granted. On prospects of success, the Applicant submitted that he was dismissed twice for the same misconduct and as such the principle of double jeopardy finds application.
- [9] No opposing papers were filed on behalf of the Third Respondent but its representative made oral submissions opposing condonation application on 31 May 2021. The First Respondent issued a condonation ruling on 19 June 2021 rejecting the applicant's explanation and reasons for delay. He further found that the Applicant was not subjected to double jeopardy because the appeal outcome did not find his dismissal unfair but merely recommended that he should be given another chance to be heard.

Applicant's grounds for review

- [10] In the founding affidavit, the applicant avers that the ruling is unreasonable and is not one that a reasonable arbitrator could reach on all the material that was before the First Respondent.
- [11] Furthermore, the First Respondent committed a reviewable irregularity by refusing to allow parties to make oral submissions the during in limine hearing in violation of the audi alteram principle[3]; and in concluding that the Applicant had lesser prospects of success because the principle of double jeopardy did not find application.
- [12] In his condonation ruling, the First Respondent opined that this is a case of a representative who was negligent and did not have the interests of the Applicant and he concluded that the reasons submitted by the Applicant's representative in terms of the cause of the delay are unjustifiable and weak. The ruling is also challenged on this ground.

Analysis

[13] I am of the view that the Arbitrator's decision to allow the parties to make oral submissions was correct on the basis of the Labour Appeal Court decision in *Kungwini Residential Estate and Adventure Sport Centre Ltd v Mhlongo NO and others*[4] and the decision of this court in *Silver Unicorn Trading 33 (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and others*[5]. In these cases, the Court held that the arbitrator should not have decided the application on papers but should have set the matter down for oral submissions.

[14] Section 191(2) of the LRA 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 in subsection (1) has expired."

[15] The approach which the Labour Court and the Labour Appeal Court have followed in determining whether good cause has been shown, is the often referred to passage enunciated by Holmes JA in *Melane v Santam Insurance Co Ltd*[6]:

'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.'

[16] The Court in *Academic and Professional Staff Association v Pretorius NO and Others*[7] summarized the principles for consideration as follows:

'The factors which the court takes into consideration in assessing whether or not to grant condonation are: (a) the degree of lateness or non-compliance with the prescribed time frame; (b) the explanation for the lateness or the failure to comply with time frame; (c) prospects of success or bona fide defence in the main case; (d) the importance of the case; (e) the respondent's interest in the finality of the judgment; (f) the convenience of the court; and (g) avoidance of unnecessary delay in the administration of justice. It is trite law that these factors are not individually decisive but are interrelated and must be weighed against each other. In weighing these factors for instance, a good explanation for the lateness may assist the applicant in compensating for weak prospects of success. Similarly, strong prospects of success may compensate the inadequate explanation and long delay.'

[17] In applying the above principles in this matter, the Commissioner accepted that the degree of lateness or non-compliance with the prescribed timeframe is three months and 16 days. The Applicant was dismissed on 27 November 2023 and ought to have referred his dispute on or before 27 December 2020. The referral was only filed on 12 April 2021. However, the application for condonation was only served on the Third Respondent on 29 April 2021. The explanation provided by the Applicant for this non-compliance is that his file was misplaced when his legal representatives were moving offices. The Applicant did not file any

confirmatory affidavit confirming the averments made by his legal representative.

[18] In respect of prospects of success, the Arbitrator found that because the reasons provided for the non-compliance are weak and unjustifiable, the Applicant's prospects of success are weak in that he was not subjected to double jeopardy when he was afforded another opportunity to be heard since the first hearing proceeded in his absence without presenting his defence.

[19] In *National Union of Mineworkers v Council for Mineral Technology*[8], the Labour Appeal Court held as follows:

"The approach is that the court has a discretion, to be exercised judicially upon a consideration of all facts, and in essence, it is a matter of fairness to both parties. Among the facts usually relevant are the degrees 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."

[20] The Court in *Independent Municipal and Allied Trade Union on behalf of Zungu v SA Local Government Bargaining Council and Others*[9] 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. The mere listing of significant events which took place during the period in question without an explanation for the time that lapsed between these events does not place a court in a position properly to assess the explanation for the delay. This amounts to nothing more than a recordal of the dates relevant to the processing of a dispute or application, as the case may be.'

[21] In order to exercise its discretion whether or not to grant condonation, this adjudicator must be appraised of all the facts and circumstances relating to the delay. Condonation cannot be had for the mere asking, and a party is required to make out a case entitling it to the commissioner's indulgence by showing sufficient cause, and giving a full, detailed and accurate account of the causes of the delay.[10] Between 12 December 2020 and 28 March 2021, the Applicant did not take any positive steps to enquire from his legal representative on the status of his matter, he only called on 29 March 2021.

[22] The Applicant's representative submitted in the condonation application that the cause of the delay should not be apportioned on the Applicant. In *Saloojee and Another NNO v Minister of Community Development*[11], Steyn CJ stated the following in relation to a lack of diligence on the part of an attorney and how a litigant that chose that attorney as its representative should not be absolved from the normal consequences of such a relationship, no matter what the consequences

of the failure by the attorney are:

"I should point out, however, that it has not at any time been held that condonation will not in any circumstances be withheld if the blame lies with his attorney. 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. To hold otherwise might have a disastrous effect on the observance of the Rules of this Court. Considerations ad misericordiam should not be allowed to become an invitation to laxity. In fact, this Court has lately been burdened with an undue increasing number of applications for condonation in which the failure to comply with the Rules of this Court was due to neglect on the part of the attorney. The attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a Rule of Court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the consequences of the failure are."

[23] This principle was enunciated in the *PPWAWU and Others v AF Dreyer and Co (Pty) Ltd*,[12] where the court held that employees are not entitled to rely on the tardiness of their representative. Although the delay was caused by the negligence of the representative, there are limits to which applicants can rely on such negligence even when they are personally

innocent of any tardiness. The Applicant failed to account for a full period of delay between 15 December until 28 March 2021 when he eventually made contact with his legal representatives. A prescribed period of thirty days within which his unfair dismissal dispute ought to have been lodged expired on or during December 2020 and he waited until 29 March 2021 to enquire on progress on his matter.

Relief sought by Applicant

[24] In his notice of motion, the Applicant is seeking an order in the following terms:

24.1 reviewing and setting aside the condonation ruling issued by the First Respondent on or about 19 June 2021 under case number: GPRFBC63446;

24.2 Condoning the Applicant's late referral of his unfair dismissal dispute under case number GPRFBC63446.

[25] Having regard to all the evidence and material filed in this matter, I cannot find any basis to review and set aside the condonation ruling on any of the grounds submitted by the Applicant. The explanation for the delay is wholly inadequate and non-existent, it was his legal representatives who were moving offices not him.

Prospects of success

[26] I agree with the Arbitrator's conclusions on the interpretation of the appeal outcome. The Applicant employee's guilt or innocence was never pronounced by the appeal chairperson; he/she took into account that the employer acted unfairly towards the employee by proceeding with a disciplinary hearing in his absence. I believe that the sanctioning of the second disciplinary hearing was meant to afford the employee a right to be heard and adduce evidence in defence of allegations against him and this was a fair approach.

[27] Fairness for an employee is to have an adequate opportunity to respond to the allegations. In *BMW (South Africa) (Pty) Ltd v Van der Walt*[13] the LAC dealt with the question of whether or not it would be fair for the employer to subject an employee to a second disciplinary inquiry and held as follows:

'Whether or not a second disciplinary inquiry may be opened against an employee would, I consider, depend upon whether it is, in all the circumstances, fair to do so... In labour law fairness and fairness alone is the yardstick.'

[28] Therefore, and even if it can be said that the arbitrator committed a reviewable irregularity by allowing the Third Respondent to make oral submissions without filing opposing papers as prescribed by Council Rules, the fact is that this did not affect the fair determination of the applicant's condonation application. Section 138(1) of the LRA enables commissioners to arbitrate disputes in a manner they consider appropriate in order to determine them fairly and quickly with the minimum of legal formalities. This Court, in considering the condonation application on the merits, comes to the same conclusion that the Applicant failed to give adequate explanation for the delays and give a full account of the full period of delay. The condonation ruling must therefore be upheld. The matter was unopposed, and thus the issue of costs do not arise.

[28] In the premises, I make the following order:

Order

1. The review application is dismissed.

GC Phakedi

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant : Mr S Ntshaba of Voyi Incorporated Attorneys

For the Respondent : No appearance.

[1] No. 66 of 1995, as amended.

- [2] A dismissed employee may refer the dispute in writing to council within thirty (30) days of the date of a dismissal.
- [3] This ground was abandoned by the Applicant in his supplementary affidavit (para 21, 22, 23).
- [4]
- (2006) 27 ILJ 953 (LAC)
- [5]
- (2011) 32 ILJ 1760 (LC)
- [6] 1962 (4) SA 531 (A) at p. 532 at para C – E.
- [7]
- (2008) 29 ILJ 318 (LC) at paras 17–18.
- [8]
- [1999] 3 BLLR 209 (LAC) at para 10.
- [9]
- (2010) 31 ILJ 1413 (LC) para 13
- [10] Mulaudzi v Old Mutual Life Assurance Co (South Africa) Ltd 2017 (6) SA 90 (SCA) at para 6.
- [11] 1965 (2) SA 135 (A) at 141C - E.
- [12]
- [1997] 9 BLLR 1141 (LAC).
- [13]
- [2000] 2 BLLR 121 (LAC).

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