THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JR2795/11

TLADI JACOBETH MAKUSE **Applicant**

and

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **First Respondent**

COMMISSIONER FRANCOIS VAN DER MERWE **Second Respondent**

INDEPENDENT COMMUNICATION AUTHORITY OF SOUTH AFRICA **Third Respondent**

Heard: 17 August 2015

Delivered: 18 August 2015

Summary: Condonation for 8 month delay in filing section 145 review application – stringent test to be applied – prospects of success immaterial where delay egregious and no compelling explanation tendered – condonation refused – rationale for stringent test examined

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JUDGMENT

MYBURGH, AJ

Introduction

[1] In an arbitration award issued by him, the second respondent found that the applicant had not been dismissed in terms of section 186(1)(b) of the LRA,[1] in that she did not have a reasonable expectation of the extension of her fixed-term contract.

[2] Dissatisfied with the award, the applicant launched a review in terms of section 145. But she did so some eight months outside of the six-week period prescribed in section 145(1)(a).[2] She now seeks condonation.

[3] Before evaluating the application for condonation, it is useful to consider first what the test for the grant of condonation is in the present circumstances.

The test for the grant of condonation

[4] Labour law litigation is unique in that it takes place within a system designed to ensure the effective (and thus expeditious) resolution of labour disputes – this being one of the primary objects of the LRA.[3] The need for this, and the implications of delays, were explained as follows by Ngcobo J in *CUSA v Tao Ying Metal Industries & others* [2009] 1 BLLR 1 (CC):

> "The LRA introduces a simple, quick, cheap and informal approach to the adjudication of labour disputes. This alternative process is intended to bring about the expeditious resolution of labour disputes. *These disputes, by their very nature, require speedy resolution. Any delay in resolving a labour dispute*

[1] Labour Relations Act 66 of 1995.

[2] The award was issued on 2 March 2011, and the review application delivered on 9 December 2011. It ought to have been brought by mid-April 2011, and was thus brought a week short of eight months late.

[3] See section 1(d)(iv). The delay in the resolution of labour disputes is "one of the underlying problems that the LRA seeks to remedy": *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile & others* [2010] 5 BLLR 465 (CC) at para 45.

> *could be detrimental not only to the workers* who may be without a source of income pending the resolution of the dispute, but it may, in the long run, have *a detrimental effect on an employer* who may have to reinstate workers after a number of years."[4] (Emphasis added.)

[5] It follows from this that condonation for delays in all labour law litigation is not simply there for the taking. But this is particularly so when it comes to delays in the launching of section 145 review applications, especially in the context of individual dismissals. Here the courts have made it clear that applications for condonation will be subject to "strict scrutiny", and that the principles of condonation should be applied on a "much stricter" basis. This can be traced back to this important *dictum* of the LAC (per Conradie JA) in *Queenstown Fuel Distributors CC v Labuschagne N.O & others* [2000] 1 BLLR 45 (LAC), which was decided in 1999:

> "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*.
>
> 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."[5] (Emphasis added.)

[4] At para 63.

[5] At paras 24-25.

[6] This *dictum*, which has been followed by the LAC in other judgments,[6] was explained as follows by Sutherland AJ (as he then was) in *Lentsane & others v Human Sciences Research Council* (2002) 23 *ILJ* 1433 (LC):

> "In that decision Conradie JA pointed out that the principles of condonation should be *much stricter* than those which were applied 'in normal circumstances'. This remark I understand to be an endeavour to distinguish the considerations pertinent to challenging an award granted by a commissioner of the CCMA, in relation to other litigious issues, such as for example an application for condonation of the late referral of a statement of case or of defence. The policy reasons for that distinction are clear. Once a party has an award in his or her favour, the failure to respond within the six-week period to challenge that award gives rise to considerations which are absent at the outset of litigation, where the table is being set for debate."[7] (Emphasis added.)

[7] Consistent with these judgments, the Constitutional Court has also recognised that there comes a point at which a successful party can feel secure in the decision in question and arrange its affairs accordingly, and that it is difficult to obtain condonation for the late launching of an application for leave to appeal (and the same would apply to a review) after this point in time. As the court put it in *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)* 2008 (2) SA 472 (CC):

> "There is an important principle involved here. An inordinate delay induces a reasonable belief that the order had become unassailable. This is a belief that the hospital entertained and it was reasonable for it to do so. It waited for some time before it took steps to recover its costs. A litigant is entitled to have closure on litigation. The principle of finality in litigation is intended to allow parties to get on with their lives. *After an inordinate delay a litigant is entitled to assume that the losing party has accepted the finality of the order and does not intend to pursue the matter any further*. To grant condonation after such

[6] *Mbatha v Lyster & others* [2001] 4 BLLR 409 (LAC) at para 18; *Hardrodt (SA) (Pty) Ltd v Behardien & others* (2002) 23 *ILJ* 1229 (LAC) at paras 3-4.

[7] At para 14.

> an inordinate delay and in the absence of a reasonable explanation, would undermine the principle of finality and cannot be in the interests of justice."[8] (Emphasis added.)

[8] From about 2007 onwards, this court and the LAC were taken to task by both the SCA and Constitutional Court for "systemic delays"[9] in the resolution of labour law disputes, particularly in the context of the final determination of review applications.[10] In *Shoprite Checkers (Pty) Ltd v CCMA & others* [2009] 7 BLLR 619 (SCA), the SCA held that such delays are untenable:

> "The entire scheme of the LRA and its motivating philosophy are directed at cheap and easy access to dispute resolution procedures and courts. Speed of result was its clear intention. Labour matters invariably have serious implications for both employers and employees. Dismissals affect the very survival of workers. *It is untenable* that employees, whatever the rights or wrongs of their conduct, be put through the rigours, hardships and uncertainties that accompany delays of the kind here encountered. It is equally unfair that employers bear the brunt of systemic failure."[11] (Emphasis added.)

[8] At para 31.

[9] A phrase coined by the SCA in *Shoprite Checkers (Pty) Ltd v CCMA & others* [2009] 7 BLLR 619 (SCA) at para 33.

[10] See this string of high-ranking judgments: *Republican Press (Pty) Ltd v CEPPWAWU & Gumede & others* [2007] 11 BLLR 1001 (SCA) at paras 20-22; *Equity Aviation Services (Pty) Ltd v CCMA & others* [2008] 12 BLLR 1129 (CC) at para 52; *Netherburn Engineering CC t/a Netherburn Ceramics v Mudau NO & others* [2009] 6 BLLR 517 (CC) at paras 1 and 12; *Shoprite Checkers (Pty) Ltd v CCMA & others* [2009] 7 BLLR 619 (SCA) at paras 33-34; *Strategic Liquor Services v Mvumbi NO & others* [2009] 9 BLLR 847 (CC) at para 12; *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile & others* [2010] 5 BLLR 465 (CC) at para 47; *Visser v Mopani District Municipality & others* [2012] 3 BLLR 266 (SCA) at paras 13-14.

[11] At para 33.

[9] In *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile & others* [2010] 5 BLLR 465 (CC), the Constitutional Court held that whatever the cause of the problem is, it had to be addressed:

> "It is unfortunately necessary to make some forthright comments about this unsatisfactory state of affairs again. There is nothing inevitable that causes delays in the dispute resolution process under the provisions of the LRA. *If there is an underlying cause it may be because problems in the process are not addressed timeously and are then acknowledged as being the acceptable norm*.
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> … The Labour Court and Labour Appeal Court Rules provide for a court-managed process to ensure that matters are heard in proper form, and expeditiously so. If practitioners cause delays, the rules provide the means for the Labour Courts' judiciary to exercise discipline and control over them. As judges we also need to produce our judgments expeditiously. *Accountability and responsibility affect and concern us all*."[12] (Emphasis added.)

[10] As an institution, the labour courts took heed of this criticism and responded to it through a range of remedial measures. Amongst them was the introduction of a *pro bono* judge system in 2011, in terms of which practitioners act as judges on a *pro bono* basis for a week during recesses, with the specific objective being to address the back-log in review applications. Allied to this, in April 2013, a practice manual was introduced, which contains a number of provisions (in para 11.2) aimed at speeding up the determination of reviews. It records that a review application "is by its very nature an urgent application", and requires review records to be delivered within 60 days of them being made available by the CCMA (or bargaining council) and for all the necessary papers in the application to be filed within 12 months of the date of the launch of the application.

[12] At para 47.

[11] In addition to this, the legislature found it necessary in the 2014 amendments to the LRA (which took effect on 1 January 2015) to pass three amendments to section 145, which are specifically aimed at expediting the prosecution of review applications. The first is that an applicant on review must apply for a hearing date within six months of launching the review (subsection (5)); the second is that judgments in review applications must be delivered as soon as reasonably possible (subsection (6)); and the third is that the institution of a review does not suspend the operation of the award, unless the applicant furnishes security to the satisfaction of the court (subsection (7)).

[12] For present purposes, the amendment requiring the applicant to apply for a hearing date within six months of launching the review stands to be emphasised. In practical terms, it halves the time for the completion of the filing of all papers set in the practice manual. In effect, the legislature wants reviews determined twice as fast as the target set by the court itself in its practice manual.

[13] The corrective steps taken by the labour courts as an institution and the legislature to ensure the expeditious prosecution and determination of review applications outlined above underscore the statutory imperative that labour disputes must be effectively (and thus expeditiously) resolved. And the strict scrutiny of condonation applications relating to the late launching of section 145 review applications is very much part of this overall scheme of things.

[14] Although the review application in this matter dates back to 2011, and was thus brought before the introduction of the practice manual and the 2014 amendments to the LRA, I do not believe that this means that a less stringent test for the grant of condonation should apply. As far back as 1999, the LAC's *dictum* in *Queenstown Fuel Distributors* quoted above has been the law (and remains the law).

Evaluation

[15] It is in this overall context that the application for condonation herein stands to be determined. As a point of departure, the delay of some eight months is egregious. Instead of taking six weeks to bring the review, the applicant took more than nine months to do so, which equates to more than six times longer than the statutory standard. (Judged in terms of the current six-month standard in section 145(5), the applicant took three months longer just to launch her review than applicants have to apply for a hearing date.)

[16] The question then is whether the applicant (in the words of the LAC in *Queenstown Fuel Distributors*) has tendered a "compelling" excuse for non-compliance. The sum total of the explanation (such as it is) is this: once the award was received by Clientele Legal (the applicant's legal insurers) on 2 March 2011, the matter was assessed internally, with the legal advisor assigned to the matter having changed on three occasions, which caused delays; and it ultimately took much time for Clientele Legal to give the go ahead for the review and the appointment of attorneys – this in circumstances where, so it is alleged, their internal legal advisors are not familiar with the time periods for the launching of a review (a scarcely credible allegation).

[17] Self-evidentially, this explanation is entirely bereft of substance and detail. Critically important facts are missing, like, for example, the date upon which the applicant's current attorneys were appointed, thus making it impossible to assess the diligence or otherwise with which they conducted themselves after being appointed. The applicant also makes no attempt at all to take the court into her confidence about what, if any, steps she took to follow up with Clientele Legal, or to seek alternative legal advice. There is also no confirmatory affidavit from anyone at Clientele Legal (attesting to their alleged lack of knowledge of time periods). In these circumstances, the applicant has come nowhere near establishing that she was free from blame for the delay.

[18] In addition, although the applicant does not deal with this at all in her application for condonation, it appears that the notice of motion and founding

affidavit were signed on 8 November 2011 and 28 November 2011, respectively, and that the review application was delivered by fax on 9 December 2011. There is no explanation for the apparent delay in the signature of the founding affidavit (by some three weeks) and the subsequent delay in the delivery of the application (of 11 days). In effect, a delay of an entire month again goes entirely unexplained – and this in circumstances where the review application was already hopelessly out of time by that stage.

[19] In short, the applicant has not demonstrated a reasonable and acceptable explanation for the egregious delay – let alone a compelling one, as is required in the circumstances of this matter.

[20] This leaves the issue of prospects of success. While an analysis of judgments of the LAC over the years reveals that it has not always consistently adopted the position that the failure to provide a reasonable and acceptable explanation for the delay renders prospects of success immaterial,[13] it endorsed such a position in its recent judgment in *Colett v Commission for Conciliation, Mediation and Arbitration and others* [2014] 6 BLLR 523 (LAC). Significantly, this was in the context of an application to dismiss a review application for want of diligent prosecution. In an unanimous judgment, Musi AJA held 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 532C–D … should be followed but:

[13] Compare, for example, *NUM v Council for Mineral Technology* [1999] 3 BLLR 209 (LAC) at para 10 with *NEHAWU obo Mofokeng & others v Charlotte Theron Children's Home* [2004] 10 BLLR 979 (LAC) at para 23.

> '(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.'
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> 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."[14] (Emphasis added.)

[21] In the light of this *dictum*, given that the applicant has not provided a reasonable and acceptable explanation for the delay and is guilty of a flagrant and gross failure to comply with the prescribed time-period (the application being eight months late), her prospects of success are immaterial, and thus need not be considered.

[22] In the result, when subjected to the "strict scrutiny" required by the LAC in *Queenstown Fuel Distributors,* the application for condonation falls hopelessly short of the mark, and must fail. In the absence of the applicant having succeeded in obtaining condonation, the review application also stands to be dismissed.

[23] Turning to the issue of costs, in the light of the jurisprudence outlined above, it is unacceptable for a party to bring a review application eight months late, and then put the respondent to the expense of defending a hopeless application for condonation. To my mind, it is high time that applicants on review come to learn that where they bring a review application way out of time and condonation is refused, they cannot reasonably expect to escape paying the costs.

Order

[24] In the circumstances, the following order is made:

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[14] At paras 38-39.

1. application for condonation is dismissed;

2. the review application is accordingly dismissed;

3. the applicant shall pay the costs.

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Myburgh, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

On behalf of the applicant: N Mahomed of Nadeem Mahomed Attorneys

On behalf of the third respondent: R Venter
Instructed by: Maenetja Attorneys