IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Not reportable

Case no: 464/15

In the matter between:

ANNE MARIE OHFF	**Applicant**
and	
SAROJINI BALKARAN N.O	**First Respondent**
THE COMMISSION FOR CONCILIATION,	
MEDIATION AND ARBITRATION	**Second Respondent**
DERIVCO	**Third Respondent**
Heard:	**30 November 2016**
Delivered:	**2 June 2017**

JUDGMENT

GUSH J

[1] This is an application to review and set aside the first respondent's ruling issued on 9 August 2015 dismissing the applicant's application for condonation for the late filing of her dispute

[2] The applicant was employed by the third respondent on 4 January 2000 as a Database Administrator and, on the 13 December 2013, was appointed as Software Development Manager.

[3] On 27 February 2014, the applicant and the third respondent entered into a "separation agreement" regarding the applicant's continued employment. The settlement agreement records that the date of termination of the applicant's employment is 28 February 2014.

[4] The agreement further records that:

> '(a) The third respondent would pay to the applicant a "termination payment" in the amount of R42, 630 per month until 30 November 2014 with leave pay;
>
> (b) On termination of her employment the applicant was to return all documents etc and remain bound by the confidentiality agreement;
>
> (c) the "agreement has been reached is in full and final settlement of all claims and rights" which the applicant may have against the third respondent."
>
> (d) The "agreement constitutes the whole agreement between the parties"'.[1]

[4] It would appear that the parties had agreed that in order for the applicant to claim unemployment insurance the applicant would be deemed to be retrenched. The third respondent issued a letter confirming the retrenchment. On 5 February 2015, the applicant wrote to the third respondent complaining that her claims for unemployment benefits due to her as a result of her retrenchment had been refused as the third respondent had reflected a determination as a resignation. This administrative error was acknowledged by the employer and rectified. The applicant now claims she was unfairly dismissed for operational requirements on 30 November 2014.

[5] The applicant signed a referral to the second respondent ostensibly on "29 January 2015" (which referral was only served on the third respondent on 27 February 2015) in which referral the applicant claimed she had been dismissed on 30 November 2014.

[6] Based on the applicant's averment that she was dismissed on 30 November 2014, the referral was some 59 days late. As a result, the applicant applied for

[1] Pleadings page 27 – 34.

condonation for the late filing of her referral which she averred was 55 days late.

[7] In her application for condonation, the applicant, in her affidavit studiously and obviously intentionally avoids any mention of the agreement she entered into with the third respondent which agreement records that her employment was terminated on 28 February 2014. Neither did the applicant attach the agreement with the third respondent to her application. The reason for the delay the applicant suggests was due "primar[il]y [to the fact that] during December 2014 until 15th January 2015 being the Christmas and New Year recess, it was virtually impossible to obtain any legal assistance in the matter…".

[8] The applicant avers in her founding affidavit in the review application that she was not advised by her attorney to attach supporting documentation in applying for condonation. This and the applicant's deliberate failure to include the agreement in her condonation application is to be contrasted with the specific averment the applicant makes in her founding affidavit:

> 'Unfortunately, the Director of Labour Project, Roger Brown ("Brown") did not agree with me regarding the merits of my dismissal and refused to give her mandate an attorney to act on my behalf. His refusal was based on me having signed the separation agreement. Various discussions took place between the same Labour Project attorney and me with the result that by the middle of December 2014 I had still not properly briefed an attorney to larger referral with the second respondent.'[2]

[9] The applicant in her affidavit in support of her condonation application fails to mention that the issue she had with her attorney involved the separation agreement and the fact that that agreement recorded that the date of termination of her employment was 28 February 2014.

[10] The test to be applied when considering condonation was summarised in *NUM v Council for Mineral Technology* [3]

[2] Founding affidavit para 36
[3] [1999] 3 BLLR 209 (LAC)

> '… the approach in Melane v Santam Insurance Co Ltd 1962 (4) SA 531 (A) at 532C–F should be adopted ... . The approach 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 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 (cf Chetty v Law Society, Transvaal 1985 (2) 756 (A) at 765A–C; National Union of Mineworkers & others v Western Holdings Gold Mine (1994) 15 ILJ 610 (LAC) at 613E).'[4]

[11] In order to consider the applicant's application for condonation and the refusal thereof by the first respondent, it is necessary to consider the applicant's explanation and in particular the extent to which the applicant took the first respondent into her confidence in explaining the reason for the delay.

[12] There can be no doubt that the applicant was well aware of the consequences of the separation agreement and the contents thereof. When the issue of condonation arose, the applicant attempted to explain away the delay by suggesting that she was dismissed was on the 30 November 2014. This was in spite of the fact that she had agreed in the separation agreement her employment had terminated "by agreement and consensually on the termination date viz. 28 February 2014. In addition, instead of disclosing that she had concluded a separation agreement she averred that dismissal was unfair purely based on an averment that the third respondent had dismissed her without complying with section 189 of the Labour Relations Act 66 of 1995.

[4] At para 10.

[13] It is a principle in our courts that litigants should approach a court and for that matter the Commission for Conciliation, Mediation and Arbitration with clean hands. The applicant in this matter agredd to the termination of her employment and accepted the payments made to her in terms of that agreement. She was also was complicit in the attempt to claim unemployment insurance. The applicant made it clear that she had waited until 30 November 2014 to ensure she received the payment she was entitled to in terms of the separation agreement. It was only thereafter that the applicant suggested she had been dismissed for operational reasons. If the applicant was concerned about the circumstances surrounding the signing of the settlement or separation agreement the time to raise those concerns was at the time the agreement was signed.

[14] The applicant's grounds of review are that the first respondent misdirected herself in finding:

(a) That the date of her dismissal was 28 of February 2014;

(b) That the first time the applicant believed she had been retrenched was when she attempted to claim unemployment benefits;

(c) That the applicant's prospects of success were negligible; and

(d) The explanation for the delay was unacceptable is unreasonable.

[15] The facts of the matter are that the separation agreement specifically records the date of dismissal as 28 February 2014. The Labour Relations Act defines the date of dismissal as "the earlier of the date on which the contract of employment terminated or the date on which an employee left the service of the employer".[5]

[16] The separation agreement specifically provides that the applicant's employment terminated "by agreement and consensually".[6] This leads incontrovertibly to the conclusion that the applicant was neither retrenched nor dismissed and her prospects of success are non-existent.

[5] S 190.
[6] Pleadings page 28.

[17] The applicant was at all times aware of the date of termination which was the date on which she left the employ of the third respondent. She elected, in the face of an admitted discussion she had with her legal representative regarding the separation agreement, **not to disclose** the existence thereof on affidavit when applying for condonation.

[18] I am not persuaded that the award of the first respondent refusing condonation is in any way reviewable.

[19] As far as costs are concerned, in the interest of law and fairness, I am satisfied that the conduct of the applicant in this matter warrants that she be ordered to pay the costs of this application.

[20] In the circumstances and for the reasons set out above, I make the following order:

The applicant's application is dismissed with costs.

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Gush J

Judge of the Labour Court of South Africa

APPEARANCES:

FOR THE APPLICANT: In Person

FOR THE RESPONDENT: M.M Posemann

Instructed by Macgregor Erasmus