IN THE LABOUR COURT OF SOUTH AFRICA HELD AT JOHANNESBURG

Reportable

Case no: JR 2725/16

In the matter between:

POPCRU obo P MALEKANE **Applicant**

and

SAFETY AND SECURITY SECTORAL

BARGAINING COUNCIL **First Respondent**

RM LYSTER N.O. **Second Respondent**

SOUTH AFRICAN POLICE SERVICE **Third Respondent**

Heard: 16 May 2017
Delivered: 19 May 2017

Summary: Review of condonation ruling – Commissioner has a sole discretion to decide on the condonation application – good cause inquiry is not only limited to the degree of lateness, explanation for the delay, prospects of success, and prejudice, – condonation ruling may be decided using the reasonableness test.

JUDGMENT

Mabaso AJ

Introduction

[1] Holmes J.A (as he then was), in *Melane v Santam Co Ltd*[1] said:

> "And in this country one has a human, and I trust judicial, measure of sympathy for a humble ["person"][2] struggling to reconcile an alien concept of urgency with the un-plentiful subject of cash."[3]

[2] It is imperative to remark on this *obiter dictum* in determining this review application because: (i) the Commissioner set out the requirements as enunciated in *Melane* as the yardstick in deciding whether or not to grant a condonation application, delivered by the applicant in an attempt to exercise her right of challenging the fairness of her dismissal by her erstwhile employer;[4] (ii) that the applicant raised the issue of lack of funds as one of the factors that necessitated the late delivery of the referral of dispute to the Bargaining Council; and (iii) taking into account that a consideration for condonation application calls for the determination of the interests of justice based on the factors required to meet the principle of good cause as required by section 191(2) of the LRA.[5]

[1] 1962 (4) SA 531 (A). (*Melane*)

[2] Added, taking into account that the original word used is offensive.

[3] Id at 532.

[4] Section 185(a) of the Labour Relations Act 66 of 1995 (LRA).

[5] Section 191(2) of the LRA makes provision for condonation of the late referral of disputes to the CCMA and reads:

> "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."

[3] The applicant asks this Court to review and set aside the condonation ruling by the Commissioner, dated 2 November 2016, under the bargaining council case number PSSS 384-16/17. The respondents are the Safety and Security Sectoral Bargaining Council (Bargaining Council), the Commissioner, and the South African Police Service (SAPS).

Relevant Background

[4] The applicant in this matter is an adult female who was employed by SAPS as a police officer in the capacity of a Captain and has worked in the service for 21 years. The applicant's dismissal by SAPS sprung from allegations of misconduct which related to an incident of escape from custody by a detainee – one Erasmus.

[5] The principal grounds, in this review, are that the Commissioner committed an a reviewable irregularity in deciding the condonation application as he "*adopted a piecemeal approach*" in deciding it. This is because he, *inter alia:* failed to properly take into account the prospects of success*;* the reasons for the delay; and that the applicant would be deprived of an opportunity to ventilate the alleged unfair dismissal dispute properly. Moreover, that there would be no prejudice on SAPS as it would have an opportunity to address the issue of hearsay evidence. Therefore, his conclusion is one that a reasonable decision maker could not have made based on the evidence properly placed before him.

Averments before the commissioner

[6] The referral was 20 days out of time, and the applicant – in her affidavit – proferred the following reasons for the delay: upon receipt of the outcome of her appeal she approached a trade union which had represented her during the internal hearing, and was advised that they were to *"first evaluate my prospects on appeal and that after the evaluation I would be informed of their decision"* and she then asked for advice in respect of "*what needed to be done for the referral to be commenced with*". However, she was told that she

was to be notified accordingly once an assessment of the prospects of success had been formed.

[7] The affidavit further states that she then unsuccessfully explored all possible means in an endeavour to source the necessary financial assistance to be able to instruct attorneys to pursue an unfair dismissal claim before the Bargaining Council, until some of her friends came to the rescue, and recommended the present attorneys of record to her. The attorneys advised that the condonation application was necessary to declare a dispute against SAPS. Hence the dispute was declared, accompanied by the condonation application, which was disposed of without viva voca"evidence was led".

[8] The application before the Commissioner was unopposed. Moreover, that should the condonation not be granted; she was to be prejudiced as it was going to be difficult to obtain employment taking into account that she had been dismissed for misconduct. Furthermore, that the conclusion by the chairperson of the disciplinary hearing was wrong and cried out for a fair tribunal and that the evidence presented at the disciplinary hearing was based on hearsay. The chairperson of the internal hearing was wrong in imposing a sanction of dismissal as he did not take into account her personal circumstances. Meaning, the applicant expected the Commissioner to take into account two-fold requirements of prospects of success.[6]

The ruling

[9] As stated above, the Commissioner, set for himself, five factors to be relied upon in deciding the condonation, namely (a) the degree of lateness; (b) the explanation for the delay; (c) prospects of success; (d) the importance of the case, (e) the prejudice to the parties ("*Melane's* requirements"). In his attempt to amplify (b) and (c) factors, the Commissioner said:

[6] *SATAWU obo Matlatso v Commission for Conciliation, Mediation and Arbitration and Others* [2013] JOL 30727 (LC) at para 5:

> "There is, however, *one aspect of the enquiry which the Commissioner failed to conduct in this matter*, which is whether the relationship between the parties had irretrievably broken down as a result of the misconduct, warranting the sanction of dismissal…" (Emphasis added.)

> *"[*See also the case of *Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA & Others [1997] 11 BLLR 1475 (LC) and Queenstown Fuel Distributors CC v J Labuschagne and others 2002 ILJ 186 LAC.* In the latter case, the court said that the reasons for the delay must be convincing and compelling, and **the prospects of success must be strong**. The court added that condonation in the case of individual dismissal would not readily be granted.]" (Emphasis added.)

[10] It is prudent, to interpose and mention that I do not agree with the Commissioner's analysis of the *Queenstown* matter, where he says "*the prospects of success must be strong*" as nowhere in that judgment was that statement mentioned or alluded to. Therefore, I conclude that his yardstick is misplaced in this regard. The Commissioner acknowledged that the delay was not excessive, however, he was of the view that the reasons for the delay were not acceptable and that the filling of the referral did not require any legal expertise or assistance as "*she was not required to make out a case for unfair dismissal in that referral",* and the Commissioner interestingly says:

> "With regard to the prospects she has *no realistic prospects of success in the main action* on her own version the three witnesses testified for the respondent it is clear from the Appeal finding with which I have been finished that the chair of that disciplinary hearing accepted the evidence of those witnesses, and rejected that of the Applicant and her witnesses. The appeal chair also notes that the versions of the Applicant and her witnesses was not put to the respondent's witnesses when they testified I cannot conclude on the basis of the Applicant's submissions that the Chair and the appeal chair reached conclusions that they were not entitled to reach. With regard to her submissions that the chair accepted hearsay evidence and that the respondent's witnesses were not present when the detainee is actually escaped, that is irrelevant. Applicant has not denied that he did escape"

Applicable principles and application thereof

[11] The Commissioner had a discretion as to whether he grants the condonation application or not. And this Court will not easly tamper with that discretion, however, if the applicant has shown that the commissioner committed an irregularity in the proceedings which prevented her to have a fair hearing, then this Court will have to come to her rescue. For example, in the matter of *Cowley v Anglo Platinum & others*[7], the Court held that—

> "when the Commissioner is endowed with a discretion this court will be very slow to interfere with the exercise of that discretion. The Commissioner's exercise of discretion would be upset on the review if the applicant shows, inter alia, that the Commissioner committed a misdirection or irregularity, or that he or she acted capriciously, or on the wrong principle or in bad faith or unfairly or that the exercise seeing the discretion the Commissioner reached a decision that a reasonable decision-maker could not reach." (footnote omitted)

[12] *Goldfields Investment Ltd and Another v City Council of Johannesburg and Another*,[8] the Court held as follows regarding reviewable ground where a presiding officer has made an error of law which amounts to the one that a reasonable decision maker could not have made taking into account the totality of the evidence before him:

> "The law, as stated in *Ellis v Morgan* has been accepted in subsequent cases, and the passage which has been quoted from that case shows that it is not merely high-handed or arbitrary conduct which is described as a gross irregularity; behaviour which is perfectly well-intentioned and bona fide, though mistaken, may come under that description. The crucial question is whether it prevented a fair trial of the issues. If it did prevent a fair trial of the issues then it will amount to a gross irregularity. Many patents irregularities have this effect. And

[7] JR 2219/2007; [2016] JOL 35884 (LC) at para 21. It was also referred to in *Seardel Group Trading (Pty) Ltd t/a Romatex Home Textiles v Petersen and Others* [2010] ZALC 127; [2011] 2 BLLR 211 (LC) ; (2011) 32 ILJ 439 (LC) with approval.

[8] 1938 TPD 551.

> if from the magistrate's reasons it appears that his mind was not in a state to enable him to try the case fairly this will amount to a latent gross irregularity. If, on the other hand, he merely comes to a wrong decision owing to his having made a mistake on a point of law in relation to the merits, this does not amount to gross irregularity. In matters relating to the merits the magistrate may err by taking a wrong one of several possible views, or he may err by mistaking or misunderstanding the point in issue. In the latter case it may be said that he is in a sense failing to address his mind to the true point to be decided and therefore failing to afford the parties a fair trial."[9]

Therefore, in casu the question that has to be answered is whether the Commissioner committed an irregularity which deprived the applicant an opportunity to have her condonation to be dealt with fairly?

[13] I agree with the Commissioner that the factors (a) to (e) are the ones that must be looked at in deciding a condonation application, as per *Melane,* and for avoindance of doubt I quote the relevant paragraph in that judgment below:

> "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, 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 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 for prospects of success which are not strong. Or the

[9] Id at p 560.

> 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 discursiveness should be discouraged in canvassing the prospects of success in the affidavits. I think that all the foregoing clearly emerge from decisions of this Court, and therefore I need not add to the evergrowing burden of annotations by citing the cases." (Emphasis added.)

However, these factors are not exhaustive as is apparent from the phrase: *"among the facts usually relevant"*. Nowhere in *Melane* was it held that these are the only factors that had to be looked at. Instead the word "among" clearly shows that there are other factors to be considered. The Commissioner also refers to the *Rustenburg Platinum Mines* matter, which introduced another requirement which will be referred as (f), herein, "*the attitude of the employee after the dismissal*"[10] — meaning what did she do after learning about the dismissal.

[14] In *Grootboom*,[11] the Constitutional Court, in dealing with the condonation application held that in deciding such application one has to look at the interests of justice.[12] The Court acknowledged that interests of justice has no definitive definition.[13] It however, at paragraph 22, set out non exhaustive factors that are relevant in an inquiry for determining whether it would be in the interests of justice to grant a condonation application as follows:

> ". . . based on *Brummer* and *Van Wyk*, the standard for considering an application for condonation is the interests of justice. However, the concept "interests of justice" is so elastic that it is not capable of precise definition. As the two cases demonstrate, it includes*: the nature of the relief sought; the extent and cause of the delay; the*

[10] *Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA & Others* [1997] 11 BLLR 1475 (LC) at 1480.

[11] *Grootboom v National Prosecuting Authority and Another* [2013] ZACC 37; 2014 (2) SA 68 (CC); 2014 (1) BCLR 65 (CC); [2014] 1 BLLR 1 (CC); (2014) 35 ILJ 121 (CC).

[12] Id at para 22.

[13] Id.

> *effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the importance of the issue to be raised in the intended appeal; and the prospects of success.* It is crucial to reiterate that both *Brummer* and *Van Wyk* emphasise that the ultimate determination of what is in the interests of justice must reflect due regard to all the relevant factors but it is not necessarily limited to those mentioned above. The particular circumstances of each case will determine which of these factors are relevant." (Emphasis added.)

Further, Zondo J remarked as follows in explaining the inter-relationship between these factors :

> "*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*.
>
> 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."[14] (Own emphasis)

Thus gleaned from the above, these are in summary, the factors that are relevant in the interest of justice enquiry include: the existence of reasonable

[14] Id at para 50-1.

prospects of success, the importance of the issue raised by the matter, prejudice and the reasonableness of the applicant's explanation for the delay, the extent and cause period of delay, the effect of the delay on the administration of justice and other litigants. Sometimes, even if the explanation for the delay is not sufficiently explained, the court may grant condonation on the basis that the other party is not opposing it, or an applicant did not show any disinterest in the matter.[15]

[15] Taking into account these principles, in casu the Commissioner failed to deal with factors (d), part of (c), (e), and (f); in that, the applicant clearly stated the importance of the case to her in that it will be difficult to impress prospective employers because her record will reflect that SAPS dismissed her. Further, that SAPS was not going to be prejudiced by the granting of the condonation because it had not opposed it and moreover it was going to have an opportunity to ventilate the matter before an independent person; and the issue of hearsay evidence that the applicant alleged had been relied upon in concluding that she had committed the misconduct dismissed for. Further, that one of the issues that she wanted to raise was the issue of the harshness of sanction as she believes that the chairperson of the hearing failed to take into account the service period, as she is of the view that the relationship has not irretrievably broken down.

[16] The Commissioner failed to properly consider that the applicant, following her dismissal, did take steps to challenge it. Unfortunately, she could not afford fees for attorneys. The Commissioner's conclusion that there was no need for the lawyers failed to take into account that a party who is completing a referral has to state briefly the reasons why she is of the view that the dismissal is unfair, and that the nature of the charges the applicant was dismissed for might lead to criminal charges being leveled against her; and therefore, whatever she was to write on the referral might trigger the State to pursue charges based on the seriousness of the accusations.

[15] *City Power (Pty) Ltd v Grinpal Energy Services (Pty) Ltd & others* [2015] 36 ILJ 1423 (CC) at para 15.

[17] Regarding the applicant having a union at the time of dismissal, she explained that she did approach that union and was advised that they were to revert to her once they have assessed the merits of the matter. The averments in the affidavit crystalize that she ended up being assisted by friends to financially pursue the matter of the alleged unfair dismissal accompanied by the condonation application.

[18] It is further clear that the Commissioner did not plainly understand the test that he had to follow, taking into account that he misunderstood the *Queenstown's* case by saying the test is one of "must be strong" prospects of success instead of "a reasonable" prospects of success. Further, the Commissioner seemed not to understand that other factors had to be looked at such as the prejudice to the parties. It is clear in the ruling that the Commissioner does not deal with the issue of harshness of sanction as pleaded by the applicant, therefore under those circumstances, it is clear that the Commissioner failed to apply her mind to this issue which is one of the crucial aspect in deciding prospects of success. Further the Commissioner failed to deal with the issue of prejudice.Therefore, the Commissioner reached an unreasonable conclusion.

[19] Based on the above, I conclude that the Commissioner's ruling has to be reviewed and set aside taking into account the interest of justice.

[20] I have taken into account that the dismissal took place almost a year ago, the records of the condonation application are complete, therefore, to postpone the matter will further delay its finalisation as the bargaining council will have to again appoint a commissioner to decide on the condonation application. Under the circumstances, I am of the view that submitting the matter back to the bargaining council would serve no interests of justice, hence I have made the following order.

<u>Order</u>

[21] In the circumstances the following order is made:

1. The condonation ruling issued by Commissioner RM Lyster, under the auspices of the first respondent under case number PSSS384-16/17, dated 2 November 2016 is reviewed and set aside. Thus, replaced with the order that:

> "The applicant's condonation application for the late referral of the unfair dismissal dispute against South African Police Service is hereby granted."

2. There is no order as to costs.

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S Mabaso

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant: E Sithole
Instructed by: Makgahle Mashaba Attorneys

For the Respondent:
Instructed by: