IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 137/2015

In the matter between:

PASSENGER RAIL AGENCY SOUTH AFRICA **Applicant**

And

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION **First Respondent**

COMMISSIONER BONGANI KHUMALO N.O **Second Respondent**

MOHLALA M.M **Third Respondent**

SATAWU **Fourth Respondent**

Heard: **8 June 2017**

Delivered: **26 April 2018**

JUDGMENT

TLHOTLHALEMAJE, J:

Introduction and background:

[1] The third and fourth respondents seek condonation for the late filing of an answering affidavit to the applicant's application to review and set aside the arbitration award issued by the second respondent dated 8 December 2014.

[2] The review application was filed on 26 January 2015. On 21 August 2015, the applicant (PRASA) filed notices in terms of Rule 7A (6) & 7A (8) (b) (b) the Rules of this Court, indicating that it stood by its Notice of Motion.

[3] In terms of Rule 7A (9), the third and fourth respondents ought to have delivered their answering affidavit on or about 4 September 2015. They only did so on 16 February 2017. The delay in delivering the answering affidavit is about 17 months. On 16 February 2017, PRASA delivered an objection in terms of clause 11.4.2 of the Practice Manual read with Rule 7A (9) of the Rules of this Court, leading to the filing of the present application for condonation.

[4] A brief background to the dispute between the parties is important in order to contextualise the application before the Court. The dispute arose sometime in September 2011 after the third respondent and other candidates had applied for the advertised post of Financial Accountant. After a protracted process of short-listing flowing from about 18 applications, the third respondent's complaint is that she was not short-listed as she did not have the required B Com (Accounting) and at least three years relevant experience as a Financial Accountant. The successful candidate was appointed from three others who were shortlisted, and had commenced his employment in January 2012.

[5] The third respondent had lodged an appeal against the appointment of the successful candidate, contending that PRASA's recruitment and selection policy gave first preference to internal candidates, the failure to appoint her essentially involved non-compliance with company recruitment and selection policies. When the grievance was not resolved, she had then referred a dispute to the CCMA.

[6] Conciliation having failed, the alleged unfair labour practice dispute related to the failure to promote and appoint was then referred for arbitration. On 8 December 2014, an award was issued by the second respondent (Commissioner) in favour of the third respondent in terms of which it was found that PRASA had committed an unfair labour practice related to promotion. The Commissioner ordered a protective promotion to the third

respondent and further ordered that she be paid compensation in the amount of R486 662.00. It is that award that PRASA seeks to review and set aside.

Condonation and evaluation:

[7] The factors applicable when considering applications for condonation are well-known as elucidated in *Melane v Santam Co Ltd*[1] as follows;

> "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 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 ever-growing burden of annotations by citing the cases."

[8] In *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others,* it was held that it was appropriate that an application for condonation be considered and granted if that is in the interests of justice and refused if it is not. The interests of justice must be determined by reference to all relevant factors including the nature of the relief sought, the extent and cause of the delay, the nature and cause of any other defect in respect of which condonation is sought, the effect on the administration of justice, prejudice and the reasonableness of the

[1] 1962 (4) SA 531 (A) at 532B-E.

applicant's explanation for the delay or defect[2]. To that end, it is accepted that the interests of justice is not a self-standing factor to be taken into account.

[9] In this case, the delay in filing the answering affidavit is excessive in the extreme, and this required of the third and fourth respondents to furnish a reasonable and acceptable explanation for each period of the delay. In the absence of a reasonable or plausible explanation for that delay, the Court would then be hard-pressed to deal with other factors applicable to such applications[3].

[10] The third and fourth respondents in the founding affidavit deposed to by SATAWU's Legal Officer and its representative in these proceedings, Mr Bareng Mokoena averred the following;

[11] Upon the filing of the review application, the parties have been engaged in settlement discussions, and the third respondent had 'relaxed' and was under the impression that the matter would be settled and the review application withdrawn. In this regard, reliance is placed on;

a) The appointment of the third respondent into the position of Assistant Manager on 24 June 2015. Despite the appointment, the third respondent was nonetheless not allowed to assume that position as the appointment letter was not signed and further since other conditions of employment had not been finalised.

[2] 2000 (5) BCLR 465; 2000 (2) SA 837 (CC) at para 3. See also *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae* [2007] ZACC 24; 2008 (2) SA 472(CC); 2008 (4) BCLR 442(CC) at para 20.

[3] See *NUM v Council for Mineral Technology* [1999] 3 BLLR 209 (LAC) at para 10, where it was held that;

> "…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…"

b) An e-mail was sent by the third respondent on 5 November 2015 to Makhubela, the PRASA's ER Manager in respect of the offer made.

c) A letter sent to PRASA by SATAWU's Provincial Office on 7 November 2016 to request a meeting to discuss the third respondent's appointment

d) A further letter sent by SATAWU to PRASA on 1 February 2017 to follow up on the discussions held in November 2016 regarding the third respondent's matter.

e) An e-mail sent by the third respondent on 7 February 2017 to PRASA's Acting Provincial Manager in regards to the settlement of the matter and the withdrawal of the review application.

f) An e-mail on 7 February 2017 sent by the Acting Provincial Manager to the acting HR HOD to investigate the third respondent's matter so that it can be closed

[12] The third and fourth respondents contend the above indicates that at all material times, attempts were made by the parties to have the matter resolved, and as a consequence of a change of leadership in the Gauteng provincial Management, the settlement discussions were interrupted.

[13] PRASA's starting point in opposing the application for condonation was that the allegations made by Mokoena in the founding affidavit constituted inadmissible hearsay as he was not party to any discussions surrounding settlement proposals. This was in circumstances where the third respondent had not filed a confirmatory affidavit at the time that the founding affidavit was filed. She had only filed the confirmatory affidavit and that of SATAWU's official Booi on 30 March 2017, together with her replying affidavit. In her replying affidavit, she contended that she and Booi had been involved in the settlement discussions and had fully appraised Mokoena for the purposes of the founding affidavit.

[14] The difficulty however with the belated confirmatory affidavits is that a case cannot be made out in the replying affidavit, and to the extent that the confirmatory affidavit was not filed simultaneously with the founding affidavit, the averments made therein remain inadmissible hearsay as correctly pointed out on behalf of PRASA.

[15] Notwithstanding the above, PRASA further takes issue with the explanation proffered for the delay, contending that the third and fourth respondents have not shown good cause and/or sufficient cause as to why the answering affidavit was filed some 17 months out of time in circumstances where;

a) There was no agreement between the parties to hold the proceedings in abeyance when settlement discussions were continuing, and where the third and fourth respondents were aware that the dispute might not be settled.

b) The settlement discussions commenced in June 2015 but the third respondent was not prepared to accept the offer by PRASA. It was therefore apparent that the parties were far apart from reaching settlement when the third respondent made a counter offer that was unacceptable to PRASA.

c) The Rule 7A (6) & 7A (8) notices were delivered on 21 August 2015, and it was apparent to the third and fourth respondents that PRASA was pursuing the review application

d) The third and fourth respondents neglected to deliver an answering affidavit or make a request to have the matter held in abeyance pending any settlement discussions

e) The third and fourth respondents' alleged impression that the matter could be settled and the review application withdrawn in the absence of an agreement being reached over 17 months was unreasonable and unrealistic

f) A firm and signed offer of appointment as Assistant Manager was made to the third respondent on 24 June 2015, which she had rejected it as she was unhappy with her salary package. In November 2015, the third respondent was advised that her counter offer was not acceptable, and it was therefore apparent that no settlement would be reached

[16] As already indicated, in instances where a delay in complying with prescribed time limits is extreme as in this case, there is an even onerous obligation on the defaulting party to give a full account of all periods of the delay. In this case, it appears to be common cause that settlement discussions took place, resulting in the offer of employment on 24 June 2015. Once the Rule 7A (6) & 7A (8) notices were delivered on 21 August 2015, it should have become apparent to the third and fourth respondents that PRASA was serious in pursuing the review application.

[17] Significant with the third respondent's averments in the replying affidavit is that despite it being contended in the answering affidavit to the condonation application that no good cause had been shown for the delay, she further proceeded to implore the court to take notice that she and her union official, Booi are laypersons and do not understand processes of this court. Obviously this excuse was never proffered in the founding affidavit and even if it were to be considered, it is indeed lame in the extreme. A litigant assisted by a large union like SATAWU cannot claim to have no knowledge of Court processes, and that excuse ought to be rejected.

[18] The third respondent's further contentions that an impression was created that the matter would be settled and the review application be withdrawn is further without merit. Since the offer and appointment were made in June 2015, and further since she was advised in November 2015 that her counter offer was not acceptable, there is nothing placed before the Court to indicate that settlement discussions had continued in earnest. The only evidence of any form of discussions is correspondence of 5 November 2015 that the third respondent relied upon. Other than that correspondence, there is no explanation as to what caused the delay between November 2015 and November 2016 when Booi sent correspondence to request a meeting with

PARSA. A whole year remains unexplained. It was only in February 2017 when Booi sent correspondence to PRSA following upon the matter, and by then, the matter had been set down for pre-enrolment before this Court. It took the pre-enrolment hearing and a court order on 17 February 2017 to have the third and fourth respondents file and serve their answering affidavit and this condonation application.

[19] In the light of the above circumstances, I have no hesitation in concluding that this is a matter where the explanation in regard to the excessive delay in essence amounts to no explanation at all. The allegation that the third and fourth respondents were lured into settlement discussions and then given an impression that the matter would be resolved is unsustainable.

[20] It was submitted on behalf of the third respondent that the interests of justice and speedy resolution of disputes dictated that they be allowed to oppose the review application. I nonetheless do not share that view, as it is the third and fourth respondents that are the sole cause of a delay in the speedy resolution of the matter.

[21] In circumstances where the delay is excessive and no reasonable or acceptable explanation had been proffered, that would ordinarily be the end of the matter. This case however is not ordinary in that PRASA seeks to review and set aside an award issued in favour of the third respondent. The question is whether it would be in the interests of justice to deny her an opportunity to defend an award in her favour. This is so in that if condonation was to be denied, she would not be in a position to defend her favourable award.

[22] In contending that the third respondent had reasonable prospects of success in the review application, it was averred that PRASA did not have a case, and that its grounds of review were unsustainable. On the same issue, it was submitted on behalf of PRASA that even if the Commissioner had reached a reasonable decision in the award, and the evidence indicated that the third respondent was denied an opportunity to compete, and not to be appointed, at best, the Commissioner could have awarded relief by way of a *solatium* instead of protective promotion.

[23] I have already concluded that the explanation for the excessive delay was not acceptable or reasonable. Notwithstanding, it is my view that upon a consideration of the interests of justice, encompassing the third and fourth respondents' prospects of success; PRASA's own averments in regards to the possibility of some relief being granted to the third respondent by an arbitrator; the endeavours of the parties in attempting to resolve the matter (*albeit* those attempts were not sustained); and the prejudice the third respondent would suffer if she is not afforded an opportunity to defend an award in her favour, (as opposed to the failure of PRASA to address the aspect of prejudice), a discretion should be exercised in the third and fourth respondents' favour, and condonation ought to be granted.

[24] The granting of condonation nonetheless comes at a price. The third and fourth respondents had clearly been remiss and negligent in not delivering the answering affidavit when required to do so, compelling PRASA to file an objection in terms of clause 11.4.2 of this court's Practice Manual read with Rule 7 (5) (a) of the Rules of this Court. PRASA as a consequence of the third and fourth respondents' dilatoriness was also compelled to oppose the condonation application in circumstances which the third and fourth respondents could have avoided. In the circumstances, considerations of law and fairness dictate that the fourth respondent be burdened with the costs of this application. Accordingly, the following order is made;

Order:

1. The late filing of the third and fourth respondents' answering affidavit to the applicant's review application is condoned.

2. The review application is to be set-down for a hearing on the opposed motion court roll on notice to both parties.

3. The fourth respondent is ordered to pay the costs of this application.

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Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicants (Condonation application): Mr. B Mokoena, SATAWU Official

For the Respondent (Condonation application): Mr P Mosebo of Werkmans Attorneys