Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT JOHANNESBURG

Case no: JR 1964/16

In the matter between:

FRANK SELLO MOMOTSAU	**Applicant**
and	
THE COMMISSION FOR CONCILIATION, MEDIATION & ARBITRATION	**First Respondent**
ISAAC MILANZI (NO)	**Second Respondent**
THE SOUTH AFRICAN POST OFFICE LTD	**Third Respondent**

Heard: 26 April 2018

Delivered: 3 May 2018

Summary: (review-condonation ruling-short delay-prejudice not considered--delay due to short-sightedness rather than neglect or dilatoriness-in all the circumstances refusal of condonation unduly harsh-reading set aside)

JUDGMENT

LAGRANGE J

Background

[1] This is an opposed application to review a condonation ruling. The second respondent ('the arbitrator') dismissed the application for condonation for the late referral of an unfair dismissal dispute.

[2] The applicant resigned on 31 March 2016 but worked a full month's notice ending his employment on 29 April 2016. His referral was served by fax on 14 June 2016. Accordingly, it was 16 days late.

[3] His explanation for the delay was essentially that, he had a legal aid policy and the administrative delays in his lawyers obtaining approval to proceed to act on his behalf caused the delay. After lodging a claim with the insurer the insurer gave him a provisional go-ahead subject to a merits assessment. His attorneys of record received instruction on 11 May and held an appointment with him on 19 May. They assessed the claim, considered the documentation he gave them, and submitted a detailed report to the insurer on 10 June 2016. On the same day the instruction to proceed was given by the insurer, they filed the referral.

The condonation ruling

[4] The arbitrator accepted that clearly the application was not excessively late. However, in his view there was nothing to stop the applicant referring his constructive dismissal dispute to the CCMA before obtaining approval from his legal insurer to pay legal his fees. Owing to his position as an acting managing director he should have known what the time periods were. There was also no explanation why his attorneys did not advise him to refer the matter while they waited for the final confirmation from his insurers. The arbitrator found that the attorneys were remiss in not advising him of the need to comply with the time limit when they consulted on 19 May, and that he had a remedy against them.

Effectively, the arbitrator decided that the applicant had failed to fully explain all the periods of delay for the reasons mentioned and was plainly of the view that this alone justified refusing the condonation application.

[5] Nevertheless, he considered the prospects of success and found that in the absence of any evidence that the applicant he attempted to resolve the

grievances he had before tendering his resignation his prospects of success were meek not non-existent.

Grounds of review

[6] To some extent, the review application uses the language of an appeal in that the applicant claims that the Commissioner "erred" in ruling that his explanation for the delay was inadequate.

[7] Further, he claims the Commissioner ought not to have relied solely on his letter of resignation because it was not necessary for him to deal with efforts to resolve issues. He claims that the Commissioner misdirected himself in assessing his prospects of success because if he can prove that the third respondent made his working relationship intolerable then he would succeed with his claim of constructive dismissal.

[8] The applicant also complained that the arbitrator's finding that he would not suffer prejudice because the delay was caused by his own tardiness was irrational and not supported by evidence. The only mention of prejudice by the arbitrator in his award was the following: "The employee will not suffer prejudice because his and his attorney's tardiness resulted in the late referral of the matter." The only plausible meaning I can attribute to this is that he was implying that any prejudice caused to the applicant was self-inflicted.

[9] The respondents claim that applicant failed to demonstrate why the alleged irregularities were so material that a reasonable decision maker could not reach that decision in the circumstances. Secondly, they argue the grounds of review were not pleaded in insufficient factual detail, and amount to legal submissions.

[10] Further, the respondents argue that the arbitrator asked the correct questions and reached conclusions respect of each issue he was required to decide. In the absence of evidence that the decision reached is one that no reasonable arbitrator could reach, the review cannot succeed.

Evaluation

[11] In ***Department of Home Affairs and another v Ndlovu and others*** the LAC stated:

> '[9] Essentially in applications for condonation, what is needed is an objective conspectus of all the facts. Thus the importance of the issues between the parties and the strong prospects of success may tend to compensate for a long delay. In *Brummer v Gorfil Brothers Investments (Pty) Ltd and others*,[1] the [Constitutional] Court gave the following guiding exposition in matters such as the present one:
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> > "It is appropriate that an application for condonation be considered on the same basis and that such an application should be 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 applicant's explanation for the delay or defect." '[2]

[12] Having regard to most of the inferences drawn by the arbitrator, it is difficult to see why they were inherently irrational on the basis of the evidence before him.

[13] In essence, he found that the delay which the applicant attributed to the administrative process of obtaining confirmation from the insurer's for the attorneys to proceed to pursue the claim was not really an explanation why the referral form could not have been completed in the meantime. This is not an irrational finding. The completion of the referral form does not require pleadings to be drawn up or to make an assessment of the merits of the claim and is something individuals do every day. Consequently, it was not unreasonable in my view for the arbitrator to conclude that, strictly speaking, the applicant's attorneys, or the applicant

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[1] 2000 (5) BCLR 465 (CC) at para [3]

[2] [2014] 9 BLLR 851 (LAC) at 854

himself if the attorneys were not prepared to act until receiving confirmation that the legal insurers would cover the fees, could have made the initial referral.

[14] Secondly, in assessing the prospects of success the onus is on the applicant to set out reasonable prospects of success. While it is undoubtedly correct that it was not necessary for the applicant to deal with the merits of his constructive dismissal, his resignation letter apart from a single paragraph in his affidavit in support of his condonation application, the arbitrator had little else before him. The arbitrator placed much emphasis on the apparent failure of the applicant to deal with whether he had afforded the respondent an opportunity to deal with his grievances prior to resigning. Certainly, there is authority for the view that one of the factors and employees should establish if they claim a constructive dismissal is that they attempted to resolve the difficulties which caused them to resign before embarking on that step. See for example ***Smithkline Beecham (Pty) Ltd v CCMA and Others*** **(2000) 21 ILJ 988 (LC)**. However, in his resignation letter, which he had attached to his founding affidavit in the condonation application, he claims to have made a number of requests to be relieved of responsibilities which she considered onerous, which were not treated sympathetically. Accordingly, the influence the arbitrator drew in this regard is not reasonably justified on the evidence. To the extent that played a considerable role in his decision that the applicant's prospects of success were poor that inference materially affected the outcome. That is not to say that the applicant's prospects of success are necessarily good. Constructive dismissal claims are notoriously difficult to prove. However, a decision on condonation will seldom be decided on the prospects of success as a factor, unless they are plainly remote.

[15] What is more glaring is the arbitrator's failure to deal with prejudice. Insofar as he did consider it, he only considered it in relation to the applicant, and even then did not seem to ask the correct question. He certainly did not weigh up the extent of prejudice to the respondent of granting condonation. Had he done so, he would have been compelled to ask if applicant's prejudice of being denied an independent hearing of his

constructive dismissal case was outweighed by the prejudice that would be suffered by the respondent of allowing him to proceed notwithstanding the two week delay in referring the matter. It is salutary in this regard to note the following dictum:

> "In the case of less unduly long periods of delay however, the element of actual or potential prejudice to the opposing party must, in my view, always be a most material factor in determining whether or not condonation of delay should be granted."[3]

[16] Plainly, it would have been very difficult for the arbitrator to conclude that the prejudice to the applicant given the relatively short delay would have outweighed the prejudice to the respondent.

[17] That factor would then have to have been taken into account by the arbitrator in weighing up the other factors in whether to grant condonation and would have required a rebalancing of the weight he attributed to each one. He would then have to have considered inter-alia whether that prejudice was offset by the blameworthiness he attributed to the applicant and his attorneys for not filing the referral earlier. In that regard, given the limited prejudice of the delay to the respondent, he ought to have considered if the type of blameworthy conduct he attributed to them was such that the short delay was inexcusable. In asking if it was a delay caused by neglect or indifference to complying with the time limit and whether, during the time in question, the applicant would have had any reason to doubt that his attorneys would not proceed expeditiously, I think it would have been difficult for the arbitrator to conclude that the steps taken by the applicant and his attorneys really reflected the actions of parties acting in a dilatory fashion, rather than moving *bona fide* and reasonably expeditiously, albeit short-sightedly, to first obtain authority to act before the referral was initiated. There was certainly no basis on the evidence to infer an absence of intention to proceed or an indifference to how long it took to obtain authorisation for payment of legal fees. It is

[3] *Shepherd v. Mossel Bay Liquor Licensing Board* 1954 (3) SA 852 (C) at 857A-D, cited with approval in *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit Van Kaapstad* [1978] 1 All SA 369 (A) at 385 and 387.

noteworthy in this regard that, the referral was made immediately payment of legal fees was approved.

[18] In conclusion, the arbitrator's failure to consider the question of prejudice in the context of the delay and the degree to which the blameworthy conduct of the applicant and his attorneys was serious led him to a conclusion that was unjustifiably harsh in the circumstances on any reasonable basis and in the result did not exercise his discretion in a manner that was fair to both sides as set out in ***Melane v Santam Insurance Company Limited*** .[4]

Order

[1] The condonation ruling of the second respondent under case number GAJB 8942-16 dated 27 July 2016 is reviewed and set aside.

[2] The ruling is substituted with a ruling that the applicant's late referral of his unfair dismissal dispute to the CCMA is condoned and must be set down for conciliation within 30 days of this order being served on the first respondent.

[3] No order is made as to costs.

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Lagrange J

Judge of the Labour Court of South Africa

[4] [1962] 4 All SA 442 (AD)

APPEARANCES

APPLICANT:	W J Van Wyk instructed by Erasmus Scheepers Attorneys
THIRD RESPONDENT:	L Nyangiwe instructed by Madhlopha Inc.