THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JR121/2018

In the matter between:

ANDRIES BOUWER	**Applicant**
and	
SUPREME PETS CC	**First Respondent**
COMMISSIONER DESMOND LYNCH	**Second Respondent**
COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION	**Third Respondent**

Heard: **10 July 2019**

Delivered: **08 November 2019**

JUDGMENT

BOSWEL, AJ

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Introduction

[1] This an application in terms of rule 7A of the Rules of the Labour Court for an order in terms of section 145 and/or 158 (1) (g) of the Labour Relations Act[1] (the LRA) to review and set aside a condonation ruling issued by the third respondent dismissing the applicant's condonation application.

Background

[2] The applicant was found guilty of theft, and was advised of the decision to dismiss him on 7 February 2017, and the applicant was advised of this on 8 February 2017. On 16 February 2017, the applicant's attorneys lodged an appeal dated 14 February 2017 against the verdict, sanction and substantive fairness of the dismissal. I pause to note that on 9 February 2017, the applicant's attorneys enquired from the first respondent as to what the time limits were in which an internal appeal could be lodged and was advised that they had five working days to do so. The internal appeal should therefore be lodged on or before 14 February.

[3] Despite the appeal being lodged out of time the first respondent nevertheless considered the appeal and on 17 February, upheld the verdict and sanction, and dismissed the appeal. The outcome of the appeal was never formally communicated to the applicant and it was only eventually attached to the first respondent's bundle of documents dated 20 July in its opposing papers to the applicant's application for condonation to the third respondent.

[4] As the respondent consistently failed to advise the applicant of the outcome of the appeal, despite being repeatedly asked for same, the applicant referred a unfair dismissal dispute to the third respondent on 13 March 2017, only to be advised by the third respondent that a condonation application must be submitted as he was allegedly out of the 30 day time limit from his date of dismissal, being 7 February 2017. On 20 July 2017, the third respondent

[1] Act 66 of 1995, as amended.

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ruled that as the applicant's condonation application was defective, that it accordingly lacked jurisdiction to hear the matter and that the applicant must re-refer the dispute which he did on 20 July 2017 together with a condonation application.

[5] On 9 November 2017 the second respondent made a ruling dismissing the applicant's condonation application. In doing so the second respondent found that the applicant was *"21 days late"* and although "*not excessive"* on the basis of the applicant's "*uncontested admission of guilt"* at the disciplinary hearing, the applicant must *"suffer the consequences"* of his misconduct and accordingly dismissed the application.

[6] The first respondent argues that the applicant's appeal was late as it was lodged out of the five-day period calculated from the date of dismissal. The first respondent also says that according to its internal appeal procedures that in the event of a dismissal being confirmed, the date of dismissal should be the date on which the *"employee is advised of the outcome of the appeal hearing"*. It further states that the dismissal only becomes effective on the date that the employee is advised of the outcome of the appeal hearing. The first respondent then states in its heads of argument that as the appeal was not "*lodged within the five days… no appeal was lodged".* This a fallaciously misleading argument as the first respondent indeed considered the applicant's appeal, and indeed made a finding which was withheld for a considerable length of time from the applicant, which appears to have created a misapprehension in the applicant's mind that it should apply for and be granted condonation, regarding the initial referral which resulted in a defective "condonation" application and the 20 July ruling.

[7] According to section 191(1)(b)(i) of the LRA, an employee may refer a dispute about the fairness of the dismissal to the third respondent within 30 days of the date of the dismissal, or if it is a later date within 30 days of the employer making a final decision to dismiss or uphold the dismissal. Subsection 191(1)(b)(i) was enacted to provide that the 30 day deadline runs from the

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date that the employer takes a final decision to dismiss the employee, that is after the dismissal of an appeal, if any.

[8] The first respondent's internal appeal procedures also provide that the date of dismissal is the date that the employee is advised of the appeal hearing. Although the first respondent made a final decision to dismiss the applicant's appeal on 17 February 2017, this decision was only informally communicated to the applicant when it filed its opposing papers to the applicant's condonation application which was heard on 20 July 2017, by attaching a copy of the appeal outcome thereto.

Evaluation

[9] The proviso (section 191 (1)(b)(i) of the LRA) that the 30 day period must run from the date on which the employer takes a final decision to dismiss or uphold the dismissal was added to the LRA by way of an amendment to avoid compelling employees to seek condonation for a late referral if their internal appeals were concluded more than 30 days after the initial decision to dismiss. This amendment means that the time limit runs from the date on which the employee is informed that the appeal is unsuccessful.

[10] As the applicant was only informed, *albeit* informally, of the outcome of the appeal on 20 July 2017, the 30 day period in which the employee had to refer an unfair dismissal dispute to the CCMA commenced on this date, despite his earlier unsuccessful referral. Added to this is the employer's own appeal procedures providing that the date of dismissal is the date that the employee is advised of the outcome of the appeal hearing. The applicant completed and signed the second 7.11 referral form on this date, 20 July 2017.

[11] The applicant's application does not disclose when and how the 20 July 2017 referral was served and filed on the first and third respondents which is critical to its condonation application to this Court. The only indication which I have in this regard is an e-mail attached to the applicant's bundle dated 23 August 2017, from the first respondent to the applicant's attorneys confirming receipt

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of the applicant's referral and condonation application which they received on 22 August 2019.

[12] According to section 191(1)(b)(i) of the LRA the 20 July 2017 referral should have been made within 30 days of the date of the applicant becoming aware of the fact that the first respondent had made a final decision to uphold the dismissal, which was 20 July 2017.

[13] It is trite that the date of referral is the date that the referral papers are properly filed at the CCMA with or without a condonation application and not the date that it is served on the employer. There is no indication in the applicant's application when the second referral was served on the CCMA, and clearly this should have been within the 30 day period calculated from 20 July 2017. The second respondent similarly gives no indication in his ruling as to when the 20 July 2017 referral was received other than to state that it is 21 days late. I, however, without any information to the contrary must accept this as being correct as this period has not been disputed by any of the parties to this application.

Late filing of review application

[14] The first respondent also says in its answering affidavit that this review application has been brought out of time and should have been delivered on or before 21 December 2017 as the date that the condonation ruling was issued was 9 November 2017. This is not denied by the applicant.

[15] Section 145 (1) of the LRA deals with the review of arbitration awards and in particular states that an application for an order reviewing and setting aside an arbitration award must be brought within 6 weeks of the date the award was served on the applicant. The arbitrators ruling was served on the applicant's attorneys on 9 November 2017. This application was launched on 23 January 2018 without a condonation application attached, which makes it 6 weeks and 5 days late.

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[16] I find it inconceivable that the same firm of attorneys who assisted the applicant throughout the proceedings served and filed the 20 July 2017 referral late, and then subsequently launched these proceedings substantially out of time, and without a condonation application or at the least an attempt to explain the delay.

[17] The granting of condonation is the exercise of discretion by a court. Absent of any application for condonation for the late filing of this review application this court lacks the jurisdiction to consider and condone the late filing of the applicant's review application in terms of section 145(1A) of the LRA which is to do so on good cause shown.

[18] Section 158 of the LRA deals with the powers of the Labour Court, and section 158(1)(f) of the LRA empowers this Court to condone the late filing of any document with, or the late referral of any dispute to, this Court. This is however subject to the provisions of the LRA which in this case clearly state that this can only be done if good cause has been shown.

[19] In the matter of *A Hardrodt (SA) (Pty) Ltd v Behardien and Others*[2] the Labour Appeal Court concluded that the court *a quo 'should not have condoned the late filing of the review on the basis of the totally inadequate explanation'.* The onus to satisfy this Court that condonation should be granted is on the applicant, which the applicant's attorneys have completely failed to do.

[20] This application was also brought in the alternative in terms of section 158(1)(g) of the LRA, and although there is no statutory time limit in terms of this section for which such reviews must be launched, it has been held by this Court that they must be launched within a reasonable time which has also been held to be six weeks.[3]

[2] (2002) 23 ILJ 1229 (LAC).
[3] See: *SACCAWU obo Manzana and others v Pick 'n Pay, Kimberley and others* [2000] 10 BLLR 1065 (LC).

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[21] I find that the delay in bringing this application is unreasonable, and more so in light of the fact that there is no condonation application attached.

Costs

[22] It would be unfair to burden the applicant with a costs order in light of the conduct of its attorneys throughout this matter, considering that there was no attempt to rescue the applicant's case by bringing it within the jurisdiction of this court. I therefore must consider alleviating the applicant's plight to some degree by ordering that the applicant's attorneys pay the applicant's costs on a *de bonis propriis* basis.

[23] The circumstances in which a costs order *de bonis propriis* may justifiably be imposed are negligence in a serious degree on the part of the party against whom such a costs order is sought. Thus, in *Moloi and another v Euijen and another*[4] the Labour Appeal Court held as follows:

> "Costs de bonis propriis are awarded against legal practitioners in cases which involve serious delinquencies such as dishonesty, wilfulness or negligence in a serious degree."

[24] This standard was confirmed by the Constitutional Court as appropriate in *SA Liquor Traders Association v Chairperson, Gauteng Liquor Board and Others*[5] in the following terms:

> "An order of costs de bonis propriis is made against attorneys where a court is satisfied that there has been negligence in a serious degree which warrants an order of costs being made as a mark of the court's displeasure."

[25] I am accordingly satisfied that there has been negligence to such a serious degree by the applicant's attorneys that this warrants an order of costs against the applicant's attorneys *de bonis propriis*. However, before doing so it

[4] (1999) 20 ILJ 2829 (LAC).
[5] 2009 (1) SA 565 (CC).

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appropriate to provide them with an opportunity to make representations to this Court why such an order should not be made.

[26] In the premises the following order is made:

Order

1. The applicant's review application in terms of section 145 and 158(1)(g) of the Labour Relations Act, 1995, is dismissed with costs for lack of jurisdiction.
2. The applicant's attorneys must deliver an affidavit to this Court within 30 days of the date of this judgment, explaining why they should not be ordered to pay the applicant's costs *de bonis propriis* on an attorney and own client scale.
3. In the absence of an explanation to the satisfaction of this Court the applicant's attorneys shall pay the applicant's costs *de bonis propriis* on a scale as between attorney and own client.

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Boswel AJ

Acting Judge of the Labour Court of South Africa

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Appearances:

For the Applicant:	Advocate HW Botes
Instructed by:	Hefferman Attorneys
For the Respondents:	Mr HB Van Niekerk

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