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IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Not Reportable

Case Number: C169/2015

In the matter between:

CLEMENT ROLAND DU PLESSIS	**Applicant**
And	
D.I.K. WILSON N.O.	**First Respondent**
THE COMMISION FOR CONCILIATION, MEDIATION AND ARBITRATION	**Second Respondent**
CAPE PENINSULA UNIVERSITY OF TECHNOLOGY	**Third Respondent**

Date heard: 22 October 2015

Delivered: 17 February 2016

JUDGMENT

RABKIN-NAICKER J

[1] The applicant seeks to review and set aside a condonation ruling by the first respondent (the Commissioner). The Commissioner dismissed the application for

condonation for the late referral of a dispute. The referral of an alleged unfair dismissal dispute to the CCMA was 69 days late. The third respondent opposes the review.

[2] The applicant was a lecturer employed by the third respondent. He was dismissed after being found guilty of sexual harassment. The matter came before Steenkamp J, under case no C817/2014 as a review application. He decided a jurisdictional point in favour of the third respondent. The conclusion of his judgment was as follows:

"[14] Having regard to the context outlined above and to the provisions of section 188A as they currently stand, I cannot agree with the applicant that the procedure leading to his dismissal was a pre-dismissal arbitration as contemplated in section 188A of the LRA. It was, instead, a disciplinary enquiry chaired by an independent external chair person. The respondents should perhaps have made it clearer to the applicant that that was the nature of the process, despite the earlier guidelines contained in the disciplinary code envisaging a form of pre-dismissal arbitration. The fact remains, though, that in law the process adopted did not conform to the provisions of section 188A.

[15] With regards to costs, I take into account that the applicant may justifiably have been confused by the nature of the proceedings. I accept that he was bona fide in bringing an application for review to this court rather than referring an unfair dismissal dispute to the CCMA. For that reason, I do not consider a cost award to be appropriate in law and fairness.

Order

The application for review is dismissed for lack of jurisdiction."

[3] It was submitted on behalf of applicant that the above judgment makes it clear that the applicant was justifiably confused about the forum in which he had to pursue his matter. This goes to the compelling reason for the delay and it was argued by Mr Ackerman for the applicant, that this is where the Commissioner erred, by paying scant attention to the court's finding that it was reasonable for applicant to

have made the mistake he did. It was argued that: “this Court’s finding provides a compelling reason for lateness and should carry the day. The requirements for condonation must be subordinate to the reasons for lateness.” For this submission regarding the paramountcy of the reasons for lateness, the applicant relies on **Melane v Santam Insurance Co**[1] and specifically the following dictum:

> “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.”

[4] Try as I may, I can find no basis for the proposition that the **Melane** case establishes that ‘the other requirements for condonation must be subordinate to the reasons for lateness.’ Indeed it appears to me that this *locus classicus* does just the opposite, in warning against a piecemeal approach.

[5] The Commissioner stated in his Ruling that:

> “37. In this case, the degree of lateness is substantial, the explanation for the delay is acceptable (given that the Applicant should not be prejudiced by the actions of his attorneys), but the prospects of success are virtually non-existent (on the averments made on behalf of the Applicant). Prejudice is not a major factor. Applicant also argued that the case is an important one as it could have

[1] 1962 (4) SA 531 (a) at page 532

far-reaching consequences for the process of mediation. I do not accept that argument. It is not disputed that mediation is a without prejudice process, and any evidence relating to the mediation process should not be taken into account. This is in fact what occurred in this instance."

[6] The above finding reflects that the Commissioner accepted that the explanation for the delay was reasonable, but that applicant's application for condonation foundered on the issue of the prospects of success. Applicant's case before the Commissioner in respect of the prospects of success turned on the following: the independent chairperson of the disciplinary had allowed the respondent's legal officer, Adv. Sifumba (who had played the role of mediator between the applicant and the female students who had raised complaints against him), to testify at the hearing. The record of the disciplinary chairperson's finding was before the Commissioner in the condonation proceedings. The following is stated in paragraph 37 of that finding, in dealing with an objection raised by applicant's legal representative at the disciplinary hearing:

> "….Mr von Lieres raised an objection at the hearing to any evidence relating to the content of the mediation being led on the basis that the mediation was conducted on a without prejudice basis. I agreed with Mr von Lieres. However, the employer explained that although Advocate Sifumba was involved in the mediation, she was also involved in the investigation of the complaints against Mr du Plessis. I accordingly allowed her to testify. However during her evidence Advocate Sifumba did make several references to the content of the mediation. I have therefore not considered any of her testimony in arriving at my decision. I have also been mindful in not taking into account any references to the content of the mediation by any of the other witnesses."

[7] The applicant averred in his affidavit seeking condonation, that the mere fact that Sifumba testified, whether or not it influenced proceedings, was grossly irregular and unfair; that as the legal officer of the respondent it was entirely improper for her to act as mediator; that the issue goes to the heart of a process that must not

only be fair but must also be seen to be fair; that the process was tainted from the start and a pattern of gross irregularity is evident culminating in Sifumba being allowed to testify.

[8] What needs to be emphasised at this point is that the above submissions by applicant were heard by the Commissioner in a condonation application for the late referral of an unfair dismissal dispute. In a review application these submissions may have had more resonance, but in the context of an unfair dismissal dispute their ambit was limited to issues of procedural fairness of the dismissal. In this regard the Commissioner stated in his Ruling that:

"33. Turning to the prospects of success, the Applicant did not make any averments regarding the substantive fairness or otherwise of his dismissal, but relied on an allegation of procedural (sic) fairness based largely on the fact that the chairperson allowed Ms Sifumba to testify, in part, as to what occurred during the mediation. Applicant claimed that even though the chairperson stated in her findings that she had not taken any of Ms Sifumba's evidence into account, the very fact that the evidence was led irrevocably tainted the process.

34. This argument might well be valid in terms of court proceedings; however it does not take account of the less formal nature of disciplinary proceedings, and for that matter arbitration proceedings. In such processes it is common for a chairperson or arbitrator to hear evidence that would be inadmissible in a court of law, such as hearsay evidence, and to decide in his or her findings whether any weight can or should be attached to such evidence. An experienced chairperson or arbitrator is fully capable of putting any evidence deemed to be unacceptable out of mind in reaching decision. It was not disputed that Ms Singh-Boopchand is an experienced practitioner, and when she states in her findings that she has not taken account of Ms Sifumba's evidence I am inclined to take that at face value. There is no reference to what occurred in the mediation process in her analysis of the evidence, and she basis her findings purely on the evidence of the complainants and other witnesses, as well as the Applicant's own version. I am

therefore satisified that the Applicant has poor prospects of success on the procedural grounds raised…."

[9] Mr Ackerman submitted that the Commissioner's finding that the prospects of success were poor amounted to a misdirection in that he erred on the facts and the law. Reliance was placed on the matter of **Hendricks v Cape Peninsula University off Technology & Others**[2] in this regard. In that matter, the High Court was seized with an application for the review and setting aside of disciplinary proceedings which led to the dismissal of the applicant on charges of sexual harassment. The applicant claimed that the university had breached the contract of employment between them, by failing to properly comply with the provisions of its sexual harassment policy and disciplinary code when investigating and instituting formal disciplinary proceedings against him. The applicant also sought to set aside the disciplinary proceedings on the ground that the respondent's code unlawfully prohibited legal representation in disciplinary proceedings.[3] The law as espoused in that judgment may have come to the assistance of the applicant in a review and/or a dispute alleging breach of contract. But it certainly cannot be the basis to find that the Commissioner's ruling is susceptible to review.

[10] The test on review is whether the Commissioner's decision to refuse condonation was one to which a reasonable Commissioner, "upon the body of evidence adduced, could not come."[4] In my judgment the decision reached by the Commissioner in this matter cannot be characterised as an unreasonable result. He applied the test for condonation correctly and did not commit a gross irregularity of the latent type.[5] In all the circumstances therefore this application cannot succeed. I see no reason why costs should not follow the result.

[2] (2009) 30 ILJ 1229 (C)
[3] At Paragraph 1
[4] As the test is eloquently described in DHL Supply Chain (Pty) Ltd v De Beer NO & others (2014) 35 ILJ 2379 (LAC) at paragraph 2.
[5] Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae) (2013) 34 ILJ 2795 (SCA) at paragraph 21

Order

1. The application is dismissed with costs.

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H. Rabkin-Naicker

Judge of the Labour Court of South Africa

Appearances:

Applicant: LW Ackermann instructed by Hein Von Lieres

Third Respondent: Norton Rose Fulbright South Africa