DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.

2019/05/17
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THE JUDICIARY · REPUBLIC OF SOUTH AFRICA ·

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Of interest to other Judges

CASE NO: JR 1110/15

In the matter between:

LULAMA MOSES	**Applicant**
and	
CCMA	**First Respondent**
PJ CLOETE *N.O*	**Second Respondent**
EC DEVELOPMENT CORPORATION	**Third Respondent**

Heard: 15 May 2019

Judgment delivered: 17 May 2019

JUDGMENT

VAN NIEKERK J

[1] This is an application to review and set aside a jurisdictional ruling issued by the second respondent (the commissioner) on 21 February 2017. In his ruling, the commissioner held that the CCMA had no jurisdiction to entertain a dispute referred for arbitration, in effect, because the dispute did not fall within the closed list of unfair labour practices as defined by s 186 (2)(a).

[2] The background facts are not in dispute. The applicant was employed by the third respondent. On 20 December 2013, she received a notice of transfer, transferring her from Queenstown to East London. In the referral form, the applicant classified the dispute as one concerning an unfair labour practice, and one concerning a unilateral change to terms and conditions of employment. She states that she was transferred without being given an opportunity to state her case, and that her employer (the third respondent) failed to attend to the grievance that she lodged. The outcome sought by the applicant was restoration to her appointed office, compensation for costs incurred consequent on her employer's actions and a formal enquiry into the processes followed and their outcomes.

[3] The dispute was ultimately referred to arbitration. The third respondent took the point that the CCMA had no jurisdiction to arbitrate the dispute since the dispute related to a transfer, a matter not contemplated by the definition of an unfair labour practice. The commissioner engaged with the parties' legal representatives at some length and recorded, correctly, that the parties '*were in agreement that the CCMA did not have jurisdiction with regard to a transfer*'. The submissions made on behalf of the applicant amounted to an assertion that the dispute was not about the transfer itself '*... the issue at hand [is] the manner in, which the grievance was handled*' and later '*Well uhm Commissioner I think the, as we proceed with the matter there might be some points that reveal that uhm that there was an internal; grievance before you know the issue of transfer you know coming to the picture.*

So the gist of the matter is that such grievance was never handled in a manner that is recognized by the ECDC policy. So the employee feels that the manner in, which this particular uhm grievance you know was unfair to an extend that it, uhm contravenes even the principle of natural justice I would audi et alterem partem.'

[4] The commissioner's ruling records that the applicant's representative submitted that the matter was in fact about the grievance procedure which the applicant alleged had not been handled in terms of the respondent's policy and that together with the transfer, was tantamount to a demotion and as such, the CCMA has jurisdiction. The commissioner found that this submission did not accord with the 'arguments submitted in support of the application for legal representation', and that 'the CCMA is a creature of statute bound to the legislative prescripts'. The commissioner upheld the point in *limine* and found that the CCMA had no jurisdiction to arbitrate the dispute.

[5] The applicant seeks to review and set aside that ruling. She applies for the condonation for the late filing of the review application, the late upliftment and filing of the record, the applicant's non-compliance with Rule 7A(8) and leave to have the file retrieved from the archives, to file a notice in terms of Rule 7A(8) in terms of which she abides by her initial notice of motion.

[6] The court has a discretion, to be exercised judicially, to grant condonation. Among the factors usually relevant for consideration are the degree of lateness, the explanation therefor, the prospects of success, the prejudice that parties will suffer if condonation is granted or refused, and the importance of the case. None of these factors are individually decisive and the court must consider all the facts. In the final analysis, it is a matter of fairness to the parties. Condonation applications require a court to balance various interests and factors, having regard to all of them with none of them being decisive. (See *Melane v Santam Insurance Co. Ltd* 1962 (4) SA 531 (A) at page 532; *NEHAWU obo Mafokeng and Others v Charlotte Theron Children's Home* [2004] 10 BLLR 979 (LAC).

[7] The principles were also summarised in *South Africa Post Office Ltd v CCMA & Others* [2012] JOL 28463 (LAC). In this case, the court recognised that ultimately the test is whether it is in the interests of justice to grant condonation. The court accepted that in matters where importance is placed upon the speedy and expeditious resolution of a dispute, even a short delay may not be excusable, unless an explanation is proffered that sets out the reasons for the delay which the court should find acceptable. The court further held that:

> Where it is evident that the party seeking condonation has no prospects of succeeding in his principal claim or opposition, no purpose is served in granting condonation and the Court must in such circumstances refuse to grant condonation irrespective of the degree of delay or the explanation provided.

[8] It is trite that condonation is not a mere formality and there for the taking; rather, the applicant for condonation must provide a proper and full explanation for the period of the delay. In *Independent Municipal and Allied Trade Union on behalf of Zungu v SA Local Government Bargaining Council and Others* (2010) 31 *ILJ* 1413 (LC) at para 13, the Court held:

> In explaining the reason for the delay it is necessary for the party seeking condonation to fully explain the reason for the delay in order for the court to be in a proper position to assess whether or not the explanation is a good one. This in my view requires an explanation which covers the full length of the delay. ..."

[9] In *eThekwini Municipality v Ingonyama Trust* 2013 (5) BCLR 497 (CC) at para 28, the court said the following where the explanation furnished did not cover the entire period and part of the delay was unexplained:

> As stated earlier, two factors assume importance in determining whether condonation should be granted in this case. They are the explanation furnished for the delay and prospects of success. In a proper case these factors may tip the scale against the granting of condonation. In a case where the delay is not a short one, the explanation given must not only be satisfactory but must also cover the

entire period of the delay. Thus in *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae),* this Court said in this regard:

> "An applicant for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of delay. And, what is more, the explanation given must be reasonable. The explanation given by the applicant falls far short of these requirements. Her explanation for the inordinate delay is superficial and unconvincing."

[10] During argument, I proposed to the applicant's representative that the matter be argued on the basis of the applicant's prospects of success in the main application, since in the absence of any such prospects, the various applications for condonation stood to be dismissed on that basis. The determination of any prospects of success in the review application is necessarily informed by the legal principles applicable to the review of a jurisdictional ruling by a CCMA commissioner.

[11] Those principles are well-established. In a review of a jurisdictional ruling, the applicable threshold is not that of reasonableness;[1] the review court must determine whether or not the commissioner's decision is correct. In *SA Rugby Players Association & others v SA Rugby (Pty) Ltd & others* (2008) 29 *ILJ* 2218 (LAC) the LAC said the following:

> [39] The issue that was before the commissioner was whether there had been a dismissal or not. It is an issue that goes to the jurisdiction of the CCMA. The significance of establishing whether there was a dismissal or not is to determine whether the CCMA had jurisdiction to entertain the dispute. It follows that if there was no dismissal, then, the CCMA had no jurisdiction to entertain the dispute in terms of s 191 of the Act.

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[1] *Sidumo & another v Rustenburg Platinum Mines Ltd & others* [2007] 12 BLLR 1097 (CC) and amongst others, *Goldfields Mining SA (Pty) Ltd v CCMA & others* [2014] 1 BLLR 20 (LAC)).

> [40] The CCMA is a creature of statute and is not a court of law. As a general rule, it cannot decide its own jurisdiction. It can only make a ruling for convenience. Whether it has jurisdiction or not in a particular matter is a matter to be decided by the Labour Court.

[12] More recently, in *Phaka v Commissioner Bracks* [2015] 5 BLLR 514 (LAC), the LAC confirmed that when the jurisdiction of an arbitrator is in question (the case concerned a bargaining council but the same holds for the CCMA), the issue is whether he or she objectively had jurisdiction in law and fact – a finding that the arbitrator had jurisdiction because he or she might reasonably have assumed as much '*is wholly untenable in principle*'.[2] In other words, the question of the reasonableness of the commissioner's decision does not arise and in effect, the commissioner's decision is of no real consequence. The court must decide the jurisdictional issue *de novo* [3] on the basis of the record filed in the review proceedings.

[13] The applicant has not made clear the basis of the review application. Her affidavits refer variously to 'unlawful administrative action' (suggesting a review in terms of the Promotion of Access to Justice Act), 'legality' (suggesting a legality review under s 158 (1)(h) of the LRA) and a reasonableness review in terms of s 145 read with s 158 (1) (g) of the LRA. I will accept for present purposes is that the applicant seeks a review in the latter provision. That being so, her submissions regarding the reasonableness of the outcome of the proceedings under review are entirely irrelevant – they misconceive the nature of the test to be applied.

[14] On the basis of the record of the arbitration proceedings under review, there is nothing that discloses in unequivocal terms that the real nature of the dispute before the commissioner was an unfair labour practice in the form of unfair employer conduct in relation to a demotion. The applicant's substantive complaints were that the third respondent had unilaterally altered her terms and conditions of

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[2] At paragraph [29]. As the LAC observed, the standard of review enunciated in *Sidumo and another v Rustenburg Platinum Mines Ltd and others* 2008 (2) SA 24 (CC), that of the reasonable decision-maker, applies only to the review of determinations of the fairness of a dismissal or labour practice.
[3] See Myburgh and Bosch *Reviews in the Labour Court* at 114-115.

employment, and that it had failed to comply with its own grievance procedure. Neither of these disputes are disputes that are arbitrable in terms of the LRA. The commissioner's ruling was thus correct. Even if I were to accept that the commissioner adopted an overly parsimonious stance to the case that had been presented on behalf of the applicant, any dispute concerning unfair conduct in relation to a demotion is moot. It is not disputed that the applicant was dismissed for misconduct on 3 May 2017, and that on 29 August 2017, a commissioner appointed to arbitrate that dispute ruled that he dismissal was substantively fair and that she was not entitled to any relief. The applicant has sought to review that decision, in an application filed in this court on 11 October 2017. That application was opposed, and the applicant has taken no further steps to prosecute the application. In terms of the practice manual, the application is deemed to have been withdrawn. The best available outcome for the applicant in the present proceedings is that the matter is remitted to the CCMA for the hearing of evidence and a fresh decision on the third respondent's jurisdictional point. There would be no purpose to such an order given the applicant's dismissal by the third respondent, her dispute concerning any alleged unfair labour practice is self-evidently moot.

[15] Mr Grogan, who appeared for the third respondent, accepted that the matter be argued on the basis of an absence of any prospects of success in the main application but submitted that in any event, there was an inordinate delay in the filing of the various processes that are the subject of the condonation applications, and that in each case, there was no satisfactory explanation for the delays concerned. I agree with that submission. The fact remains that the incident that gave rise to the present dispute arose some 5 1/2 years ago, the proceedings under review took place some 5 years ago. The practice manual provides that reviews applications are by their nature urgent, and applicants are required to prosecute review applications with due diligence. The applicant has failed to do so.

[16] For all of the above reasons, the applicant has failed to satisfy the requirements for condonation and the various applications for condonation stand to be dismissed.

[17] Section 162 of the LRA provides that the court has a discretion to make orders for costs according to the requirements of the law and fairness. That discretion must be exercised judicially, taking into account all relevant factors. In *Zungu v Premier of the Province of KwaZulu-Natal and others* (2018) 39 *ILJ* 523 (CC), the Constitutional Court said the following (footnotes omitted):

> [23] ... The correct approach in labour matters in terms of the LRA is that the losing party is not as a norm ordered to pay the successful party's costs. Section 162 of the LRA governs the manner in which costs may be awarded in the Labour Court. Section 162 provides:
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> "(1) The Labour Court may make an order for the payment of costs, according to the requirements of the law and fairness.
>
> (2) When deciding whether or not to order the payment of costs, the Labour Court may take into account—
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> (a) whether the matter referred to the Court ought to have been referred to arbitration in terms of this Act and, if so, the extra costs incurred in referring the matter to the Court; and
>
> (b) the conduct of the parties—
>
> (i) in proceeding with or defending the matter before the Court; and
>
> (ii) during the proceedings before the Court."
>
> [24] The rule of practice that costs follow the result does not apply in Labour Court matters. In *Dorkin*, Zondo JP explained the reason for the departure as follows:
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> > "The rule of practice that costs follow the result does not govern the making of orders of costs in this Court. The relevant statutory provision is to the effect that orders of costs in this Court are to be made in accordance with the requirements of the law and fairness.

> And the norm ought to be that costs orders are not made unless the requirements are met. In making decisions on costs orders this Court should seek to strike a fair balance between on the one hand, not unduly discouraging workers, employers, unions and employers' organisations from approaching the Labour Court and this Court to have their disputes dealt with, and, on the other, allowing those parties to bring to the Labour Court and this Court frivolous cases that should not be brought to Court."

[18] This position was most recently confirmed by the same court in *Long v South African Breweries and others* (CCT 61/18), where the court confirmed that in this court, costs do not necessarily follow the result and that considerations of fairness are paramount.

[19] I do not understand these judgments to say any more than that in this court, the rule that costs follow the result does not apply and that ultimately, the discretion to be exercised having regard to the requirements of the law and fairness means that a balance should be struck between the exclusionary effect that a costs order may have on the one hand, and the need to discourage frivolous litigation on the other.

[20] It is common in this court, having regard to the first of the above considerations, for the court to be hesitant to make an order for costs where the applicant is a single employee who misguidedly, but in good faith, pursues what he or she perceives to be legitimate grievances against an employer. On the other hand, the need to discourage misguided litigation ('hopeless cases'[4]) is essential if this court is retain any ability to manage its burgeoning workload. That workload and the backlog that it has generated is due, in part at least, to cases referred to the court that manifestly lack merit, in circumstances where there are no real consequences, whether by way of the deterrent of an adverse order for costs, to pursuing that litigation. Although considerations of access to justice would ordinarily favour an

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[4] Judge Owen Rogers, 'The Ethics of the Hopeless Case' Advocate vol 30 number 3 December 2017.

approach that seeks to encourage litigants to refer their disputes to the court, that approach has the potential to compromise the right of access to justice of the hundreds of litigants in cases with merit, who wait for unacceptably long periods to have their matters enrolled and heard.

[21] In the present instance, the third respondent sought an order for costs, such costs to include the reasonable costs of travel from the Eastern Cape and accommodation in Johannesburg. I will accept that the applicant did not elect to institute these proceedings in Johannesburg, in circumstances where the parties are based in the Eastern Cape, with any malicious intent. The applicant's attorney is based in Bloemfontein, and that would appear to be the reason for not filing the application in Port Elizabeth. In relation to the costs of the application, the third respondent has succeeded in having the applications for condonation refused and the review application dismissed. The applicant is an individual, whom I accept initiated these proceedings in good faith. However, the applicant has been represented throughout the course of this dispute. The applicant ought to have been aware, at least by the date of which her challenge to her dismissal on 3 May 2017 was dismissed by the CCMA, that the present proceedings would serve no purpose. In my view, the applicant acted unreasonably by persisting with application after 29 August 2017, with the consequence that the third respondent has been obliged to incur costs in opposing the application. The third respondent is a statutory body whose business is underwritten by the taxpayer. In these circumstances, the requirements of the law and fairness are best met by an order in terms of which the applicant be ordered to pay those of the third respondent's costs incurred after 29 August 2017. That is the fair point at which the present application became a hopeless case and ought to have been withdrawn.

I make the following order:

1. Condonation for the late filing of the review application and the record of the proceedings under review is refused.
2. The review application is dismissed.
3. The applicant is to pay the third respondent's costs, limited to those costs incurred after 29 August 2017.

André van Niekerk
Judge

REPRESENTATION

For the applicant: Ms H Fourie, NM Bahlekazi Attorneys

For the third respondent: Adv. J Grogan, instructed by Wesley Pretorius Attorneys