IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT PORT ELIZABETH)

CASE NO: P 229/2009

In the matter between:

ALEXANDER FREDERICK CARTER **Applicant**

and

THE COMMISSION FOR CONCILIATION, MEDIATION & ARBITRATION **1ST Respondent**

COMMISSIONER Y GROOTBOOM N.O. **2RD Respondent**

TELKOM SA (PTY) LTD **3RD Respondent**

JUDGMENT

LAGRANGE,AJ

Introduction

1. This is a review application of a condonation ruling made by the second respondent. The commissioner dismissed the applicant's condonation application for the late referral of his unfair dismissal dispute to the CCMA.

Factual background

2. The applicant was dismissed for the use of racist language towards a colleague in that on 15 July 2008 he allegedly referred to the colleague as a 'monkey' on more than one occasion and accused him of wanting to be or acting 'lily white'. In the condonation hearing the employer's representative claims three witnesses had heard these statements.

3. The applicant denied referring to his colleague as a 'monkey' but had asked him to 'stop monkeying around' and that his use of the term 'lily white' was a reference to professed innocence.

4. The applicant was dismissed on 2 October 2008 after being employed for 30 years by Telkom without any prior misconduct. The applicant took steps to appeal against the decision, but asked for more time to lodge his appeal as he was waiting for the minutes of the enquiry, which ran to some 125 pages. His request for more time to file the appeal was granted. On 28 October 2008 the applicant obtained the transcript of the enquiry. His attorneys prepared his appeal which they emailed to the employer on 31 October 2008, or so they thought at the time. It is common cause that the employer's email address, which the applicant supplied to his attorneys and to which the appeal was sent, was incorrect, so the appeal was not received by Telkom.

5. On 2nd December 2008, having received no response from Telkom about the appeal the applicant's attorneys wrote to Telkom at his request asking for information about the progress of the appeal. No response was forthcoming. Again, the reason for the lack of a response was that this letter had been sent to the same incorrect email address.

6. During January 2009 the applicant says he was distracted with arrangements he was making to settle in his daughter at university which entailed a time consuming repair to a motor vehicle which the applicant performed himself. It was only on 2nd February 2009, when the applicant himself phoned Telkom to find out about the progress of his appeal that he learnt that his appeal had not reached Telkom. He was also advised that

the employer had taken the view that because it had not received his appeal timeously, it would no longer consider it. Consequently the final decision the employer made on the status of the applicant's termination was when it originally decided to dismiss him on 2 October 2008.

7. On 5 February 2009, within three days of learning of the debacle surrounding the processing of his appeal and Telkom's refusal to entertain it, the applicant referred his dispute to the CCMA. By this stage, the referral was some 94 days late when reckoned against the date of dismissal, and the applicant was required to apply for condonation.

8. At the hearing of the condonation application before the second respondent, oral evidence was also tendered by the parties in addition to the evidence set out in their affidavits.

The arbitrator's ruling

9. The arbitrator dismissed the condonation application on 8 April 2009. The main features of her reasoning are summarised below.

10. The arbitrator restated the standard test setting out the criteria for evaluating condonation applications and proceeded with her analysis of the degree of lateness, the explanation therefore, the prospects of success, the importance of the case and prejudice.

11. The commissioner found the period of lateness in excess of three months to be "extensive" and one that would require a good explanation.

12. In considering the applicant's explanation for delay, the commissioner accepted that up to 2 December 2008 the applicant did take steps to pursue his appeal. However, between that date and 2 February 2009 when he learnt that his appeal had not been

received, the arbitrator found the applicant did nothing to pursue his case and neither he nor his attorney treated the matter with the required sense of urgency having regard to the timeframes for referring disputes to the CCMA. The arbitrator rejected the applicant's explanation that he took no further steps in January because he spent a week repairing a vehicle and had to take his daughter to university. Relying on the case of ***NUM v Council for Mineral Technology*** **(1998) 3 LCD 448** the arbitrator expressly adopted the view that in the absence of a proper explanation for the delay the prospects of success become immaterial.

13. Notwithstanding the commissioner's clear view that the applicant's failure to provide a proper explanation for the delay was sufficient justification for dismissing the condonation application, she still gave some consideration to the merits of his case. In doing so, she discounted the applicant's thirty years of unblemished service as not being a sufficient mitigating factor to prevent his dismissal for such the offence, which was treated as a dismissable one by the company. Moreover, the commissioner noted that the company claimed to have witnesses that the contentious remarks made were not taken out of context.

14. Quite apart from taking account of what might have emerged from the evidence of the employer's witnesses, the arbitrator also expressed the view that she could not see how the terms 'monkey' and 'lily white' could be taken out of context. As such she clearly expressed an *a priori* view on the possible meaning that could be attached to the applicant's utterances to his colleague.

15. In evaluating the importance of the case the commissioner found it was important to both parties without elaborating on her reasons for saying so.

16. In evaluating prejudice the commissioner held that both parties would suffer prejudice 'if the matter is condoned or not condoned.' Presumably, the arbitrator meant to say that one party would suffer prejudice if the referral was condoned and the other would suffer if it was not.

Grounds of review

17. The applicant seeks to set aside the condonation ruling on four main grounds.

18. Firstly, the applicant alleges the commissioner erred in concluding that he took no action during December 2008, when in fact on 2 December he got his attorney to follow up on the appeal. The applicant argued that the arbitrator failed to have any regard to the fact that after sending off this letter, the applicant was then awaiting a response from Telkom and it was reasonable to believe that with the annual shutdown imminent a prompt response might not have been expected.

19. Secondly, the applicant claims the commissioner unreasonably held that he and his attorney had failed to act with the requisite urgency in the light of the timeframes for referrals. The applicant reasons that the commissioner ought only to have considered the 30 day period after the outcome of the appeal hearing for the purposes of determining lateness.

20. Thirdly, the applicant contends that the commissioner applied the incorrect test in deciding that she was not required to consider the prospects of the case in this instance because of her finding that the explanation for the delay had been inadequate. The applicant contended that the principle applied by the commissioner only applies if there is no explanation at all for the delay. Only then may an adjudicator dispense with a consideration of the merits of a case in deciding a condonation application.

21. The primary authority relied on in support of the principle applied by the commissioner is the case cited in her award, ***NUM & Others v Western Holdings Gold Mine*** **(1994) 15 ILJ 610 (LAC)** at 613E.

22. In ***National Union of Mineworkers v Council for Mineral Technology*** **[1999] 3 BLLR 209** at 211-213, the LAC restated the position again follows:

> "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: c.f. Chetty v Law Society 1985 (2) SA 756 (A) at 765A-C; NUM v Western Holdings Gold Mine (1994) 15 ILJ 610 (LAC) at 613E."[1] (emphasis added)

23. The applicant conceded that this approach has been followed in a number of decisions of the LAC, but argued that it should be reconsidered in the light both of the more all-embracing approach set out in ***Melane v Santam Insurance Co Ltd*** **1962 (4) SA 531 (A)**, and other decisions of the LAC in which an applicant's prospects of success have nonetheless been considered despite wholly defective explanations for the period of delay.

24. In support of the applicant's contrary approach that an adjudicator must always consider the prospects of success except when there is no explanation for the lateness tendered at all, the applicant cited other LAC decisions in which a more flexible approach has been adopted. In ***National Education Health & Allied Workers Union on behalf of Mofokeng & Others v Charlotte Theron Children's Home*** **(2004) 25 ILJ 2195 (LAC)** at 2200, the LAC summarized the more flexible approach thus:

"[23] This court has previously confirmed the principle that without a reasonable and acceptable explanation for a delay the prospects of success are immaterial: Miya v Putco Ltd unreported judgment of the Labour Appeal Court DA 17/98. See also PPAWU & others v A F Dreyer & Co (Pty) Ltd [1997] 9 BLLR 1141 (LAC); Toyota Marketing v Schmeizer [2002] 12 BLLR 1164 (LAC) at para 15. It should be noted that in the two latter cases, the approach as set out in Miya was qualified with a measure of flexibility, in that failure to provide a reasonable and acceptable explanation for a delay was not regarded necessarily as an absolute bar to condonation."

[1] Reaffirmed again in ***Mziya v Putco Ltd*** **[1999] 3 BLLR 103 (LAC)** at 106. One may add to this authority similar pronouncements in ***NEHAWU v Nyembezi*** **[1999] 5 BLLR 463 (LAC)** at para [10]; ***Waverley Blankets Ltd v Ndima & others*** **(1999) 20 ILJ 2564 (LAC)** at 2567 par [11] and ***Zondi & others v President of the Industrial Court & another*** **[1997] 8 BLLR 984 (LAC)** at 989E-F.

25. In ***MM & G Engineering (Pty) Ltd v NUMSA & others*** **[2005] 9 BLLR 918 (LAC)** the LAC also held that notwithstanding an unacceptable delay and explanation it still examined the prospects of success in deciding the condonation application.

26. The most recent pronouncement of the LAC grappling with the principles governing condonation, indicates that the more tractable approach above does not mean the Court has jettisoned the principle that a condonation application may be dismissed solely on grounds of an inadequate explanation for the delay. Moreover condonation can be refused on this basis not only in those cases in which no explanation for the whole delay is proffered. In ***Moila v Shai NO & Others*** **(2007) 28 ILJ 1028 (LAC)** the LAC reaffirmed the principle enunciated in ***Chetty v Law Society, Transvaal*** **1985 (2) SA 756 (A)**, in the context of a rescission application:

> 'For obvious reasons a party showing no prospect of success on the merits will fail in an application for rescission of a default judgment against him, no matter how reasonable and convincing the explanation of his default. An ordered judicial process would be negated if, on the other hand, a party who could offer no explanation of his default other than his disdain of the Rules was nevertheless permitted to have a judgment against him rescinded on the ground that he had reasonable prospects of success on the merits .'[2]

27. Zondo JP, writing for a unanimous bench in *Moila's* case, elaborated on this statement as follows:

> "Although I do not think that it can be said that the reason for the appellant's failure timeously to request that his dispute be arbitrated was his disdain for the relevant provisions, I do not think that Miller JA meant to lay down disdain for the rules or statutory provisions as an essential requirement before the principle he enunciated could apply. I think that was simply an example he used to illustrate the point. I am sure it would apply in a case where there was no disdain but negligence or carelessness. Indeed, it is clear from ***P E Bosman Transport Works Committee v Piet Bosman Transport (Pty) Ltd*** **1980 (4) SA 794 (T)** at 799D, that in a case such as this one, it is not necessary to consider

[2] Per Miller JA, at 765D-E of the judgment

> the prospects of success and that condonation could be refused no matter how strong the prospects of success are in a case such as the present one. P E Bosman was a case where the appellant had failed to note the appeal and deliver the appeal record timeously and there were periods of delay for which there was either no acceptable explanation or no explanation at all and the breach of the rules was serious."[3] (emphasis added).

28. The facts in *PE Bosman* were that there was a delay of more than three months in filing the notice of appeal and an unexplained delay of some months in filing the appeal record. In *Moila's* case, the explanation for a delay three times greater than the prescribed period was an unsubstantiated one amounting to no proper explanation at all. The dictum in *Moila's* case confirms that an adjudicator *may* decline to consider the merits of a case when one or more significant periods of a lengthy delay are not satisfactorily explained or are not explained at all.

29. In summary, in the light of current jurisprudence, it seems that in condonation applications where the explanation for one or more significant periods of delay is absent or completely inadequate this may constitute a sufficient reason for refusing condonation, but even in such instances, adjudicators in exercising their discretion are not precluded from still considering the prospects of success.

30. In this case, the arbitrator seems to have decided the matter on the basis of what she considered to be an unacceptable explanation for the delay between 2 December 2008 and 2 February 2009, but in order to be comprehensive still considered the prospects of success.

31. In relation to the prospects of success the applicant accuses the commissioner of adopting a subjective and biased approach in her assessment of the prospects of success. In particular, he takes issue with her view that the contentious words in question could not possibly have a non racist connotation when seen in context.

[3] At 1038, par [36] of the LAC decision.

The commissioner's approach to the applicant's reason for the delay

32. It certainly appears that the commissioner concluded that the applicant could not explain why he and his attorney had not acted with greater urgency after 2nd December 2008, because she believed they ought to have been aware of the need to refer the dispute within 30 days of the original date of his dismissal on 2 October 2008. The commissioner's view was premised on the assumption that the applicant and his attorney knew that time for referring the matter had run out. Yet there was no evidence before the commissioner from which it could be inferred that before 2 February 2009 they had reason to believe the thirty day period for referring the matter had started to run. On the contrary, their actions were consistent with their belief that the internal appeal process was being pursued and that any delays in concluding that after the appeal was lodged were attributable to the employer. What is readily apparent is that when the position regarding the appeal process became clear the applicant and his attorney acted very expeditiously in referring the matter to the CCMA and in filing a condonation application. I agree with the applicant that in this respect the commissioner failed to assess the reasonableness of the explanation for not taking action sooner with reference to the applicant's motives and conduct, as she ought to have done.[4]

33. The commissioner evaluated his explanation for the delay as if the applicant and his attorney were cognisant that the 30 day time period was already running. In so doing she not only failed to have regard to their motives and conduct, but also ignored the effect of section 191(b)(ii) of the Labour Relations Act which makes it clear that the 30 day period expires either 30 days after the dismissal, or 30 days after the employer makes a final decision on the dismissal. In circumstances where all the evidence suggests that the applicant and his attorney were under a *bona fide* but mistaken belief that the employer was entertaining the appeal but had not yet made a decision, it ought to have been apparent to the commissioner that the provisions of section 191(b)(ii) ensured that as matters appeared to stand, they would not have needed to have regard to the referral timeframes in the LRA, until they had received the

[4] See ***NUMSA & Another v Hillside Aluminium*** **[2005] 6 BLLR 601 (LC)** paras [11] and [17].

outcome of the appeal. The expectation that the employer would decide the appeal was confounded when it informed them it would no longer consider it.

34. Accordingly, there is no reason to suppose the applicant and his attorney ought to have been aware of any urgency in making the referral until they knew of the outcome of the appeal or, as it turned out, that it was not going to be considered and the original decision to dismiss stood unaltered. The commissioner's finding that they did not act with sufficient urgency in the circumstances is unreasonable and is one that no rational arbitrator could have reached.

35. As far as the commissioner's assessment of the explanation for the delay is concerned, because she adopted an approach which measured the applicant's actions against a 30 day period which commenced with his dismissal on 2 October 2008, without contextualizing it against the backdrop of a party that believed he was still engaged with an internal appeal process, she measured the reasonableness of the explanation against the yardstick of an applicant who knew that the relevant thirty day time period had already expired by 2 November 2008 and who was not pursuing an internal appeal. In the circumstances, the commissioner construed the explanation completely out of context, which was wholly unreasonable.

The commissioner's consideration of the prospects of success

36. Insofar as the commissioner's decision relied also on her assessment of the prospects of success, the third failure in the commissioner's reasoning is her refusal to entertain even the possibility that the word 'monkey' in the phrase 'monkey around' or the phrase 'lily white' could have a non-racist connotation. The briefest consideration of a standard dictionary such as the Concise Oxford dictionary would have revealed that the term "lily-white" can mean 'faultless' as well as referring to a 'pure white colour', and that to 'monkey around' can mean to 'fool around'.

37. In reaching the conclusion that there was no conceivable non-racist meaning which could have been attributed to the applicant's utterances, the commissioner appears to

have closed her mind to even the possibility of another interpretation. Such a predisposed attitude to the determination of a dispute of this nature is clearly problematic. In the context of a tentative evaluation of the prospects of success in a condonation application, the commissioner's fixed stance of principle indicates a wholly inappropriate prejudgment of the issue on her part.

38. The commissioner clearly failed to apply her mind properly to the material issue of the possible alternative meanings of the contentious words under consideration. This prevented her from making a balanced evaluation of the applicant's prospects of success. In the circumstances, the commissioner's failure was such that the applicant was denied a fair hearing which constituted misconduct in the performance of her duties as an arbitrator.

The importance of the case

39. Lastly, in passing it should be mentioned that the commissioner failed to understand that when considering the importance of the case, it is not so much a question of whether the parties regard it as important for themselves, but whether it has a wider importance because of the issues it raises. As the case involves the alleged use of racist language, and may raise issues touching on fundamental constitutional values it is a matter which may have a significance beyond the direct interests of the two parties. It seems the commissioner gave no consideration to this.

Conclusion

40. Accordingly,

    40.1. the second respondent's condonation ruling of 8 April 2009 in case number ECPE 461-09 is reviewed and set aside;

    40.2. the applicant's condonation application for the late referral of his dismissal dispute to the CCMA is granted, and

40.3. the third respondent is ordered to pay the applicant's costs.

ROBERT LAGRANGE

ACTING JUDGE OF THE LABOUR COURT

Date of hearing: 3 March 2010

Date of judgment: 23 March 2010

Appearances:

For the applicant: Mr R Wade

Attorney : Mr F Le Roux

For the respondent: Mr J A Oberholzer