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CASE LAW UPDATES

The requirements in review of condonation applications of the CCMA

By Johanette Rheeder - Director JRA Attorneys

Introduction

In this caselaw update, the various legal principles relating to the test for review, res judicata, condonation applications in the CCMA, and the correct calculation of the date of dismissal of an employee were considered in the matter of Kooganasen v CCMA and others [1]. This is also a case in point where the employer was dragged, for years on end, to the CCMA, the LC, LAC and the Constitutional Court in numerous failed applications, without fail or acknowledgment by the employee of the fatality of his case.

The employee was dismissed by the employer in September 2014 already, for misconduct. The matter took its turn in two review applications in the LC and an appeal in the LAC. The employee was reinstated by the LC and the LAC dismissed a petition to appeal. The employer subsequently gave effect to the LC order and reinstated the employee, however, the position of the employee at that stage, was redundant. The parties could not agree on the alternative position to which the employee should be reinstated and all attempts by the employer to reintegrate the employee failed.

The current dispute came before the CCMA Commissioner as a condonation application for the late referral of the dispute to the CCMA. The commissioner dismissed the application and the matter ultimately ended up before the Labour Court (LC) as a review application in terms of section 145 read with 158(1)(g) of the LRA.

History of the matter

The matter has a long history in the LC and the LAC before it ultimately came before the CCMA in the matter under discussion herein. This history deserves some mentioning to give context to the LC judgment. The employee was subsequently retrenched with his final date of employment on 30 June 2018, after various failed attempts to engage him in consultation. An unfair dismissal dispute (retrenchment) was referred to the CCMA on 26 August 2018. In the referral he alleged the date of dismissal to be 31 July 2018.

The employee maintained his central dispute to be that the employer failed to give effect to the erstwhile reinstatement order of the LC. He subsequently applied to the Director of the CCMA for the dispute to be heard by the LC in terms of section 191(6) of the LRA

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At the time of arbitration on 20 February 2019 (some 7.5 months post-dismissal), the jurisdiction dispute was still not resolved, and an order was made that the condonation application must first be heard before the section 191(6) application can be submitted to the Director.

The employee eventually submitted a condonation application on 27 February 2019, which was dismissed. In dismissing the condonation application, the commissioner considered the prospects of success, which she found to be slim in the face of the obstructive and un-cooperative nature of the employee's conduct. She also dealt with the extensive delay and prejudice to the employer.

In the meantime, the employee, in persisting with his argument that the employer failed to reinstate him, brought an ex parte application to the LC for contempt of court order. A rule nisi was granted which was subsequently dismissed [2] with punitive costs. The employee, undeterred by another dismissal of his case, applied for leave to appeal, and petitioned the LAC and the Constitutional Court for leave to appeal, which was eventually dismissed by the Constitutional Court.

After all this, the review case against the condonation ruling eventually came before the LC.

Applying the test for review to condonation applications.

In many a matter, the trite test for review is either misunderstood or still not correctly applied by applicants. In case the employee represented himself and stepped into the trap of missing the legal foundation of his case and getting totally wrapped up in "what he perceived" to be the legal issue at hand, being that he was not reinstated in accordance with the first order of the LC and that the retrenchment was unlawful, and in doing so, did not file his application timeously.

Simply put, the LC confirmed [3] that the court must first consider if there is a failure or error on the part of the arbitrator? Secondly, the court, if such error exists, must consider whether the outcome arrived at by the arbitrator was reasonable based on all the evidence and issues before him/her. Even if the outcome is reasonable for different reasons, then the matter is not reviewable. It is only when the failure or irregularity is the only basis to sustain the outcome that the review would succeed.

Because this was a condonation application that's on review, a further factor had to be considered [4].

The court found that condonation is an exercise of judicial discretion.

The exercise of the discretion will not be judicial if it is based on incorrect facts or wrong principles of law or where the court of first instance acted capriciously or in a biased manner, or committed a misdirection or an irregularity or exercised its discretion improperly or unfairly.

If none of these grounds are established, it cannot be said that the exercise or discretion was not judicial.

Furthermore, the court found, that where the nature of the discretion is one in the "true sense", the court should be slow to substitute a decision with that of its own, if the decision is within the range of permissible outcomes [5]. In determining what the permissible outcome of the condonation application is, the Commissioner must apply the principles as set out in Melane v Santam Insurance Co Ltd [6]. These factors are not individually decisive but are interrelated and must be weighed against each other. For instance, weak prospects may be excused by a good explanation for the lateness or strong prospects may compensate an inadequate delay. A delay must be explained in detail, dealing with each period for the delay and the reasons for it. The court considered the issue of a proper and full explanation for the entire period of the delay (therefore the length and the explanation for it) to be the most critical component to any condonation application [7]. Therefore, the applicant must for instance, not only list the time periods, but also explain why the lapse of time took place between these periods.

Another important consideration, is the prejudice both parties may suffer, which must also be explained with sufficient detail. Only once this is done, can the court make a balanced decision.

Of equal importance are the prospects of success. All that is necessary to consider is whether the applicant would succeed, if the version is correct and true. It should not be proven to be correct, but only on a prima facie basis be established. If the applicant does not explain the delay in sufficient detail, the court found the prospects to become irrelevant.

Lastly, condonation must be applied for as soon as possible or immediately upon the discovery of the failure or when the applicant should reasonably have become aware of the failure to comply with the time period. Even a delay in filing the application, can result in circumstances where the application stand to be dismissed [8].

1 Kooganashen Theo Pillay v CCMA and others, reported case C268/19, heard on 27 July 2022 and delivered on 30 Nov 2022.

2 Pillay v Santam Ltd and another (2020) 41 ILJ 2695 (LC)

3 Ad para [36]

4 See National Education Health and Allied Workers Union (NEHAWU) V Metrofile (Pty) Ltd (2021) 42 ILJ 1914 (LAC)

5 Ad para [38] and see also Steenkamp and others v Edcon Ltd (2019) 40 ILJ 1731 CC at para 33

6 1962 (4) SA 531 (A) 532C-E

7 Ad para [44]

8 Ad para [48]

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