



**IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN**

Not Reportable

Case no: D 1064/2015

In the matter between:

**LINDA MNGUNI**

**Applicant**

and

**COMMISSIONER H.P KHANYILE NO**

**First Respondent**

**SOUTH AFRICAN LOCAL GOVERNMENT**

**BARGAINING COUNCIL**

**Second Respondent**

**eTHEKWINI MUNICIPALITY**

**Third Respondent**

**Delivered: 15 November 2018**

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**JUDGMENT**

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**TLHOTLHALEMAJE, J:**

- [1] With this application, the applicant seeks to review and set aside a condonation ruling issued by the first respondent (Commissioner) dated 21 October 2015, issued under the auspices of the second respondent (SALGBC). The application is opposed by the third respondent (Municipality).
- [2] The applicant is employed in the Economic Development Planning Department of the Municipality on salary level Task Grade 7. He had responded to an advertisement for the post of Building Inspector Economic Development and Planning Cluster at salary level Grade 10. The closing date for the applications was 31 October 2014. As at 2 January 2015, the applicant had not received a response and had lodged a grievance as he wanted to be

shortlisted and interviewed for the post. The grievance reached the applicant's supervisor. Mzimela on 19 January 2015 for a decision. On 20 January 2015, Mzimela discussed the grievance with the applicant, flowing from which the applicant was to proceed to step two of the grievance procedures.

- [3] On 2 February 2015, the Municipality's Ramdayal had sent an email to the applicant in response to the latter's enquiry regarding the post, and was advised that no appointments had been made. This was again confirmed by Bheki Ngcobo of the Municipality's Human Resources Department on 15 April 2015 that he was not shortlisted as he did not meet the relevant requirements for the post.
- [4] The applicant's contention nonetheless is that another person, Thulile Gcaba had been appointed into the post. The Municipality however disputed this version, contending that after the shortlisting and interviews that had excluded the applicant, no appointment was made into the post as there was no suitable candidate. This was confirmed through the Appointment Circular dated 6 March 2015.
- [5] The same post was however re-advertised in January 2015, with the closing date being 6 February 2015, and the applicant did submit his application. According to the Municipality, he had nonetheless kept making enquiries about the post on which no appointment was made.
- [6] Despite the applicant being advised that the position was not filled, he had referred a dispute for conciliation on 27 August 2015 alleging an unfair labour practice that arose on 30 June 2015. His contention was that the dispute arose on that date as that is when he was informed by Ngcobo that he was not shortlisted as he had not met the requirements for the post. In his referral, the applicant sought that he be appointed to the position of Building Inspector. This was despite not having been shortlisted nor interviewed.
- [7] At the conciliation proceedings held on 23 September 2015, the Municipality had raised a preliminary point and contended that the referral was out of time, and that the applicant ought to seek condonation. He had duly filed an application in that regard which the Municipality had opposed.

[8] In his application for condonation, the applicant had averred the following;

- 8.1 The post having advertised on 17 October 2014, he had applied and when he heard nothing from the Municipality, he lodged a grievance on 2 January 2015;
- 8.2 The reason he filed a grievance was that he was informed by colleagues that the post had been filled by Gcaba, which appointment the Municipality denied in April 2015. He however contends that he was never given an appointment circular despite several requests. He had therefore used an email sent to him on 30 June 2015 by Ngcobo which confirmed that he did not meet the relevant requirements of the post, as the cause of action.
- 8.3 He contended that had the Municipality provided him with the non-appointment circular on 15 April 2015, which he had requested on 4 February 2015, he would have referred the dispute then.
- 8.4 The applicant does not in the application for condonation indicate the length of the delay, but he nonetheless attribute any delay to the fact that he was never provided with an appointment circular despite making several requests. He conceded that he had received the 'non-appointment circular' on 16 March 2015 from Ramdayal. He further disputed that the appointment circular was published in terms of the Municipality's Employment Practice Policy.
- 8.5 The nub of the applicant's averments in regards to his prospects of success, was that he met the requirements of the post, and that the Municipality had not fairly conducted the appointment process in accordance with its Employment Practices Policy, and had thus committed an unfair labour practice.
- 8.6 The applicant further averred that he would suffer prejudice should condonation not be granted as he met the minimum requirements for the post.

[9] The Municipality had opposed the condonation application on the grounds that;

- a) At a grievance meeting held on 04 February 2015, the applicant was provided with reasons for his non-shortlisting, and subsequent to the non-resolution of the grievance, he was advised to refer the dispute to the SALGBC.
- b) The applicant had referred the dispute on 27 August 2015, some six months after he became aware that the grievance remained unresolved.
- c) The request for the non-appointment circular did not prevent the applicant from timeously referring the dispute, and his explanation for the delay in referring the dispute ought to be rejected.
- d) The applicant did not meet the requirements of the post and accordingly lacked prospects of success as no appointment was made into the post. He further would not suffer any prejudice as the post was re-advertised and he had submitted his application.

[10] The Commissioner having considered the condonation application and the opposition thereto, came to the conclusion that the applicant had not shown good cause in that;

- 10.1 He failed to meet the standard required of an application for condonation as he had failed to deal with the length of the delay, which was fundamental to showing good cause.
- 10.2 It was not the duty of the Commissioner to speculate on the degree of lateness, and to the extent that the applicant failed to deal with this issue, the application was defective.
- 10.3 The applicant had conceded that the grievance meeting was held on 4 February 2015 where he was informed of the reasons for his non-shortlisting, and was further advised to refer the dispute to SALGBC as the grievance remained unresolved.

- 10.4 The circular of non-appointment that the applicant had insisted upon was not going to change the circumstances of his non-shortlisting as it was irrelevant for the purposes of referring the dispute, and accordingly his explanation for the delay ought to be rejected.
- 10.5 The applicant had not demonstrated prospects of success in that he had not shown that he was an exceptional candidate deserving to be appointed. Furthermore, since the applicant required that he be shortlisted, it was not for the Commissioner to make any such order, including that he be interviewed and promoted.
- 10.6 The prejudice the applicant complained of was of his own making as he failed to prosecute the matter timeously. Furthermore, the applicant still had an opportunity to apply for the post as it was re-advertised.

The grounds of review and evaluation:

- [11] The applicant contends that the Commissioner made an error in the ruling, which made it 'invalid and unlawful', and thus deserving to be set aside. He further contends that the Commissioner committed a gross irregularity in the conduct of proceedings.
- [12] In dealing with the grounds of review, it is of importance to reiterate that where this Court is called upon to review and set aside a condonation ruling, it is essentially invited to consider the exercise of a discretionary power<sup>1</sup>. The principles applicable in such instances includes a determination of whether a tribunal had exercised its discretion capriciously or upon a wrong principle; whether the tribunal did not exercise a judicial discretion and, if it did exercise a discretion at all, it did so improperly or unfairly; whether the decision is

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<sup>1</sup> See *Cowley v Anglo Platinum & others* JR 2219/2007; [2016] JOL 35884 (LC) at para 21, where it was held that;

"...when the Commissioner is endowed with a discretion this court will be very slow to interfere with the exercise of that discretion. The Commissioner's exercise of discretion would be upset on the review if the applicant shows, inter alia, that the Commissioner committed a misdirection or irregularity, or that he or she acted capriciously, or on the wrong principle or in bad faith or unfairly or that the exercise seeing the discretion the Commissioner reached a decision that a reasonable decision-maker could not reach." (footnote omitted)

vitiated by misdirection or irregularity, or is one to which no Court could reasonably have come<sup>2</sup>.

[13] This being an application to review the Commissioner's ruling, the above questions as to whether this Court should intervene with the Commissioner's discretion ought to be answered within the context of the trite principles applicable to condonation applications.

[14] In accordance with the provisions of section 191(2) of the LRA, the Commission/Bargaining Council may on good cause shown, condone the non-observance of the time frames. 'Good cause' was explained in *Melane v Santam Insurance Co. Ltd*<sup>3</sup> in the following terms;

'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, 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 prospects which are not strong. Or the importance of the issue and strong prospects may tend to compensate for a long delay. And the Respondent's interests in finality must not be overlooked"

[15] The Constitutional Court in *Brummer v Gorfil Brothers Investments (Pty) Ltd* has since pointed out that an application for condonation should be granted if it is in the interests of justice and refused if it is not. The interests of justice must be determined by reference to all relevant factors, including the nature of the relief sought, the extent and cause of the delay, the nature and cause of any other defect in respect of which condonation is sought, the effect on the

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<sup>2</sup> *Coates Brothers Limited v Shanker and Others* (DA 22/2002) [2003] ZALAC 12 (29 September 2003) at para [3]

<sup>3</sup>1962 (4) SA 531 (A) At 532b-E

administration of justice, prejudice and the reasonableness of the applicant's explanation for the delay or defect<sup>4</sup>.

- [16] Significant with a determination of such applications is that condonation cannot be had for the mere asking, and that a party is required to make out a case entitling it to an indulgence by giving a full, detailed and accurate account of the causes of the delay<sup>5</sup>. In the end, the explanation must be reasonable enough to excuse the default.<sup>6</sup>
- [17] In this case, the Commissioner had regard to the factors to be considered when determining applications for condonation. In regards to the period of delay, the applicant had for reasons best known to him, not indicated how late the referral was. It can be deduced that he had done so deliberately as he was indeed aware that the delay in question, when it is accepted that the applicant knew as of 5 February 2015 that he had not been shortlisted, was excessive in the extreme. The failure to deal with this aspect of condonation was indeed fatal as correctly pointed out by the Commissioner.
- [18] The Commissioner had further dealt with the explanation proffered by the applicant. That explanation as correctly found by the Commissioner was wholly inadequate, and in the words expressed by Zondo JP (as he then was) in *Moila v Shai NO and Others*<sup>7</sup>, amounted to no explanation at all.

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<sup>4</sup> 2000 (5) BCLR 465 ; 2000 (2) SA 837 (CC) at para 3; See also *Ndlovu v S* 2017 (10) BCLR 1286 (CC); 2017 (2) SACR 305 (CC) (15 June 2017) at paras 22 – 23; *Van Wyk v Unitas Hospital (Open Democratic Advice Centre as amicus curiae)* 2008 (2) SA 472 (CC) at 477A-B; *SA Post Office Ltd v CCMA* [2012] 1 BLLR 30 (LAC) at para [23], where Waglay DJP (as he was then) stated that;

'In my view, each condonation application must be decided on its own facts bearing in mind the general criteria. While the rules are there to be applied, they are not inflexible but the flexibility is directly linked to and apportioned in accordance with the interests of justice; prejudice; prospects of success; and finally, degree of delay and the explanation thereof. The issue of delay must be viewed in relation to the expedition with which the law expects the principal matter to be resolved'

<sup>5</sup> *Mulaudzi v Old Mutual Life Assurance Company (South Africa) Limited* 2017 (6) SA 90 (SCA) at para 6

<sup>6</sup> *Ndlovu v S* at para 31 *supra* at fn 3

<sup>7</sup> [2007] 5 BLLR 432 (LAC), At para 33, where it was held that;

"If ever there was a case in which one can conclude that good cause has not been shown for Condonation without even considering prospect of success, then this is it. When, in an application for Condonation the delay is excessive and an explanation been given for that delay or an "explanation" has been given, but such explanation amounts to no explanation at all, I do not think it is necessary to consider the prospects"

- [19] The nub of the applicant's explanation was that he was not furnished with a circular of appointment for the post. That circular as however pointed out by the Commissioner was irrelevant for the purposes of referring a dispute, as the applicant knew as of 5 February 2015 when his grievance was not resolved that he had not been shortlisted. Even if there was any merit in his contention that he had to wait for the circular, it is trite that he was required to explain each and every period of the delay. He nonetheless merely alleged that he had made several requests for the circular, without indicating exactly when those requests were made.
- [20] Any contention by the applicant that he had any prospects of success on the merits, *i.e.*, that he would be shortlisted, interviewed and appointed into the post is to be viewed within the context of whether someone was appointed into the post, or whether the post was ultimately re-advertised. If it is established that the post which was the source of the applicant's grievance was not ultimately filled, and that it was re-advertised, in my view, that should be the end of the matter. This is so in that the applicant has no entitlement to be shortlisted or interviewed for the post, and a mere allegation that one met the requirements of a post does not give rise to a right to an appointment. Even if there was some unfairness in the failure to shortlist the applicant, I fail to appreciate what remedy would have been available in circumstances where the very same post was re-advertised.
- [21] In argument, it was persisted on behalf of the applicant in this case that it was not true that the post was re-advertised, as it appeared that there were two posts, with one being re-advertised whilst the other was not. It was contended that the posts appeared to be the same save for the reference number used in the two posts.
- [22] Counsel for the Municipality had pointed out that Circular 'SVC363' for the post was issued on 16 March 2016<sup>8</sup>. The same circular reference number had been used for the post initially advertised in October 2014, as no appointments had been made in respect of the initial advertisement. This was confirmed in an email correspondence between Ramdayal and the applicant

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<sup>8</sup> Annexure 'D1' at page 34 - Pleadings



on 2 February 2015. Flowing from further enquiries from the applicant, he was again informed on 15 April 2015 by email that no appointments were made in respect of the post under 'SCV363', and that the post was re-advertised under 'SCV368' issued on 23 January 2015<sup>9</sup>. Other than that, the applicant was also furnished with appointment circular No.2246 dated 16 March 2015, which confirmed that no appointments were made for the post.

- [23] The applicant had confirmed in his replying affidavit that he had indeed applied for a post, but which he understood to be a new post (even if it was for Building Inspector). He however contended that he was not aware that it was the same post re-advertised, and he was pursuing the matter on the basis that he was not shortlisted in respect of the post under 'SCV 363'. It is not clear from the applicant's averments as to what made him to believe that the re-advertised post is not the same as that he had applied for initially. His contention that the original post was filled by Gcaba is also not supported by any evidence, and if he insisted on seeking to be appointed into the post, his application would have been defective on account of the non-joinder of Gcaba.
- [24] I have difficulties in understanding the applicant's insistence that he is pursuing the matter in respect of a post which was clearly re-advertised, simply because he was not aware that the post that he had re-applied for was not the same post that was re-advertised. If he was not shortlisted for the post, and no appointments were made in that post, I fail to appreciate the reason he would insist that he should have been shortlisted when he has a second chance at the post flowing from his second application. As already indicated, the applicant's rights in such cases are limited to a fair process. He nonetheless has no right or entitlement to be shortlisted, and besides, it is unclear what possible prejudice he could have suffered under the circumstances when no one was appointed. On the contrary, it is the Municipality that stood to suffer prejudice, as it would have been compelled to defend a matter that had no merit. In my view, the Commissioner's

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<sup>9</sup> Annexure 'BN1' to the Answering Affidavit

conclusions that the applicant had not demonstrated any prospects of success are unassailable.

[25] Having had regard to the factors taken into account by the Commissioner in refusing the applicant's application for condonation, I am satisfied that there is no basis for any conclusion to be reached that the Commissioner committed a misdirection or irregularity, or failed to apply his discretion or improperly applied that discretion, or that he acted capriciously, or that he reached a decision that a reasonable decision-maker could not reach.

[26] Further having had regard to the requirements of law and fairness, and in the light of the conclusions reached, I am satisfied that this application should not have seen its way on the court's roll as it was indeed ill-conceived. Accordingly, I am of the view that the applicant should be burdened with its costs.

[27] Accordingly, the following order is made;

Order:

1. The application to review and set aside the condonation ruling issued by the First Respondent dated 21 October 2015 is dismissed with costs.

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E Tlhotlhemaje

Judge of the Labour Court of South Africa

**APPEARANCES:**

For the Applicant:

P Pillay of Pungi Pillay & Associates

For the Respondent:

CM Kulati

Instructed by:

Hlela Attorneys

LABOUR COURT