

DETAILS OF HEARING AND REPRESENTATION

1. The matter was scheduled for an in limine hearing on 15 January 2025 at the offices of the CCMA in Cape Town. Ms Bombanani Wonga, attorney of Wanga and Associates Attorneys represented the applicant. Mr Neil Va Zyl, attorney of Louis Van Zyl Attorneys represented the applicant. The parties had made written submission with regard to the condonation application. The applicant applied for condonation, the respondent made answering submissions, and the applicant replied to those submissions.
2. On 15 January 2025, the parties traversed their written submissions clarifying and adding to such, as necessary. The proceedings were recorded.

THE ISSUE TO BE DETERMINED

3. I have to determine whether or not the applicant's unfair dismissal referral was late and if so whether to grant condonation thereof in terms of section 191 of the Labour Relations Act 66 of 1995 as amended (LRA).

BACKGROUND

4. The following facts are common cause unless otherwise indicated. The respondent is the business of providing cyber security services to its clients. The respondent employed the applicant as a Senior Digital Risk Associate from January 2022 until, it is disputed 30 April 2024 or 31 May 2024. The parties on 30 April 2024 entered into a written agreement headed settlement agreement which terminated the employment relationship.
5. When the agreement was signed the applicant was undergoing performance management. The agreement stated inter alia that.
The termination date of the employment contract will be 30 April 2024 which will also be the employee's last date of work. The employee will be required to make herself available for a handover between 2 and 3 May 2024.
The employee will be paid a settlement amount of R22, 554.22 (net) for the month of May 2024. and that such amount would be paid by the 31 May 2024.
In addition, the balance of leave amounting to 1.7 days equal to R1, 600.32 (nett) will be payable.
The company shall provide the employee with a copy of the UI19 form for UIF application purposes. The UIF form will state that the reason for termination of services was 'End of Contract.'

The company shall provide the employee with a neutral reference letter.

6. The applicant recorded the conversation between herself and employees of the respondent party which led to the signing of the agreement. The recording was transcribed, and the transcription was entered into the record and agreed as being a true reflection of the conversation.
 7. The applicant referred an unfair dismissal dispute to the CCMA on 11 June 2024 by way of a referral dated 6 June 2024 claiming that she was unfairly dismissed on 31 May 2024 for reasons relating to performance.
 8. On 19 July 2024 the matter was set down for a conciliation hearing (the respondent having objected to the con-arb proceedings), at that hearing the respondent claimed that the CCMA had no jurisdiction to arbitrate the dispute as the applicant was not dismissed as the employment relationship ended by way of a settlement agreement and even if that were not the case, the date of dismissal would be the 30 April 2024 and as such the referral was twelve days late.
 9. The applicant disputed this and claimed that the CCMA had jurisdiction to arbitrate the dispute as she entered into the agreement under duress which the respondent disputed. On that day, the applicant despite disputing that the referral was late agreed that she would apply for condonation for the alleged late filing of the referral. The applicant applied for condonation, the respondent submitted an answering affidavit, and the applicant submitted a replying affidavit. The documents submitted amounted to some 100 pages, most of which dealt with the actual merits of case which I do not have to determine
 10. The first issue for me to determine was whether the referral was late. The applicant referred an unfair dismissal dispute, such dispute must be referred within 30 days of the date of dismissal.
 11. Section 190 of the LRA provides that the date of dismissal is
 - (1) *The date of dismissal is the earlier of*
 - (a) *the date on which the contract of employment terminated; or*
 - (b) *the date on which the employee left the service of the employer*
 - (2) *despite subsection (1)*
.....
 - (d) *if an employer terminates an employee's employment on notice, the date of dismissal is the date on which the notice expires or, if it is an earlier date, the date on which the employee is paid all outstanding salary.*
 12. Section 191 (1) (b) of the LRA allows the CCMA to condone the late referral of the dispute 'on good cause'.
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13. In considering the application for condonation I am in terms of the rules of the CCMA required to take into consideration: the degree of lateness, the reason for lateness, the referring party's prospects of success, prejudice to the respondent should condonation be granted and any other relevant factors.

SUBMISSIONS

Degree of lateness and reasons therefore

14. The applicant claimed that the employment relationship ended on 31 May 2024 or at the earliest on 28 May 2024 when her monies were paid out. She relied on section 191 (2) (d) of the LRA referred to above which provides that

if an employer terminates an employee's employment on notice, the date of dismissal is the date on which the notice expires or, is an earlier date, the date on which the employee is paid outstanding salary.

15. The applicant referred to the transcript of the conversation which as stated was agreed as a true reflection thereof.

16. Oeil Heuvel stated *yes, you are still under Mobius's employment, you are essentially just serving your months at home. So that is also what it means. So, you will no longer be required to physically come here or physically do any of Mobius's work, for the month, it is serving your notice period at home. That is really all that means.*

17. The respondent claimed that this part of transcript was cited out of context and disputed the fact that the applicant could have been under the impression that the employment relationship terminated on notice.

18. The applicant referred to the signed UI19 Department of Labour form which she was provided with which stated the reason for termination of the employment as 'end of contract' and that date of termination of employment as 31 May 2024. The applicant cited case law indicating that it was a criminal offence to mislead the Department of Labour.

Prospects of success

19. The applicant claimed that she entered into the agreement under duress in that she was informed that whether she signed the agreement or not her services would still terminate; if she signed the agreement she would be provided with a neutral reference, and it will not be on record that she was dismissed for reasons relating to poor work performance. The respondent disputed this and claimed that the applicant was at all times aware that she was entering into the agreement voluntarily and understood the ramifications of entering into such an agreement.
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ANALYSIS

21. The Labour Appeal Court was of the following view in the matter of *Mziya v Putco* (1999)8 LAC 1. 18.1 where Myburgh JP, as he was then, stated the following:

“The approach is that the court has discretion to be exercised judicially upon consideration of all the facts, and in essence it is a matter of fairness to both sides. Amongst the facts usually relevant is the degree of lateness, the explanation therefore, the prospects of success and the importance of the case. These facts are interrelated and 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 that 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 long delay, an application for condonation should be refused.....”

22. The first issue I must determine is whether the referral was actually late. The applicant is a lay person and even though the agreement states that the date of termination of employment is 30 April 2024, given the reference to being paid for the month of May 2024 and the recording of what was said during that meeting, see paragraph 16, it was reasonable for her to believe that she was being dismissed on notice ending 31 May 2024 as opposed as to the respondent's claim that payment for the month of May 2024 was a settlement amount. I find the wording of the agreement to be ambiguous.

23. I find that it was reasonable for the applicant to believe that the date of 'dismissal' was 31 May 2024 or at the earliest 28 May 2024 when her monies were paid out, section 190 (2) (d) of the LRA.

24. For this reason, I find that condonation is not required but assuming I am wrong, and the employment relationship terminated on 30 April 2024, the delay of twelve days is not significant in the circumstance and there are acceptable reasons for the lateness.

25. In term of the principles cited in the case referred to above there was a slight delay and acceptable reasons for lateness and I do not have to consider the prospects of success.

26. The issue of whether the agreement entered into was settlement agreement entered into under duress must be ventilated at an arbitration hearing.

RULING

27. Condonation of the late referral of the dispute is granted.

