



IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NO: 5886/2016

In the matter between:

MM LEDINGWANE

APPLICANT

And

SPEAKER: LIMPOPO

PROVINCIAL LEGISLATURE

FIRST RESPONDENT

PREMIER OF LIMPOPO PROVINCE

SECOND RESPONDENT

Headnote: Civil procedure- statutory condonation – applicant required to have first issued Sec 29 notice before pursuing litigation and before expiry of twelve months period from the date of cause of action- a litigant seeking indulgence required to set out explicitly facts to be weighed against each other to show where 'interest of justice' ultimately rest, lest condonation under S29 (3) would fail. Purpose of S29 notices is to enable the state or organs of State to investigate claims made, to defend or compromise/settle such claims and for expeditious disposal thereof- similarly, if a claim is under PAJA, exhausting internal remedies before

embarking on litigation is cost-effective and assist the executive to rectify alleged irregularities first – *In casu*, applicant's reasons for non-compliance with S.29 (1) and (2) unreasonable and flimsy – Held, condonation dismissed with costs.

JUDGMENT

MG PHATUDI J

[1] The facts giving rise to the present statutory condonation application constitute *res nova* in this Division. The applicant seeks condonation for non-compliance with the provisions of section 29(1) and 29(2) of the Limpopo Legislature Service Act, 1997 ("LLSA").¹ The actual relief sought is located in sub section (3) thereof.

The Notice of Motion sets out the relief as follows:

"

1. *That the requirements and limitations contained in section 29 of the Limpopo Province Legislature Act 3 of 1997 be dispensed with in terms of sub-section (3) thereof in respect of the action instituted under case number 5886/2016;*

¹ Act 3 of 1997, ("LLSA")

2. *That, should any respondent oppose this application, it be ordered to pay costs hereof;*

3. *That the applicant be granted further and/or alternative relief.*

1.2 The First Respondent oppose the application. The second Respondent (Premier: Limpopo Province) who has been sued in his nominal capacity as the Executive and Political Head of the Provincial Administration, did not deliver papers in opposition to the application, as no relief is sought against his office in the main action. A notice to abide by the court's decision was in fact delivered on 17 February 2017.

The dispute is therefore between the Applicant and the First Respondent only, as the "Speaker of Limpopo Provincial Legislature".

B: A SURVEY OF THE FACTS:

[2] The applicant, herself an attorney at law, was appointed as Secretary to the Limpopo Provincial Legislature ("LPL") by the First Respondent ("the Speaker") on 18 September 2013.

2.1 In a letter addressed to the applicant by the First Respondent ("Nong") dated 17 April 2014,² she was informed by the Board of the Legislature's decision that her appointment as the Secretary was "irregular" in that;-

² Paginated Index – p12 "annexure "C" "FA"

“2.1.1 The recommendations of the Interviewing Panel was not presented to the Board in terms of Section 12 of the Service Board Act, and

2.1.2 The resolution of the Board was not tabled in the House.”

2.2 For the reasons espoused by Nong, the Applicant was summarily placed on “special leave” as from 02 April 2014, pending further procedural processes.

2.3 Subsequent thereto and on 05 May 2014, the Applicant was informed in writing by Nong of the decision by the Limpopo Legislature Service Board , (service Board) of the Board’s resolution to have her appointment as Secretary of the legislature set aside for want of compliance with the spirit and letter of section 12 of the “LLSA” .³ Because her appointment is not at issue, I shall for avoidance of prolixity refrain from making any reference to the provision thereof.

[3] Aggrieved by the adverse decision against her, the applicant on 13 May 2014 approached the Labour Court with an urgent application (Case no: J1129/2014) seeking a declaratory relief, among other things, that her appointment as Secretary was lawful and validly effected, and that the

³ Ibid p13, “annexure “C2”.

termination thereof was unlawful. In the same breath, it appears that she also prayed for her reinstatement, alternatively be compensated for the balance of her five (5) year contract period. This application was met with resistance on some of its technical deficiencies, leading to several postponements, for instance failure by applicant to appear in court after the matter was postponed more than once at her own instance, and ultimately the matter was finally "removed from the roll" by the court order of **Molahlehi J** dated 04 December 2014.⁴

3.1 Since the withdrawal of the urgent application I may state of the court order on 06.08.2015,⁵ and after an effluxion of one year and few months down the line, the applicant sued out a Combined Summons in this court, this time around claiming relief predicated on an entirely different cause, namely, Cancellation of the employment contract, payment of monetary compensation for damages in the amount of R7 101 568.00 payable against "the legislature", alternatively, by the "defendants" jointly and severally absolving the one for whom payment is made, plus costs of suit.

⁴ Ibid p33, annexure "B" ANSWERING AFFIDAVIT ("aa")

⁵ The Summons sets out main cause of action and the relief claimed (Pleadings Bundle)

[4] The First Respondent, in opposing the condonation application contended that the applicant was enjoined by the provisions of section 29(1) and 29(2) of the "LSSA" to have commenced action by issuing the requisite notices to the First Respondent or the functionaries listed therein prior to instituting a claim for civil damages. Failure to have complied with section 29, so the submission went, rendered the applicant non-suited. The applicant, conversely, holds a different view.

C: THE LEGAL ISSUE:

[5] The legal issue that calls for consideration is whether the Applicant has made out a proper case for condonation sought in terms of section 29(3) of the "LLSA".

[6] I deem it expedient first to focus on the provisions of section 29(1) and 29(2) before section 28(3), which is the live wire of the condonation application, is considered.

[7] Section 29(1) creates a legal limitation of institution by a litigant of legal proceedings against the Board, the secretariat or any employee in the Service for any alleged act or omission committed under the Act ("LLSA") **unless such proceedings are instituted before the expiry of a period of twelve (12) calendar months after the date upon which**

the claimant acquired knowledge or reasonably expected to have had knowledge of the alleged act or omission.

[8] Subsection (2) of section 29 states that no such legal proceedings (under section 29(1)) shall be instituted before the expiry of at least one (1) calendar month after a written notification was served on the defendant (respondent) as the case may be, in which notification particulars of the alleged act or omission shall be given of the intention to initiate legal proceedings.

[9] Furthermore, section 29(3) provides that subsection (1) and (2) shall not be so construed as to preclude a court of law from dispensing with the requirements or prohibitions of the subsections where it is in the interest of justice.

[10] Properly construed, subsection (3) of section 29 in my view accords a court of law power to dispense with the jurisdictional notices necessary to be issued before legal proceedings may be instituted in the manner prescribed in subsections (1) and (2) of section 29, **unless it is in the interest of justice to do so.**

[11] That said, I am called upon to examine whether or not the interests of justice in the present instance would best be served in the event condonation is granted in favour of the Applicant.

[12] Counsel for the Applicant, Mr Skosana SC, correctly submitted that the court has judicial discretion to lean in favour of granting condonation envisaged in subsection 29 (3) to which reference is made, where **“it is in the interest of justice”** to do so. The operational words contained in subsection (3) of section 29 are “the interest of justice”. This notion entails such a variety of factors well vested in our law as the reasons for non-compliance, the degree of delay, the reasonableness of the explanation offered, prospects of success (in the main case) as well as prejudice. I may add, the complexity of the matter, its practical effect (if not moot) at all. Merits would vary from case to case depending on the circumstances. However, the enquiry does not end there, and is certainly not exhaustive.

[13] Turning to the facts in the instant matter, it is not in dispute, and consistent with her version, the applicant issued a Combined Summons in this court on 05 December 2016. This then begs the question; did the applicant prior to setting her civil claim in motion issue the requisite written notices envisaged in subsection 29(1) and (2) of the “LLSA”?

12.1 I must point out from the onset that the date upon which the Applicant launched her Labour Court application on 13 May 2014, is to my mind, not proximately relevant for the purpose of the present application. Nonetheless, that the same had been withdrawn from the roll on 06 August 2015, and it was never again revived. There is

therefore no *lis inter partes* however, what is crucial is the initiation of the civil action and the time when proceedings were commenced with.

[14] It is common cause that the applicant was informed of termination of her employment on 05 May 2014. This was when the cause of action arose if indeed aggrieved by that decision and then contemplated to protest either her employment rights or civil action damages, as the case may be.

14.1 Either way one looks at it, it was incumbent for Applicant to have first issued the section 29 notices to the first Respondent before pursuing litigation.

[15] Legal proceedings in this court should have been preceded by a subsection 29(1) notice to the first Respondent before expiry of a period of twelve (12) calendar months from 05 May 2014. In *casu*, the Applicant failed to trigger a lawsuit within 12 months by 07 May 2015. She waited until 05 December 2016 to institute a civil action claiming cancellation of the employment contract and monetary compensation. This was a delay of almost 2 years 7 months.

15.1 This court is not informed as to why she chose the Labour Court as court of first relief and only to have her claim withdrawn and never revived it. I can only assume, without deciding, that she

had since 05 August 2015 either lost interest in the matter or simply abandoned her Labour Court claim in that forum, hence the matter was formally withdrawn by agreement, which agreement was made a consent court order.⁶

15.2 My view is, even though I was not asked to make a determination, the Labour Court would have been the exclusive forum⁷ to have come to her assistance if and only where she had a legitimate claim, and provided that she had issued beforehand the jurisdictional notices to the First Respondent.

15.3 Be that as it may, the Applicant on her own version, conceded and correctly so, in my view, that she did not issue the statutory prescribed notice within one(1) month as envisaged in subsection 29(2) of the said Act. It does not appear on the facts either that she endeavoured to issue the prescribed notices first before litigation ensued. This then thrust a duty upon her to have sought an indulgence in the manner contemplated in subsection 29(3) in circumstances where this court 'if satisfied 'would lend an indulgence to the applicant, if it is the interest of justice to do so

⁶ Paginated Index pp34 -35 , "AA", Email Annexure "c1), and court order, annexure "c2", respectively.

⁷ See, Chirwa v Transnet Ltd & Others (Case no: CCT78/06) (66), Decided on 28.11.2007 – On the exclusive jurisdiction of the Labour Court in all labour matters. Section 157 of the Labour Relations Act 66 of 1995, as amended.

within the purview of 29(3). The Applicant, in any event, failed to issue the section 29(2) notice against the First and the Second Respondents before suing out the civil action in this Division.

15.4 In short, whether the declaratory order sought was pursued within 12 months or not, was an immaterial consideration. What really matters is the prosecution of the civil action in this jurisdiction. In addition, such action was instituted way outside the timeline set out in section 29(1).

[16] In consequence, and for the foregoing reasons, I am unable to agree with Applicant's Counsel that the particulars of claim (cause of action) for which the urgent Labour Court application was launched, constituted a "demand". This submission is not only bad in law, but equally untenable.

To that extent, I remain firm in my view that the Applicant's failure to comply with the requisite statutory provisions rendered her non-suited. She founded no proper case to persuade this court to the contrary in order to dispense with the requirements of section 29(1) and (2).

[17] I proceed now to examine the purpose of the required statutory notices to which reference is made.

17.1 First and foremost, the Applicant (Plaintiff in the main civil action) is a self-confessed attorney of this court. I presume that she would be quite familiar with the objective of legal notices such as these.

17.2 It is significant if not necessary for a party seeking an indulgence to set out explicitly factors he/she relies on to be weighed against each other to essentially demonstrate where the “interest of justice” ultimately rests. In the present instance, the Applicant did not demonstrate on the merits of the main action sufficient facts to enable this court to decide whether it is in the interest of justice to grant section 29(3) condonation. The enquiry orbits around the well-known principles aptly laid down by the Constitutional Court in ***Mankayi v AngloGold Ashanti Ltd.***⁸ See also ***Matjabeng Local Municipality v Eskom Holdings Ltd & Others*** 2018 (1) SA (CC).

17.3 The court, absent any demonstrable factors referred to elsewhere in this judgment, (Para ; 12) may not exercise its discretion properly in terms of section 29(3) to dispense with

⁸ 2011 (3) SA 237 (CC) PARA: 8 at 244.

subsection (1) and (2) of section 29 notices as the case may be, in order to grant condonation.

[18] The purpose of statutory notices,⁹ most of which conditionally limit the institution of legal proceedings, are in the main, to enable the State or even organs of state, first to investigate claims made against them as alleged debtors. Not only that, and to enable them to admit or deny, liability defend the claim or where appropriate, to settle or compromise such claims in order to obviate unnecessary cost escalation. The observation I make above is consonant with the reasoning adopted in *Mothupi v MEC for Health, Free State*¹⁰ that claims made against the State must be expeditiously investigated soon after the alleged claim had arisen as indicated in the statutory notice. I may as well add that such a notice serves to avoid so-called “trial by ambush” against the defendants, which are themselves creatures of statute.

[19] Furthermore, and quite intriguingly, despite issuing summons on 05 December 2016, the Applicant chose to seek condonation on 07 February 2019, some three (3) years down

⁹ Section 3(4)(b) Act 40 of 2002; section 24 (6) RAF Act, and section 35, General Law Amendment Act 1945, cited as few examples.

¹⁰ [2016] ZASCA 27 (SCA) para: 12.

the line. The application does not show the practical effect of or compelling reasons why condonation should be granted to her.

[20] The other difficulty Applicant faces is that, she “discovered that during May 2018 the legislature had wrongly entered in its records and caused such entry to be made in the Persal system”, that “I have been dismissed from the legislature....”¹¹)

To these allegations, the First Respondent apart from disputing them in its answering affidavit “AA”, contended that the adverse decision (enlisting applicant on National Treasury) has since been deleted. The “AA” was delivered on 14.03.2019.

[21] Bearing in mind these developments, one wonders if the reasons for inclusion of consequential damages as introduced by the amended particulars of claim was still worth the salt to pursue on trial. The said amendment was delivered on 27 November 2017,¹² yet condonation was sought only on 07 February 2019, some one (1) year and 2 months after.

¹¹ Paginated Index, (Condonation) p8, para: 2;9.

¹² Pp 93 – 101.

[22] Having said that, the view I take in that instance is that the issue about the alleged damaging effect on Applicant's name being wrongfully enlisted on the infamous National Treasury records of undesirable public servants, has now become superfluous for mootness, as the complaint had become redressed or corrected. Courts must not be seen to be pre-occupied by litigation that is moot with little or practical, effective consequences. To do so would not be in the interests of administration of justice or sound legal policy.

[23] In addition to what I have already alluded to in paragraph (18) above regarding the necessity to issue the prescribed statutory notices, I venture to suggest, that the objective is also to assist a litigant to first exhaust internal remedies available before venturing in, costly and often protracted litigation, when same could have been avoided. This is particularly important where the claim such as the one asserted by the Applicant borders on administrative action under section 7(2) (c) of "PAJA".¹³ Section 7(2) (c) of PAJA is however, not cast in stone as it bestows judicial discretion in

¹³ Promotion of Administrative Justice Act, 3 of 2000

“exceptional circumstances” to depart from prior exhaustion of internal legal remedies if the interests of justice so dictate.

[24] What has been stated in ***Kobaye v Minister For Home Affairs***,¹⁴ by **Mokgoro J** in paragraph [35] is commendable.

The learned Judge stated that;-

“[35] Internal remedies are designed to provide immediate and cost-effective relief, giving the executive the opportunity to utilise its own mechanisms, rectifying irregularities first, before aggrieved parties resort to litigation. Although courts play a vital role in providing litigants with access to justice, the importance of more readily available and cost-effective internal remedies cannot be gainsaid.” I agree absolutely.

CONCLUSION:

[25] By failing to have issued the required statutory notices prior to institution of legal proceedings both in the Labour court (now dead in the water) and in this court, the first Respondent was clearly prejudiced as it was denied an opportunity to employ its own mechanisms to obviate litigation in case there were apparent illegalities or irregularities in its decision to

¹⁴ 2010(4) 327 (cc) at 341. See also, section 195 (1)(b) of the Constitution Act 108 of 1996.

terminate the Applicant's appointment as secretary of the "LPL".

[26] It is generally accepted principle that a party seeking condonation must place the court in a vintage position to evaluate the merits and to balance all factors with the reasons for non-compliance as well as the explanation for inordinate delay.¹⁵ This will ordinarily complement merits which often mitigate fault, since absence of merits, may render mitigation pointless. Furthermore, inordinate delay litigating, damages the interests of justice. They protract disputes over rights and obligations sought to be enforced, prolonging the uncertainty of all concerned about their affairs.¹⁶ All these negativities clearly are a recipe for untold prejudice to the parties.

[27] In sum, the Applicant's delay in instituting the civil action, after a passage of one year and seven months after the claim had arisen coupled with failure to address the statutory notice timeously or at all cannot, in my view, be said to be excusable nor reasonable. And, the purported explanation does not cover the entire period of the delay. Furthermore, the

¹⁵ Minister of Agriculture & Land Affairs v C.J Rance (Pty) Ltd 2010 (4) SA 109 (SCA).

¹⁶ Mohlomi v Minister of Defence 1997 (1) SA 124 (cc) PARA; [11]

allegations that she ran out of funds, or failed to secure *pro bono* assistance, when she intimated that she is herself an attorney by profession, and in the process still hired and fired legal representatives, are nothing cumulatively viewed, but flimsy reasons.

[28] The principles governing applications for condonation were over the years aptly articulated by Holmes JA in *Melane v Santam Insurance CO. Ltd.*¹⁷ One can safely say that these principles remain as useful tools for juridical guidelines as they were then, to our modern constitutional jurisprudence.

[29] What is needed, ultimately, is an objective conspectus of all the facts. Accordingly, **“an Applicant for condonation must give full explanation for the delay. In addition, the delay must cover the entire period of delay. And, what is more, the explanation given must be reasonable.”**¹⁸ It follows that the Applicant’s given explanation falls far short of the said threshold and is blatantly superficial, to say the least. The application is therefore condemned to fail.

¹⁷ 1962 (4) SA 531 (AD) at 532 C-F.

¹⁸ Van Wyk v Unitas Hospital 2008 (2) SA 472 (cc) AT 477, PARA: [22] F.G.

[30] For all these reasons it is not in the interest of justice to grant condonation for purposes of section 29(3) of the "LLSA".

E. COSTS:

[31] It is trite practice that the costs follow the cause. Costs are a matter that resides in the court's judicial discretion, after a consideration of all factors.

[32] In the circumstances, I make an order as follows; _

The application for condonation is dismissed with costs.

MG. Phatudi

Judge of the High Court

Limpopo Division, Polokwane

REPRESENTATIONS:

1. Counsel for the applicant : Adv Skosana SC

On instruction by : Ledingwane attorneys Sunnyside

Sunnyside, 0001

2. Counsel for First Respondent : Adv N.A Cassim SC

On instructions by : M.M Baloyi Attorneys

C/o Mashola & Co Inc

Polokwane

4. Date heard : 05 February 2020

5. Date handed down : 11 May 2020