

IN THE LABOUR COURT OF SOUTH AFRICA
Held in Durban

Case no: D 813/2007

In the matter between

BONGANI PHILIP MNGADI

Applicant

And

MONDI BUSINESS PAPERS

Respondent

JUDGMENT

SHAI, AJ

INTRODUCTION

[1] This is an application by the Applicant for condonation for the late filing of the statement of claim. The Applicant was employed by the Respondent in May 1990. He was dismissed on 30 April 2007 for operational requirements, a dispute which was referred to the **Commission for Conciliation Mediation and Arbitration (“the CCMA”)**. The commissioner issued a certificate of non-resolution on 10 July 2007. The matter was then referred for arbitration on 15 July 2007. On 30 August 2007 the arbitration commissioner ruled that the CCMA lacked jurisdiction to hear the matter.

[2] The Applicant filed his statement of case on 30 January 2008. It is this referral which the Applicant seeks condonation for its late referral. The Respondent is opposing this application.

[3] On 02 September 2010 the court issued an order amongst other in the following terms:

- “1. The Applicant is ordered to file an application for condonation within ten (10) days as of today,
2. ...
3. ...
4. In the event if the Applicant fails to file the condonation reply within the prescribed time period, the referral is dismissed.”

[4] The Applicant has failed to comply within this time frame and this then led the Applicant on 03 February 2011 to apply to the court to use its discretion to extend the time frames and condone the said late filing of the application for condonation as directed to by the court as outlined in paragraph 3 above.

[5] Further that the respondent has raised a point *in limine* that the Labour court does not have the jurisdiction to adjudicate any dispute about the procedural fairness of the dismissal based on the employer's operational requirements in any dispute referred to it in terms of section 191 (5) (b) (ii) of the Labour Relations Act 1995. This matter is more associated with the merits of the matter and I direct that it be heard with the merits of the case.

The application to condone the late filing of the condonation within the prescribed period as per court order on 02 October 2010 as outlined in paragraph 3 above

[6] The late condonation application was set down for 03 February 2011. At the beginning of the proceedings the Applicant's representative having noted that the condonation application did not comply with the order given in paragraph 3, sought to apply for condonation of the said

non compliance with the order from the bar. No notice of motion accompanied by an affidavit was filed with the court. Counsel for the Respondent opposed the application. I agreed to hear the said application together with the main condonation application on condition that if I find in favour of the Applicant I will also decide the main condonation application. Further that if the Applicant fails in this regard then it will serve no purpose to decide the main condonation application.

LEGAL POSITION

[7] The factors that need to be taken into account in determining whether there was sufficient cause to grant condonation were set out in ***Melane v Santam Insurance Co Ltd 1962 (4) SA at 532*** and it involves weighing together the following factors; which are interrelated: degree of lateness, explanation thereof, the prospects of success and the importance of the case. The court went on and said that although these factors are interrelated and are not individually decisive, if there are no prospects of success there would be no point in granting condonation.

[8] The Melane decision was followed in many subsequent court decisions.

In the case of ***Moila v Shai NO & Others (2007) 16 LAC 1.23.1*** reported (Butterworths) 2007 JOL 19117 LAC. Zondo JP cited the case of ***Chetty v Law Society, Transvaal 1985 (2) SA 756 AD*** with approval and said “In ***Chetty v Law Society, Transvaal 1985, (2) SA 756 (AD)*** Miller JA, on behalf of a unanimous court, dealt with the term ‘sufficient cause’ or ‘good cause’ when used in the

context of an application for rescission of a judgment. At 765 D – E he said:

“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 Rules was nevertheless permitted to have a judgment against him rescinded on the grounds that he had reasonable prospects of success on merits.”(My underlining)”

[9] The court went further to say though the above passage was said in respect of an application for rescission of a judgment there is no reason why the principle cannot or should not hold good in respect of an application for condonation such as the one the Appellant made to the CCMA in the case that was before the court.

[10] The court went further at 33 and in relation to the excessiveness of the delay and said:

“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 that it is necessary to consider the prospects”.

[11] In the case ***Kritzibger v CCMA & Others (JR 2254/05 [2007] ZALC 85 (9 November 2007)*** Molahlehi J said the following in relation to the test as initiated in ***Melane v Santam Insurance Co Ltd 1962 (4) SA at 532:***

“These factors are not individually decisive but are interrelated and must be weighed against each. In weighing the factors for instance, a good explanation for the lateness may assist the application in compensation for weak prospects of success. Similarly strong prospects of success may compensate for the inadequate explanation and the long delays. “

[12] In the end what it means is that the court on exercising its discretion will consider all the circumstances of each case to come to a reasonable conclusion.

[13] The application for condonation was made one day late. The Applicant through its Counsel indicates that the instruction to draft the condonation application was given to the Counsel timeously but there was a delay in returning the draft application. At the time the applicant had to sign the document, he could not be traced until after the lapse of the condonation period ordered by the court. Further, the Applicant’s Attorney realising the predicament they were in caused a letter to be dispatched to the respondent’s Attorneys explaining the situation and faxed them the Notice of Motion without supporting affidavits which was also served with the Registrar within the time frame. However, it is trite law that such a service amounts to no service. See *Morgan Fashions SA (PTY) LTD v CCMA and Others* (1990) 10 BLLR 1063 (LC). In this case, the court said the following:

“Although Rule 7A was not in force at the time that the proceedings were instituted in the present matter, any application must be supported by an affidavit. It is not sufficient merely to serve a notice of motion”.

The counsel for the applicant has conceded that there is a late filing.

[14] Given the period of delay, which is one day, and the reasons given to the late filing of the condonation application and the steps that the applicant's attorneys took to ensure compliance, I have come to the conclusion that good cause for condonation has been shown. I have also taken into consideration the prejudice that the respondent may suffer and came to the conclusion that there is little if any prejudice. They were apprised and aware of the situation by way of the letter and notice of motion, of the difficulties that the applicant party was faced with.

[15] I therefore condone the late filing of the condonation application

THE MAIN APPLICATION FOR CONDONATION

Degree of lateness

[16] The CCMA issued a certificate of none-resolution on the 30/10/2008 and immediately referred the matter for arbitration wherefore the CCMA commissioner pronounced that the CCMA lacks Jurisdiction to determine the matter mainly because it was a retrenchment of more than one employee. The applicant is of the view that the counting of days for purpose of Section 191 of the Labour Relation Act of 1995 should start after the issuing of the ruling by the commissioner that the CCMA lacks jurisdiction to determine the matter. However, applicant contents that if I rule that the counting starts after the issuing of the certificate of outcome then the Applicant concedes that its application is late by 113 as

argued above by the respondent. The applicant contends that the application is late by 64 days.

[17] Section 191 (5) (b) ii) provides amongst others as follows;

“If a Council or Commission has certified that the dispute remains unresolved, or if 30 days have expired since the Council or the Commission received the referral and the dispute remains unresolved-

(a)

(b) the employee may refer the dispute to the Labour Court for adjudication if the employee has alleged that the reason for dismissal is -

(i)

(ii) based on the employers operational requirements.

[18] Section 191 (11) (a) of the Labour Relations Act of 1995, provides as follows:

“(a) the referral, in terms of subsection (5)(6), of a dispute to the Labour Court for adjudication, must be made within 90 days after the Council or (as the case may be) the Commission has certified that the dispute remains unresolved.”

[19] Going through the two paragraphs above, there can be no doubt that time starts to count after the issuing of the certificate by the Council or Commission or expiry of 30 days since the council or the commissioner received the referral.

[20] Having determined the issue in the preceding paragraph, it is now common cause that the application is late by 113 days, which in my opinion is long.

EXPLANATION OF THE DELAY

[21] The applicant in his founding affidavit explained that after the certificate of none-resolution was issued he referred the matter to the CCMA for arbitration wherefore the commissioner issued a ruling to the effect that the CCMA did not have jurisdiction to arbitrate the matter. The ruling is dated 30th August 2007. Further he laboured under a mistaken belief that for the purpose of Section 191 (11)(a), dies starts to run after the commissioner has issued the said ruling.

[22] In the midst of process of the CCMA, he was unrepresented although he later engaged an attorney to help him through. He further contents that the CCMA office was closed during the December period. I can safely take judicial notice that the CCMA offices do not close during December period. However, the CCMA goes into recess with a skeleton staff to attend to accepting referrals and to other urgent matters. In the circumstances, it is probable that the applicant experienced problems in receiving the ruling. The fact of being unrepresented at the initial stage may have added to the applicant's woes. However I am satisfied that once he received the ruling, seven days thereafter, he filed his statement of case. In the circumstances, I am of the opinion that the delay, albeit long is fully and properly explained.

PROSPECTS OF SUCCESS

[23] In so far as prospects of success, the applicant in his founding Affidavit indicates only that his prospects of success are good. This however, was amplified by Counsel during argument and in his statement of case. Counsel for the applicant indicated that

various meetings were held. Secondly a similar position to that of the applicant was created but offered to a person with lower qualifications. The position was however given a new name. Counsel for the respondent took view that the applicant had laid no basis for saying he has good prospects of success in his founding affidavit. I have indicated above that Counsel for the Applicant clarified this statement and of the opinion that he has laid a reasonable basis for prospect of success.

IMPORTANCE OF THE CASE

[24] The applicant contents that the case is important to him more so in the light of the good prospect of success as contained in his statement of claim.

[25] When all these factors are weighed together the cumulative effect leads me to the conclusion that a good cause for condonation has been made despite there being a long delay.

[26] In the premise I conclude that

1. The late filing of statement of case by the applicant is condoned.
2. The Applicant to pay the costs of the application.

SHAI, AJ

Date of hearing : 3 February 2011
Date of Judgment : 18 February 2011

Appearances:

On behalf of the Applicant : Advocate Z. Oliver
Instructed by : Lushen Pillay Attorneys
On behalf of the Respondent : Advocate I. Pillay
Instructed by : Deneys Reitz Inc.

LABOUR COURT JUDGMENT