



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

REPORTABLE

Case no: J S 122/2011

In the matter between:

ANTOINETTE DU PLESSIS

Applicant

and

WITS HEALTH CONSORTIUM (PTY) LTD

Respondent

Heard: 23 May 2012

Delivered: 14 June 2012

Summary: Application for condonation for the late filing of the statement of case. Explanation- due to lack of funds –no details as to how and when were the funds raised- no explanation as to why the amount paid for the retrenchment package was not used.

JUDGMENT

Molahlehi J

Introduction

- 1] This is an application for condonation for the late filing of the statement of case by the applicant. The main case of the applicant concerns the alleged unfair dismissal for operational reasons.
- 2] In opposition to the condonation application, the respondent has filed an answering affidavit and has disputed that the applicant was unfairly dismissed for operational reasons. The respondent contends that the relationship between the parties was terminated by mutual agreement between the parties and thus there was no dismissal and accordingly the court does not have jurisdiction to entertain the matter. The applicant has not filed a replying affidavit.
- 3] It is common cause that prior to her dismissal for the alleged operational reasons, the applicant was employed in the IT department of the respondent. It is common cause that during February 2010, the respondent embarked on a restructuring process of its entire business operations. It, however, seems that the IT department was not affected by the restructuring process.
- 4] The other common cause fact is that at the completion of the restructuring process and when the decision was taken to retrench certain of the affected employees it was not envisaged that the applicant would also be retrenched.
- 5] According to the applicant, on 1 March 2010, when she could not access the information system, she approached the HR manager to enquire about the problem. According to her, she was informed that there was no work for her to do as her work was then done by another employee. She further says in her statement of case that she was told that she was being dismissed for operational reasons.
- 6] The above facts are disputed by the respondent in its answering affidavit to the statement of case and the application for condonation.

- 7] According to the respondent, it was before the completion of its restructuring process approached by the applicant who indicated that she wanted to accept a voluntary retrenchment. The respondent further states that in the discussions the applicant had with its HR executive manager, the parties agreed as follows:

‘9.3.1 The applicant’s employment would be terminated by agreement due to operational requirements with effect from 2 March 2010.

9.3.1 The applicant would be paid 1 (one) months’ notice for March 2010, but would not be required to work out her notice;

9.3.3 The applicant would receive, due to having accepted voluntary retrenchment, an extra pay of one weeks’ salary per completed year of service;

9.3.4 The applicant would receive, due to having accepted voluntary retrenchment, an extra sum of 2(two) months’ salary

9.3.5 The applicant’s accumulated leave would be paid out to her.’

- 8] The applicant’s affidavit in support of the application for condonation is at most a page and half and it is set out as if condonation is there as an entitlement and should be readily granted on the “say so” of the applicant.

- 9] In as far as the degree of the delay is concerned; the applicant says the 85 days delay was not excessive because she ‘had to seek the services of an attorney.’

- 10] The applicant states the reason for the delay as follows:

‘9.1 I only received the arbitration report and the reasons for the decision during August 2010 by post.

9.2 I approached the CCMA and was told to approach an attorney. I

gave instructions to my attorney during August 2010 but had to raise money to pay my attorney of record. Due to the fact I had to find a job and then raise funds to pay my attorney, I could not file my statement of case timeously.'

- 11] The applicant then deals briefly with the issue of prejudice and in one sentence with the prospects of success. The prospects of success is stated as follows:

'10. I submit that I have good prospects of success as the Respondent's action amounted to an unfair procedure.'

- 12] It has repeatedly been stated in case law that in considering whether to grant condonation for failure to comply with the time frames set out in the rules or legislation, the court has a judicial discretion to exercise. It is also trite that in exercising that discretion, the court has to take into account factors such as the degree of lateness, the explanation for the delay, the prejudice, the prospects of success and the importance of the matter. These factors are not to be considered in isolation of each other but together. The two most important factors are in this regard the reasonableness of the explanation and the prospects of success. The authorities have repeatedly stated that if the explanation for the delay is unsatisfactory condonation should be refused and thus the requirement to consider prospects of success becomes unnecessary. Similarly, where there are no prospects of success, a good explanation would serve no purpose in as far as the granting of condonation is concerned.

- 13] Another important principle is that in an application for condonation the applicant is seeking the indulgence of the court and thus has to take the court into his or her confidence in providing an explanation and that is done by ensuring that all the relevant facts and circumstances relating to the delay are disclosed to the courts. In other words the applicant has to give full explanation of the reasons for the delay. The ultimate consideration when all other factors have been taken into account is whether refusing or granting condonation would serve the interest of

justice.¹

- 14] The delay in the present matter whilst not excessive it is not insignificant. The explanation is grossly unsatisfactory. The applicant says she could not file her statement of case because she did not have funds. She in this respect in the heads of argument relies on the decision of this court in *Gaoshubelwe and Others v Pie Man's Pantry (Pty) Ltd*,² where the court accepted as reasonable the explanation that the delay was caused by lack of funds on the part of the applicants. It is also important to note that the other part of the delay in that matter was caused by the attorney who the union had instructed to deal with the matter on their behalf. The communication regarding progress of the matter was between the union and the attorney. The letter that the applicants received from the union indicated that their matter was receiving attention and thus the assumption which the court regarded as being reasonable was that there was progress in prosecuting their matter. In dealing with the issue of lack of funds as a reason for the delay, the court had the following to say:

[35] I now proceed to consider the explanation of the delay after the applicants became aware of the outcome of the review application. The explanation for this period is as indicated earlier that, firstly, Mr Gaoshubelwe had to find the other applicants and also seek funds to pay an attorney to assist them in processing their claim. I align myself to the view expressed by Ncamu AJ in *Mabunda's case (supra)* that it is not in every case where the delay is occasioned by the applicant seeking funds that the application for condonation should be dismissed. The explanation based on lack of funds has to be evaluated within the context of the facts and the circumstances of a given case.

[36] In my view, there is no rule that the explanation that the delay was occasioned by lack of funds should automatically lead to the dismissal of the application for condonation. If this was to be the case then, in my view, the court would be ignorant of the

¹ *Mankayi v Anglogold Ashanti Limited* 2011 (5) BCLR 453 (CC) at para 8.

² (2009) 30 ILJ 347 (LC).

economic reality that in most instances faces unrepresented dismissed employees. I do however agree that as a general approach that lack of funds should not on its own constitute reasonable explanation. In this particular instance it seems to me that it cannot be disputed the applicant had based their hopes of access to justice on the union which apparently deserted them without any notice. Faced with this and in the context where free legal assistance is not readily accessible, it cannot be said that the period of three months is unreasonable regard being had to the fact that the applicant had to contact the affected employees to seek the mandate to include them in the claim, including having to ask them to put forward a contribution for the legal fees.'

- 15] In *Dyasi v Fort Cox College of Agriculture and Forestry and Another*,³ the applicant who had commenced with a common law review had to abandon it because of lack of funds. The explanation given for that delay when the matter was reinstituted was that it was due to lack funds. In rejecting that explanation the court held:

'Under these circumstances the court will, by reason of the long lapse of time, be at a great disadvantage in going into the questions raised by the appellant, and it is right that it should refuse to do so, unless very exceptional circumstances are placed before it.'

- 16] It is clear from the above and other judgments that a claim of lack of funds on its own cannot constitute reasonable explanation for the delay. In other words, when pleading lack of funds as the cause of the delay, the applicant needs to provide more than a mere claim that the reason for the delay is lack of funds. In this respect, the applicant has to take the court into his or her confidence in seeking its indulgence by explaining "when" not only that he or she finally raised funds to conduct the case but also how and when did he or she raise those funds. The "when" aspects of the explanation is important as it provided the courts with the information as to whether there was any further delay after raising the

3 [1998] 6 BLLR 641 (Tk).

funds and whether an explanation has been provided for such a delay.

- 17] The facts in as far as the explanation for the delay is concerned in *Gaobushubelwe* is different to the present explanation. In that case the applicants provided a full explanation regarding the lack of funds and how they managed to raise them including other factors that contributed to the delay. In the present case, the applicant does not take the court into her confidence by providing a full and proper explanation as how and when did she raise the funds. She also does not explain why she could not use the money she received from the retrenchment package to pay her attorneys. If she needed to use that money for other purposes, she does not explain why could she not pay her attorneys or other attorneys to assist her only with the drafting of the statement of case. She never approach the attorneys of the respondent and indicated that she needed to challenge her dismissal and that she needed their indulgence in as far as the time frames for filing the statement of case was concerned. Approaching another party and indicating the intention to challenge the decision to dismiss including seeking an indulgence in as far as the failure to carry out the intention timeously, would go a long way in tilting consideration in favour of granting condonation.
- 18] In my view, the applicant's application for condonation stands to be dismissed for the above reason alone.
- 19] The application still stands to be dismissed even if regard was to be had to prospects of success. Although the applicant has essentially failed in her application to deal with and substantiate her prospects of success, I had adopted a liberal approach of having regard to the statement of case reasonable in considering the chances the applicant had in succeeding in the main case if condonation was to be granted. I do so being aware that the statement of case for the purpose of considering condonation application is not in a form of an affidavit neither did the applicant sought to incorporate its contents into her founding affidavit in the condonation application.

20] As indicated above, the respondent has placed in dispute the allegation that it had dismissed the applicant. It contends that the termination of the employment relationship was by mutual agreement. In this respect, the respondent in its answering affidavit quotes the letter wherein the terms of the alleged agreement are recorded. It is stated that the relevant portion of that letter reads as follows:

‘ . . . you have indicated that you opted for retrenchment package to be paid in lieu of notice and your employment contract . . . will therefore be terminated on the grounds of operational requirements, with effect from 2 March 2010.’

21] It is further stated in the answering affidavit that the applicant recorded the acceptance of the terms of the termination of the employment relationship as contained in the said letter by signing “accepted” in the letter. The applicant was thereafter, according to the respondent, paid the package as agreed between the parties.

22] It was stated earlier that the applicant did not file a replying affidavit. This means the averments and the allegations made by the respondent in the answering affidavit stand unchallenged. The applicant does raise the issue of the credibility of the version of the respondent in the heads of argument. The logic of the applicant accepting the retrenchment when the IT department was not part of the restructuring does not according to the applicant’s heads of argument make sense.

23] The point missed on behalf of the applicant is that what is stated in the heads of argument does not constitute evidence that could be weighed against the version of the respondent as set out in the answering affidavit. The one critical aspect which the applicant does not deal with even in the heads of argument is the letter which the respondent says the applicant accepted the package which was agreed between the parties.

24] It seems to me on the basis of the above discussion the chances of the

applicant succeeding if the matter was to proceed to trial are non-existence and therefore there would be no purpose in granting condonation for the late filing of the statement of case.

25] The respondent has asked that costs be awarded against the applicant. In terms of section 162 of the Labour Relations Act 66 of 1995, the court in considering the issue of costs has to take into account the dictates of law and fairness. Whilst the court is generally slow in granting costs against the individual litigants, in the present instance, I find the conduct of the applicant to have been unreasonable and therefore warranting the awarding of costs.

26] In the premises, the applicant's application for condonation for the late filing of the statement of case is dismissed with costs.

Molahlehi J

Judge of the Labour Court of South Africa

Appearances

For the Applicant: Ms K Pillay of Krishnee Pillay Attorneys

For the Respondent: Mr L Hutchinson instructed by Snyman Attorneys.