

REPUBLIC OF SOUTH AFRICA



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JS 812/2012

In the matter between:

ARTHUR LAYANI KHOSA

Applicant

and

ABSA BANK LIMITED

Respondent

Heard :12 March 2013

Delivered : 12 March 2013

EX-TEMPORE JUDGMENT-REASONS FOR ORDER

AC BASSON J

- [1] This is an application for condonation for the late filing of the statement of claim. The statement of claim was filed 54 days late, and the condonation application 147 days after the statement of claim was filed. The certificate of outcome was issued on 12 April

2012 and the applicant had to deliver his statement of claim no later than 11 July 2012. The applicant only delivered his statement of claim on 3 September 2012. It should be noted that the respondent raised the issue of condonation already on 17 September 2012.

- [2] Despite the fact that the applicant was alerted to the need to apply for condonation as far back as September 2012, the applicant only filed the application for condonation on 29 January 2013 - more than four months after the applicant was alerted to the need to file a condonation application. It is trite law that an applicant should file an application for condonation without delay.¹ Instead the applicant waited another four months before it applied for condonation. This is unacceptable. A litigant must seek an indulgence as soon as he or she becomes aware of the need to do so.²

¹ See also: *Rennie v Kamby Farms (Pty) Ltd* 1989 (2) SA 124 (A) at 129G where Hoexter JA stated: 'Whenever an appellant realises that he has not complied with a Rule of Court he should apply for condonation without delay.'

² In *Darries v Sheriff, Magistrate's Court, Wynberg, and Another* 1998 (3) SA 34 (SCA) Plewman JA (with whom Hefer JA, Eksteen JA, Olivier JA and Melunsky AJA concurred) at 40I - 41A/B stated as follows: 'Condonation of the non-observance of the Rules of this Court is not a mere formality. (See *Meintjies v H D Combrinck (Edms)Bpk* 1961 (1) SA 262 (A) at 263H - 264B; *Saloojee and Another NNO v Minister of Community Development* 1965 (2) SA 135 (A) at 138E - F.) In all cases some acceptable explanation, not only of, for example, the delay in noting an appeal, but also, where this is the case, any delay in seeking condonation, must be given. **An appellant should whenever he realises that he has not complied with a Rule of Court apply for condonation as soon as possible.** See *Commissioner for Inland Revenue v Burger* 1956 (4) SA 446 (A) at 449F - H; *Meintjies'* case *supra* at 264B; *Saloojee's* case *supra* at 138H. **Nor should it simply be assumed that, where non-compliance was due entirely to the neglect of the appellant's attorney, condonation will be granted. See *Saloojee's* case *supra* at 141B - G.** In applications of this sort the appellant's prospects of success are in general an important though not decisive consideration. **When application is made for condonation it is advisable that the petition should set forth briefly and succinctly such essential information as may enable the Court to assess the appellant's prospects of success.** See *Meintjies'* case *supra* at 265C - E; *Rennie v Kamby Farms (Pty) Ltd* 1989 (2) SA 124 (A) at 131E - F; *Moraliswani v Mamili* 1989 (4) SA 1 (A) at 10E. But appellant's prospect of success if but one of the factors relevant to the exercise of the Court's discretion, unless the cumulative effect of the other relevant factors in the case is such as to render the application for condonation obviously unworthy of consideration. When non-observance of the Rules has been flagrant and gross an application for condonation should not be granted, whatever the prospects of success might be. See *Ferreira v Ntshingila* 1990 (4) SA 271 (A) at 281J - 282A; *Moraliswani*

- [3] I have also taken note of the fact that the applicant had been represented by attorneys throughout the process and he therefore should have been advised by his attorneys that the dispute had to be referred to the Labour Court and not to arbitration under the auspices of the CCMA.
- [4] If regard is had to the statement of claim, it is clear that the applicant is alleging discrimination on the basis of race. The law is clear: where an applicant alleges discrimination on the basis of race, the dispute must be referred to the Labour Court after conciliation and not to arbitration. Furthermore, as already pointed out, the applicant had been represented by attorneys who should have alerted him to the fact that the matter had to be referred to the Labour Court. There could not have been any confusion regarding the nature of the dispute as the statement of claim clearly shows the cause of action of the applicant to be based squarely on the provisions of section 6 of the Employment Equity Act³ as he is alleging that he was discriminated against on the basis of race.
- [5] The applicant fails to explain the degree of lateness and merely boldly asserts that he was not “legally required to apply for condonation”. He further merely states that if he is required to apply for condonation he does so. While he applies for condonation he fails to provide a reasonable explanation for the delay.⁴ An

v Mamili (supra at 10F); Rennie v Kamby Farms (Pty) Ltd (supra at 131H); Blumenthal and Another v Thomson NO and Another 1994 (2) SA 118 (A) at 121I - 122B.' (Court's emphasis.)

³ Act 55 of 1998

⁴ In *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532C-F, the court held 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 delay,

applicant is in terms of section 191(11)(a) of the Labour Relations Act⁵ ('the LRA') to refer a dispute within 90 (ninety) days after the dispute was conciliated. Based on the fact that the applicant was legally represented and also based on the fact that the dispute relates to discrimination he ought to have been aware of the time frame within which he was required to institute a referral to this Court. The applicant also fails to explain this glaring point, namely, why a dispute based on racial discrimination was referred to arbitration. I do not accept that the fact that the Commissioner had indicated on the Certificate of Outcome that the matter had to be referred to arbitration is an excuse for referring a matter to the wrong forum. I have already indicated that the applicant has been legally represented throughout this dispute. I am therefore not persuaded that the applicant has adequately explained the delay. The application should therefore be dismissed on this point alone. The applicant's reliance on poor legal advice is not a ground to warrant condonation. Coupled with the applicant's failure to timeously seek an indulgence for the late filing of the referral warrants a dismissal of the application. It is therefore not necessary for this Court to even consider the merits.

- [6] However, even if this Court is inclined to consider the merits of the matter, it is clear from the application for condonation that the applicant makes out no case in respect of the prospects of

an application for condonation should be refused. It is also important to consider what steps the applicant took as soon as it became aware that he or she was late in terms of the required time frames. In other words the applicant should bring the application for condonation as soon as he or she becomes aware of the lateness of its case.

⁵ Act 66 of 1995

success,⁶ except for a bold statement that he has good prospects of

⁶See also *Novo Nordisk v CCMA & Others*J2498/08 where the Court gave a particular helpful exposition of the principles governing condonation applications:

“Principles governing condonation

[23] This Court has in several of its judgments stated that the principles governing the requirement for granting or refusal of condonation are well established in our law. In terms of these principles the Court has a discretion which is to be exercised judicially after taking into account all the facts before it. The factors which the court takes into consideration in assessing whether or not to grant condonation are: (a) the degree of lateness or non compliance with the prescribed time frame, (b) the explanation for the lateness or the failure to comply with time frames, (c) prospects of success or bona fide defense in the main case; (d) the importance of the case, (e) the respondent’s interest in the finality of the judgement, (f) the convenience of the court; and (g) avoidance of unnecessary delay in the administration of justice. See Foster v Stewart Scott Inc (1997) 18 ILJ 367 (LAC).

[24] There is also clear authority that these factors are not individually decisive but are interrelated and must be weighed against each other. In weighing these factors for instance, a good explanation for the lateness may assist the applicant in compensating for weak prospects of success. Similarly strong prospects of success may compensate the inadequate explanation and the long delay.

[25] In an application for condonation, good cause is shown by the applicant giving an explanation that shows how and why the default occurred. There is authority that the court could decline the granting of condonation if it appears that the default was wilful or was due to gross negligence on the part of the applicant. In fact the Court could on this ground alone decline to grant an indulgence to the applicant.

[26] The prospects of success or bona fide defence on the other hand mean that all what needs to be determined is the likelihood or chance of success when the main case is heard. See Saraiva Construction (PTY) Ltd v Zulu Electrical and Engineering Wholesalers (PTY) Ltd 1975 (1) SA 612 (D) and Chetty v Law Society 1985 (2) SA at 765A-C.

[27] It is important to point out 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 delay, an application for condonation should be refused. See Melane v Santam Insurance Co Ltd, 1962 (4) SA 531 (A) at 532C-F. It has also been held by the courts that the applicant should bring the application for condonation as soon as it becomes aware of the lateness of its case.”

Further at paragraph [45] the Court explains what must be addressed when dealing with the prospects of success:

“[45] In my view whilst the standard required in showing prospects of success is lower than that applied when the main case is considered. The applicant for condonation needs show more than just listing factors related to prospects of success. The applicant needs to persuade the Court that there is a chance of the arbitration award being found when the review is considered in the main case to be irregular or unreasonable”.

success.⁷ That case must be made out in the condonation application and the papers filed in support thereof.

[7] Furthermore, I have already indicated that condonation should be brought immediately when it comes to the litigant's attention that condonation is need.⁸

[8] In the event, the application for condonation is dismissed. I have considered the issue of costs, and in the interests of fairness, I have decided to make no order as to costs.

[9] I therefore make the following order:

9.1 The application for condonation for the late filing of the statement of claim is dismissed.

9.2 There is no order as to costs.

⁷"I have good prospects of success as clearly outlined in my statement of claim". See in this regard: *Rustenburg Gearbox Centre v Geldmaak Motors CC t/a M E J Motors* 2003 (5) SA 468 (T) where the full bench held as follows: "In para 14 at p 419 the appellant simply submits that it has good prospects of success on appeal. (See also para 4.2 at p 21 of the notice of motion of 21 February 2003.) That is not sufficient. What is required is that the deponent should set forth briefly and succinctly the essential information that may enable the Court to assess the appellant's prospects of success. **A bald submission unsupported by any factual averments is not good enough to discern what the prospects of success are in this matter.**" (471A – C.) (Court's emphasis.)

⁸See also: *Seatlolo and Others v Entertainment Logistics Services (A division of Gallo Africa Ltd)* 32 ILJ 2206 (LC) at paragraph 10: 'It is trite law that an application for condonation must be brought as soon as the party becomes aware of the default. This principle has been emphasized by the Supreme Court of Appeal on numerous occasions (see *Saloojee* at 138H; *Rennie v Kamby Farms (Pty) Ltd* 1989 (2) SA 124 (A) at 129G; and *Napier v Tsaperas* 1995 (2) SA 665 (A) at 671B-D). This approach has been endorsed by the Labour Appeal Court which in fact advocates bringing the application for condonation on the same day it is discovered to be necessary. See in this regard inter alia *Allround Tooling (Pty) Ltd v NUMSA and others* [1998] 8 BLLR 847 (LAC) at 849 para 8; *NEHAWU v Nyembezi* [1999] 5 BLLR 463 (LAC) at 464D-F; and *Librapac CC v FEDCRAW and others* (1999) 20 ILJ 1510 (LAC); [1999] 6 BLLR 540 (LAC) at 543.'

AC BASSON J
Judge of the Labour Court
19 April 2013