



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JS 370/2012

In the matter between:

JEANETTE KUPER

Applicant

and

SOUTH AFRICAN BOARD OF

JEWISH EDUCATION

First Respondent

Heard: 6 March 2013

Delivered: 19 April 2013

Summary: Application for condonation for late filing of statement of case, application to strike out parts of heads of argument and application to submit supplementary affidavit.

JUDGMENT

VISAGIE, AJ

Introduction

- [1] This is an application for condonation for the late filing and service of the applicant's statement of case. The application for condonation is opposed. In the course of the parties filing their heads of argument, the respondent annexed

documents to its heads of argument that did not form part of its answering affidavit. The respondent later filed a supplementary affidavit attaching these documents thereto. The applicant brought an application to strike out the supplementary affidavit filed by the respondent and that certain paragraphs of the respondent's heads of argument relating to the documents which were attached thereto, be likewise struck.

- [2] The aforementioned prompted the respondent to bring an application to permit the supplementary affidavit.

Background facts

- [3] The applicant was employed by the respondent as an educator. In October 2011 she was informed that her employment would terminate on 31 December 2011 by reason of the fact that she had reached an alleged retirement age of 65 years. The applicant, believing that she was automatically unfairly dismissed, referred a dispute to the CCMA and the dispute was unsuccessfully conciliated on 7 February 2012. A certificate of non-resolution was issued on the same day.
- [4] After consulting with her family and legal representatives, the respondent stated that she wanted to avoid litigation. She then proposed a to resolve the dispute and this proposal was transmitted to the respondent on 29 February 2012. The general director of the respondent, Rabi Kacev, confirmed receipt of the proposal on 5 March 2012 and undertook to respond in due course. On 15 March 2012, Rabi Kacev informed the applicant that a response will only be forthcoming after a board conference was held. He undertook to revert to the applicant by 23 March 2012. Eventually on 26 March 2012, Rabi Kacev's response was received by the applicant and the parties were unable to resolve the dispute.
- [5] The applicant then considered whether or not she should continue to pursue her dispute. She took into account the fact that her grandchildren was still attending the school at which she taught and she was concerned that if she pursued her dispute further this could potentially prejudice them. She also considered whether she wanted to take on an organisation which plays an essential role within the Jewish community in Johannesburg and that it would not be an easy decision for her to make. It was only when a judgment of the Supreme Court of England, dealing with age discrimination, came to her attention on 19 May 2012 that she

decided to continue her dispute because she believed that other persons in a situation similar to her situation would continue to be discriminated against. The applicant accepts, as she states in her founding affidavit, that 'there is some degree of criticism which can be levelled against me for not acting sooner but I beg that this Honourable Court appreciates the difficult position in which I am in in respect of my community and my family and my attempts to find a non-litigious solution to this dispute.'

- [6] The applicant eventually filed her statement of case on 29 May 2012. It is common cause that her statement of case was 22 days late.
- [7] After the filing of the affidavits, the parties filed their heads of argument and the respondent's heads of argument was accompanied by two documents. The one document is an unsigned letter of appointment purporting to confirm the terms and conditions of the applicant's employment with effect from 1 January 2010 ("the letter of appointment"). The second document purports to acknowledge receipt by a number of employees (including the applicant) listed on the document of proposed amendments to the retirement policy of the respondent. Next to the applicant's name, however, her signature is scratched out. It is common cause that she scratched out her signature ("the consent document"). The respondent's heads of argument makes reference to these two documents in paragraphs 22 and 23.
- [8] On 3 September 2012, the respondent filed a supplementary affidavit wherein the respondent explained how the two documents were discovered by the respondent. The respondent indicated that for the sake of completeness, that these documents should be put before the court. Attached to the supplementary affidavit were the respondent's employee manual and a letter from the general director to staff. In the affidavit the respondent states that because these documents are listed in the schedule of documents in the respondent's reply to the applicant's statement of case, it should also be placed before the court. The letter of appointment, employee manual and director's letter to staff are listed as part of the schedule of documents in the respondent's reply to the applicant's statement of case.
- [9] On 11 September 2012, the applicant brought an application to strike out. In the application she requested the supplementary affidavit to be struck, that

paragraphs 22 and 23 of the heads of argument to be likewise struck and that the respondent pays the costs of the application to strike out. In the application, the applicant makes the point that the supplementary affidavit filed by the respondent was commissioned by a member of the respondent's staff and accordingly should be disregarded. Respondent then filed a notice of opposition to the application to strike out. The respondent also filed the exact same supplementary affidavit, however, this time it was commissioned by another commissioner. The respondent brought an application to submit the supplementary affidavit on 30 October 2012. Both the applications to strike out and to submit the supplementary affidavit are opposed by either party respectively and in each of these applications full sets of papers were filed. I deal with the interlocutory applications first.

- [10] On behalf of the respondent, Advocate Campanella, correctly pointed out that the legal position to allow further affidavits in motion proceeding has been set out in the case of *Afric Oil (Pty) Ltd v Ramadaan Investments CC*,¹ where Moleko J stated the following:

'Normally in motion proceedings, 3 sets of affidavits are allowed and no further affidavits may be filed without leave of the court. Such leave is in the discretion of the court and such discretion is exercised judicially upon consideration of the facts in each case.

In *Herbstein and Van Winsen*, Civil Practice of the Supreme Court of South Africa at 359 it is stated that leave of Court will only be granted in special circumstances or if the Court considers such a course advisable. Special circumstances exist where something unexpected or something new emerges from the applicant's replying affidavit. There must be a satisfactory explanation which negatives mala fide as to the reason why the information was not placed before the court at an early stage.'² (Court's emphasis)

¹ 2004 (1) SA 35 (N).

² Id at pages 38I to 39B.

- [11] Advocate Campanella also contended that although there is no rule in the Rules of this court dealing with the filing of additional affidavits, Rule 6 of the High Court Rules makes provision for a discretion to be exercised by the court to allow additional affidavits.
- [12] During argument, it became clear that the only contentious document between the parties and on which the interlocutory applications were focused, was the consent document.³
- [13] According to the respondent, the reasons why the consent document was not put forward at an early stage is that the human resources manager obtained the initial documents in the personnel file of the applicant. It was only after the heads of argument of the respondent was filed that the respondent requested the human resources manager to do a wider search. In doing so, the respondent discovered the consent document in a general file. As the supplementary affidavit seeks to admit the consent document (together with the other documents which were already attached to the respondent's response to the Applicant's statement of case), the supplementary affidavit, so the respondent argued, is highly relevant and material in order for this court to determine whether the applicant has good prospects of success in a claim of an automatically unfair dismissal based on age discrimination. Whether an applicant has good prospects of success is of course an important factor to consider by this court in deciding whether to grant condonation.⁴
- [14] It was further argued, on behalf of the respondent, that the applicant cannot suffer any prejudice if the supplementary affidavit is admitted because the applicant did get an opportunity to answer to the allegations set out in the supplementary affidavit. In response, counsel for the applicant, Advocate Lennox, contended that even if the affidavit is admitted, the consent document, in as much as it may have relevance to the prospects of success issue that this court need to consider in the condonation application, does not take the matter any further if one has regard to the fact that the consent document is nothing more than an acknowledgement by the employees of receipt thereof. Secondly,

³ The unsigned letter of appointment of 23 November 2009, employee's manual of 31 May 2003 and director's letter to staff 10 September 2009 all form part of the schedule of documents in the respondent's reply to the applicant's statement of case.

⁴ *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532C-F.

the applicant clearly deleted her signature that appears thereon. It is not denied by the Respondent that the applicant scratched out her signature on the document.

- [15] I accept the reasons provided by the respondent why the material in the supplementary affidavit was not put forward at an early stage. It is not inconceivable that after the initial search for any relevant documents in the personnel file a second search in a general file was undertaken in preparation of the condonation hearing. I also accept that the respondent, in good faith, believed that the documents referred to in the supplementary affidavit may be material to the issues that this court is required to decide in the condonation application. There is also no prejudice to the applicant because the applicant has had a full opportunity to reply to the supplementary affidavit. In the reply, the applicant did deal with the relevance or not of the documents referred to in the supplementary affidavit. The materiality of the documents, and particularly the consent document, to the question of prospects of success I will deal with below when I deal with the condonation application. For these reasons, therefore, I am inclined to grant the application of the respondent to submit the supplementary affidavit.

Condonation application

- [16] The often quoted passage in *Melane v Santam Insurance Co Ltd*⁵ setting out the requirements for condonation is the following:

'In deciding whether sufficient cause has been shown, the basic principle is that the court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success and the importance of the case. Ordinarily, these facts are inter-related: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success, there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed, is an objective conspectus

⁵ Ibid.

of all of the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. The respondent's interests in finality must not be overlooked.⁶

- [17] In the case of *NUM v Council for Mineral Technology*,⁷ after endorsing the approach adopted in *Melane v Santam Insurance Co Ltd (and other further authorities)* the Labour Appeal Court stated the following at page 211(h):

'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 delay, an application for condonation should be refused. (*cf. F Chetty v Law Society, Transvaal* 1985 (2) 756 (A) at 765 (A-C); *National Union of Mineworkers and Others v Western Holdings Gold Mine* (1994) 15 ILJ 610 (LAC) at 613 (E)).'

- [18] Counsel for the respondent argued that the applicant did not provide an acceptable or reasonable explanation for the full period of the delay. In argument, the respondent accepts that the applicant attempted to resolve the dispute with the respondent up until 26 March 2012. However, according to the respondent, the applicant provided no reason for the delay from the period of 19 May 2012 when the applicant became aware of the judgment of the Supreme Court of England to the time that the statement of case was filed on 29 May 2012. The respondent also contended that the applicant's fear for her grandchildren, as one of the reasons why she did not do anything from 26 March 2012 to the time that she heard about the English judgment, was unfounded.

- [19] I do not agree with the contentions of Advocate Campanella with regard to the respondent's explanation for the delay. In my view, the applicant was truthful and authentic in her reasons for her delay in filing the statement of case. It is common cause that it was the applicant who initiated the attempt to try and settle the matter after the conciliation. The concern of the applicant for her grandchildren at the very same school that she was an educator which she is now challenging in litigation, is a reasonable concern in my view. I also have no doubt that the

⁶ At 537C-F.

⁷ [1999] 3 BLLR 209 (LAC) at para 10.

applicant thought long and hard about her decision to take on the respondent because of the fact that the respondent plays an essential role within Jewish life in Johannesburg. For these reasons, therefore, I do not think that 22 days is too long a period taking account of the reasons provided by the applicant.

Prospects of success

- [20] Having found that the applicant has provided a reasonable explanation for the delay and that the delay is not that extensive in light of the reasons given for it, I now deal with the arguments presented on the applicant's prospects of success even though in terms of *Melane*, the prospects of success need not be strong if there is a slight delay and good reasons given for it.
- [21] The respondent contends that the applicant has no prospects of success on the basis of the authorities that provide that the termination of employment due to retirement is not a dismissal. In addition, the respondent argues, Section 187(2)(b) of the LRA⁸ provides that a dismissal based on age is fair if the employee has reached a normal or agreed retirement age for persons employed in that capacity despite what may be contained in Section 187(1)(f).⁹ It is not disputed that the applicant reached the age of 65. Although there is some dispute as to whether or not the retirement policy of the respondent provides for a retirement age of 65, I accept for purposes of dealing with this leg of the condonation application that the retirement policy provides for a retirement age of 65 (and my acceptance should not be construed as a definitive view as to whether the policy is assailable or not).
- [22] Advocate Campanella contended that for the condonation application to succeed, the applicant must lay a foundation in her founding affidavit to indicate that there are prima facie prospects of succeeding in her claim. He contended further that the applicant failed to lay any foundation in her affidavit indicating that the alleged

⁸ Act 66 of 1995

⁹ 187 Automatically unfair dismissals

187(1)(f) A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to Section 5 or, if the reason for dismissal is, that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscious, belief, political opinion, culture, language, marital status or family responsibility.

187(2)(b) Despite sub-section 1(f) ... a dismissal based on age is fair if the employee has reached the normal or agreed retirement age for persons employed in that capacity.

retirement policy was applied inconsistently. Put differently, the applicant did not lay an evidentiary basis that the alleged dismissal was automatically unfair nor that the policy was applied in an inconsistent manner.

[23] I do not share Advocate Campanella's view on the prospects of success of the applicant's claim as set out in the statement of case. At the very least her claim not only comprises the allegation that she was automatically unfairly dismissed due to her age and that this amounts to direct discrimination, but also that the respondent allegedly applies the contentious policy in a capricious, arbitrary and inconsistent manner. In this latter regard, the applicant states in her statement of case that it is applied to some employees, but not to others.

[24] In the case of *Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd*,¹⁰ this court stated the following:

'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 Zululand Electrical and Engineering Wholesalers (Pty) Ltd* 1975 (1) SA 612 (D) and *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 765 (A-C).'

[25] In my view, there is the likelihood or chance of the applicant succeeding with her main case. There is clearly a policy (although the exact nature of that policy is being challenged by the applicant) that allows the respondent to continue to employ educators past the age of 65. How this policy is being applied for the benefit of some and to the exclusion of others, is one of the legs of the applicant's claim as set out in her statement of claim. The respondent may have a good explanation and defence to differentiating between those that it decides to retain for whatever period and those that it decides not to retain. Those are issues that need to be ventilated in the trial and whether that differentiation amounts to discrimination is still to be determined by the trial court.

[26] Advocate Campanella argued that the matter is not of importance based on decisions of this court relating to the termination of an employee's employment after reaching retirement age. In my view, the importance of the issue is probably

¹⁰ 2009 30 ILJ 347 (LC) at para 27.

neutral, although I am of the view that a number of employers apply a similar discretion when employees retire to decide which of the employees they intend contracting further or allowing to work beyond retirement age. A decision as to how that discretion or, if there is a policy, how that policy is applied may have some importance.

- [27] On the issue of prejudice, I do not think that the delay in the applicant filing her statement of case is such that the respondent would be prejudice in meeting that case in the ordinary course.

Conclusion

- [28] In conclusion, therefore, I find that the respondent's application to submit the supplementary affidavit succeeds. I also find that the reasons provided for the delay by the applicant of the statement of case adequately explains the 22 days.

Costs

- [29] In considering costs, I point out that, in my view, the interlocutory applications were completely unnecessary. In fact, the pleadings filed in the interlocutory applications are more voluminous than the very concise pleadings in the application for condonation. Although I wish to make an adverse costs order to show this court's displeasure in the manner in which a simple condonation application unravels to the point where interlocutory applications consume more time to deal with than the main condonation application, it is clear that both parties share an equal blame for their conduct. In the circumstances, therefore, I do not think a costs order in favour of either party is warranted.

Order

[30] In the result, the following order is made.

30.1 The application to submit the supplementary affidavit is granted.

30.2 The application to strike out the supplementary affidavit is denied.

30.3 The condonation application of the applicant is granted.

30.4 There is no order as to costs.

Visagie, AJ

Acting Judge of the Labour Court

APPEARANCE

For the Applicant: Moss Cohen and Partners

For the Respondent: Dewey De Souza Attorneys