



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

CASE NO: JS 902/2014

In the matter between

MAGDEL COETZEE

First Applicant

DAVID COETZEE

Second Applicant

and

NAMPAK LIQUID BLOEMFONTEIN

Respondent

Heard: 22 May 2015

Delivered: 26 May 2015

Summary: Condonation of the late filing of the statement of case may be granted when the applicants have good prospects of success and will suffer prejudice should condonation be refused.

JUDGMENT

LALLIE J

- [1] This is an application to condone the late filing of the applicants' statement of case. It is opposed by the respondent. The applicants were employed by the respondent until their dismissal for operational requirements on 31 March 2014. Aggrieved by their dismissal they referred a dispute to the Commission for Conciliation Mediation and Arbitration ("the CCMA") on 6 May 2014. As the CCMA lacked jurisdiction over the dispute, it transferred it to the Metal and Engineering Industries' Bargaining Council ("MEIBO/ bargaining council"), the correct forum for the conciliation of the dispute. The applicants did not attend the conciliation which was scheduled for 4 June 2014. They filed their statement of case at the Labour Court on 10 October 2014, outside the 90 day period envisaged in section 191(11)(a) of the Labour Relations Act 66 of 1995 ("the LRA"). The condonation application is opposed by the respondent.
- [2] The following dictum in *South African Post Office Ltd v Commission for Conciliation Mediation and Arbitration and Others*¹:

'[17] This Court has a discretion when deciding to condone the late filing of the record or any other pleading. In exercising that discretion, the court must consider a number of factors, namely: the degree of the delay and the explanation for the delay; the prospects of the party seeking the indulgence succeeding in its claim or defence; the prejudice that the parties will suffer if condonation is granted or refused; and finally, whether it is in the interests of justice to grant the condonation sought.

[18] The degree of delay and the reason thereof complement each other. While the degree of delay is a mere arithmetic calculation, it is significant in relation to the expeditiousness with which the matter was required to be resolved. Hence, in the matters where importance is placed upon the speedy and expeditious resolution of a dispute, even a short delay may not be excusable unless an explanation is proffered that sets out the reasons for the delay which the court finds acceptable. With the factors of delay, go the prospects of success. Where it is

¹ [2012] 1 BLLR 30 (LAC)

evident that the party seeking condonation has no prospects of succeeding in its principal claim or opposition, no purpose is served in granting condonation and the court must in such circumstances refuse to grant condonation irrespective of the degree of delay or the explanation provided. Where the prospect of success are reasonably good or even fair then depending on the delay and the explanation, consideration must be given to the prejudice that the parties may suffer before the discretion can be exercised on whether to grant the indulgence sought. The factor of prejudice plays a role only when the delay is substantial.'

- [3] The extent of the delay is 56 days. It is substantial. The reason proffered by the applicants is that they are policy holders of Legal Wise which is responsible for the payment of the fees of their legal team. Legal Wise has terms and conditions which govern payment of the fees. Cover was granted by legal wise on 28 May 2014 thereafter the applicants' attorney consulted with them in preparation for the conciliation which was scheduled for 4 June 2014. It was submitted on behalf of the applicants that they could not afford to travel from Bloemfontein to Welkom for the conciliation. The efforts of the applicants' attorney to obtain conciliation outcome certificates from the bargaining council yielded partial results in June 2014, when he received a copy of the certificate pertaining to the first applicant's dispute. The bargaining council failed to attach the second applicant's certificate as promised in its letter of 23 July 2014. In fact, it never finished the applicants' attorneys with the certificate pertaining to the second applicant's dispute. After losing hope of receiving the certificate, the applicants' attorney contacted the applicants to arrange consultation for the referral of the dispute to the Labour Court. He also enquired from Legal Wise whether the applicants were covered for travel and accommodation costs involved in the planned consultation. He received the response informing him that they were not covered for the costs on 25 September 2014. The applicants took responsibility for the payment, consultation was held and their statement of case was filed on 10 October 2014. The applicants therefore attributed the delay to the bargaining council's failure to provide their attorney with the certificate of the non- resolution of the

second applicant's dispute as well as the cover confirmation response he had to wait for from Legal Wise. It was submitted that the applicants have good prospects of success in that the respondent failed to follow the procedure laid down in section 189A of the LRA in that it did not afford them the 60 day period for consultation before effecting their dismissal. In addition, it had no basis to dismiss them for its operational requirements and singled them out unfairly for the dismissal. The applicants' case is that their condonation application should succeed as, although the delay is excessive, it was caused by reasons out of their control they have good prospects of success and have at all reasonable times expressed an interest of pursuing the dispute.

[4] Opposing the application the respondent submitted that the applicants conceded that the delay was lengthy. They failed to submit proof of their attorney's efforts to obtain certificates of the non-resolution of the disputes from the bargaining council and there were steps that their attorney could have taken to avoid the delay which he elected not to take and caused of the delay. They denied that the retrenchment which led to the termination of the applicants' contracts of employment was a large scale retrenchment and submitted that it did not breach provisions of section 189A of the LRA. It further denied that the applicants were unfairly singled out for the retrenchment. It was the respondent's case that the applicants had no prospects of success. It further attacked the applicants for their failure to state why they would suffer prejudice.

[5] It is common cause that the applicants' delay in filing their statement of case is excessive. As the extent of the delay compliments the explanation thereof, it was necessary for the applicants to provide reasonable explanation for the delay. I have considered the explanation proffered on behalf of the applicants. Their attorney knew of the conciliation date before it sat on 4 June 2014 and informed the relevant panellist that the applicants would not attend it owing to financial constraints. At that stage, the applicant's attorney knew that the 90 day period within which the dispute should have been referred to the Labour Court started running from 4 June 2014. The certificates were not necessary either for filing the statement of case or enquiring from Legal Wise whether

the applicants were covered for the consultation and the filing of the statement of case as the attorney already knew that they were recovered. The only enquiry that had to be made was the one pertaining to travel and accommodation costs. The date on which the enquiry was made has not been disclosed and the only date which was furnished is the one on which the response from Legal Wise declining to cover travel and accommodation costs was received. This was after the 90 day period had come and gone. The explanation provided by the applicants' attorney is inadequate and unreasonable. It proves that the delay was caused by his failure to prosecute the applicants' case expeditiously having been paid by Legal Wise.

- [6] I am not convinced that the applicants have no prospects of success in their main claim. They did not have to prove a *prima facie* case against the respondent. Their prospects of success needed to be fair. The applicants could be successful should they prove that the respondent failed to fulfil the requirements in terms of section 189A of the LRA. The submission that they are casualties of a large scale retrenchment is not far-fetched as it is based on a letter they received from the respondent albeit the respondent subsequently averred that their retrenchment had been incorrectly classified in error. There is substance in the respondent's argument that the applicants made no submissions on the prejudice the parties stands to suffer should this application be granted or refused. However, it can be gleaned from a reading of the application in its totality that they stand to suffer the prejudice of being non-suited should this application be refused. Without diminishing the prejudice the respondent stands to suffer as a result of the delay, the applicants will suffer more prejudice than the respondent should this application be refused as their main case will not be heard.
- [7] I have considered the authority the respondent sought to rely on in arguing that condonation will not be readily granted in cases of disputes over individual dismissals as well as those providing that even a blameless client may not hide behind the negligence of its attorney. Each case is determined on its merits. The applicants have good prospects of success and they stand to suffer more prejudice than the respondent should this application be

refused. I cannot turn a blind eye to the reality that the applicants are unemployed and dependent largely on Legal Wise to fund their legal representation. They cannot be non-suited because of the financial position they find themselves in. Access to justice is not a preserve of litigants who have the financial means to fund and have full control over their litigation. It is in the interests of justice that this application be granted.

[8] When this matter was argued the respondent sought a costs order *de bonis propriis* to be paid by the applicants' attorney. Section 162 (1) of the LRA provides that this court may make an order for the payment of costs according to the requirements of the law and fairness. Section 162 (3) enables this court to grant a costs order against any person who represented a party in proceedings before it. The applicant's attorneys are responsible for the delay in the filing of the applicant's statement of case and the respondent did not act unreasonably in opposing the condonation application. It will not be fair for the applicants to be mulcted with costs as a result of delays occasioned by its attorney. I do not give costs orders *de bonis propriis* easily, however, the law and fairness require that the attorney pay the respondent's costs.

[9] In the premises the following order is made:

- 9.1 The application for condonation of the late filing of the statement of case is granted.
- 9.2 Mr Jacques Nortjie of Kramer Weihmann & Joubert Inc. is ordered to pay the respondent's costs.

Lallie J

Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant:

Instructed by:

For the Respondents

Instructed by:

LABOUR COURT