



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR1585/15

In the matter between:

GEORGE ANDRIES WHITE

Applicant

and

ALSTOM S&E AFRICA (PTY) LTD

First Respondent

Heard: 4 August 2017

Delivered: 7 August 2017

JUDGMENT

VAN NIEKERK J

- [1] This is an application to condone the late filing of a statement of claim. The certificate of outcome was signed by the CCMA on 20 July 2016. The statement

of claim ought to have been filed within 90 days thereafter. The statement was served on the respondent attorneys 19 December 2016, which the parties agree is 62 days outside of the period prescribed by Rule 6.

- [2] The explanation for the delay is twofold. First, the applicant states that he suffered a heart attack and was incapacitated. The applicant has attached a medical certificate to the application, certifying that he was unfit for work between 30 August 2016 and 23 October 2016. Secondly, on 30 August 2016, the dispute was initially referred to arbitration by a candidate attorney employed by applicant's representatives. He states that after contacting the CCMA, he realised that something was amiss when he was not provided with a case number. He also realised that the matter ought to have been referred to this court for adjudication. This much is obvious from the certificate of outcome issued on 20 July 2016. The candidate attorney admits that the lateness of the referral was solely due to his tardiness and his failure to apply himself to the matter with due diligence.
- [3] Insofar as the applicant's prospects of success are concerned, the applicant submits that he has good prospects of success. He was employed by the respondent from 30 July 2012 to 31 May 2016. The project on which he was engaged had been completed and whose position was no longer required. The fixed term contract in terms of which the applicant was engaged provides that contract terminates automatically on the completion of the Medupi project 'all at any stage that your position is no longer in the view of the company required'. Although the statement of claim is not a model of clarity, the applicant appears to contain that his dismissal was automatically unfair in that he was dismissed on account of his age. In support of this contention, he avers that he was told that his contract was being terminated on account of the fact that he turned 65 in August 2015. The defence to the applicant's claim is that at the relevant time, part of the project had been concluded, resulting in a need to reduce the number of employees on site, and in particular, the number of safety officers. The respondent contends that the need to reduce the number of safety officers as a result of the completion of a part of the project had the consequence that the

applicant's fixed term contract terminated automatically. It would appear that the employment of not all of the safety officers engaged on the project was to be terminated and that a process of selection was applied. The respondent states that it took into account the need to retain the essential skills, the last in first out principle and pensionable age. The respondent admits that the applicant was over its pensionable age and that he was before selected for demobilisation. What is likely to be in dispute in the course of any trial therefore is whether the contract terminated automatically (i.e. whether one or more of the conditions on which the applicant's employment would terminate had been met) and whether it was fair of the respondent in the circumstances to apply a matrix of criteria that included the applicant reaching the age of 65.

- [4] Although the applicant did not file a replying affidavit, there is no dispute of fact that is sufficiently material that requires the *Plascon Evans* approach to be adopted. The test to be applied is well-established. The court must exercise discretion, having regard amongst other things to the period of the delay, the explanation for the delay and the applicant's prospects of success in the main action. No single factor is definitive – the court must exercise discretion having regard to all of the relevant facts and circumstances.
- [5] Although the court is concerned that labour disputes be resolved expeditiously and that a failure to comply with prescribed time periods frustrate this statutory purpose, the delay in the present matter is a lengthy one, but it is not inordinate. I accept that in terms of the medical certificate filed by him the applicant was incapacitated and unfit for duty between 30 August 2016 and 23 October 2016. I also accept that the essential failure to file the statement of claim within the prescribed time limit is the fault of the candidate attorney. While there is a limit to the extent to which the court will accept the negligence of a representative as an excuse on the part of the litigant, in the present instance, the delay caused by the candidate attorney's negligence is not significant and the nature of his oversight is one which inclines me to accept the reasonableness of his explanation. While I am required to do no more than take a *prima facie* view of the merits of the case, it would seem to me from the pleadings that whether either (or both) of the

conditions stipulated in the applicant's contract had been met is a matter that is best canvassed by evidence and that to the extent that the applicant's claim is resisted on the basis of what are contended to be his selection for termination of employment on the basis of objective criteria, the fairness of the criteria both in their substance and application are matters that are best argued, particularly since it appears that the applicant was advised of these criteria after the date of his letter of termination, and since it does not appear from the applicant's contract of employment that he was required to become a member of any retirement fund or that he was bound by the rules of any such fund, at least insofar as retirement age is concerned. In my view, it cannot be said that the applicant has no prospects of success. It follows that the application for condonation should be granted. I do not intend to make any order as to costs.

I make the following order:

1. The late filing of the applicant's statement of claim is condoned.
2. The parties are ordered to convene a pre-trial conference and to file a pre-trial minute within 21 days of the date of this order.

André van Niekerk
Judge

REPRESENTATION

For the applicant: Mr A Brandmuller, Brandmuller Attorneys

For the respondent: Mr L Frahm-Arp, Fasken Martineau