



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JS 1003/16

In the matter between:

CECILIA MAUREEN HOLROYD

Applicant

And

AUDIOTRONIC (PTY) LTD

Respondent

Heard: 3 November 2017

Delivered: 14 November 2017

JUDGMENT

TLHOTLHALEMAJE, J:

Introduction:

- [1] The respondent in the main claim, Audiotronic (Pty) Ltd (Audiotronic) seeks condonation for the late filing of its statement of response to the applicant's (Holroyd) claim. Holroyd opposed the application.

Background:

- [2] Holroyd commenced employment with Audiotronic in June 1993 as a book-keeper. At the time of commencement of her employment she was 50 years old. During August 2005, Holroyd and Audiotronic concluded a written

contract of employment wherein Holroyd was appointed as Accounts Administrator. At the time that the contract was concluded, Holroyd was 62 years of age. She would have been about 73 years of age at the time of the termination of her employment contract.

- [3] On 25 July 2016, Audiotronic informed Holroyd that it intended to replace her with an existing Accountant within the company, and thus ultimately placing her on retirement at the end of August 2016. Holroyd, was also required to undertake and conclude a handover process before her contemplated date of retirement.
- [4] On 29 July 2016, Audiotronic furnished Holroyd with a notice of retirement with the date of termination being 31 August 2016. In a reply to the notice of retirement, Holroyd indicated that firstly, there was no formal meeting held with her in respect of the contemplated retirement, secondly, that there was no agreement that she would go on retirement, thirdly, there was no mention of Audiotronic's normal retirement age in her contract of employment and lastly, that Audiotronic had no policy in respect of a retirement age.
- [5] On 12 August 2016, Holroyd received an 'SMS' from Audiotronic to the effect that she had indicated in the meeting of 29 July 2016 that she was not averse to retirement. In an email on the same day, Holroyd replied and disputed that there was an agreement on her taking retirement.
- [6] On 24 August 2016, Holroyd then referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). The dispute was conciliated on 21 September 2016. That process however failed to resolve the dispute, which was subsequently referred to this court for adjudication in terms of the provisions of section 187 of the Labour Relations Act (LRA).¹
- [7] The statement of claim was filed with the Registrar of this Court on 8 December 2016, and Audiotronic, if it elected to oppose the claim, was called upon to deliver its' statement of response within 10 days from the date

¹ Act 66 of 1995, as amended

of service of the statement of claim. The statement of response was filed on 16 February 2017, together with an application for condonation for its late filing.

The legal framework and evaluation:

- [1] The principles applicable to applications for condonation are fairly trite. Foremost is that in considering whether to grant condonation, the Court in exercising its discretion in that regard will take into account what the interests of justice dictate. The test in this regard was elucidated by the Constitutional Court in *Grootboom v National Prosecuting Authority and Another*,² in the following terms:

‘In this Court, the test for determining whether condonation should be granted or refused is the interests of justice. If it is in the interests of justice that condonation be granted, it will be granted. If it is not in the interests of justice to do so, it will not be granted....’

And,

‘The interests of justice must be determined with reference to all relevant factors. However, some of the factors may justifiably be left out of consideration in certain circumstances. For example, where the delay is unacceptably excessive and there is no explanation for the delay, there may be no need to consider the prospects of success. If the period of delay is short and there is an unsatisfactory explanation but there are reasonable prospects of success, condonation should be granted. However, despite the presence of reasonable prospects of success, condonation may be refused where the delay is excessive, the explanation is non-existent and granting condonation would prejudice the other party. As a general proposition the various factors are not individually decisive but should all be taken into account to arrive at a conclusion as to what is in the interests of justice.’

² [2014] 1 BLLR 1 (CC) at paras 50-51.

- [8] The factors identified by the Constitutional Court as above are those that were long identified in *Melane v Santam Insurance Co. Ltd*³ in the following terms;

'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 interrelated, they are not individually decisive, 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 of all the facts. Thus a slight delay and a good explanation may help to compensate prospects which are not strong. Or the importance of the issue and strong prospects may tend to compensate for a long delay. And the Respondent's interests in finality must not be overlooked"

- [9] The factors as outlined in *Melane* and subsequent authorities are to be considered collectively and not through a piecemeal approach in coming to a conclusion that the interests of justice dictate that condonation ought or ought not to be granted.⁴ Further principles applicable to condonation applications are that a litigant who intends applying for condonation is required to launch such application as soon as she or he or it becomes aware of the necessity to do so⁵; and that a case must be made out as to

³ 1962 (4) SA 531 (A) at 532B-E

⁴ *United Plant Hire (Pty) Ltd v Hills* 1976(1) SA 717 (A) at 720 E –G:

"[I]t is well settled that, in considering application for condonation, the court has a discretion, to be exercised judicially upon a consideration of all the facts, and that in essence it is a question of fairness to both sides. In this enquiry, relevant considerations may include the degree of non-compliance with the rules, the explanation thereof, the prospects of success on appeal, the importance of the case, the respondent's interest in the finality of the judgment, the convenience of the court, and the avoidance of unnecessary delay in the administration of justice. The list is not exhaustive. These factors are not individually decisive but are interrelated and must be weighed one against the other, thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong".

⁵ See *CWIU and Another v Ryan and Others* [2001] 3 BLLR 337 (LC)

why a party ought to be granted an indulgence⁶. It is further trite that where a period of delay is excessive and the explanation is unreasonable, the court may deny the application for condonation without the consideration of the prospects of success.⁷

Extent of the delay and explanation thereof:

[10] Audiotronic having been served with the statement of claim on 7 December 2016, was supposed to have filed its statement of response on or before 22 December 2016.⁸ The statement of response was only filed with the Registrar of this Court on 16 February 2017. The statement of response was therefore filed 40 days out of time. I did not understand from either the pleadings or the arguments that there was a dispute in regards to this period

⁶ *Grootboom* at para 23 where it was held that;

'It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or the court's directions. Of great significance, the explanation must be reasonable enough to excuse the default'

See also *Uitenhage Transitional Local Council v South African Revenue Service 2004 (1) SA 292 (SCA)* at para 6, where it was held that;

'.... It must be obvious that, if the non-compliance is time-related then the date, duration and extent of any obstacle on which reliance is placed must be spelled out.'

⁷ *NUM v Council for Mineral Technology 1999 3 BLLR 209 (LAC)* at 211 G-H:

".... 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 also In *Moila v Shai N.O. and Others(2007) 28 ILJ 1028 (LAC)* at para 34 the Labour Appeal Court held:

'I do not have the slightest hesitation in concluding that this is a case where the period of delay is excessive and the appellant's purported explanation for the delay is no explanation at all. I accept that the case is very important to the appellant. However, the weight to be attached to this factor is too limited to count for anything where the period of delay is as excessive as is the case in this matter and the explanation advanced is no explanation at all. If ever there was a case in which one can conclude that good cause has not been shown for condonation without even considering the prospects of success, then this is it. Where, in an application for condonation, the delay is excessive and no explanation has been given for that delay or an "explanation" has been given but such "explanation" amounts to no explanation at all, I do not think that it is necessary to consider the prospects of success.

⁸ Rule 6: **Referrals:**

(1) ...

Response

(3) (a) Any party on whom a statement of claim is served may deliver a response to that statement.

(b) The response must, with the changes required by the context, contain the same information required by subrule (1).

(c) A response must be delivered within 10 days of the date on which the statement of claim is delivered.

of the delay. Inasmuch as I agree that the delay is lengthy, I however do not hold the view that it is excessive in the extreme.

[11] Mr Gregory Paul Cumming (Cumming), Audiotronic's Director in his founding affidavit in support of the application for condonation averred that the delay was attributable to the following factors;

11.1. During the period that Holroyd served her statement of claim on Audiotronic, Cumming was overseas and had only returned to the Republic on 22 December 2016. After his return, there was the "festive season" and as a result, potential legal representative were not available for consultation.

11.2. In 2017, in an attempt to avoid potentially unnecessary legal expenses, Audiotronic through its current attorneys of record endeavoured to explore settlement of the dispute with Holroyd's attorneys of record. In that regard on 16 January 2017, Audiotronic's attorneys of record sent correspondence to Holroyd's attorneys of record wherein the following was record:

"...

Please be advised that it is our client's instruction that the matter is to be opposed.

We have, however, also been advised that there was a brief and cursory discussion with [Counsel], in which it was mentioned that a settlement in the matter may be possible. In order to save both parties the time and expenses of litigation, we shall be pleased to learn whether you have obtained an instruction from your client on a possible settlement proposal.

..."

11.3. In a letter dated 17 January 2017, Holroyd's attorneys of record replied to Audiotronic's invitation to engage in settlement discussion, however they pointed out that any settlement discussions would not stay, detract from or pend the proceedings before this Court. The relevant parts of the correspondence read as follows:

"...

Our statement of claim was served on your client on 7 December 2016 and filed at court on 8 December 2016.

[The] writer was only contacted by [your counsel] on Tuesday 10 January 2017 to discuss the matter and it was recorded during that discussion that any settlement proposal and/or discussion would not detract from, stay, or pend the court action and proceedings, which are currently unopposed.

With the above in mind please note that our client is amenable to discuss settlement of the matter and welcome any settlement proposal your client may have at this stage, however any settlement discussion will not detract from the court action and proceedings which are currently underway.

...”

- 11.4. A settlement proposal was thereafter made in a letter dated 17 January 2017 by Audiotronic’s attorneys of record. The proposal was rejected and as consequence, additional legal advice had to be sought. The identified legal counsel could only be available for consultation and settlement of the papers in respect of the main action as well as the condonation application on 13 February 2017.

[12] In opposing the condonation application, Holroyd avers *inter alia* that:

- 12.1 There was no proof that Cumming was overseas during the period that the statement of claim was served on Audiotronic. Moreover, even if Cumming was overseas, other persons within Audiotronic had a duty to deal with the matter and “they” failed to exercise that duty.

- 12.2 On 9 January 2017, Holroyd’s attorneys of record contacted Audiotronic to confirm the serving of the statement of claim. During that telephonic conversation, no mention was made about Cumming being overseas. What was mentioned however, was that Audiotronic had forwarded the statement of claim to their attorneys of record to deal with.

[13] The difficulty with the explanation proffered by Cumming is that it is lacking in details, particularly as there is no indication as to who the statement of claim was served on at Audiotronic, and why that particular person could not have

brought it to the attention of Cumming, notwithstanding the fact that he was overseas.

- [14] Upon the return of Cumming from the overseas trip on 22 December 2016, the only explanation that is furnish is that due to the Christmas holidays, the potential legal firms were not available. There is no explanation as to what attempts were made at the earliest in securing legal representation, which other legal firms were approached, and if so, when they were approached.
- [15] There is no explanation in respect of the period of delay between 2 January 2017 and 16 January 2017, the first date Audiotronic's attorneys of record first made an invitation for settlement discussions. Holroyd in her answering affidavit to the condonation affidavit averred that on 9 January 2017, her attorneys of record made telephonic contact with Audiotronic with regards to service of the statement of claim, and there is no explanation as to what action was taken between that date and the date of the letter of 16 January 2017. Moreover, Audiotronic elected not to file a replying affidavit to answer to the allegation made by Holroyd that indeed on 9 January 2017, the matter was brought to Audiotronic well after 18 calendar days and after Cumming had returned from his overseas trip.
- [16] When the settlement discussions broke down after 17 January 2017, there is no explanation as to what steps Audiotronic took to defend the claim, except to aver that the preferred counsel was only available on 13 February 2017. There is no explanation whether it was feasible to approach another counsel and if so what attempts were made. It is significant to observe that as at 17 January 2017, the statement of response was already about 16 days out of time, and one would have expected a diligent litigant to have acted with the necessary haste at that point. But that is not what Audiotronic did, it waited a further 18 days before consulting with counsel on 13 February 2017.
- [17] Notwithstanding the problems as highlighted above, it is trite that a lack of a sufficient, satisfactory or detailed explanation for the delay does not

necessarily translate into an absolute bar to condonation.⁹ The court is required to undertake an objective conspectus of all the factors, including the importance of the issue and the strong prospects of success, which factors may tend to compensate for the shortcomings in the explanation or length of the delay.

Prospects of success:

[18] It is trite that even if a less than adequate or satisfactory explanation for the delay was proffered, the factors to be addressed in seeking condonation should not be evaluated individually. In explaining the approach to the issue of prospects of success, this Court in *Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd*¹⁰ held that:

"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)."

[19] Cumming averred that there were excellent prospect of success in defending the claim. In this regard, it was submitted that;

19.1. Holroyd had agreed to retire with effect from 31 August 2016 and therefore she was neither unlawfully and/ or wrongfully dismissed by Audiotronic.

19.2. The last date that Holroyd reported for duty was on 2 August 2016. Thereafter she did not resume her services, which resulted in her employment contract being terminated as a consequence of her desertion.

⁹ See *Toyota Marketing v Schneider* [2002] 12 BLLR 1164 (LAC)

¹⁰ (2009) 30 ILJ 347 (LC) at para 27

19.3. The termination of Holroyd employment did not constitute an automatically unfair dismissal within the meaning of the provisions of section 187(1)¹¹ of the LRA.

19.4. Audiotronic admitted that it did not have a normal retirement age policy in place. It however contended that there was an agreement between it and Holroyd that she would retire on 31 August 2016. Moreover, Holroyd's employment services were terminated as a result of her desertion.

19.5. The trial court will be called upon to determine the real dispute, that is, the real reason for the termination of the employment relationship. The trial court will have determine whether or not Holroyd had deserted prior to the agreed date of retirement, being 31 August 2013, or whether she was dismissed as she had alleged.

[20] Mr. Morgan on behalf of Holroyd submitted that there were indeed factual disputes in regard to what had led to the termination of Holroyd's contract of employment. He however contended that Audiotronic had failed to sufficiently deal with its prospects of success in in its application.

[21] There is a dispute of fact as to when and how Holroyd's contract of employment was terminated. Holroyd contends that the contract of employment was terminated by Audiotronic on 31 August 2017 through a forced retirement. Auditronic on the other hand contended that the contract was terminated on 2 August 2017, through the act of desertion by Holroyd. It is apparent that these disputed facts can only be resolved by affording both parties an opportunity to ventilate their respective cases at trial. In the light of these disputed facts, it cannot be said that Audiotronic does not have

¹¹ Section 187: **Automatically unfair dismissals**

(1) A *dismissal* is automatically unfair if the employer, in dismissing the *employee*, acts contrary to section or, if the reason for the *dismissal* is –

(a) ...

(f) 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, conscience, belief, political opinion, culture, language, marital status or family responsibility.

prospects of success. In line with *Gaoshubelwe*¹², it should be found that Audiotronic has demonstrated the likelihood or chance of success when the main case is heard.

Prejudice and other considerations:

[22] It was further common cause that the pleadings in this case have been closed, and the parties had completed and filed a signed pre-trial minute. As correctly pointed out on behalf of Audiotronic, it cannot be said in view of these common cause factors that Holroyd has been prejudiced by the delay, which it has already been concluded, is not excessive in the extreme. If any prejudice has been suffered, I do not believe that such prejudice can outweigh all the other considerations taken into account in deciding whether condonation should be granted.

Conclusion:

[23] The delay in filing a response to the statement of claim is not excessive in the extreme. The explanation for the delay may be inadequate but is not necessarily unacceptable. Any shortcomings in the explanation proffered for the delay in any event have been compensated by Audiotronic's prospects of success on the merits of the main claim and the fact that it cannot be said that Holroyd has been prejudiced by the delay. In the end, and in consideration of these factors, the interests of justice dictate that condonation ought to be granted.

Costs:

[24] I have had regard to the requirements of law and fairness in considering the issue of costs. Audiotronic did not do itself any favours by the delay in filing a response, particularly in view of the collapse of the settlement negotiations. Similarly, Holroyd was within her rights to oppose the application for condonation application. I have no reason to believe that the opposition to the application was *mala fide*, *albeit* it can be deemed as having been

¹² *supra*

unnecessary in the circumstances. Accordingly, the requirements of law and fairness dictate that each party must be saddled with its own costs.

Order:

[25] In the premises, the following order is made:

1. The late filing of the statement of response by the Respondent is condoned;
2. Each party is to pay its own costs
3. The Registrar of this Court is directed to set the matter down for trial for two days.

E. Tlhotlhemaje

Judge of the Labour Court of South Africa

APPEARANCES:

For the Respondent:

Adv. J Campanella

Instructed by:

L Cirone Attorneys

For the Applicant:

Mr D. Morgan of Mc Larens
Attorneys

LABOUR COURT