



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Not of interest to other judges

Case no: JS 317/16

In the matter between:

ERNEST THEODORIS SCHOEMAN

Applicant

And

ANGLO AMERICAN PLATINUM LIMITED

Respondent

Heard: 02 March 2018

Delivered: 20 March 2018

Summary: Practice and procedure: Condonation application – Adequate and acceptable explanation for delay – No prospects of success in unfair dismissal claim- Absent prospects of success condonation *brutum fulmen* – Condonation not in interests of justice – Application dismissed

JUDGMENT

LEKALE, AJ

Introduction and background

- [1] The applicant was employed by the respondent as a Senior Foreman: Mechanics until 01 May 2015 when he was dismissed on the basis of the respondent's operational requirements.
- [2] He felt aggrieved by the dismissal and referred the dispute concerning alleged unfair dismissal to the Commission for Conciliation, Mediation and Arbitration ("CCMA") for resolution. When the dispute remained unresolved on 03 June 2015 after an attempt at conciliation, he requested arbitration.
- [3] On 03 September 2015 the arbitrating CCMA Commissioner issued a jurisdictional ruling, inter alia, to the effect that the matter should be referred to this court for adjudication following a successful objection to CCMA jurisdiction by the respondent.
- [4] On or about 27 October 2015 the applicant was informed by his trade union Solidarity, which had been representing him before the CCMA, that they could not represent him at the Labour Court according to their rules of membership.
- [5] In November 2015 applicant's wife was diagnosed with cancer and became seriously ill requiring costly medical treatment.
- [6] In December 2015 the applicant underwent a surgical procedure related to an unbearable chronic neck pain. His wife was also operated on during that month.
- [7] Prior to the applicant's retrenchment he was suspended for eighteen (18) months at the behest of the Department of Mineral Resources ("DMR") which was conducting an investigation into allegations of serious racially related conduct on his part, among others.

- [8] During the course of January 2016 and the beginning of February 2016, the applicant received treatment and attended regularly at specialists and physicians.
- [9] About or between August 2015 and beginning of January 2016 the applicant was in contact with the respondent's mine captain when the possibility of his re-employment at one of the respondent's shafts was discussed and pursued.
- [10] At the beginning of April 2016 the applicant approached his current attorney for advice and assistance in referring the dispute to court for adjudication. He, eventually, instructed his legal representative to assist after securing the required funds.
- [11] The referral and condonation application were drafted by counsel and eventually filed with this court on 04 May 2016 after the affidavit in support of the condonation application was signed on 26 April 2016.

Issues for determination

- [12] I am enjoined in the instant matter to determine whether or not good cause exists for condonation of the late filing of the statement of claim regard being had to the reason for the delay involved and the applicant's prospects of success in the alleged unfair dismissal claim.
- [13] In the event of the preceding question being decided in the affirmative, I am required to condone the delay involved and to order costs against the respondent insofar as it opposes the application.

Depositions and contentions for and on behalf of the applicant

- [14] The applicant deposes, inter alia, to the effect that he referred the dispute to the CCMA indicating that the reason for the dismissal was unknown and the conciliating commissioner, eventually, certified it arbitral in the certificate of non-resolution on 03 June 2015. He only learnt that it was adjudicable by this Court on the 03 September 2015 when the jurisdictional ruling was

issued at arbitration level. He was engaged in communication with the respondent's mine captain from August 2015 to and including March 2016 when it became apparent that the talks about possible re-employment would yield no positive results. Throughout that period he persistently had contact with the said mine captain with the intention to "settle" the issues with the respondent by re-employment failing which to proceed with litigation. He cannot recall the exact date in March 2016 when it became apparent that the negotiations may possibly reach no fruition. The financial and emotional impact of the developments relating to his wife and himself was so great that it wore him down with emotional distress.

- [15] In argument before the court Mr Parsons submits for the applicant, inter alia, to the effect that it is in the interests of justice to grant condonation in the matter insofar as the applicant has explained the delay in full and has good prospects of success in his claim for unfair dismissal.

Depositions and contentions for and on behalf of the respondent

- [16] The respondent's Employee Relations Manager deposes, inter alia, to the effect that the referral is 240 (two hundred and forty) days late and not 137 (one hundred and thirty-seven days) late as contended for the applicant. He, further, disputes that the applicant developed the neck pain only in November 2015 and points out that the latter reported the same as well as the need for surgery to the mine captain in August 2015 already. In his view the issue did not contribute to the delay involved.
- [17] The manager, furthermore, disputes that the discussions between the applicant and the mine captain endured until March 2016 and deposes that the applicant was unequivocally informed by the mine captain that there were no prospects of re-employment at the beginning of January 2016 and not in March 2016.
- [18] Ms Maharaj-Pillay for the respondent party submits, inter alia, to the effect that the delay involved is inordinate and has not been explained adequately and satisfactorily by the applicant. The applicant's unfair dismissal claim,

further, enjoys no prospects of success regard being had to the collective agreement which was extended to non-parties such as the applicant in terms of section 23(1)(d) of the Labour Relations Act (“the LRA”). AMCU, which is the majority trade union at the relevant workplace, and its members agreed in the collective agreement to “[w]aive... any right to challenge the substantive fairness and procedural fairness as well as validity of any termination of employment subsequent to [the consultation] process [involved]”

Applicable legal position

- [19] The question *in casu* is whether or not it is in the interests of justice to condone the delay involved regard being had to a balanced conspectus of factors such as the degree of lateness involved, its explanation and the applicant’s prospects of success in his claim.¹
- [20] It is incumbent upon the applicant for condonation to “furnish an explanation of his default sufficiently full to enable the court to understand how it came about and assess his conduct and motives.”²
- [21] Unacceptable explanation for the delay renders it unnecessary for the court to consider prospects of success in a condonation application.³
- [22] Prescribed time-frames in litigation seek to obviate inordinate delays which compromise the interests of justice insofar as time is the worst enemy of human memory.⁴
- [23] Where a final relief is sought in motion proceedings and parties are in irreconcilable dispute over applicable factual matrix, the respondent-friendly

¹ See generally *Grootboom v National Prosecuting Authority and Another* 2014 2 SA 68 (CC) and *Chetty v Law Society (TVL)* 1985 2 SA 756 (A) at 765B-D.

² See *Premium, Western Cape v Lakay* 2012 2 SA 1 (SCA) para [17].

³ See *GIWUSA obo Heyneke v Klein Karoo Korporasie Bpk* [2005] 8 BLLR 791 (LC) at para 17 and 18.

⁴ See *Mohlomi v Minister of Defence* 1997 1 SA 124 (CC) at para [11].

test applies in that the relief sought should be consistent with common cause and/or undisputed facts and facts alleged by the respondent.⁵

[24] Hearsay evidence is only admissible in our courts if “a) each party against whom the evidence is to be adduced agrees to the admission thereof; or (b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or (c) the court having regard to (i) the nature of the proceedings; (ii) the nature of the evidence; (iii) the purpose for which the evidence is tendered; (iv) probative value of the evidence; (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends; (vi) any prejudice to a party which the admission of such evidence might entail; (vii) any other factor which should in the opinion of the court be taken into account; is of the opinion that such evidence should be admitted in the interests of justice.”⁶

[25] Granting condonation where no prospects of success exist amounts to *brutum fulmen*.⁷

Application of legal position to the facts and findings

[26] The parties in the instant matter are effectively at variance on whether or not the delay has been adequately and satisfactorily explained with the respondent maintaining, in effect, that the delay stretches from 03 June 2015 when the certificate of non-resolution was issued to May 2016 when the papers were filed.

[27] The parties are, further, in dispute over whether or not the applicant became aware that there existed no possibility of re-employment in March 2016 as opposed to the beginning of January 2016 regard being had to the delay involved between the relevant date and the date on which the referral to this court was made.

⁵ See *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 3 SA 623 (A).

⁶ See section 3(1) of the Law of Evidence Amendment Act 45 of 1988 and *PSA of South Africa v Minister of Department of Home Affairs and Others* [2013] 3 BLLR 237 (LAC).

⁷ See *Rashavha v Van Rensburg* 2004 2 SA 421 (SCA).

- [28] It is true that the 90 (ninety) day period limited for referring disputes for arbitration and adjudication starts running from the date of certificate of non-resolution and *in casu* from the 03 June 2015. It is, therefore, correct that such a period expired on 01 September 2015 in the instant matter. The period of delay, thus, spans more than seven months from 2 September 2015 to the date of filing of the statement of claim, the first day being 02 September 2015 inclusive and the last day excluded.
- [29] I am, however, satisfied that good cause exists for accepting, for practical purposes, that the applicant only became aware of the need to refer the dispute for adjudication on 03 September 2015 when the jurisdictional ruling was issued. The delay involved stretching from 02 September 2015 to and including 90 days after the 03 September 2015 *viz.* 03 December 2015 can, in my view, fairly be regarded as *dies non* in the calculation of the period of delay. The delay in question is, therefore, condonable.
- [30] The question is, therefore, whether or not the delay between 03 December 2015 and 04 May 2016 being the date on which the condonation application was filed with the registrar of this court *ex facie* the date stamp on the notice of motion has been explained fully and satisfactorily.
- [31] The applicant did not file any reply in response to the respondent's opposing affidavit. In its opposing papers the respondent disputes that the applicant became aware of the deadlock in the re-employment negotiations in March 2016 and maintains that it was at the beginning of January 2016. The deponent on behalf of the respondent, however, has no personal knowledge of the facts insofar as according to him the mine captain informed the applicant accordingly at the beginning of January 2016. Such evidence is hearsay and is generally not admissible as evidence according to our law. The applicant did not consent to its admission and no application serves before me for its admission as effectively contemplated by section 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988. No reason is apparent from the instant application as to why it cannot be given by the mine captain involved.

- [32] The piece of evidence in question is, therefore, inadmissible against the applicant with the consequence that his evidence in the relevant regard stands unrefuted before the court. It is worth noting that it is not the applicant's case that there was any agreement with the respondent that litigation would be suspended during the relevant period. He only believed that it was advisable for him to give such efforts a chance.
- [33] As for the delay involved between March 2016 and the filing of the statement of claim the applicant's explanation is neither admitted nor denied by the respondent which simply points out that it has not knowledge of the major strain the applicant was going through as a result of the events of the previous year and the desperate situation he found himself in. The explanation in question is, in my view, reasonable and consonant with undisputed events and experiences he went through during the relevant period.
- [34] The parties are, further, at odds as to the applicant's prospects of success in his claim for unfair dismissal. As indicated above the applicant did not file a replying affidavit in response to the respondent's opposing papers.
- [35] In the application the applicant effectively contends that no fair procedure was followed in effecting the dismissal and he was not even advised of the reason for the dismissal. He, as such, contends that the dismissal was both procedurally and substantively unfair.
- [36] On its part, the respondent, through its Employee Relations Manager, painstakingly contends that the applicant is bound by the collective agreement concluded with AMCU on or about 11 October 2015 in terms of which AMCU and its members waived their rights to challenge the procedural and substantive fairness of relevant large scale retrenchments as well as the section 189A process which commenced on 15 January 2013 and which agreement was expressly extended to non-parties such as the applicant in terms of section 23(1)(d) of the LRA.

- [37] The respondent-friendly test applies in this matter insofar as the applicant seeks a final relief on motion in the form of condonation.
- [38] The effect of the respondent's version is that the applicant has no prospects of success in his claim whatsoever. The test for prospects of success is, however, a *bona fide* case which, though open to some doubt, carries some prospects of success.⁸
- [39] I am in any event obliged to apply the respondent-friendly test insofar as the dispute in this regard is concerned. The respondent's version does not render prospects reasonable. The interests of justice, in my view, are such that to grant condonation in the circumstances of the instant matter would amount to *brutum fulmen* no matter how reasonable and acceptable the explanation for the delay may be.
- [40] In the result no good cause exists for condonation.
- [41] As for costs I am persuaded by the material before me that the requirements of law and fairness cry out for costs to follow the result insofar as the parties prayed for an order of costs against each other in the papers.

Order

- [42] In the result:
1. The application is dismissed with costs.

LJ Lekale

Acting Judge of the Labour Court of South Africa

⁸ See *Chetty v Law Society (TVL)* *supra*.

Appearances

For the applicant: Mr J Parsons (Parsons Attorneys)

For the respondent: Advocate P Maharaj-Pillay

Instructed by: ENS Africa Inc.

LABOUR COURT