



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Not of interest to other judges

Case no: JS 438/10

In the matter between:

SACWU obo PETER NDLOZI

Applicant

And

KARBOCHEM (PTY) LTD

Respondent

Heard: 02 March 2018

Delivered: 20 March 2018

Summary: Practice and procedure: Condonation application – Inadequate explanation of delay in delivering statement of claim – Excessive delay involved – Respondent-friendly test applicable as to prospects of success – Not even necessary to consider prospects of success – Condonation not in interests of justice.

JUDGMENT

LEKALE, AJ

Background and introduction

- [1] The applicant's member was employed by the respondent at its Newcastle plant until 30 November 2009 when he was dismissed following a disciplinary enquiry into allegations of creating a hostile environment at the workplace levelled against him.
- [2] The applicant's member felt aggrieved by his dismissal, which he viewed as a form of victimisation in the light of the grievance he had lodged, and referred the dispute to the bargaining council having jurisdiction for resolution.
- [3] The matter remained unresolved after an attempt at conciliation made on 25 January 2010 and was, eventually, ruled adjudicable by this Court at arbitration level following a preliminary point of lack of jurisdiction raised by the respondent.
- [4] The parties, thereafter, concluded an agreement in terms of which the respondent, *inter alia*, undertook not to oppose the applicant's application for condonation of the late referral of the dispute to the court on condition that the referral was delivered not later than 02 June 2010.
- [5] The referral was, however, only delivered more than three years after the agreed date on 16 August 2013 although it was, *ex facie* the same, signed on 01 June 2010.
- [6] The respondent filed a special plea on 30 August 2013 to the effect that the referral was filed out of time and was not accompanied by an application for condonation.
- [7] The applicant subsequently filed an application for condonation for the late referral on or about 20 May 2016 and more than five years after the date of the certificate of non-resolution.

- [8] The applicant, further, applies for condonation of the late delivery of the condonation application itself as the first prayer in the Notice of Motion.
- [9] This is, therefore, first an application for condonation of the late delivery of the condonation application and secondly an application for condonation of the late filing of the statement of claim.

Issues for determination

- [10] The parties are *ante omnia* at variance on whether or not good cause exists for condonation of the late application for condonation of the late delivery of the statement of claim.
- [11] In the event of the preceding question being decided in the affirmative, then and only in that eventuality I am enjoined to determine whether or not good cause exists for condonation of the late delivery of the applicant's statement of claim.

Depositions and contentions for the applicant

- [12] The applicant's member, Peter Ndlozi, deposes, *inter alia*, to the effect that during or about the latter part of October 2014 he travelled to the applicant's main office in Johannesburg to enquire after progress in the matter and it was the first time the applicant's General Secretary ("GS") became aware of the same as the employment of the previous GS, who was handling the same, was said to have been terminated during or about December 2013. The new GS searched in vain for the file and eventually procured a copy of the court file on or about 28 October 2014. The applicant's attorneys of record were, thereafter, instructed and consultation with counsel took place on 04 December 2014. Counsel, thereafter presented his quote for professional services to be rendered. The applicant lacked the required funds and only accepted the quote on or about 23 February 2015. Counsel could, however, not commence work due to previously arranged commitments until about 31 March 2015 and 26 April

2015 when he settled the notice of amendment and the condonation application, respectively.

[13] He was not in a financial position to instruct his own legal representatives and it would, further, not have been cost effective for the applicant to brief another counsel who would, in any event, have had to qualify himself by familiarising himself with the matter which would have resulted in duplication of legal costs for the applicant. He and the GS do not know why the statement of claim was not delivered timeously when it was signed on 01 June 2010. He has excellent prospects of success as the respondent was not entitled to dismiss him. The matter is of outmost importance to him and the court should take the opportunity to send a strong message to employers not to victimise employees for exercising their rights. He is an experienced employee and it would be to the respondent's advantage to re-employ him. The injustice committed against him outweighs by far the respondent's interest in finality.

[14] In argument before the court Ms Mosala concedes that the referral is extremely late but submits, *inter alia*, that none of the remissness involved is attributable to the applicant's member who genuinely believed that the applicant's erstwhile GS was handling the matter properly.

Depositions and contentions for and on behalf of the respondent party

[15] The respondent's Human Capital Specialist deposes, *inter alia*, to the effect that incidents leading to the dismissal of the applicant's member date as far back as 2004 and the respondent has been prejudiced in its ability to plead to the allegations. The applicant should, in law, have applied for condonation as soon as it realised that it was out of time. In the instant matter the delay involved is inordinate and there exists no full and proper explanation for the same. The applicant's member has simply no prospects of success in his claim.

[16] Mr Buirski submits on paper and in argument before the court, *inter alia*, to the effect that there is no adequate and acceptable explanation for the

delay in applying for condonation and in filing the statement of claim late. There is, as such, no reason for the court to consider prospects of success in the circumstances according to case law. Even if such an exercise is undertaken it is clear from the respondent's opposing papers that there is no reason to believe that the applicant has any prospects of success in his claim.

Applicable legal position

- [17] The test in the instant matter 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, prospects of success, prejudice to the respondent and importance of the matter to the applicant.¹
- [18] 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 really came about and to assess its conduct and motives".²
- [19] "Condonation must be applied for as soon as the party concerned realises that it is required."³
- [20] An inadequate or unacceptable explanation for the delay renders it unnecessary for a court to consider prospects of success in a condonation application.⁴
- [21] Prescribed time limits in litigation seek to obviate inordinate delays that compromise the interests of justice insofar as time is the worst enemy of human memory.⁵

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 *Minister of Agriculture and Land Affairs v CJ Rance (Pty) Ltd* 2010 4 SA 109 (SCA) para [39] and *Arnott v Kunene Solutions and Services (Pty) Ltd* [2002] 8 BLLR 722 (LC) at para 34.

⁴ See *GIWUSA obo Heyneke v Klein Karoo Korporasie Bpk* [2005] 8 BLLR 791 (LC) at paras 17 and 18 and *Grootboom v National Prosecuting Authority and Another supra*.

- [22] Where a final relief is sought in motion proceedings and an irreconcilable factual dispute exists a respondent-friendly test applies in that the relief sought should be consistent with common cause and/or undisputed facts and facts alleged by the respondent.⁶

Application of legal position to the facts and findings

- [23] The parties are correctly *ad idem* that the delays involved are inordinate and in respect of the filing of the statement of claim spans multiple years while in the case of application for condonation endured for more than one and half years.
- [24] The delay involved in applying for condonation is effectively attributed by the applicant to its erstwhile attorneys whose member has reported to the law society for discipline.
- [25] I am persuaded by the facts relating to the delay in applying for condonation after the respondent filed a special plea that none of the remissness is attributable to the applicant's member who indisputably stays in Kwazulu Natal and has irregular income. He reasonably expected the lawyers to do the necessary after the delay in referring the dispute to the court for adjudication was discovered. In my view it is in the interests of justice to condone the delay in that regard.
- [26] As far as the delay in referring the matter to court is concerned there is simply a glaring lacuna in the explanation of the same with the applicant effectively lifting its shoulders and throwing its hands in despair pointing out that it does not know why the referral was not made timeously. The application is simply silent on the efforts, if any, made to establish the facts underlying the default in question. Nothing is apparent *ex facie* the application with regard to the whereabouts of the applicant's erstwhile GS who was responsible for handling the matter at the time when the referral was supposed to be made. The delay in question is extremely excessive

⁵ See *Mohlomi v Minister of Defence* 1997 1 SA 124 (CC) at para [11].

⁶ See *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 3 SA 623 (A).

and unaccounted for. The applicant's member is also not without any fault insofar as he contributed to the delay by not keeping contact with the applicant's office for more than four years after the date on which the referral was supposed to be made. Being a shop steward he is reasonably expected to have been aware of time limits involved and to have kept the applicant's office on its toes. In my view had he kept reasonable contact with the applicant the default would have either been avoided or discovered within a reasonable time.

[27] A balanced conspectus of the relevant factors indicates that it is not in the interests of justice to grant condonation *in casu* regard being had to the respondent-friendly test applicable in motion proceedings where a final relief is sought and facts are irreconcilably in dispute. The respondent disputes intensely that the applicant's member has good prospects of success in his claim for victimisation and grapples with the facts in that regard.

[28] The requirements of law and fairness cry out for costs to follow the event in the present matter regard being had, *inter alia*, to excessive delay involved and the fact that the parties prayed for a costs order against each other in the papers.

Order

[29] In the result I make the following order:

1. The application for condonation of the late filing of the condonation application is condoned without an order as to costs;
2. The application for condonation of the late filing of the statement of claim is dismissed with costs.

LJ Lekale

Acting Judge of the Labour Court of South Africa

LABOUR COURT

Appearances

For the applicant: Adv Mosala

Instructed by: Matlatle Attorneys

For the respondent: Adv P Buirski

Instructed by: Salijee Govender Van der Merwe Inc

LABOUR COURT