



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JS 641/16

In the matter between:

RORY DINKELMAN

Applicant

and

FRUIT AND VEG CITY GAUTENG (PTY) LTD t/a

FOODLOVERS MARKET

Respondent

Heard: 13 October 2017

Delivered: 23 March 2018

JUDGMENT

TLHOTLHALEMAJE, J.

Introduction:

- [1] The applicant seeks condonation for the late filing of his statement of case. As per his claim, the applicant seeks an order declaring his dismissal by the respondent to be automatically unfair within the meaning of section 187 of the Labour Relations Act (LRA)¹, or in the alternative, that the dismissal was procedurally and substantively unfair. The application is opposed.

¹ Act 66 of 1995

- [2] The statement of claim was filed and served on 20 October 2016, together with an application for condonation. The respondent had filed an answering affidavit on 24 November 2016. The applicant elected not to file a replying affidavit.

Preliminary points:

- [3] The respondent's answering affidavit to the condonation application was filed out of time by some 20 days. The applicant did not file a notice of objection as contemplated in clause 11.4.2 of this Court's Practice Manual, nor did he seriously oppose the granting of condonation in that regard.
- [4] In opposing the application, the respondent raised a preliminary point to the effect that the Court lacked jurisdiction to adjudicate the dispute on the grounds that subsequent to his dismissal, the applicant had only referred an alleged unfair labour practice dispute to the Commission for Conciliation Mediation and Arbitration (CCMA), which dispute was also recorded by the CCMA on the certificate of outcome as being one that was conciliated. It was contended that the alleged unfair labour practice dispute was referred on 2 February 2016, prior to his dismissal, which took place on 11 February 2016.
- [5] To the extent that this was the case, it was contended that the certificate attached to the statement of case pertained to a different dispute other than an automatically unfair dismissal, and since the applicant had relied on it in referring the latter dispute, the Court lacked the necessary jurisdiction to adjudicate the matter, particularly since the dispute sought to be adjudicated was not conciliated.
- [6] It is trite that for this court to have jurisdiction to adjudicate alleged unfair dismissal disputes that ordinarily ought to be adjudicated², that dispute must

² Section 157(5) of the LRA provides that:

"Except as provided for in section 158(2), the Labour Court does not have jurisdiction to adjudicate an unresolved dispute if this Act or any employment law requires the dispute to be resolved through arbitration."

have been referred for conciliation³. For the purposes of adjudication, and as further evident from the provisions of section Sections 115(1), 133(1) and 135(1) of the LRA. it is further trite that the dispute conciliated, must have been the dispute referred by a party.

- [7] As to whether a particular dispute was referred to conciliation or not involves an examination and construction of the contents of the referral documents⁴. In this case, Annexure 'LDJ3' to the answering affidavit is a copy of a referral for Con/Arb dated 24 February 2016, in which the applicant had alleged the nature of the dispute as pertaining to an unfair labour practice and a dismissal. He further summarised the facts of the dispute as pertaining to an alleged automatically unfair dismissal, which dispute arose on 11 February 2016 and sought reinstatement with back pay / maximum compensation.
- [8] A Certificate of outcome issued on 12 April 2016 however only reflects that a matter pertaining to an alleged unfair labour practice referred to the CCMA on 2 February 2016 remained unresolved. This copy is materially different to the one furnished by the applicant as attached to his statement of claim, which reflect the same information other than the date that the dispute was referred for conciliation, which is reflected as 12 February 2016.
- [9] Both certificates however reflect that the dispute should be arbitrated. In my view, and further to the extent that it was common cause that the respondent did not attend the conciliation proceedings for whatever reason, and it further being common cause that the applicant was dismissed on 11 February 2016, I am satisfied that based on the contents of the referral form, and notwithstanding the fact that the certificate of outcome merely reflects an alleged unfair labour practice dispute having been referred, this Court has the requisite jurisdiction to adjudicate the alleged automatically unfair dismissal dispute as claimed in the applicant's statement of claim.

³ See *National Union of Metal Workers of South Africa v Driveline* [1999] ZALC 157; 2000 (4) SA 645 (LAC); *National Union of Metal Workers of SA v Intervale (Pty) Ltd* [2014] ZACC 35; (2015) 36 ILJ 363 (CC); 2015 (2) BCLR 182 (CC); *September and Others v CMI Business Enterprise CC* (CCT279/16) [2018] ZACC 4 (27 February 2018)

⁴ *Intervale* at para 100

- [10] It follows that the preliminary point raised by the respondent cannot be upheld. What remains however is whether the applicant has shown just cause for the delay in referring this matter for adjudication.

Condonations and the legal position:

- [11] The Court's discretion when considering applications for condonation derive from the provisions of section 191(11)(b) of the LRA and Rule 12 of the Rules of the Conduct of Proceedings. Thus, on good cause shown, the Court may condone the non-observance of the time frames stipulated in section 191 of the LRA or in its Rules.
- [12] The test for condonation as enunciated in *Melane v Santam Insurance Co. Ltd*⁵ remains authoritative. Added to the factors to be considered in *Melane* is whether overall, it is in the interests of justice to grant condonation. To the extent that the dispute was to be referred to this Court, section 191(5)(b)(i) read with section 191(11)(a) of the LRA required that the referral should have been made within 90 days from the date that the certificate of outcome was issued. In this regard, the dispute was supposed to have been referred to this Court on or no later than 15 July 2016. The referral was therefore some four months out of time, which is excessive, *albeit* not in the extreme.

The explanation for the delay:

- [13] To enable this Court to properly exercise its discretion, a party seeking condonation must set out all the facts and circumstances relating to the delay, and most importantly, must provide a satisfactory explanation for each

⁵1962 (4) SA 531 (A) at 532B-E, where it was held that;

'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'

period of the delay. Any period of delay that is unaccounted for, will result in condonation being refused⁶.

- [14] The applicant's explanation for the delay was that upon receipt of a copy of the certificate of outcome, he had requested a case number from this Court on 20 July 2016, and that therefore his referral to the Court was only nine days out of time. This contention obviously lacks merit. A request for a case number cannot be equated with the filing of a statement of claim as contemplated in Rule 6 of the Rules of this Court. To the extent that he had only filed a proper statement of claim on 20 October 2016, the delay is not nine days, but about some four months.
- [15] The applicant further attributed the delay to the fact that he is a member of Labour Project, a monthly membership organisation that provides labour related services to its members for a monthly fee. When he initially referred an unfair labour practice (related to promotion) dispute to the CCMA, he was represented by a different attorney (Quinton Horne), who was mandated by Labour Protect to pursue that matter. When the matter had to be referred to this Court as a result of the applicant's dismissal, he had to get a different set of attorneys (current attorneys of record) who originate from Cape Town.
- [16] The applicant further attributed the delay to the fact that when the matter was handed over to a new set of attorneys, there were delays in taking instructions as well as preparing the documents. He however contended that since then, he had done everything possible to refer the matter timeously, hence the filing of the statement of claim and the application for condonation simultaneously. He further averred that he was a lay person and relied upon his attorneys to ensure that the matter was properly before the Court.
- [17] In this case, I am of the view that the Applicant's explanation falls short in accounting for each period of the delay. The nub of his explanation is to blame his legal representatives or people that were supposed to assist him and, and it is trite that there is a limit beyond which a litigant cannot escape

⁶ See NUMSA and another v Hillside Aluminium [2005] 6 BLLR 601 (LC)

the results of his representative's lack of diligence⁷. In opposing the application, it was correctly pointed out on behalf of the respondent that the applicant's explanation is of a general nature and void in detail, particularly since it must be taken into account that he was always legally represented.

- [18] The applicant does not give details regarding when Labour Protect was contacted, who had assisted him in Labour Protect, when the new set of attorneys were secured, and the reason it took some four months before a statement of case could be filed. Significantly, and despite apportioning blame on Labour Protect or mandated attorneys, no confirmatory affidavits were forthcoming to explain further what the cause of the delay was. The excuse that the applicant is a layperson is indeed lame in the light of him being legally assisted or entitled to legal assistance from Labour protect by virtue of his membership of that organisation. That association in my view cannot be any different to that between attorney and client. In the light of these deficiencies in the explanation for the delay, it follows that it ought to be rejected as being unsatisfactory.

Prospects of success:

- [19] In *NUM v Council for Mineral Technology*⁸, it was held that;

".... 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"

- [20] In the light of the nature of the delay in referring the dispute, and further in view of the unsatisfactory explanation proffered for the delay, it would not, based on the above authority, be necessary to deal with the applicant's prospects in respect of the main claim. However, for the sake of completeness, it is significant to note that it was common cause that the applicant was dismissed for acts of alleged misconduct involving making false and damaging statements towards the company in that as a manager,

⁷ *Saloojee & another NNO v Minister of community Development* 1965 (2) SA 135 (A). See also *Buthlezi & others v Eclipse Foundries Ltd* (1997) 18 ILJ 633 (A) at 638I–639A

⁸ 1999 3 BLLR 209 (LAC) at p211 paragraph G-H

he aired his grievances to junior staff, including telling them that he was going to sue the company; disrespecting the Regional HR Manager; and using his cell phone on the shop floor contrary to company policies.

- [21] According to the internal enquiry findings and sanction report⁹, the applicant had pleaded guilty to the charge of making false and damaging statements towards the company. The chairperson had also found him guilty of the charge of disrespecting the HR Manager.
- [22] The applicant however contended that his dismissal was automatically unfair as he had raised an internal grievance. He based his contentions on the timing of his dismissal, the respondent's alleged refusal to address him on the issues raised in his grievance, and the harshness of the sanction of dismissal. In his statement of claim, the applicant went at length in disputing the fairness of the sanction, contending *inter alia* that it was excessive as there was a failure to apply progressive discipline.
- [23] In the original statement of claim, it is safe to conclude that the details in regard to the reason the dismissal was viewed as automatically unfair were sketchy, and the manner with which the claim was pleaded cannot *prima facie*, point to an automatically unfair dismissal. This had resulted in an exception being raised by the respondent in terms of Rule 11 of the Rules of this Court.
- [24] An amended statement of claim was filed on 28 June 2017 after the respondent had filed a Rule 11 application to complain about the irregularities in the original statement of claim and the fact that the statement did not contain clear and concise statement of the legal issues.
- [25] It was only in the amended statement of claim that an elaborate history of grievances was proffered to indicate the reason it was alleged that the dismissal was automatically unfair. What is significant however for the purpose of a determination of this application is the averments made in the

⁹ Annexure 'RD4' to the Statement of Claim

application for condonation and the respondent's answer thereto, bearing in mind that the applicant failed to file a replying affidavit.

- [26] The respondent had denied that there were grievances pending at the time that the applicant was dismissed, or that there was any causal connection between the reason for the dismissal and the litany of grievances lodged by the applicant. It was argued that there was no basis for the applicant to be dismissed for merely lodging a grievance, particularly in view of his previous history of lodging several grievances in regard to a variety of matters.
- [27] The respondent further denied that it had unilaterally changed the applicant's job title, duties and responsibilities whilst still employed, as he was at all material times consulted over these issues. To the extent that the applicant had continuously raised grievances and complaints about his promotion or remuneration, these were addressed at all relevant times, but the applicant had consistently remained disgruntled. It was contended that his dismissal related to nothing else other than the allegations of misconduct, and that the dismissal was procedurally and substantively fair.
- [28] In the light of the failure to file a replying affidavit, and further having had regard to the amended statement of claim and the founding affidavit in respect of this application, I am satisfied that the applicant as correctly pointed out on behalf of the respondent, has failed to provide any factual basis to substantiate his allegation that he was dismissed for any other reason but for misconduct. As further pointed out on behalf of the respondent, the invariable conclusion to be drawn from the applicant's pleadings and as further evident from the written heads of argument in regard to this application, is that his claim essentially relates to the fairness of his dismissal and in particular, the severity of the sanction, and this Court is not the proper forum to deal with such disputes. In the end, I am not satisfied that the applicant has demonstrated a reasonable prospect of success in respect of his alleged automatically unfair dismissal claim.

Other considerations and conclusion:

[29] Based on a conspectus of facts as elucidated above, it follows that the applicant has not shown good cause as to why the late filing of his statement of claim should be condoned. It cannot be doubted that it is the respondent that stands to suffer extreme prejudice should condonation be granted in circumstances where a delay of about four months is not sufficiently and in detail, accounted for, and further in circumstances where on the papers, the applicant's prospects of success on the merits of the main claim are poor.

[30] In *Brummer v Gorfil Brothers Investments (Pty) Ltd*¹⁰, it was stated that the interests of justice should be an overall consideration when dealing with applications for condonation. In the light of the factors considered and conclusions reached in that regard, the interests of justice dictate that the application for condonation should not be granted. Further having further had regard to considerations of law and fairness, I am of the view that a cost order is not appropriate in this case.

Order:

[31] In the premises, the following order is made;

1. The late filing of the Respondent's answering affidavit to the application for condonation is condoned
2. The application for condonation for the late filing of the Applicant's statement of claim is dismissed.
3. There is no order as to costs.

Edwin Tlhotlhamajje

Judge of the Labour Court of South Africa

¹⁰ [2000] (2) SA 837 (CC) at 839 F

APPEARANCES:

For the Applicant:

Mr. K Munro of RM Brown
Attorneys

For the Respondent:

Adv. C Goosen

Instructed by:

Van Gaalen Attorneys

LABOUR COURT