



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

CASE NO: JS829/17

In the matter between:

JOHAN

LOUWRENS

Applicant

and

VITAL

CASTINGS

CC

Respondent

Application heard: 22 June 2018

Judgment delivered: 25 June 2018

JUDGMENT

VAN NIEKERK J

- [1] This is an application to condone the late referral of a dispute to this court for adjudication.
- [2] The material facts are not in dispute. There are two referrals to the court. The first is a dispute about an unfair labour practice; the second a disputed unfair dismissal. It would appear that the disputes were consolidated, and that they were set down for arbitration on 7 July 2017. On 10 July 2017, the commissioner made a ruling to the effect that the CCMA lacked jurisdiction to entertain the disputes and that they should be referred to this court for adjudication. The commissioner held that the applicant's unfair dismissal dispute concerned a dismissal for a reason that is automatically unfair, since the applicant alleged that the reason for his dismissal was that he had made a protected disclosure to the department of labour in respect of unsafe working conditions. The unfair demotion dispute, the commissioner found, was similarly grounded in the applicant's allegations of an unsafe working condition and directly related to his dismissal. In these circumstances, and with the parties' broad agreement, the commissioner held the CCMA had no jurisdiction and advised the applicant to refer both disputes to this court.
- [3] The applicant's statement of case was filed on 13 October 2017. The applicant concedes that the disputes were filed 284 and 309 days late respectively, and that these delays are excessive.
- [4] The applicant's explanation for the delay is largely one of ignorance – he did not understand the jurisdictional complexities and it was only on 10 July 2017 when the commissioner attempted to ascertain the real dispute between the parties that he appreciated that he was in the wrong forum. His belief that he had correctly referred the disputes had been sustained by the reference in the certificate of outcome granted in the unfair labour practice dispute to the effect that the dispute should be referred to arbitration, and in the unfair dismissal dispute by the ruling that his late referral to arbitration should be condoned.
- [5] In respect of the delay after 10 July 2017, the applicant avers that he experienced some difficulty contacting a specialist firm, with which he made

contact in mid-August 2017, and that he managed to secure a consultation on 11 September 2017. The need to secure and collate documentation and afford his attorney proper instructions had the result that the statement of case was filed only on 13 October 2017.

- [6] In addressing his prospects of success, the applicant states that he was discriminated against and dismissed on account of having made a protected disclosure. The disclosure on which the applicant relies comprises a report to the department of labour at its local and provincial offices.
- [7] In relation to the issue of prejudice, I was advised that the applicant sought orders of compensation, and that he did not wish to be reinstated or re-employed.
- [8] The court has a discretion, to be exercised judicially, to grant condonation. Among the factors usually relevant for consideration are the degree of lateness, the explanation therefor, the prospects of success, the prejudice that parties will suffer if condonation is granted or refused, and the importance of the case. None of these factors are individually decisive and the court must consider all the facts. In the final analysis, it is a matter of fairness to the parties. Condonation applications require a court to balance various interests and factors, having regard to all of them with none of them being decisive. (See *Melanie v Santam Insurance Co. Ltd* 1962 (4) SA 531 (A) at page 532; *NEHAWU obo Mafokeng and Others v Charlotte Theron Children's Home* [2004] 10 BLLR 979 (LAC).
- [8] As I have indicated, the applicant concedes that the delay is excessive. The explanation for the delay, certainly until the jurisdictional ruling, is acceptable. The jurisdictional bifurcation between this court and the CCMA is often complex, and despite the respondent's assertion to the effect that the applicant is engaged in no more than forum shopping and that he made a decision to abandon his claims at the CCMA, this is not what is reflected in the commissioner's ruling. On the contrary, the ruling records there the parties were 'essentially in agreement' that the dispute had to be referred to this court, and there is no indication the real

reason for the dismissal emerged other than during an attempt by the commissioner to narrow the issues dispute. In regard to the delay after the jurisdictional ruling was issued, I accept that the applicant is based in Kroonstad, that he was required to look for an attorney sufficiently experienced to draft the statement of claim and that there were delays in the process that were not the consequence of any dilatory conduct on the part of the applicant. In short, the explanation for the delay is not unreasonable. The present application really hinges on the applicant's prospects of success. The court is required to be satisfied that the applicant has made out a *prima facie* case the respondent does not dispute that the applicant made reports to the Department of labour and their action was taken against the respondent is consequence. The respondent contends that the applicant was dismissed for legitimate reasons, and ascribes his medical condition to factors other than those which have their origins in the workplace. On the face of it, if the applicant succeeds in establishing the averments made in his statement of claim, his claim of having suffered an occupational detriment on account of having made a protected disclosure, his claim may well have merit. To the extent that the respondent submits that the applicant was dismissed for *bona fide* reasons, most claims of dismissal or demotion consequent on having made a protected disclosure involves an apparent and a real reason to dismiss, an issue that is best resolved by evidence. In regard to the issue of prejudice, apart from the obvious but minimal prejudice consequent on delay, it seems to me that the prejudice to the applicant in closing the doors of the court to him outweighs any prejudice to the respondent in having to defend the applicant's claims. This is particularly so where the applicant has abandoned the remedy of reinstatement, and where the only issue should the applicant succeed in establishing his claim is the quantum of any compensation to which he may be entitled.

- [9] In short, I am satisfied that notwithstanding an excessive delay, the applicant acted with sufficient diligence to pursue his claim after a ruling that the CCMA, where those claims were initially lodged, had no jurisdiction, that on the face of it, his prospects of success are not such that condonation ought to be refused and

finally, that on balance, given the nature of the relief sought by the applicant the consideration of prejudice favours the applicant. For these brief reasons, the application for condonation ought to be granted.

[10] Finally, in relation to costs, the court has a broad discretion in terms of s 162 of the LRA to make orders for costs according to the requirements of the law and fairness. Those interests are best served by each party bearing its own costs.

I make the following order:

1. The late filing of the applicant's statement of claim is condoned.

André van Niekerk
Judge

REPRESENTATION

For the applicant: Mr Brandmuller, Brandmuller Attorneys

For the respondent: Adv. H Gerber, instructed by Welman and Bloem Attorneys