



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: JS 385/16

In the matter between:

MAPULE MUSHAISANO SIBANYONI

Applicant

and

TRANS AFRICAN PROJECTS (PTY) LTD

Respondent

Heard: 11 May 2018

Delivered: 28 June 2018

**Summary: Condonation application for the late filing of a statement of case.
No proper explanation for the delay tendered. Application dismissed.**

JUDGMENT

PRINSLOO J

Introduction

- [1] The Applicant seeks condonation for the late filing of her statement of case.
- [2] The application is opposed.

Background facts

- [3] The Applicant was employed by the Respondent as a document controller/reception assistant. On 10 April 2015 a formal consultation session was held where the Applicant was informed that the Respondent would embark on a restructuring exercise, as provided for in the Labour Relations Act¹ (LRA) and that her position may be affected.
- [4] As an alternative to dismissal, the Respondent offered the Applicant a position in the form of working on a rotational basis of one week at reception and one week in document control. This offer was made to ensure the Applicant's job retention.
- [5] The Applicant rejected this offer and requested to rather take a voluntary retrenchment package.
- [6] In accordance with the Applicant's request and on 23 April 2015 the Applicant and the Respondent concluded a severance agreement wherein the parties agreed to the termination of the Applicant's services with effect from 30 April 2015. The parties also agreed to the amount to be paid to the Applicant. The agreement was in full and final settlement of 'all claims and disputes which have arisen or which may arise in future between the parties in relation to the employee's employment with the Company and the termination thereof and whether such claims or disputes arise in contract, delict, equity, fairness, statute or otherwise.'
- [7] In May 2015 the Applicant referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) under case number GAJB 10010-25, disputing *inter alia*, the calculation of her severance pay. The Respondent indeed miscalculated the Applicant's years of service and on 3 June 2015 the parties concluded a settlement agreement in terms of which the Respondent paid the Applicant an additional amount of R 8 000. This was the second settlement agreement concluded between the parties.

¹ Act 66 of 1995, as amended.

- [8] Notwithstanding the conclusion of the aforesaid agreements, the Applicant referred an unfair discrimination dispute to the CCMA on 26 October 2015 under case number GATW13383-15. The dispute was conciliated on 4 December 2015 and the matter was erroneously referred for arbitration. The dispute was set down for arbitration on 24 March 2016 when the CCMA issued a ruling that it lacked jurisdiction to adjudicate the Applicant's unfair discrimination dispute and the matter should be referred to the Labour Court.
- [9] The Applicant filed a statement of case on 26 July 2016 and it is evident from the legal issues and the relief sought, as set out in the statement of case, that the issues raised by the Applicant are twofold. Firstly, the Applicant challenges whether her dismissal based on operational requirements was justifiable and for a fair reason and she seeks an order that her dismissal be found to be substantively and procedurally unfair. Secondly, the Applicant's case is that she was unfairly discriminated against in the workplace on the basis of her race and she seeks an order that she was so discriminated against.
- [10] The Applicant filed an application for the late filing of her statement of case and the condonation application was enrolled for hearing on 18 November 2016. The Applicant failed to attend Court on 18 November 2016 and the matter was struck off the roll for lack of appearance. On 22 June 2017 the Applicant filed an affidavit in terms of the provisions of Rule 15 of the Labour Court Rules, requesting for the matter to be re-enrolled. The application for re-enrolment of the condonation application was granted on 13 March 2018 and the matter was enrolled for hearing on 11 May 2018.

The test for the grant of condonation

- [11] The relevant legal principles to be applied in an application for condonation are well established.

[12] This Court has a discretion, which must be exercised judicially on a consideration of the facts of each case and in essence it is a matter of fairness to both sides².

[13] In *Melane v Sanlam Insurance Co Ltd*³ it was held that:

‘... Among the facts usually relevant, are the degree of lateness, the explanation therefore, the prospects of success and the importance of the case. Ordinarily these facts are interrelated, they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there will be no point in granting condonation. What is needed is an objective conspectus of all the facts.’

[14] In this Court however the principles have long been qualified by the rule that where there is an inordinate delay that is not satisfactorily explained, the applicant’s prospects of success are immaterial.

[15] This Court has conventionally applied the approach that in the absence of a satisfactory explanation for a delay, the applicant’s prospects of success are ordinarily irrelevant.⁴ This principle was confirmed in *National Education Health and Allied Workers Union on behalf of Mofokeng and others v Charlotte Theron Children’s Home*⁵ where the Labour Appeal Court held that without a reasonable and acceptable explanation for a delay, the prospects of success are immaterial.

[16] In *Collett v Commission for Conciliation, Mediation and Arbitration*⁶ the Labour Appeal Court confirmed that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial and without good prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused.

² ‘Civil Procedure in the Superior Court, Harms at B27.6.

³ 1962 (4) SA 531 (A) at 532 C - F.

⁴ See *NUM v Council for Mineral Technology* [1999] 3 BLLR 209 (LAC).

⁵ (2004) 25 ILJ 2195 (LAC) at para 23.

⁶ (2014) 6 BLLR 523 (LAC).

- [17] The onus is on the applicant to satisfy the court that condonation should be granted. In employment disputes there is an additional consideration which applies in determining whether the onus has been discharged, as was held in *National Union of Metalworkers of SA on behalf of Thilivali v Fry's Metals (A Division of Zimco Group) and others*⁷:

‘There is, however, an additional consideration which applies in employment disputes in determining whether an applicant for condonation has discharged this onus. This is the fundamental requirement of expedition. The Constitutional Court has, as a matter of fundamental principle, confirmed that all employment law disputes must be expeditiously dealt with and any determination of the issue of good cause must always be conducted against the back drop of this fundamental principle in employment law.’

- [18] The fundamental requirement of expedition is not to be ignored. In *Toyota SA Motors (Pty) Ltd v CCMA and others*⁸ the Constitutional Court emphasised that one of the fundamental purposes of the LRA was to establish a system for the quick adjudication of labour disputes. When it assesses the reasonableness of a delay, the court must not lose sight of this purpose.
- [19] In summary: the Courts have endorsed the principle that where there is a delay with no reasonable, satisfactory and acceptable explanation for the delay, condonation may be refused without considering prospects of success and to grant condonation where the delay is not explained, may not serve the interests of justice. The expeditious resolution of labour disputes is a fundamental consideration.
- [20] Condonation for delays in all labour law litigation is not simply there for the taking. The starting point is that an applicant in an application such as the present seeks an indulgence and bears the onus to show good cause.
- [21] It is in this context that the application for condonation stands to be determined.

The degree of lateness

⁷ (2015) 36 ILJ 232 (LC)

⁸ (2016) 37 ILJ 313 (CC).

- [22] As already alluded to, the Applicant's statement of claim has two distinct causes of action namely an unfair dismissal based on operational requirements and an unfair discrimination claim based on the provisions of the Employment Equity Act⁹ (EEA).
- [23] The claim based on dismissal due to operational requirements was set down for conciliation on 3 June 2015 when the parties concluded a settlement agreement in full and final settlement of the said dispute.
- [24] The claim based on unfair discrimination was set down for conciliation on 4 December 2015, where after it was erroneously referred for arbitration.
- [25] Section 191(11)(a) of the LRA prescribes a 90-day period for referral of a dispute to the Labour Court for adjudication. The 90-day period is calculated from the date a commissioner has certified that the dispute remained unresolved.
- [26] In *casu* the dispute relating to unfair dismissal for operational requirements had to be referred within 90 days from 3 June 2015, thus by 1 September 2015, and the claim based on unfair discrimination had to be referred within 90 days from 4 December 2015, thus by 3 March 2016. The relevant date being the date on which the dispute was certified to remain unresolved.
- [27] The statement of case was filed with this Court only on 26 July 2016, clearly outside the prescribed 90-day period.
- [28] It is evident from a perusal of the statement of case that the Applicant conflated her retrenchment with a claim for unfair discrimination. The dispute relating to unfair dismissal for operational requirements was referred more than 10 months late and the claim based on unfair discrimination was more than 4 months late.
- [29] The delay is no doubt material and inordinate. In fact, it is excessive given the context within which labour litigation takes place and the system that is designed to ensure the effective and expeditious resolution of labour disputes.

⁹ Act 55 of 1998.

This is even more so where the LRA provides for a period of 90 days to file a statement of case, which period is in itself generous and lengthy.

[30] The degree of lateness is also material considering that the dispute arose as far back as 2015.

[31] The degree of lateness should however not be considered in isolation.

Explanation for the lateness

[32] A failure to comply with the generous period of 90 days, has to be explained and the reasonableness of the delay should be considered by having regard to the explanation for the delay.

[33] As the Applicant seeks an indulgence from the Court and as she bears the onus to satisfy the Court that condonation should be granted, it is incumbent upon the Applicant to provide the Court with a full explanation for every period of the delay. It is not sufficient simply to list significant events that occurred during the period in question as that does not assist the Court properly to assess the reasonableness of the explanation¹⁰

[34] The explanation for the delay has to be compelling, convincing and comprehensive and should cover every period of the delay.

[35] In her affidavit before Court, which was drafted with the assistance of an attorney, the Applicant provided the following explanation for the delay:

[36] The Applicant attended to her father who took ill and was admitted at a hospital in Thohoyandou since the beginning of April 2016. The Applicant was actively involved in caring for her father and she remained at his bedside. The Applicant's father passed away on 29 April 2016.

[37] The Applicant submitted that she was unable to engage the services of an attorney 'until recently' and the delay in filing her statement of case was a

¹⁰ see *IMATU obo Zungu v SALGBC and others* (2010) 31 ILJ 1413 (LC).

direct result of her not being in a position to seek legal advice. She failed to raise enough funds to enable her to engage the services of an attorney until 'recently'.

- [38] This is the entire explanation provided by the Applicant.
- [39] I have already alluded to the fact that the Applicant should provide a full explanation for every period of the delay. The longer the delay, the better the explanation should be.
- [40] The dispute relating to unfair dismissal for operational requirements had to be referred 1 September 2015. There is no explanation for the period between September 2015 and April 2016. A substantial period of the delay remained completely unexplained and this Court is, in the absence of any explanation, unable to assess the reasonableness of the delay.
- [41] The claim based on unfair discrimination had to be referred by 3 March 2016.
- [42] The only period of the delay that is explained, is April 2016, when the Applicant attended to her ill father. Her father passed away at the end of April 2016 and evidently there is no explanation whatsoever for the period prior to April 2016 and the period between May 2016 and 26 July 2016, when the statement of case was filed with this Court.
- [43] The Applicant made a vague statement about being unable to engage the services of an attorney 'until recently' without tendering any explanation as to why she was unable to do so or when she engaged an attorney to assist her. The Applicant's failure to raise enough funds, is also not explained. The Applicant does not tell this Court when she was able to raise the funds, when she instructed her attorney and what other attempts she made to obtain alternative assistance, for instance approaching a law clinic or the Legal Aid Board.
- [44] It is evident that the explanation tendered for the period of delay is bereft of any detail and lacks particularity. The Applicant did no more than to refer to

her father's sickbed in April 2016 and her inability to engage the services of an attorney in a sketchy manner without providing any particulars.

- [45] There are material and substantial periods of the delay that remained completely unexplained and for which the Applicant tendered no version as to what she did. In the instances where she tendered an explanation, it did not record in any degree of detail what transpired during the relevant period of delay but it was rather sketchy, bereft of any substance and detail and wholly inadequate.
- [46] The Applicant has to provide an explanation for every period of the delay to enable this Court to assess the reasonableness of the delay and the explanation for it. This the Applicant failed to do. The explanation she tendered is inadequate and far from compelling, convincing or comprehensive.

Prospects of success

- [47] Having found that the delay is inordinate and the explanation tendered not compelling or adequate, it leaves the issue of prospects of success.
- [48] In the authorities referred to *supra* the Courts have endorsed the position that the failure to provide a reasonable and acceptable explanation for the delay renders prospects of success immaterial.
- [49] In *casu* and in light of the said authorities and given that the Applicant has not provided a comprehensive, compelling or convincing explanation for the delay, her prospects of success are immaterial, and thus need not be considered.

Prejudice

- [50] This Court has a discretion, which must be exercised judicially on a consideration of the facts of each case and in essence it is a matter of fairness to both sides.

- [51] The Respondent submitted that it would suffer prejudice if condonation is granted as the Applicant provided no proper explanation for the late referral of her statement of case and because the parties concluded an agreement in settlement of all disputes. Even if condonation is granted, the Applicant has no prospect of succeeding with her case in future as the Respondent will raise the issue of full and final settlement concluded between them.
- [52] The Applicant on the other hand submitted that she would suffer injustice and prejudice should her application for condonation fail. This is so, she submitted, because she was unfairly dismissed for operational requirements and not in accordance with the requirements of the law. She will suffer harm if the doors of justice will be closed to her.
- [53] The stance adopted by the Applicant in approaching this Court and claiming unfair dismissal and discrimination, is detached from and in direct contradiction with the letter she addressed to the Respondent on 20 April 2015. In the said letter the Applicant recorded that she was offered a position but that she took the option of retrenchment and she thanked the Respondent for all it has done for her, for allowing her to be part of the team and specifically stated that it had been a pleasure working with and representing the Respondent.
- [54] Furthermore, the Respondent made payment to the Applicant of the monies due to her in terms of the agreements the parties concluded and the Applicant accepted such payment.
- [55] The refusal to condone the late filing of the statement of case will have the result that the Applicant will be denied the opportunity to pursue her case before this Court. However, the Applicant's prejudice in her unfair dismissal and discrimination claim is not real prejudice, as she requested a voluntary retrenchment package, where after the parties concluded an agreement in full and final settlement of all claims arising out of the employment relationship and all monies due were paid to the Applicant. The retrenchment dispute was even further settled at the CCMA on 3 June 2015. The Applicant has no basis to pursue her claim any further before this Court.

- [56] It is evident that the Applicant has not pursued her matter diligently. More than three years after she left the Respondent's employ, she is not one step closer to finality in this matter.
- [57] I have to endorse the aim of the LRA namely to resolve labour disputes speedily and without delay. Granting condonation in a case like this would not be in the interest of justice as it would undermine the statutory purpose of expeditious dispute resolution, another factor that weighs heavily in the Respondent's favour.
- [58] On an objective conspectus of all the facts, the Applicant's application for condonation falls hopelessly short off the mark. The Applicant did not discharge the onus to show good cause and to provide an acceptable and plausible explanation for the delay. For the above reasons, it will not be in the interests of justice that the application for condonation be granted.
- [59] In so far as costs are concerned, this Court has a broad discretion in terms of section 162 of the LRA to make orders for costs according to the requirements of the law and fairness. In my view the interest of justice will be best served by making no order as to costs.

[60] In the premises I make the following order:

Order

1. The application for condonation for the late filing of the Applicant's statement of case is dismissed;
2. There is no order as to costs.

Connie Prinsloo

Judge of the Labour Court of South Africa

LABOUR COURT

Appearances:

For the Applicant: In person

For the Respondent: Advocate F Venter

Instructed by: Cowan Harper Attorneys

LABOUR COURT