



Not reportable

**THE LABOUR COURT OF SOUTH AFRICA,
HELD AT JOHANNESBURG**

Case Nos: J 825/07 & JS 647/07

In the matter between:

BEVERLEY CARRINGTON-HALL

Applicant

and

SAFINTRA ROOFING (PTY) LTD

Respondent

Heard: 6 September 2018

Delivered: 18 September 2018

Summary: (Trial – condonation application – pre-trial minute not concluded – condonation application pending – further steps to finalise condonation application and pre-trial minute not taken – extraordinary delay in prosecuting matter not fully explained – prejudice of delayed trial significant)

JUDGMENT

LAGRANGE J

Background

- [1] Two matters were enrolled for determination: the applicant's original application to condone the late referral of her statement of case and the respondent's application to dismiss her condonation application and, by implication, her referral, on account of her failure to prosecute her application timeously. Because the two applications are closely interrelated they have to be considered together. In this judgment, I shall refer to the parties by their citation in the original condonation application.

Supplementary affidavit filed by the applicant

- [2] After the matter was heard, but the day before judgment was due to be handed down, the applicant filed 'supplementary submissions' in the form of an affidavit couched as an application to submit further evidence. The document was prefaced with a disclaimer by the applicant reaffirming her 'lack of familiarity' with labour law and requesting the court's indulgence of her request. Despite the belated submission of what was effectively an irregular submission of supplementary affidavit after pleadings in the matter had closed, the respondent was requested by the court to respond thereto, which it did.
- [3] Understandably, the respondent objected to the irregular nature of the step, and referred to the decision of this court in *Impala Platinum Ltd v Monageng Mothiba N.O. and Others*¹, which reaffirms the principles governing the admission of supplementary affidavits:

[4] The rules of this court regulating motion proceedings make no provision for the filing of a supplementary answering affidavit. The rules accord with those of the uniform rules of the High Court, which do not permit the filing of further affidavits, without the leave of the court. In the present instance, that leave has not been sought. In *Hano Trading CC v JR 209 Investments (Pty) Ltd* 2013 (1) SA 161 (SCA), the Supreme Court of appeal stated that the filing of further affidavits in motion proceedings is permitted only with the indulgence of the court, and that the court has the sole discretion whether or not to allow such affidavits. Where there is no reason place before the

¹ (JR2567/13) [2016] ZALCJHB 475 (10 June 2016)

court for requesting it to permit the filing of further affidavits, the court would be correct in ruling that the affidavits are inadmissible. This decision is consistent with a recent decision in this court. In *Bafokeng Rasimone Platinum Mine (Pty) Ltd v CCMA & others* (2015) 36 ILJ 3045 (LC), the court held that a party to review proceedings should be careful to ensure that its case is canvassed in full at the time of drafting and that after close of pleadings, additional affidavits will not be permitted, except perhaps in exceptional circumstances. In particular, it is not open to a party to raise points in additional affidavits that ought to have been raised at the appropriate time; ultimately, the admission of additional affidavits is a matter fairness to both parties.

- [4] In this instance pleadings in the original condonation application had closed years ago. The applicant took several years to file her opposing affidavit in the dismissal application and the replying affidavit in that application was filed by mid-June 2018. The applicant had at least a couple of months to think about whether or not she wanted to place further facts before the court and apply to file a supplementary affidavit with a request to have it admitted. It was only after the matter was argued that she saw fit to try and place additional information before the court. To permit such a practice where there is no justification why the information could not have been provided in the original pleadings or at least before the matter was argued would lead to interminable motion court proceedings. To admit the admission of belated supplementary allegations under such circumstances would require an extraordinary justification in my view. Merely claiming to be unfamiliar with court procedure is not a good enough justification in the circumstances of this matter.
- [5] In any event, even if I was prepared to admit the supplementary affidavit, it would not materially assist the applicant in overcoming the biggest problem she has, namely the delay of several years before she filed her opposing affidavit or took any other steps to prosecute her claim, for which her explanation is woefully inadequate. In her supplementary papers, the key points she raises are that her advisor in 2009 who was corresponding with the respondent's attorneys on her behalf did not receive a letter which was faxed to him in which they explained what was expected of her at that

stage. However, this is hearsay evidence as it is unsupported by a confirmatory affidavit from the advisor and there is no explanation why it was not received despite the respondent attaching a fax transmission slip showing it was successfully transmitted to the fax number which appears on his letterhead. The other material point she raises is that, correspondence was served on an address she no longer used, but nowhere does she claim that she notified the respondent of an alternative address they should use for service.

Summary of the factual narrative

- [6] The application for condonation appears to have been filed in September 2007. The certificate of outcome was issued on 30 October 2006. The applicant should have referred her case to court by 28 January 2007 in terms of s 191(11)(a) of the Labour Relations Act, 66 of 1995 ('the LRA'). The referral was only made on 7 September 2007. Accordingly, the degree of lateness was considerable.
- [7] The applicant's explanation for the delay in her referral, in summary was that:
- 7.1 Initially, she enrolled the matter for arbitration on 17 January 2007. An award was issued on 31 January 2007 and she applied for it to be certified.
 - 7.2 On 27 March 2007, the respondent applied to rescind the award, which succeeded on 2 August 2007.
 - 7.3 The matter was re-enrolled on 30 August 2007 for arbitration.
 - 7.4 However, the commissioner ruled, on the strength of a recent labour court judgement at the time that the Labour Court had exclusive jurisdiction in the matter even where only one employee had been retrenched if procedural fairness was an issue in dispute.
 - 7.5 The applicant then promptly referred the matter to the labour court.
- [8] Had the applicant prosecuted the matter timeously at that stage, in all likelihood, the late referral of her case to the labour court would have been condoned. However, she took no further steps in the matter for some

years despite being advised of what she needed to do, as summarised below.

- [9] A pre-trial conference was held on 5 November 2007, but the matter never proceeded as the applicant's attorneys of record withdrew on 7 March 2008. The last step taken was that, the respondent was waiting for responses to questions put to the applicant in the course of trying to finalise the pre-trial minute.
- [10] In April 2008, the respondent attempted to pursue the conclusion of the pre-trial minute with the applicant herself, but she never responded to four letters, the last of which was sent on 9 September 2008 warning her that she needed to enrol the application for condonation and that if she did not index and paginate the file, an application would be brought to dismiss her condonation application because fourteen months had elapsed since she had taken any further steps to prosecute her claim. It must be stressed that it was the respondent who was taking the initiative in trying to get the pre-trial process moving. In her opposing affidavit, the applicant did not attempt explain why she had not responded to any of that correspondence and it was only in court that she explained that she had relocated to Port Elizabeth and that the respondent's correspondence was still been sent to her former Johannesburg address. Obviously though it was her responsibility to notify the respondent of any change of address and the respondent could not be faulted if she only saw the correspondence later.
- [11] In any event, she was aware of the application to dismiss the condonation application, which was launched on 12 February 2009. The same month, she appointed a person, supposedly with some expertise, to correspond with the respondent's attorneys about the dismissal application. Their unambiguous response in a letter dated 2 March 2009 was as follows:

We confirm that we have brought an application to dismiss Ms Carrington-Hall's Condonation Application and Statement of Case on the basis that she has done nothing to further this matter for a lengthy period of time. In the event that Ms Carrington-Hall wishes to oppose the said Application she is entitled to do so by filing a Notice to Oppose and an Answering Affidavit. We are of the view that the factual dispute between the parties are best dealt with in this manner. In the event that Ms Carrington-Hall cannot

deliver her Opposing papers timeously, an application for condonation will be necessary.

- [12] Despite this clear message in 2009, and despite obtaining legal assistance in 2016, the applicant only filed her opposing affidavit on 5 June 2018, some nine years later. Unsurprisingly, the employer objects to the late filing of the answering affidavit on the basis that it is over nine years late. The applicant claimed to have been seeking advice and assistance from various quarters during this prolonged period of delay. However, if she was in doubt about what she needed to do, she never even attempted in 2009 to follow the advice in the abovementioned letter from the respondent's attorneys nor, if she was uncertain what that advice meant, did she contact them to obtain further clarity. She claims she was not advised that it was her responsibility to drive case.

Evaluation

- [13] In the circumstances, I am satisfied that the applicant had ample opportunity and ample warning of the need to oppose the dismissal application and what she needed to do if she intended to pursue her claim and her condonation application. Even if she had no legal expertise, it would have been clear from the notice of motion served on her that she was expected to file a notice of opposition. Moreover, from the letter written to applicant's attorneys on her behalf in February 2009, it was evident that she appreciated the need to file opposing papers at that point in time.
- [14] The applicant's explanation for her inaction for a period of approximately nine years is simply wholly inadequate given the length of the delay. The respondent complains that it will suffer enormous prejudice if it has to defend the unfair retrenchment after so long in circumstances where many of the potential witnesses have left its employment, quite apart from the difficulty of reconstructing the matter so many years later. In argument, the applicant submitted that all of the potential witnesses were still 'around' and could be contacted. However, the mere existence of witnesses is not the only issue to consider when evaluating potential prejudice. It is blatantly obvious that the party that bears the onus of proving the fairness

of a dismissal is likely to be disadvantaged by lapses of memory on the part of witnesses after such a lengthy period of time.

- [15] In my view, this is one of those instances where the extraordinarily excessive delay and absence of a proper justification for not pursuing the condonation application or taking any other steps to prosecute her unfair dismissal claim constitute sufficient reason to dismiss the condonation application without consideration of the merits of her original case.

Order

- [16] The applicant's belated application to file a supplementary affidavit is dismissed.
- [17] The applicant's condonation application for the late referral of her statement of claim is dismissed and consequently the referral itself is dismissed.
- [18] No order is made as to costs.

Lagrange J
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:

In person

RESPONDENT:

I Gwanza of Edward Nathan
Sonnenberg Inc

LABOUR COURT