

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JS 123/2016

In the matter between:

MARY MOKOENA**Applicant**

And

OLD MUTUAL LIFE ASSURANCE COMPANY**Respondent****Heard: 8 March 2019****Delivered: 19 March 2019**

JUDGMENT

TLHOTLHALEMAJE, J:

Introduction and background:

- [1] This is an opposed application in terms of which the applicant seeks leave to deliver a further affidavit in support of the application for condonation.
- [2] The application is brought before the Court against the following background;
- 2.1 The applicant was employed by the respondent in June 2003 at the age of 51. Her contract of employment was to be terminated in January 2013 when she reached the age of retirement at 61. In January 2013 her contract was however extended until January 2015 when she was informed that it was to be terminated.
- 2.2 She subsequently referred a dispute to the Commission for Conciliation Mediation and Arbitration (CCMA) claiming unfair discrimination based on age, as a younger employee had replaced her. The dispute was unresolved on 10 April 2015 and a certificate of outcome was issued. The dispute was then referred to the CCMA for arbitration in August 2015. On 7 December 2015, the CCMA issued a ruling to the effect that it lacked jurisdiction to hear the matter.
- 2.3 A statement of case was then delivered in February 2016. When no response was forthcoming she had then sought and obtained a default judgment on 14 March 2017. The default judgment was rescinded on 22 February 2018, and the respondent delivered its statement of response on 6 March 2018, raising several preliminary points, including that the statement of case was delivered outside of the statutory time periods without seeking condonation.

2.4 The applicant delivered an application for condonation on 26 March 2018, stating that her statement of claim was delivered some 8 months outside of the statutory time periods. She gave a timeline and reasons for the delay. In its answering affidavit, the respondent attacked the adequacy of the reasons proffered by the applicant for the delay.

2.5 Upon receipt of the answering affidavit, the applicant sought and obtained legal advice from SASLAW Pro Bono clinic, and was informed that the respondent's challenge pertained to the way the condonation application was crafted, as it did not cover the entire period of the delay. She was further advised that no attachments were attached in support of the submissions she had made in her founding affidavit. To this end, she seeks to supplement the condonation application at its paragraphs 6 to 21, and contends that the respondent would not suffer any prejudice.

2.6 She averred that even though she was legally represented, she was failed by her legal representatives and wished to present evidence to that effect through a further affidavit, and attach communications which would highlight the prejudice she would suffer if the application proceeded with her pleadings as they currently were.

[3] In opposing the application to supplement, the respondent through the affidavit of its Senior HR Manager: Stakeholder Relations and IR, Ms Yvonne Mkefa, averred the following;

3.1 The applicant merely seeks to make out a different case to that contained in her original condonation application.

- 3.2 In the original application for condonation, the applicant's reasons for the delay were threefold, in that first, she blamed the respondent's Managing Director; second, she had alleged that the respondent did not want to settle the dispute; and third, that her erstwhile representative had assured her that the statement of case would be delivered.
- 3.3 The objection to supplement was further based on the fact that all affidavits had been exchanged and it was more than six months after the answering affidavit was filed that the applicant now sought to supplement her reasons.
- 3.4 When the condonation was set down for 17 August 2018, the applicant had sought a postponement in order to deliver her replying affidavit and heads of argument.
- 3.5 No exceptional circumstances existed to allow the applicant to supplement as the facts and reasons for lateness had not changed from the date of the filing of the founding affidavit, and that the same allegations could have been made in the original founding affidavit.
- 3.6 With the application to supplement, which was some seven months since the original application, the applicant merely sought to 'plug holes' in the deficient founding papers, and in the result, it was not in the interests of justice and fairness to allow her to keep filing further affidavits, as the respondent kept incurring costs for each occasion that the applicant reconsidered her case. It was averred that the applicant's application was an abuse of the court process and unfairly prejudiced the respondent

3.7 The respondent further took issue with the fact that the applicant failed to comply with the court order of 17 August 2018 to file her replying affidavit and heads of argument by 7 September 2018. In this regard, it was pointed out that an undated copy of the Heads of argument was delivered on 7 September 2018, whilst the replying affidavit was only filed on 10 September 2018 without a further application for condonation in that regard.

[4] In her replying affidavit, the applicant denied that she sought to make out a different case to that contained in the founding affidavit to the condonation application, and contended that the intention was merely to clarify and bring to the attention of the Court by way of supporting documents which were not attached to the founding papers. She further averred that the respondent would not be prejudiced should leave to supplement be granted as it would be afforded an opportunity to respond.

The legal framework and evaluation:

[5] The principles applicable in instances where a party seeks leave to file further affidavits or to supplement original affidavits can be said to be trite. The starting point is that as a rule, three sets of affidavits in motion proceedings are allowed, namely: founding/supporting affidavits, answering affidavits, and replying affidavits.

[6] It is further trite that an applicant must stand or fall by his/her founding affidavit.¹ In the founding affidavit, it is thus expected of the applicant to accordingly disclose facts that would make out a case for the relief sought,

¹ *Mashamaite and others v Mogalakwena Local Municipality and others, Member of the Executive Council Coghsta, Limpopo and another v Kekana and others* [2017] ZASCA 43; [2017] 2 All SA 740 (SCA) at para 21

and sufficiently inform the other party of the case it was required to meet². Thus, the filing of further affidavits in motion proceedings is permitted only with the indulgence of the Court, which has the sole discretion whether or not to allow such affidavits. Where there are no reasons placed before the Court for requesting it to permit the filing of further affidavits, any such application ought to be refused³.

[7] Flowing from the above and other authorities, the legal position can therefore be summarised as follows;

- i. Allowing the filing of further affidavits is not a right that a party has, but an indulgence from a Court in the exercise of its discretion;
- ii. The material sought to be raised in the supplementary affidavit must be relevant to the issues for determination of the main claim or application;
- iii. In exercising its discretion, the Court will do so with a measure of flexibility, taking into account all the facts of the case and in further consideration of what is fair to the parties.

² See *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999 (2) SA 279 (T); *Juta & Co Ltd v De Koker* 1994 (3) SA 499 (T) at 508 B-D.

³ See *Hano Trading CC v JR 209 Investments (Pty) Ltd* 2013 (1) SA 161 (SCA); *James Brown & Hammer (Pty)(Previously named Gilbert Hamer & Co Ltd) Ltd v Simmons*, NO 1963 (4) (SA) 656 at 660E-G where it was held that;

"It is in the interests of the administration of justice that the well-known and well established general rules regarding the number of sets and the proper sequence of affidavits in motion proceedings should ordinarily be observed. That is not to say that those general rules must always be rigidly observed: some flexibility, controlled by the presiding Judge exercising his discretion in relation to the facts of the case before him, must necessarily also be permitted. Where, as in the present case, an affidavit is tendered in motion proceedings both late and out of its ordinary sequence, the party tendering it is seeking, not a right, but an indulgence from the Court: he must both advance his explanation of why the affidavit is out of time and satisfy the Court that, although the affidavit is late, it should, having regard to all the circumstances of the case, nevertheless be received."

- iv. Leave to file further affidavits, out of sequence, may be allowed, for example, where there was something unexpected in the applicant's replying affidavits or where a new matter was raised, or where the information/evidence was not available to the respondent (or could not be made available) when the founding affidavits were filed and before the answering affidavits could be filed.⁴ Even then however, the party seeking to supplement must give a satisfactory explanation which negatives *mala fides* or culpable remissness as to why the information/evidence could not be put before the Court at an earlier stage;
- v. When considering whether to allow the filing of further affidavits, prejudice is not the test, and it is incumbent on the applicant to establish exceptional circumstances which render it fair to permit the filing of the additional affidavit⁵

[8] The applicant faces certain insurmountable hurdles with this application for a variety of reasons including the following;

8.1 The application to file a further supplementary affidavit came at a time when the pleadings in respect of the application for condonation were closed, and the matter was ripe for hearing.

⁴ See *Bafokeng Rasimone Platinum Mine (Pty) Ltd v CCMA & others* CASE NO: JR 2296/12 at para [5], where Lagrange J held that;

"Pleadings are intended, amongst other things, to identify the nature and parameters of a dispute. Care must be taken at the time of drafting to ensure that the full ambit of a party's case is canvassed. In the case of the review application an applicant has the added advantage that a weak founding affidavit can be completely replaced or augmented by a supplementary affidavit. It is at that point of the applicant's preparation of the application that it must focus its mind on the merits of its case. It should not regard the supplementary affidavit as merely a preliminary exploration of issues to be more fully developed when heads of argument are prepared. Still less should it consider the supplementary affidavit as anything less than its final statement of its grounds of review. There may be exceptional circumstances where issues come to light that a party exercising reasonable diligence in the preparation of their case could not have been aware of, or where there is some other justifiable reason why a material issue is omitted..."

⁵ *Impala Platinum Ltd v Monageng Mothiba N.O. and Others* (JR2567/13) [2016] ZALCJHB 475 (10 June 2016)

- 8.2 As to what gave rise to the need for this application some two months after the replying affidavit in the condonation application was filed is immediately not discernable, as no attempt was made to give any explanation in that regard.
- 8.3 The initial founding affidavit was filed with the assistance of a legal representative from the SASLAW Pro Bono clinic. One assumes that the applicant was requested to make available all relevant information necessary for the drafting of the founding affidavit.
- 8.4 It is trite that with every application for condonation, an applicant is required to give a detailed account of the reasons for the delay, and to further give an account of each period of the delay⁶. To this end, when the respondent in its answering affidavit contended that the explanation for the delay in the founding affidavit was not adequate, this in my view could not have been construed as something out of the extra-ordinary or unexpected, or the raising of a new matter. Thus, the respondent was merely informing the applicant that she had not done what she was supposed to do in the founding papers. This was not an invitation to have a re-look at her case and close the gaps.
- 8.5 Central to the applicant's contentions however is that she seeks to attach certain documentation in support of her contentions that her erstwhile legal representative was to blame for the delay, in circumstances where the applicant had paid her an amount of R70 000.00 for legal services which turned out to be unsatisfactory. As to why this reason (*albeit* not entirely reasonable or acceptable on its

⁶ *eThekweni Municipality v Ingonyama Trust*, 2013 (5) BCLR 497 (CC) at para [32], where the Constitutional Court held that:

"An applicant for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of delay. And, what is more, the explanation given must be reasonable."

own in the light of established authorities)⁷ was not mentioned in the founding affidavit if it was so important is not known. Furthermore, nothing is said by the applicant as to where the documents she seeks to attach were at the time that the initial founding affidavit was filed, and why they were not attached then. In this regard, there is merit in the respondent's contentions that what the applicant seeks is merely to 'plug holes' in her founding affidavit.

8.6 It was correctly submitted on behalf of the applicant that as to what constitutes exceptional circumstances has not been defined. It can only be added that any precise definition would be hard to come by, as the facts of each case would determine what those exceptional circumstances are.

8.7 In this case however, even on a liberal interpretation of what exceptional circumstances may entail, I am not satisfied that the facts of this case point to any, particularly in the light of what has been stated above. In my view, exceptional circumstances would have existed had it been the applicant's case for example, that she had drafted the pleadings on her own, and as a lay person, it could not have been expected of her to know what the requirements of a proper founding and replying affidavits were. This was not however her case.

8.8 In her initial founding affidavit, the applicant clearly made references to being unsatisfied with the manner with which her erstwhile legal representative handled her matter. In certain instances she had made reference to certain attachments or annexures in support of her contentions. As to why there was a need for this application to make available further documents when the applicant's contention is that she was not making out a new case is unclear. If indeed she was not

⁷ See *Salojee and another NNP v Minister of Community Development* 1965 (2) SA 135 (A); *Superb Meat Supplies cc v Maritz* (2004) 25 ILJ 96 (LAC)

making out a new case, the respondent's contentions in the answering affidavit could have been adequately dealt with and addressed in the replying affidavit. There is therefore clearly merit in the respondent's contentions that the applicant merely seeks to close the loopholes in her founding affidavit, which unfortunately she must stand and fall by.

8.9 To the extent that the applicant has not established exceptional circumstances for the filing of a further affidavit, it is further my view that it cannot be in the interests of fairness, nor of expeditious resolution of disputes, nor fair to the respondent that a discretion be exercised in favour of allowing the filing of an affidavit in support of the application for condonation.

[9] In the light of the protracted history and nature of this case, there is no justification for the respondent to be burdened long after the pleadings have closed to have to answer further matters that should have been raised at the time the founding affidavit was filed. The applicant has not demonstrated exceptional circumstances requiring the Court to exercise its discretion and to allow the delivery of a further affidavit.

[10] I have further had regard to the requirements of law and fairness in regards to the issue of costs. The respondent did not pursue such an order, and I am satisfied that none is appropriate.

[11] Accordingly, the following order is made;

Order:

1. The application for leave to deliver a further affidavit in support of the application for condonation under the present case number is refused.

2. The Registrar of the Court is directed to set the matter down for the determination of the applicant's application for condonation for the late filing of her statement of claim.
3. There is no order as to costs

Edwin Tlhotlhemaje

Judge of the Labour Court of South Africa

APPERANCES:

For the Applicant:

S Mabaso of Mabaso Attorneys

For the Respondent:

H Vrey of Cliffe Dekker Hofmeyr INC