IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

CASE NO: JS303/18

In the matter between:

SAMUEL MALEFANE **Applicant**

and

SAMANCOR CHROME LTD **Respondent**

Heard: 22 February 2019

Delivered: 22 May 2019

JUDGMENT

LALLIE J

[1] The applicant was employed by the respondent until he was dismissed for operational requirements of the respondent (retrenched) on 8 March 2016. On

retrenchment the applicant held the position of Operations Manager which was a tier below the Chief Executive Officer. After the retrenchment the applicant referred an unfair retrenchment dispute to the Commission for Conciliation, Mediation and Arbitration (the CCMA). The applicant was informed by the CCMA on 24 May 2016 to apply for condonation of the late referral of his dispute. As the respondent is a member of the Metal and Engineering Industries Bargaining Council (the MEIBC) which encountered problems of resolving its members' disputes at the time, the applicant's case was moved between the CCMA and MEIBC. The MEIBC eventually issued the certificate of the non-resolution of the dispute the applicant had referred (the certificate) on 16 November 2016. The certificate reflected that the step the applicant had to take was referring the dispute to arbitration. The applicant in compliance with the certificate referred his unfair retrenchment dispute to arbitration. On 6 February 2018 the MEIBC issued a ruling in which it found that it lacked the jurisdiction to arbitrate the applicant's dispute as it fell under the jurisdiction of the Labour Court. On 13 July 2018 the applicant filed the application at hand seeking condonation of the late filing of his statement of claim. The application is opposed by the respondent.

[2] The late filing of a statement of claim may be condoned on good cause shown. In *Grootboom v NPA*[1] the test for condonation is couched in the following terms:

> '…I agree with him that, based on *Brummer* and V*an Wyk*, the standard for considering an application for condonation is the interests of justice. However, the concept "interests of justice" is so elastic that it is not capable of precise definition. As the two cases demonstrate, it includes: the nature of the relief sought; the extent and cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the importance of the issue to be raised in the intended appeal; and the prospects of success. It is crucial to reiterate that both *Brummer* and *Van Wyk* emphasise that the ultimate determination of what is in the interests of justice must reflect due regard to all the relevant

[1] [2014] 1 BLLR 1 (CC) at para 22

> factors but it is not necessarily limited to those mentioned above. The particular circumstances of each case will determine which of these factors are relevant.'

[3] The applicant submitted that the filing of this condonation application was unnecessary because he filed his statement of claim within 90 days of receiving the jurisdictional ruling from MEIBC advising him that his unfair retrenchment dispute falls within the jurisdiction of the Labour Court. He argued that he therefore fulfilled the requirements of section 191(11) of the Labour Relations Act[2] (the LRA). The respondent differed and argued that the applicant was obliged to seek condonation as his statement of claim was filed 14 months late. The reason for the submission was that the 90 day period envisaged in section 191(11) was computed form 16 November 2016, the date on which the certificate was issued.

[4] The respondent's argument is correct. Section 191(5)(b)(ii) read with section 191(11)(a) of the LRA require that an unfair retrenchment dispute be referred to the Labour Curt within 90 days after the certificate has been issued,. The correctness of the respondent's version is expressed in the following dictum in *F&T Electrical CC v MEWUSA obo E Mashatola and Others*[3]*:*

> 'Before the Labour Court may adjudicate a dispute, it, like any other court, should first satisfy itself that it has jurisdiction. In this case the Labour Court failed to do so. The certificate of non-resolution was issued on 3 March 2009. In terms of section 191(5) of the LRA the employees were obliged to refer the dispute to the Labour Court or to the bargaining council or CCMA, as the case may be, within 90 days from 3 March 2009. The Labour Court would not have jurisdiction to adjudicate the dispute if the dispute was referred to the Labour Court after the expiry of 90 days from that date unless the employees applied for condonation and showed good cause. In this case, the 90-day period expired on or about 2 June 2009. The union referred the dispute to the Labour Court only on or about 7 October 2009. That was a delay of about four months.'

[2] 66 of 1995 as amended
[3] 2015 (4) BCLR 377 (CC) at para 29

[5] As the statement of claim was filed over year after the certificate was issued, the applicant was obliged to file this application and show good cause in terms of section 191(11)(b) for condonation to be granted. The applicant's alternative argument was that the late filing of his statement of claim be condoned. It is common cause that the extent of the delay is a year and two months. The delay is excessive. The applicant gave details of the difficulties he encountered form the day he referred his dispute to the CCMA. The main cause of the delay was that the CCMA and MEIBC kept changing the forum for the hearing of the applicant's dispute. The relevant period for purposes of this application commences from 20 November 2016 when the applicant received the certificate and ends on 2 May 2018, the day before the statement of claim was filed. As the certificate reflected that the applicant had to refer his dispute to arbitration he did so. The delay caused by the CCMA and MEIBC endured until 9 February 2018 when he received the ruing that his dispute had to be adjudicated by the Labour Court and not arbitrated by the MEIBC. The period thereafter is attributed to the applicant's difficulty to raise fees for his legal team and waiting for advice from his counsel.

[6] The respondent submitted that the explanation for the delay is unreasonable as the applicant had no reason to refer his dispute to arbitration after it was not resolved at conciliation. He knew that the correct forum to refer his dispute was the Labour Court as his retrenchment was part of a large retrenchment as envisage in section 189A. By virtue of his position and receipt of the retrenchment notice in terms of section 189(3) which he received on 4 February 2016 he was made aware of the nature of the retrenchment. He was also legally represented. His legal representative should have referred his matter to the correct forum notwithstanding the contents of the certificate. On 4 February 2016 the respondent briefed all its employees including the applicant on its operational requirements and the section 189(3) notice. The applicant even signed an attendance register confirming his presence at the briefing. He was also present at the consultation for non-unionised employees which was held on 6 February 2016 and at the joint consultation on 10 February 2016. The respondent submitted that the applicant was involved in

the retrenchment process until he reached an agreement with it on severance pay and his last day on duty. He was legally represented when he referred his dispute to the CCMA.

[7] The applicant did not file a replying affidavit. In terms of the rule in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*[4] I have to prefer the respondent's version because it is neither improbable nor far-fetched. The respondent's version that the applicant was aware even before his retrenchment that he was part of a mass retrenchment was not refuted. The applicant therefore was aware of the forum to which to refer his dispute and the period within which it had to be referred after receiving the certificate because he was legally represented. He is the author of the delay that resulted from referring his dispute to the wrong forum. He may therefore not rely on his self created delay. The explanation for the excessive delay is therefore unreasonable.

[8] The applicant submitted that he has prospects of success in the main claim as his retrenchment was both substantively and procedurally unfair. He alleged that following a general meeting in which general operational requirement issues were mentioned, he was called to a meeting on 8 March 2016 and retrenched. He denied having received a section 189 notice and having been informed by the respondent that he was part of a mass retrenchment process. He further submitted that the collective settlement agreement reached by the respondent and trade unions representing some of its employee was not binding on him. As already stated, the respondent submitted that the applicant's retrenchment was both substantively and procedurally.

[9] The test for prospects of success in condonation applications is whether the applicant has made averments which if proved would lead to his success in the main claim. In the averments made by the applicant, other than alleging that his retrenchment was substantively unfair he made no factual averments to support the allegation. He did not allege that the respondent's operational

[4] 1984 (3) SA 623 (A)

requirements did not justify his retrenchment. He does not deny that his retrenchment was part of a mass retrenchment exercise. All he submitted was that he was unaware of that fact. When the submissions on the alleged unfair procedural fairness are considered objectively the conclusion that the applicant was in fact part of a mass retrenchment is inescapable. I have to accept the respondent's argument that the applicant was required to have challenged the procedural fairness of his retrenchment during the consultation process in terms of section 189A(13). When the retrenchment process is over it is too late for the applicant to rely on the procedural unfairness of his retrenchment

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[10] Any prejudice the applicant stands to suffer as a result of the refusal of his condonation application is self created. He cannot escape the consequences of the delay which resulted from his unreasonable decision to refer his dispute to the wrong forum. The respondent stands to suffer more prejudice should this application be granted as the applicant's retrenchment resulted from the redundancy of his position. The respondent's right to have the dispute resolved within reasonable time cannot be overlooked.

[11] The extent of the delay is excessive. The applicant did not provide a reasonable explanation for the late filing of his statement of claim. He failed to prove that he was prospects of success. In *Grootboom (supra)* the Constitutional Court emphasized the significance of the explanation for the delay in condonation explanations. When all the circumstances of this matter are taken into account they lead to the conclusion that the applicant did not show good cause to have the delay excused. Granting condonation is therefore not in the interests of justice.

[12] In the premises, the following order is made:

Order:

1. The application for condonation of the late filing of the statement of claim is dismissed.

Z. Lallie

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr M Thompson of Thompson Attorneys

For the Respondent: Mr S Jamieson of Cliffe Dekker Hofmeyr Inc