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THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No. J780/20

In the matter between:

LEKABANE GILFORD MATSEKOLENG

Applicant

and

SYNERGY WORLD LOGISTICS (PTY) LTD

Respondent

Heard: 22 January 2025

Delivered: 12 February 2025

JUDGMENT

MAKHURA, J

[1] The retrieval application in this matter was set down on the opposed motion roll on 22 January 2025. On that day, the Court, after hearing arguments from both parties, issued an order in the following terms:

- ‘1. The application is granted, and the file is retrieved from the archives.
2. The applicant is permitted to proceed with his referral.
3. The parties are ordered, within 30 calendar days from today, to convene a pre-trial conference, conclude and sign a pre-trial minute.
4. The applicant is ordered to file the pre-trial minute and file a notice informing the Registrar that the matter is ready for allocation of a trial date within 5 days of signing the pre-trial minute.
5. Denga Incorporated is ordered, within 10 court days of this order to file an affidavit explaining and addressing the following matters:
 - 5.1 Why it should not pay the respondent's actual disbursements and/or expenditures incurred in opposing this application;
 - 5.2 Why it should not pay the counsel's fees from its own account; and
 - 5.3 Why it should not forfeit all the fees charged against the applicant from the inception of this matter, and repay the applicant any fees that he has paid into its account or in any manner until the date of this hearing.
 - 5.4 The affidavit above must be filed by hand and emailed to [N\[...\]](#).’

[2] Denga incorporated filed their affidavit in compliance with paragraph 5 of the court order on 5 February 2025. This judgment provides the reasons for the order above and also determines the issues as set out in paragraph 5 of the order.

[3] The applicant employee referred an unfair dismissal claim in terms of section 191(5)(b)(ii) read with section 191(11)(a) of the Labour Relations Act¹ (LRA). The file was subsequently archived by the Registrar in terms of item 16 of the now repealed Practice Manual².

¹ Act 66 of 1995, as amended.

² Practice Manual of the Labour Court of South Africa, effective 2 April 2013, repealed with effect from July 2024.

[4] The applicant served a statement of claim in August 2020. The statement of response was filed on 23 October 2020. The common cause facts from the statements of claim and response are that the applicant was employed by the respondent as a driver with effect from 1 October 2007.

[5] In March 2020, the President of the Republic of South Africa declared a national state of disaster and the country was placed under lockdown regulations³, in response to Covid-19 pandemic and in an attempt to place measures to mitigate against the impact of the pandemic.

[6] At 8h41 on 29 May 2020, the applicant received a text message from the respondent, asking if he could attend the office on that day. The applicant responded by a telephone call and indicated that he was in Limpopo and was not able to get to the office. The reason for the request was not set out in the message. On the same day at 14h18, the applicant received another text message from the respondent. This message reads as follows:

‘Dear Clifford,

We regret to inform you that due to the unfavourable economic circumstances, currently experienced due to the Coronavirus and its effect on operations, we have [no] alternative but to curtail expenditure.

Your position with the company therefore has been affected and your services will be terminated with immediate effect.’

[7] The applicant collected the letter of dismissal on 15 June 2020. The letter is dated May 2020, with no specific day. The letter reiterated what was set out in the text message and further stated that his last day of work was the end of June 2020.

[8] The applicant referred an unfair dismissal dispute and after unsuccessful conciliation, referred the matter to this Court in August 2020. The statement of response

³ Section 27(2) of the Disaster Management Act, 57 of 2002.

was filed on 23 October 2020. In terms of item 16.1 of the now repealed Practice Manual, which was applicable at the time this retrieval application was launched, 23 October 2020 was the last day of any process being filed and 6 months expired on 23 April 2021. The retrieval application was launched on 24 March 2023, 23 months after the file was archived.

[9] In terms of *Samuels v Old Mutual Bank*⁴ (*Samuels*), an application for retrieval of the file is effectively an application for condonation.⁵ Therefore, in determining this application, the question is whether it is in the interest of justice to retrieve the file from the archives and allow the matter to proceed.⁶ The interest of justice is determined with reference to various factors, which include the extent and cause of the delay, the reasonableness of the explanation for the delay, the effect of the delay on the administration of justice and other litigants, and the prospects of success on the merits if condonation is granted.⁷

[10] From 23 April 2021, the applicant only brought these proceedings in March 2023. The delay is approximately 23 months. This is an excessive delay.

[11] The applicant engaged Denga Incorporated to assist him with the matter. From the papers, Denga Inc. allocated the file to a candidate legal practitioner, who ran with the matter unsupervised. This is apparent from the papers because nowhere in the supporting affidavit, deposed to by Mr Alpheus Denga (Mr Denga), does Mr Denga Inc. indicate that the candidate legal practitioner was supervised by any him or any senior attorney. Mr Denga only became involved in the matter after the candidate legal practitioner left the firm.

⁴ (2017) 38 ILJ 1790 (LAC); [2017] 7 BLLR 681 (LAC).

⁵ *Samuels* at para 17.

⁶ *Mankayi v AngloGold Ashanti Ltd* [2011] ZACC 3; 2011 (3) SA 237 (CC) at para 8; *Grootboom v National Prosecuting Authority and another* 2014 (2) SA 68 (CC); [2014] 1 BLLR 1 (CC) at paras 22 – 23.

⁷ *Ibid*; see also *Brummer v Gorfil Brothers Investments (Pty) Ltd and others* 2000 (2) SA 837 (CC); 2000 (5) BCLR 465 (CC) at para 3; *Van Wyk v Unitas Hospital and another (Open Democratic Advice Centre as Amicus Curiae)* 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC) at para 20.

[12] This is serious negligence and/or a dereliction of duty on the part of Denga Inc, led by Mr Denga. The result of giving a candidate legal practitioner this unfettered and unsupervised power to run with this matter is that the applicant suffered serious prejudice as a result.

[13] The reasons given by Mr Denga and the candidate legal practitioner for this neglect are flimsy. For example, the reason why the candidate legal practitioner could not travel back to Johannesburg from Limpopo after August 2021 are not set out. It is also not explained why it took the candidate legal practitioner until October 2021 return to Johannesburg and why he could not attend to the matter in November and December 2021 before the December and January shutdown period. In my view, had the candidate legal practitioner been given the and necessary and correct supervision, this matter would not be here.

[14] It is undisputed that the applicant made several contacts with Denga Incorporated after the referral of the matter to this Court, *albeit* at a later stage. He made contact with Denga Inc. on 23 March 2022 to enquire about progress and the candidate legal practitioner was not present and he spoke to the secretary, Karabo. He was contacted on 15 June 2022 and was informed by the candidate legal practitioner that he was reducing the backlog on other urgent matters. When nothing happened, he contacted the candidate legal practitioner on 4 October 2022 for feedback. He was then informed that the candidate legal practitioner had resigned and that his matter would be reallocated.

[15] In November 2022, he was informed that Mr Denga had taken over the matter. He met Mr Denga on 14 December 2022. On 27 February 2023, Denga sought to meet the respondent for a pre-trial minute, which invitation was rejected on the basis that the file had been archived.

[16] The delay is inordinate, and may on the face of it justify the immediate refusal of condonation. However, the Constitutional Court has said that these factors are not

necessarily dispositive of the question of condonation and that other factors relevant to condonation may favour its granting and tilt the interests of justice to the other side of the scale.⁸ The conduct of the applicant in asserting his rights and showing interest in the matter is equally important. For this reason, I proceed to consider the prospects of success.

[17] The applicant is only required to show a *prima facie* prospect of success. The common cause facts are that the applicant was retrenched without a section 189 notice and without any consultation whatsoever. This in my view has a bearing on both substantive and procedural fairness of the dismissal. The case for prospects of success in the unfair dismissal dispute has been, on a *prima facie* basis, been established.

[18] The applicant's unfair dismissal dispute has not been adjudicated or determined by an independent adjudicator. The prejudice is manifest in that regard. The applicant has not shown to have abandoned his right to pursue the unfair dismissal claim.

[19] The respondent did not challenge the applicant's *bona fide* in bringing this application. To the extent that the respondent complains about the delay, it will have an opportunity during the trial to lead evidence on the appropriate remedy in the event the applicant's dismissal is declared unfair.

[20] Although the delay is excessive and the explanation for the delay is not sufficiently and convincingly set out, when considered with the prospects of success, the respondent's failure to follow the law in carrying out his dismissal, the prejudice that is wrought on him should this application be refused and the fact that he continued to show interest in asserting his right, I am of the view that it is in the interest of justice to retrieve the file and revive the matter. Denga Inc.'s negligence in handling the applicant's case should not, in the circumstances where he had made some enquiries about his case, not result in the door of justice being shut on his face.

⁸ *Mphephu-Ramabulana and Another v Mphephu and Others* [2021] ZACC 43; 2022 (1) BCLR 202 (CC) at para 38.

[21] For the above reasons, the court granted the order set out in paragraph 1 above.

[22] As indicated above, Mr Denga has filed the affidavit in accordance with the order. Mr Denga alleges that the candidate legal practitioner “*was under the supervision of one of the senior attorneys in the practice*”. The Court is however not provided with the name of this senior attorney and there is no confirmatory affidavit to that effect. The senior attorney who allegedly supervised the candidate legal practitioner did not play any role in this matter because his name does not appear anywhere in the supporting affidavit to the retrieval application. This allegation is improbable and borders on deliberate distortion of the truth.

[23] Mr Denga’s affidavit further states that as the respondent is represented by an employer’s organization, they are not entitled to charge legal fees. Nowhere in the order did this Court suggest that the respondent was entitled to charge legal fees.

[24] The affidavit further alleges that the counsel on brief is paid from its own account without the applicant’s contribution. However, he continues to state that:

‘[e]ssentially the applicant’s matter was taken on a pro bono basis on the basis that fees shall be chargeable on successful prosecution of the applicant’s claim against the respondent and in the meantime Denga Incorporated is responsible for any disbursement including the counsel’s fees.’

[25] During the hearing, I asked the same question and Mr Denga, through his counsel, submitted that he was acting *pro bono*. It eludes common sense that Mr Denga would seriously inform the Court that he is acting *pro bono*, when he has in his own words agreed with the applicant that he would charge fees upon successful prosecution of the matter. He clearly intends, in the event the applicant is successful and receives any form of payment, charging the applicant fees, which fees would include that of counsel. To further prove that Denga Inc. will be charging the applicant fees in the event of his successful referral, Mr Denga said that:

‘Disallowing Denga Incorporated from charging the client since inception of the main matter will be harsh to Denga Incorporated, especially if the applicant become successful.’

[26] From the papers, it is without doubt that the candidate legal practitioner dealt with the matter unsupervised, for if he was supervised, Mr Denga, in his capacity as a director, or the unidentified senior attorney would have, at least I would like to believe, acted expeditiously. The senior attorney’s role would have also been referred to in the supporting affidavit to the retrieval application. Mr Denga only took over the matter after the candidate legal practitioner left his employment.

[27] The explanation provided by Mr Denga, in response to paragraph 5 of the order dated 22 January 2025 is riddled with inconsistencies and not accepted. Denga Inc. failed to ensure that the candidate legal practitioner was trained, developed and guided during his time at the firm. This is an injustice and a disservice not only to the candidate legal practitioner but also to the applicant as evinced by the failure to timeously prosecute the referral. The applicant should be protected from this uncaring and negligent act. Accordingly, Mr Denga has failed to persuade this Court otherwise.

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

Order

1. Denga Incorporated shall pay the respondent’s actual disbursements and/or expenditures incurred in opposing this application.
2. Denga Incorporated shall be liable to pay the counsel’s fees to date from its own account.
3. Denga Incorporated shall not be entitled to charge the applicant any fees from the inception of the matter to date of the hearing of the revival application (22 January 2025).
4. Denga Incorporated shall repay any money that the applicant has paid into its account or in any manner for any services rendered from the inception of the

matter until the date of the hearing of the revival application (22 January 2025), within 10 days of his order.

M. Makhura

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr I. Ngwana

Instructed by: Denga Incorporated

For the Respondent: Mr K. Hayward of NEASA

LABOUR COURT