

SOUTH AFRICA / JUDGMENT

Abrahams v EOH Mthombo (Pty) Ltd (J23/21) [2021] ZALCJHB 313 (22 September 2021)

[2021] ZALCJHB 313**COURT**

Labour Court Johannesburg

BEFORE

M Sass

CASE / FILE NUMBER

J23/21

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Source record**IN****THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG****Not****Reportable****Case No: J23/21****In****the matter between:**

YUSHAA
ABRAHAMS Applicant
and
EOH
MTHOMBO (PTY)
LTD Respondent

Heard:

2 July 2021

Delivered:

22 September 2021 (In view of the measures implemented as a result of the Covid-19 outbreak, this judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be on 22 September 2021)

JUDGMENT

SASS, AJ

Introduction

- [1] This is an application in terms of rule 12 read together with rule 6 of the Rules for the Conduct of Proceedings in the Labour Court in which the Applicant seeks condonation for the for the late delivery of his Statement of Claim.
- [2] In determining the condonation application, it is necessary to consider the relevant facts as recorded in the papers which serve before me. There is, however, no need to burden this judgment with a repetition of the full factual background, which is in any event conveniently summarized by the Respondent in its Heads of Argument.[1] It is sufficient for present purposes to record the salient relevant facts which I set out hereunder.

Background

- [3] The Applicant was dismissed by the Respondent on or about 30 August 2020. The Applicant referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) and a certificate of outcome of dispute was issued by the CCMA on or about 15 October 2020.
- [4] The relevant statutory time period for the delivery of a Statement of Claim, in terms of section 191(11)(a) of the Labour Relations Act[2] (LRA), would expire on or about 13 January 2021.
- [5] On or about 21 December 2020, the Applicant requested an indulgence from the Respondent in relation to the delivery of his Statement of Claim until the end of January/beginning of February 2021. This request for an indulgence was refused by the Respondent.[3]
- [6] The Applicant's Statement of Claim was delivered on or about 27 January 2020 (by service on the Respondent and filing at this Court). The Respondent's chronology as referred to above indicates that this happened on or about 28 January 2020 although the Applicant's Proof of Service Affidavit indicates that delivery took place on 27 January 2021.[4]
- [7] The Applicant initially contended that the Statement of Claim was delivered 7 days late. Notwithstanding the above, the parties

eventually agreed during argument that the length of the delay was 14 days and that the period which I am required to consider.

- [8] The Applicant's Application for Condonation was delivered on or about 3 February 2021.

Applicable legal principles

- [9] Section 191(11)(a) of the LRA prescribes the 90-day time period for the delivery of statement of claim. Section 191(11)(b) of the LRA specifically contemplates and permits this Court to condone non-observance with that timeframe on good cause shown.
- [10] The legal principles applicable to applications for condonation where a party essentially seeks an indulgence for its non-compliance are succinctly set out in the Applicant's Heads of Argument.[5] The Respondent was in agreement with the Applicant's statement of applicable law and authorities in relation to condonation applications and had nothing to add thereto or subtract therefrom.[6]

[11] The applicable legal principles are trite and the approach to be adopted by this Court is well settled. It is not necessary to burden this judgment with a repetition of the applicable law and authorities save to also refer to the Constitutional Court judgment in *Grootboom v NPA*[7] as reiterated by that Court in its decision in *Steenkamp and Others v Edcon Limited*[8] where the Court in the second judgment therein stated:

- [36] Granting condonation must be in the interests of justice. This Court in *Grootboom* set out the factors that must be considered in determining whether or not it is in the interests of justice to grant condonation:

"[T]he 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 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."

It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or court's directions. Of great significance, the explanation must be reasonable enough to excuse the default.

The interests of justice must be determined with reference to all relevant factors. However, some of the factors may justifiably be left out of consideration in certain circumstances. For example, where the delay is unacceptably excessive and there is no explanation

for the delay, there may be no need to consider the prospects of success. If the period of delay is short and there is an unsatisfactory explanation but there are reasonable prospects of success, condonation should be granted. However, despite the presence of reasonable prospects of success, condonation may be refused where the delay is excessive, the explanation is non-existent and granting condonation would prejudice the other party. As a general proposition the

various factors are not individually decisive but should all be taken into account to arrive at a conclusion as to what is in the interests of justice.”[9]

[37] All factors should therefore be taken into account when assessing whether it is in the interests of justice to grant or refuse condonation.

The parties’ submissions

For the Applicant

[12] Principally, the Applicant’s submissions are that the delay was short and not inordinate; he had a reasonable, acceptable and/or satisfactory explanation for the short delay; he had excellent, alternatively, good prospects of success and a bona fide claim.

[13] As the Statement of Claim was only delivered 14 days late, there was no prejudice to the Respondent particularly in light of the months that the parties would have to wait for a trial date in any event once pleadings closed.

[14] If the Respondent suffers any prejudice as a consequence of condonation being granted, that prejudice is far outweighed by any prejudice

which the Applicant will suffer if condonation is not granted.

[15] Further, that it was in the interests of justice that condonation be granted, and it would be a grave injustice if the ‘doors of court were closed to the Applicant’ in the circumstances (by refusing condonation) and the evidence indicates that he was at all times serious in pursuing his dispute, did not sit idly by, and took steps to advance the matter as best he could, having regard to his circumstances.

[16] The Applicant had the following to say in relation to the delay and his explanation in respect thereof. The Statement of Claim was delivered late due to his financial position resulting from his retrenchment which in turn adversely impacted on his financial ability to seek and afford legal advice and services, including that of counsel. The delay was exacerbated by him contracting COVID-19 at the time when his Statement of Claim was due, delays in obtaining a case number as well as his computer hard drive crashing on or about 15 January 2021

[17] He has been unemployed since his retrenchment on 30 August 2020. He supports his wife and three daughters financially. His wife is unemployed and both of them are battling to find alternative employment for her. His daughters are still in school and/or university which on its own carries a substantial financial obligation. In addition, he has regular household expenses for which he is responsible on a monthly basis. He was a director of a company, but he did not earn an income from that company.

- [18] He had to inter alia cash in policies and borrow money from friends and family to be able to afford monthly expenses. He was forced to put his family home on the market in an attempt to save costs and not default on his existing and ongoing financial commitments. The sale of the property unfortunately took longer than he had anticipated.
- [19] In an attempt to find permanent employment, he travelled to the United Kingdom to explore some job opportunities (during the relevant 90-day time period). He had to cover his own costs and expenses in this regard. Due to new travel requirements involving a negative COVID-19 test and reduced flights, he needed to extend his stay for an additional two weeks from his original planned duration.

Unfortunately, this trip did not yield the fruits he expected.

- [20] He did not qualify for Legal Aid South Africa because he did not satisfy the means test. He was also not a member of any insurance companies such as LegalWise, Clientele or Scorpion Legal Protection, nor a member of a trade union, which could have financially assisted him to ensure the timeous preparation of his Statement of Claim and with the drafting the condonation application.

- [21] On 15 October 2020, whilst he was in the United Kingdom seeking employment, the CCMA conciliation process took place. He was abroad

for the period from 3 October 2020 to 14 November 2020 and could not attend the conciliation process. Consequently, he then instructed his attorney to start the process in obtaining a case number from the Registrar of this Court in anticipation of preparing and delivering his Statement of Claim. This turned out to be more cumbersome than before because of COVID-19. The first request for a case number was made on 25 November 2020. The case number was eventually provided only on 14 January 2021.

- [22] Upon the applicant's return from the United Kingdom and on the advice of his medical practitioner he was required at the very least to self-isolate for a period of 14 days (in other words from 15 November 2020 to 28 November 2020).

- [23] Having regard to the complex nature of the dispute, he initially instructed his attorney to brief senior counsel that was prepared to work on a contingency basis, given his dire financial position. After some requests, his attorney informed him that he could not find a senior counsel which was willing to accept the brief on a contingency basis. He was not comfortable instructing junior counsel to draft the Statement of Claim and deal with the complexities arising in this matter going forward. He then informed his attorney that he would revert with a date when the monies for counsel's fees would be paid.

[24] At the end of his quarantine period, he again made contact with his attorney who sought clarification regarding which counsel he must instruct and confirmation of when the deposit for counsel's fees would be paid. Notwithstanding his above-mentioned efforts, he was not able to secure sufficient funds over the festive season and immediately requested his attorney to seek an indulgence from the Respondent's attorneys in respect of the potential late delivery of his Statement of Claim.

[25] On 15 December 2020, he contracted COVID-19 and tested positive. Thereafter he entered mandatory quarantine for a period of 15 December to 29 December 2020. After this period, he still did not feel any better and only started to slowly recover during the week of 4 January 2021. Consequently, he was not in a position to consult or give further instructions to his attorney. The Applicant submitted that the Respondent's argument that he could simply have consulted during this period using a virtual platform is unreasonable in the extreme in light of his ill health.

[26] On 21 December 2020, he requested an indulgence which request was refused, which refusal he contends was unreasonable in the circumstances.

[27] He was also informed that most senior counsel would not be available to assist due to being on holiday over the festive season and that his attorney's office would be working on skeleton staff from 8 December 2020 to 11 January 2021. Consequently, he was unable to deliver his Statement of Claim timeously during this period.

[28] On 18, 22 and 24 December 2020 and 6 January 2021, his attorneys continuously followed up with the office of the Registrar in respect

of the issuing of a case number for this matter. There were delays with the issuing of a case number. It was only on 14 January 2021 that the Registrar provided his attorneys with a case number for this matter.

[29] On 18 January 2021, an urgent consultation was held between him, his attorney and senior counsel. During this consultation, he was

requested to provide several documents. Unfortunately, his computer hard drive crashed on 15 January 2021, and it took some time to restore all the data. He was only able to send the requested documentation on 26 January 2021. The Statement of Claim was accordingly prepared and delivered on 27 January 2021. He managed to place his attorney in funds on 28 January 2021.

[30] In relation to prospects of success, Mr Malan for the Applicant appeared to abandon the Applicant's claim in relation to procedural

unfairness during argument. The Applicant persisted with his claim of substantive unfairness though, the basis for which is evident from his Statement of Claim[10] and the contents of his Founding Affidavit in the Condonation Application. The Applicant contends in his Statement of Claim that:

- (i) there was not a valid and/or fair reason for the proposed retrenchments; (ii) there was not a valid and/or fair reason for his selection for retrenchment; (iii) the Respondent had an ulterior motive to get rid of him under the pretext of the proposed

retrenchment i.e. relating to him raising red flags about governance shortcomings and unethical business practices; and/or a grievance

lodged regarding the Respondent's decision to appoint Kurt Lindoor in his stead to a position prior to the commencement of the retrenchment process; and (iv) the appointment of independent contractors and third parties and/or the renewal of their contracts

despite him and other retrenchees having similar skills and experience necessary to perform the duties and functions of those independent contractors and third parties.

- [31] I asked Mr Malan why the Applicant could not have completed the simple pro forma Labour Court Statement of Claim to initiate his case in this Court before the 90-day deadline passed and then amend it subsequently once he was able to afford senior counsel, Mr Malan submitted that it was important for a litigant like the Applicant 'to put his best foot forward', if he fails to do so he may encounter insurmountable hurdles later, it was incumbent on the Applicant to make out a proper case and that later amendments were not guaranteed and could easily be opposed by the Respondent. Mr Lennox picked up on this as well during his argument and submitted that the pro forma statement of claim could have been used and that any issues arising from using the pro forma could have been 'sorted out' at a pre-trial.

For the Respondent

- [32] The Respondent challenged a number of aspects of the Applicant's explanation for the delay and contended that it is weak and based on the Applicant's opinion of the type of litigation which he wished to pursue.
- [33] In broad strokes - firstly, it contended that there is a lack of detail and specificity to the explanation. This relates, inter alia, to when the Applicant appointed or 'touched base' with his attorney of record and when he was able to provide instructions to his attorney, when he decided to retain the services of senior counsel on a contingency fee basis and when he eventually instructed senior counsel (on a 'non-contingency fee' basis), and when he was able to cash in various policies. Secondly, it contended that the Applicant created the impression that he was unemployed when the truth was otherwise (it was common cause that he was employed by Asus Consulting Services (Pty) Ltd since September 2020 according to his LinkedIn profile although the Applicant denied that he received a salary as such – the Applicant did also state in his affidavits that he was 'effectively' unemployed) and that the veracity of his averment that he was without an income should be challenged. This called into question the bona fides of the Applicant and the extent to which he has taken this Court into his confidence or sought to mislead it. Thirdly, it disputed that the Applicant should be allowed every indulgence until he was able to afford the services of a senior counsel and that he be allowed to use the best legal team even if that legal team was not available within the

prescribed statutory 90-day time period (Mr Malan SC was briefed, after the expiration of the 90-day period). It was submitted that the 90-day time period was generous.

- [34] Insofar as prospects of success were concerned and whether the Applicant's dismissal was substantively fair or not, the Respondent submitted that the Applicant did not have prospects of success in respect of his challenge to the substantive fairness of his dismissal and contended that many of the Applicant's material submissions were untrue. In this regard the Respondent submitted that: Mr Lund had longer service than the Applicant; the Applicant was aware that the Respondent's business was losing millions of rand without the prospect that the business could be turned around; the Applicant and all those employed in the area of business which he oversaw were retrenched; if a business is losing money then it cannot carry on as before; various projects had been completed and the contract with the City of Umhlathuze would terminate at the end of June 2020 (which was the final nail in the business unit of the Respondent; there were no future project opportunities in the foreseeable or near future; and it would be financially unviable for the Respondent not to have contemplated retrenchments). The Respondent further contended that the Applicant had accepted that numerous consultations were held and facilitated. It furthermore contended that the Applicant's submissions as to alternatives were not feasible and he knew by virtue of his seniority that they were not feasible (such as bumping Mr Lund who had longer service) and that it did reply to suggestions made by the Applicant.

Evaluation and analysis

The factors

- [35] The Applicant is required to show good cause for the late delivery of his Statement of Claim and that the granting of condonation is in the interests of justice. The Court must necessarily take into account the degree of lateness, the reason for lateness, the Applicant's prospects of success, any prejudice to the Respondent and any other relevant factors.
- [36] 'Good cause' requires the Applicant to provide an explanation to establish how and why the default occurred, for each period of the delay. Condonation is not to be had merely for the asking, a full and detailed account of the causes of the delay and their effects must be furnished so that the Court is in a position to understand clearly the reasons for the delay and to assess the responsibility for it.
- [37] This Court has emphasised that none of the factors referred to above are individually decisive but should all be taken into account to arrive at a conclusion as to what is in the interests of justice. It has consistently been held in this Court (and others) that:
- (i) where the delay is unacceptably excessive and there is no explanation for the delay or the explanation for the delay is unsatisfactory, there may be no need to consider the prospects of success, as this in itself justified a refusal to grant condonation; (ii) if the period of delay is short and there is an unsatisfactory explanation but there are reasonable prospects of success, condonation should be granted; and (iii) despite the presence of reasonable

prospects of success, condonation may be refused where the delay is excessive, the explanation is non-existent and granting condonation would prejudice the other party.

- [38] Put another way, if there is no reasonable and acceptable explanation for a lengthy delay, the Applicant's prospects of success are immaterial, and without prospects of success, no matter how good the explanation for the delay might be, condonation ought to be refused.

Length of the delay

- [39] By any account, a delay of 14 days is not an excessive delay, particularly when viewed proportionately in comparison to the statutory time period of 90 days which is granted for the delivery of a statement of claim.

- [40] I asked Mr Lennox whether it could be said that the delay was excessive. He conceded that it was not an inordinately long delay

although he did also contend that it was not a short delay either.

- [41] It cannot be said that a 14-day delay is grossly excessive or even excessive. As such an excellent explanation for the delay is not required. The explanation does however need to be reasonable, acceptable and/or adequate.

Explanation for the delay

- [42] It cannot be said that the explanation for the delay is scant. It would appear that the Applicant and his attorneys were aware of the existence of the relevant 90-day statutory time period and the need to comply with that time period, hence the request for an indulgence on or about 21 December 2020, which indulgence was not granted.

- [43] The Applicant did not provide any reasons or explanation to the Respondent as to why he required an indulgence. The request was

refused on the instructions of the Respondent. Mr Lennox emphasized that the Respondent's attorney acted upon the instructions of the Respondent in refusing the request and that the refusal of the request was not an unreasonable position to take.

- [44] The request was sought at a time of year when most law firms and corporates close for the end of year holidays (and counsel are often away as well). Extensions are often agreed to between parties at this time for the sake of convenience although the Respondent did have the right to refuse to grant an extension.

- [45] There is an explanation for the delay – for the most part, it encompasses the Applicant being of the view that he needed a senior counsel to draft and settle his Statement of Claim (whom he could not afford to engage before the 90-day time period elapsed and in respect of which he needed to raise money), and not his attorney or a junior counsel.

- [46] The Respondent did not challenge the veracity of authenticity of the reason, but challenged whether that reason amounted to an acceptable

reason.

[47] The Applicant's explanation for the delay is at the very least adequate. It does not appear to be contrived. The explanation is short on detail in certain respects, particularly in relation to the dates when certain events transpired and what was done during the 90-day time period. The Applicant has taken the Court into his confidence to some degree in relation to the reasons for the delay (financial difficulties, ill-health, travelling abroad to find employment etc.).

[48] The court in *Independent Municipal and Allied Trade Union on behalf of Zungu v SA Local Government Bargaining Council and others*[11] held:

“In explaining the reason for the delay it is necessary for the party seeking condonation to fully explain the reason for the delay in order for the court to be in a proper position to assess whether or not the explanation is a good one. This in my view requires an explanation which covers the full length of the delay. The mere listing of significant events which took place during the period in question without an explanation for the time that lapsed between these events does not place a court in a position properly to assess the explanation for the delay. This amounts to nothing more than a recordal of the dates relevant to the processing of a dispute or application, as the case may be.”

[49] The principal attack on the explanation provided is whether the Applicant's lack of funds to afford the services of a senior

counsel instead of just an attorney or an attorney and a junior counsel amounts to a reasonable and acceptable explanation for the delay. It does appear that if the Applicant had sufficient funds to afford a senior counsel or had obtained the services of one on a contingency fee basis prior to the passing of the 90-day time period that the Statement of Claim would in all probability have been delivered timeously. The Applicant has provided some particularity relating to the actual attempts to secure the services of senior counsel.

[50] Mr Lennox submitted during argument that the Applicant cannot simply say that he wants to brief senior counsel in his matter and can then wait until he is able to do so before delivering his statement of claim.

[51] Mr Lennox further submitted during argument that by granting condonation this Court would be 'opening the floodgates' by allowing parties an opportunity to save up enough money until they can afford the lawyers of their choice.

[52] In *Du Plessis v Wits Health Consortium (Pty) Ltd*[12] the Court held as follows:

"It is clear from the above and other judgments that a claim of lack of funds on its own cannot constitute reasonable explanation for the delay. In other words, when pleading lack of funds as the cause of the delay, the applicant needs to provide more than a mere claim that the reason for the delay is lack of funds. In this respect, the applicant has to take the court into his or her confidence in seeking its indulgence by explaining when, not only that he or she finally raised funds to conduct the case, but also how and when did he or she raise those funds. The 'when'

aspects of the explanation are important, as it provided the courts with information as to whether there was any further delay after raising the funds and whether an explanation has been provided for such a delay."

[53] This does not apply directly to the explanation of the Applicant in *casu*. The Applicant has, to some degree, explained how and when he raised the funds for senior counsel and also provided the Court with information as to whether there was any further delay after raising the funds and provided an explanation for such a delay. It appears that Mr Malan was briefed by the Applicant shortly before 18 January 2021 (according to paragraph 18 of the Respondent's Heads of Argument) and that an urgent consultation was held with Mr Malan on 18 January 2021 (albeit after the 90-day time period had lapsed). There is then a further delay from 18 January to 27 January 2021 in finalising and delivering

the Statement of Claim due to the Applicant's computer hard drive crashing (between 15 and 26 January 2021) and the Applicant

could only send various documents to his senior counsel on 26 January 2021, with the Statement of Claim being delivered the next day. The Applicant has also not relied on a lack of funds as the only explanation for the delay. Other reasons were proffered as well.

[54] In *Balmer and others v Reddam (Befordview) (Pty) Ltd*[13] the Court said:

"In the present instance the explanation of the applicants that they did not have funds to pay their lawyer is unsatisfactory in that he does not explain why, when the facts of this case are so straightforward, they did not file the statement of case on their own. . . . There is no evidence that they took any effort to enquire as to what other resources were available for assistance which suggests that they were less interested in ensuring that the dispute was speedily resolved."

[55] The Applicant's case does not appear to be straightforward or a simple matter. He certainly did not concede that it is. As alluded to above, the Applicant was of the view that the pro forma Labour Court statement of claim would not suffice in the circumstances. It also cannot be said that the Applicant did not make an effort to obtain resources to pay for senior counsel or that he was not interested in ensuring that the dispute is resolved expeditiously.

[56] From the above it is apparent that in certain cases and depending on the circumstances of that case and the explanation proffered for the delay, it has been found that waiting for legal cover is an unacceptable explanation and that a lack of funds is not a reasonable explanation if that is the only explanation that is being proffered. Waiting for legal cover or a lack of funds does not in every instance constitute an unacceptable explanation.

[57] In the end, the Applicant has proffered an explanation for what is not a material and grossly excessive delay. That means that the issue of prospects of success must be considered as well.

Prospects of success

- [58] It was conceded by Mr Malan that the Applicant's cause of action in relation to procedural unfairness had no prospects of success. The cause of action in relation to substantive fairness remained however.
- [59] In *Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd* [14] it was held that a consideration of prospects of success merely implies a determination of the likelihood or chance of success when the main case is heard. A similar approach was followed in *Seatlholo & others v Entertainment Logistics Service (A division of Gallo Africa Ltd)*[15], where it was held that the test is whether the applicants would succeed in the main action if the facts pleaded by them in their condonation application were established at trial. Equally so, the prospects of success do not entail an applicant having to prove on a balance of probabilities that he or she would succeed when the merits of the case are heard[16] .
- [60] Various disputes of facts have been raised on both sides, and it cannot be said that the Applicant does not enjoy reasonable or at least some prospects of success in relation to the claim of substantive unfairness (in respect of which the Respondent bears the onus).
- [61] It is not necessary for the Applicant to prove that he will succeed when the merits of the matter are considered; it is necessary only to provide a basis to establish that he has a reasonable chance of succeeding when the matter is heard.
- [62] In *Mulaudzi v Old Mutual Life Assurance Company (South Africa) Limited*[17] , the Supreme Court of Appeal held that it is advisable in such applications, to set forth briefly and succinctly such essential information as may enable the court to assess an applicant's prospects of success.
- [63] This requires an elucidation of the prospects of success beyond a broad and sweeping statement to the effect that 'the applicant has good prospects' – the averment must be substantiated. Mr Lennox submitted during argument that the Applicant has simply incorporated a portion of his Statement of Claim into his Founding Affidavit in support of the Condonation Application and that there were only three paragraphs in the Founding Affidavit that dealt with prospects of success. Mr Lennox contended that the Applicant did not say what specific parts of the Statement of Claim were being relied on. In paragraphs 39 to 41 of his Condonation Application Founding Affidavit, the Applicant incorporates by reference the full contents of his Statement of Claim for it to be read as forming part of the affidavit and the application. A copy of the Statement of Claim is also attached as an annexure to the Condonation Application Founding Affidavit.
- [64] The Applicant then submits that it is evident from the attached Statement of Claim that he has a bona fide claim with excellent prospects of success. Mr Malan's submission during argument in relation to why the Applicant contended that his dismissal was substantively unfair has been addressed in some detail above. The Applicant has not made a made a broad and sweeping statement that he has good prospects of success. His averments in his Statement of Claim in that regard are specifically incorporated into his Founding Affidavit

and the Statement of Claim itself served as part of the evidence before me (as an annexure to the Founding Affidavit). The Applicant could simply have repeated verbatim the contents of his Statement of Claim in his Founding Affidavit. Incorporating the contents by reference and attaching the Statement of Claim to the Founding Affidavit has the same effect.

[65] The Applicant does appear to have some prospects on his version. It cannot be said that he has none or that there is an absence of proper prospects of success.

[66] In *Ahmed v Commission for Conciliation, Mediation and Arbitration and others*[18] the Court had the following to say:

"[31] It is accepted that the standard for considering an application for condonation is the interests of justice. As to what is in the interests of justice must clearly take due regard to all the relevant factors, and the particular circumstances of each case. It cannot in my view, be in the interest of justice to grant condonation in circumstances where a party's prospects of success are remote, even if the delay is insignificant or where there is a plausible explanation for that delay. Thus, where it is evident that a party seeking condonation has no prospects of succeeding in its principal claim or opposition, it would not be in the interests of justice to grant condonation, nor would there be any purpose served in granting condonation. This factor is also aligned to the consideration of prejudice to the parties. Thus, to the extent that condonation were to be granted in circumstances where a party did not have prospects of success, it would be prejudicial to the respondent party to have to defend a matter that has no merit, and in these circumstances the interests of justice would dictate that condonation should not have been be [sic] granted, and the ruling is therefore unassailable."

[67] The Applicant has, as a minimum, a plausible explanation for the delay and the delay is not significant or inordinate. As such and in order for condonation to be refused the Applicant's prospects of success must be remote or there must be no prospects of success. I cannot conclude that the Applicant's case is hopeless based on the versions pleaded by the parties in relation to the substantive fairness/unfairness of the Applicant's dismissal due to the operational requirements of the Respondent.

Prejudice and the delay in the administration of justice

[68] The balance of convenience would appear to favour the Applicant as the prejudice which he would suffer if condonation was not granted (i.e. his unfair dismissal dispute would not be adjudicated by this Court) outweighs the prejudice that the Respondent would suffer if condonation was granted - it would need to incur the legal costs of defending the claim to trial (where it could of course obtain a costs order against the Applicant if his claim is found to be frivolous or vexatious).

[69] The costs which the Respondent incurred when opposing the condonation application was incurred knowing full well the merits and demerits of opposing the application (if having been legally represented at all material times).

[70] As for the contended delay in the administration of justice such a delay would have been negligible if the condonation application had not been opposed. The Respondent's opposition to the condonation application having been fully aware of the grounds for the condonation application elected to oppose the condonation application. It is of course entitled to do so but such opposition,

in my assessment, has contributed more to the delay in the administration of justice in this matter than the conduct of the Applicant.

[71] As the matter is an action and not a motion, the parties would also need to wait some time until a trial set down date is allocated. All things considered, a delay of 14 days in delivering the Statement of Claim does not materially prejudice the Respondent or cause an undue delay in the administration of justice.

Conclusion

[72] In all the circumstances, I am satisfied that the Applicant has established good cause and made out a proper case for the granting of condonation.

Costs

[73] This then leaves only the issue of costs.

[74] In terms of the provisions of section 162(1) of the LRA, which regulates orders for costs in this Court, I have a wide discretion when it comes to the issue of costs, having regard to the requirements of the law and fairness after taking account all of the relevant facts and circumstances.

[75] In exercising this judicial discretion, the Constitutional Court in *Long v South African Breweries (Pty) Ltd and Others*[19] reaffirmed the principle set in *Zungu v Premier of the Province of Kwa-Zulu Natal and Others*[20] with regard to costs in employment disputes and stated that 'when making an adverse costs order in a labour matter, a presiding officer is required to consider the principle of fairness and have due regard to the conduct of the parties.'

[76] Taking account of all the relevant facts and circumstances and having regard for the requirements of the law and fairness, I do not consider it appropriate to make a costs order, and I exercise my discretion as to costs accordingly.

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

Order

1. The application for condonation is granted.
2. There is no order as to costs.

M. Sass

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv. Lourens Malan SC

Instructed by: Joubert

Attorneys

For the Respondent: Adv. M Lennox

Instructed by: Botoulas

Krause & da Silva Inc.

[1] Respondent's Heads of Argument, para 4.

[2] No. 66 of 1995, as amended.

[3] Condonation Application Bundle: pp 62 to 64; Annexures AA2 and AA3 to the Respondent's Answering Affidavit.

[4] Applicant's proof of service affidavit, pp 1 to 33 and annexures thereto, Index: Proof of Services Affidavits.

[5] Applicant's Heads of Argument, paras 4 to 10.

[6] Respondent's Heads of Argument, para 3.

[7] 2014

(1) BCLR 65 (CC).

[8]

[2019] 11 BLLR 1189 (CC).

[9] Grootboom supra at paras 20-23 and 51.

[10] Condonation Application Bundle: pp 15 to 43; Applicant's Statement of Claim.

[11] (2010) 31 ILJ 1413 LC at para [13].

[12] [2013] JOL 30060 (LC) at para 16.

[13]

(2011) 32 ILJ 2121 LC at para [15].

[14] 2009 30 ILJ 347 (LC) at para 27.

[15]

(2011) 32 ILJ 2206 (LC) para 24.

[16] Production Institute of South Africa (PTY) Ltd v CCMA and others (Case No: JR1974/2009) at para 12; See also SA Democratic Teachers Union v Commission for Conciliation, Mediation and Arbitration and others (2007) 28 ILJ 1124 (LC) at para 38, where it was held that; ‘A commissioner in considering prospects of success does not have to pronounce on the merits of the case. All that the commissioner needs to do is to investigate whether on the averments made by the applicant there is a prima facie case, that there is a chance of succeeding when the main case is heard. In other words to establish whether there is a reasonable prospect of success on the merits, it suffices if an applicant can show a prima facie case through setting out averments which, if established at the proceedings of the main case, would entitle the applicant to some relief. The applicant need not deal fully with the merits of the case’.

[16] Production Institute of South Africa (PTY) Ltd v CCMA and others (Case No: JR1974/2009) at para 12; See also SA Democratic Teachers Union v Commission for Conciliation, Mediation and Arbitration and others (2007) 28 ILJ 1124 (LC) at para 38, where it was held that;

‘A commissioner in considering prospects of success does not have to pronounce on the merits of the case. All that the commissioner needs to do is to investigate whether on the averments made by the applicant there is a prima facie case, that there is a chance of succeeding when the main case is heard. In other words to establish whether there is a reasonable prospect of success on the merits, it suffices if an applicant can show a prima facie case through setting out averments which, if established at the proceedings of the main case, would entitle the applicant to some relief. The applicant need not deal fully with the merits of the case’.

[17] 2017 (6) SA 90 (SCA) at para 6.

[18] [2017] JOL 38063 (LC).

[19]

(2019) 40 ILJ 965 (CC) at para 30.

[20]

(2018) 39 ILJ 523 (CC) at para 25.

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