

SOUTH AFRICA / JUDGMENT

Adam v Patels Petroleum Distributors (D640/2021) [2024] ZALCD 37 (14 October 2024)

[2024] ZALCD 37

COURT
Labour Court Durban

BEFORE
Allen-Yaman

CASE / FILE NUMBER
D640/2021

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IN
THE LABOUR COURT OF SOUTH AFRICA, DURBAN
Case
No: D640/2021
Not
Reportable
In

the matter between: ISMAIL
ADAM
Applicant
and
PATELS
PETROLEUM DISTRIBUTORS CC
t/a
SIMS GAS (Reg No CK1986/12366/23)
Respondent

Heard: 22 March 2024

Delivered: This judgment was handed down electronically by circulation to the parties and / or their legal representatives by email. The date and time for handing-down is deemed 13h00 on 14 October 2024.

JUDGMENT

ALLEN-YAMAN J

Introduction

- [1] The respondent having terminated his services on 30 March 2021, the applicant referred a dispute to the Commission for Conciliation, Mediation and Arbitration in which he challenged the fairness of his dismissal. As that referral was referred outside the time period prescribed, he applied for and was granted condonation for the delay. A certificate of non-resolution was issued on the day on which condonation was granted, 14 June 2021. In light of the manner in which the applicant had categorised his dispute, the certificate of non-resolution indicated that he was to proceed to this court for adjudication. This he did, albeit outside the time period of 90 days permitted in terms of s191(11) of the LRA, which necessitated that he again apply for condonation, which he did. It is that condonation application, opposed by the respondent, which is to be determined.

Analysis

- [2] In view of the fact that the certificate of non-resolution was issued by the CCMA on 14 June 2021, the applicant was required to have delivered his statement of claim by no later than 12 September 2021. As this was done on 25 October 2021, the delay was a period of 43 days rather than 120 days as alleged by him in his founding affidavit. Such a period of time is neither insignificant nor inordinately long.
- [3] In opposing the granting of condonation, the respondent took issue with the explanation provided by the applicant in which he had attributed the delay to various factors, being his own ignorance of the time frames, the negligence of his erstwhile attorney, attempts to settle the matter, and financial constraints.
- [4] Notwithstanding that the certificate of outcome had been issued on 14 June 2021, it was only conveyed to him one week later. Upon receipt thereof he was advised by the firm of labour consultants who had been assisting him that he would require the services of an attorney as his matter was required to be adjudicated in this court. A firm of attorneys was recommended to him, with whom he duly consulted on 28 June 2021. On his own version the purpose of that first consultation was to investigate his potential claim in this court by establishing the timeframes and costs involved, and obtaining an opinion concerning his potential prospects of success.
- [5] Upon the conclusion of that meeting it was decided that efforts would be expended in endeavouring to settle the matter with the respondent as this was hoped to avert having to pursue his claim in this court and thereby avoid the necessity of incurring costs. It apparent from the correspondence which was annexed to the applicant's replying affidavit that his previous attorney had transmitted a letter to the respondent in which he enquired whether

it would be prepared to attempt to settle the dispute between the parties, albeit one month after the consultation, on 27 July 2021. This was seemingly attended to only after the applicant's daughter had transmitted an email to the attorney on 13 July 2021 in which she requested that she be updated on progress in relation to the applicant's matter and be provided with a copy of the letter transmitted to the respondent.

- [6] The applicant alleged that he received no response from this attorney despite his 'numerous and repeated requests for feedback'. In an attempt to substantiate that allegation, he referred to all the correspondence which had been sent to the attorney the sum of which was his daughter's email referred to above, an email transmitted on 29 June 2021 under cover of which the applicant's

proof of residence was provided, and an email on 1 September 2021 which evinced that his daughter had met with the attorney that day.

- [7] By 9 September 2021 the applicant had become disillusioned with the services he was then being provided and elected to seek assistance from a different firm of attorneys, being those who are currently on record for him. He consulted with an attorney that day and it was then that it was drawn to his attention that his referral to this court was subject to a time bar. He was provided with a quotation the following day and duly set about endeavouring to secure the funds necessary for his new attorneys to prosecute his claim. In this he experienced some difficulties and, unable to obtain a personal loan from a financial institution, he resorted to borrowing money from relatives.
- [8] He paid the funds required to his attorneys on 29 September 2021 and they, in turn, took the steps necessary to institute action in this court. At the beginning of October 2021 the applicant's former attorney's file was obtained, and his statement of claim and condonation application were drafted by 18 October 2021. Delivery was effected one week later, on 25 October 2021.
- [9] The period of delay may be divided into two time periods, before and after his present attorney of record was instructed to act on his behalf.
- [10] Prior to the effluxion of the 90 day period, it is evident that the applicant endeavoured to enlist the assistance of an attorney to attempt to settle the matter. In that time it is not evident that he took any steps to prosecute his claim in this court. If regard is to be had to his affidavit and the correspondence annexed thereto, there is no evidence of any steps taken by him to commence proceedings in this court at any time prior to 1 September 2021 on which date his daughter addressed correspondence to his previous attorneys in which she requested that a quotation to proceed with the matter be furnished.

- [11] Whilst much was made by the applicant of his previous attorney's negligence and the respondent, in turn, argued that such negligence ought to be attributed to the applicant, there is no evidence before this court that that attorney was negligent at any time prior to 1 September 2021. In light of the fact that a quotation was being sought on that date, it follows that he had not, at any time prior thereto, received an instruction to institute action on behalf of the applicant.
- [12] On the applicant's version he had been unaware of the time period involved. The respondent argued that doubt was cast on his assertion by virtue of the statement made in his own affidavit that this was one of the very issues which he intended to canvas in the course of his first consultation with his previous attorney on 28 June 2021. The statement from which the respondent derived its argument was the applicant's assertion that the purpose of the first meeting was, amongst other things, 'to understand the estimated timeframes for the referral to the Labour Court.' From his subsequent allegation, however, it is clear that a decision was taken at that meeting to attempt to resolve the matter without the necessity of incurring the costs of litigation. This being the case, it is not possible for this court to find that the partial purpose of the meeting was fulfilled and this court accordingly cannot reject his version that the first time he became aware of the time period was on 9 September 2021, when it was drawn to his attention by his new attorney.
- [13] On that date, three days remained until the 90 day period terminated. Whilst there is no reason to doubt that the applicant suffered financial constraints and that he was required to borrow funds to litigate, there is no apparent reason why he made no efforts to do so at any time prior to 10 September 2021 as it could never have been guaranteed that the respondent would agree to settle his dispute. Had he done so, there would have been no further delay caused by the need to do so at the point when there was then limited time available to him. This process was then responsible for the 17 day delay from 13 to 29 September 2021, on which date he paid that which was required to be paid to his attorney in order for his claim to be actioned.
- [14] The further delay, from 30 September 2021 to 25 October 2021 was not of his making. It was in that period of time that the matter remained with his attorney, who by 4 October 2021, when she received his file from the applicant's previous attorney, had the information, the instructions and the funds available to prosecute his claim. Given the urgency of the matter, and the fact that all parties were well aware that the statement of claim was late, she nevertheless took a further two weeks to draft the documents necessary to initiate his action, and a further week to effect delivery. The explanation provided for this period of time concerns matters not within the applicant's knowledge. As his affidavit was unaccompanied by a confirmatory affidavit deposed to by the attorney in question and nor was one supplied in response to the respondent having drawn this deficiency to his attention, the period from 4 to 25 October 2021 must be regarded as unexplained.

[15] Insofar as the applicant's prospects of success are concerned, the applicant asserted that the facts of the termination of his employment demonstrate that these are good. Arising out of such termination, the applicant articulated three claims in his statement of claim, none of which were claimed in the alternative:

The first is a claim premised on s187(1)(f) of the LRA, the applicant having asserted that his dismissal was automatically unfair in relation to his age. In respect of this claim he sought an order directing the respondent to pay the applicant the equivalent of 24 months' remuneration as compensation, or more.

The second is a claim premised on s188(1)(a)(i) and (b) of the LRA, the applicant having asserted that the respondent had no fair reason relating to either his conduct or his capacity to dismiss him, which dismissal was not effected in accordance with a fair procedure. In the result, he sought an order that the respondent be directed to pay him compensation equivalent to the amount of the equivalent of 12 months' salary, or such other amount as deemed appropriate by this court.

His final claim is premised on the Employment Equity Act, 1998, in that he asserted that his dismissal had been discriminatory as it had been based upon his age, in conflict with s6(1) of the EEA. For this he claimed an order directing that the respondent pay him compensation and damages in the amounts of R500 000.00 under each head.

[16] The respondent took issue with the first of the applicant's claims on the basis that it contended that it had not been conciliated, the applicant's form 7.11 having indicated that his dispute was one of unfair discrimination in terms of s10 of the EEA. Notwithstanding reference to s10 of the EEA in his form 7.11 and the subsequent reliance placed thereon in his Statement of Claim, he nonetheless indicated in his form 7.11 that the act of discrimination complained of was that of his having been dismissed due to his age. There is accordingly no reason for this court to conclude that the very causa upon which his s187(1)(f) claim is founded was not referred for conciliation, and accordingly the respondent's objection on that basis cannot be sustained. The merits of this claim will be returned to hereunder.

[17] It is clear that the applicant's discrimination complaint concerns the action taken by the respondent on 30 March 2021 when it dismissed him. S10(1) of the EEA expressly excludes the referral of dismissals from the disputes which may be referred to the CCMA as discrimination disputes,

'In this section, the word 'dispute' excludes a dispute about an unfair dismissal which must be referred to the appropriate body for conciliation and arbitration or adjudication in terms of Chapter VIII of the Labour Relations Act.'

Given that the discrimination alleged to have been perpetuated was his dismissal on account of his age the applicant enjoys no claim

directly under the EEA. His claim is limited to his dispute that his dismissal had been automatically unfair in terms of the LRA.

[18] The second of the applicant's claims can also not succeed in this court. The Labour Court does not have jurisdiction to determine the fairness of a dismissal in circumstances in which the complaint is other than as set forth in s187. Such disputes are required to be arbitrated by the CCMA or a council if one has jurisdiction to do so. S158(2) is not an open invitation to litigants to refer to this court disputes in respect of which this court has no jurisdiction as a matter of their own convenience. That section is designed to accommodate litigants in the limited circumstances envisaged therein; when it only becomes apparent after the fact and notwithstanding a litigant's belief that his or her claim is one required to be adjudicated by this court, that it was not the appropriate forum. It is not intended to be utilized by litigants who are aware, or who ought to be aware, that their claims are required to be dealt with elsewhere, as in the present case.

[19] As to the first of his claims, that his dismissal was automatically unfair, this was particularised in paragraphs 7.5 to 7.7 of his Statement of Claim as follows,

'It is the Applicant's case that in the absence of a written employment contract between himself and the Respondent, and if the normative age of retirement of 65 years is applied, then the Respondent acquiesced by not placing the Applicant on retirement when he turned 65 and allowed for him to continue working beyond the age of 65 up to the age of 81. In so doing, the Respondent waived any right to retire the Applicant upon the Applicant passing the age of 65 and that its conduct demonstrates an estoppel in the Applicant's favour against the Respondent.

In dismissing the Applicant, the Respondent has failed to demonstrate that the Applicant lacked the ability to carry out his functions in the normal course of the Respondent's business.

In the Notice of Retirement marked C1, the Applicant's employment was terminated allegedly on the Respondent's pretext of concern for the Applicant and its clients on account of the COVID-19 pandemic. The reasons furnished in annexure C1 are not sufficient grounds that are based on an inherent requirement of the Applicant's particular job as envisaged in Section 187(2)(a) of the Labour Relations Act,

1995. The Applicant like all other employees employed in the position as a Sales Representative and younger than him were all equally

exposed to the COVID-29 pandemic, irrespective of age.'

[20] In response the respondent denied that the termination of the applicant's services had occurred for any reason relating to his age. In its statement of response it instead asserted that this had been done as a result of his inability to perform the services for which he had been contracted. That this was the cause for his dismissal was reiterated in its affidavit opposing the granting of condonation.

[21] In reply the applicant drew this court's attention to the notice of termination given to him by the respondent on 30 March 2021 in which no mention had been made of his alleged failure to have performed the functions of his work to the standard required of him.

[22] If reference is to be had to the various reasons proffered by the respondent for having decided to place the applicant on retirement since the time when it did so, they are revealed to have been:

On 30 March 2021 it premised its decision on allegations relating to his well being in consideration of the risk associated with his potential exposure to the COVID-19 virus.

In the affidavit deposed to by Mr Mahomed Hoosen in response to the applicant's application for condonation for the late delivery of his referral to the CCMA it was alleged that the decision had been taken as a result of his inability to have carried out the functions of his job (seemingly in relation to his driving capabilities) and the respondent's concomitant concern for his own safety as well as the safety of the general public.

In response to the applicant's claim in the present instance, the respondent reiterated that his services had been terminated due to his inability to perform the work for which he had been employed, elaborated upon to encompass the diminution of both his customer base and his sales targets, whilst having expressly disavowed itself of any reliance having been placed on s187(2)(b).

[23] S187(2) reads,

'Despite subsection (1)(f) –

- (a) a dismissal may be fair if the reason for dismissal is based on an inherent requirement of the particular job;
- (b) a dismissal based on age is fair if the employee has reached the normal or agreed retirement age for persons employed in that capacity.'

[24] Whist the parties concurred that they had never reached any agreement as to a retirement age, the respondent did not dispute the correctness of the applicant's allegation that the normal retirement age in the industry in which the respondent conducts its business is 65 years. In light of the respondent's disavowed reliance on a normal retirement age, it simply discounted the applicant's allegation as irrelevant. This court must accordingly accept the correctness of the applicant's

allegation that the normal retirement age for individuals employed in the operative industry is 65 years.

[25] With this, it is necessary to consider the principles relevant to the essence of the applicant's pleaded case: that the respondent was said to have waived its right to rely on the normal retirement age applicable, in circumstances in which it had passively acquiesced to his continued employment post fact his having reached that age.

[26] A situation similar to that of the applicant's was considered by the Labour Appeal Court in *Motor Industry Staff Association and Another v Great South Autobody CC t/a Great South Panel Beaters*

(2022) 43 ILJ 2326 (LAC), the only points of difference between the applicant's case and that of the employee therein being that in that matter the parties had expressly agreed to a retirement age of 60 years. The Labour Appeal Court found that the right to retire an employee upon an employee reaching the applicable retirement age remained extant notwithstanding that such employee did not retire at that time,

'Section 187(2)(b) does not prescribe a time frame within which the dismissal should take place, provided it is after the employer has reached his

or her agreed or normal retirement date. Properly construed, section 187(2)(b) affords an employer the right to fairly dismiss an employee based on age, at any time after the employee has reached his or her

agreed or normal retirement age. This right accrues to both the employee and the employer immediately after the employee's

retirement date and can be exercised at any time after this date. The focus is not so much on when the employee reached his or her retirement date, but rather that the employee has already reached or passed the normal or agreed retirement age.'

[27] This being so, the only basis upon which the applicant could succeed in his claim that his dismissal had been automatically unfair would be by the establishment of the respondent's waiver of its right to require him to retire, which right it acquired upon him having reached the normal retirement age of 65 years.

[28] The existence of a waiver is a question of fact which necessitates the party relying thereon to both allege and prove a decision taken by the other party, either tacitly or expressly, to abandon the right in question with full knowledge of the right so abandoned. From the applicant's pleaded case (as reflected in both his Statement of Claim and founding affidavit) it is clear that the applicant did not rely on an express waiver, but rather one which was tacit, to be inferred by the conduct of the respondent in having permitted him to continue to work after his retirement age had been reached. A similar argument was rejected in *Motor Industry Staff Association*, which confirmed the decision of the Labour Court in *Schweitzer v Waco Distributors* (A division of Voltex (Pty) Ltd (1998) 19 ILJ 1573 (LC) that a dismissal in terms of s187(2)(b) will be fair if:

- (a) The dismissal is based on age;
- (b) The employee had an agreed or normal retirement age for employees employed in the capacity of the employee concerned; and
- (c) The employee has reached the normal or agreed retirement age.

[29] In the circumstances, on the authority of the Labour Appeal Court in *Motor Industry Staff Association*, and by reference to the applicant's own pleaded case (1) all three conditions were met and (2) the existence of a tacit waiver cannot be established.

[30] Accordingly, in consideration of the issue of the applicant's prospects of success, this court is obliged to conclude that he would be unable to succeed in a trial of this matter. In summary:

He does not enjoy a claim under the EEA distinct from his claim that his dismissal was automatically unfair in terms of s187(1)(f) of the LRA;

This court does not have jurisdiction to adjudicate his claim that his dismissal had been unfair for reasons relating to his conduct or his capacity; and

Even if the facts upon which he has relied to found his claim in terms of s187(1)(f) were to be established in a trial in due course and the respondent's pleaded defence rejected, on the authority of the Labour Appeal Court in *Motor Industry Staff Association*, the decision taken by the respondent to implement his retirement at the time when he was 81 years old cannot be found to have been automatically unfair.

[31] It is a trite principle of our law that, although the factors relevant to condonation are inter-related and are generally not required to be considered in isolation, without possible prospects of success, condonation will not be granted. In the circumstances,

although the respondent would not have been prejudiced in the prosecution of its defence; the length of the delay was not inordinate; and the explanation for the delay not wholly inadequate, the absence of any prospects of success negates the exercise of this court's discretion in favour of granting him condonation.

Costs

[32] Although the applicant has not been successful, in consideration of the facts of the case, he will not be ordered to pay the respondent's costs. The applicant attempted to do no more than exercise a right he bona fide believed was afforded to him under the LRA, the ambit of which right was clarified by the Labour Appeal Court only after he had instituted action. He is furthermore an unemployed litigant with obviously limited financial resources. In the circumstances, and notwithstanding that he sought an indulgence, this court is not of the belief that an order requiring him to pay the respondent's costs would serve the interests of justice.

Order

1. The applicant's application for condonation for the late delivery of his Statement of Claim is dismissed.
2. There is no order as to costs.

K Allen-Yaman

Judge of the Labour Court of South Africa

Appearances

Applicant:

Ms K Hennessy, instructed by Derik Jaftha Attorneys

Respondent:

Ms L Naidoo SC, instructed by Abdool Gaffoor Parasram & Associates

[1] At paragraph 15

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