

SOUTH AFRICA / JUDGMENT

Bisschoff v Curro Holdings Ltd t/a Curro Academy Wilgeheuwel (JS 613/17) [2020] ZALCJHB 206 (11 September 2020)

[2020] ZALCJHB 206

COURT

Labour Court Johannesburg

BEFORE

F Coetzee

CASE / FILE NUMBER

JS 613/17

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IN

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JS 613/17

In

the matter between:

CHANTAL

BISSCHOFF

Applicant

and

CURRO

HOLDINGS LTD t/a CURRO ACADEMY WILGEHEUWEL

Respondent

Heard:

21 August 2020 and postponed to 10 September 2020 for the parties to file heads of argument

Delivered:

This judgment was handed down electronically by circulation to the parties' representatives by email and release to SAFLII. The date and time for hand-down is deemed to be 11 September 2020.

Summary:

Condonation application – late filing of statement of case – excessive delay in filing a condonation application – no explanation for the delay in filing the condonation application

JUDGMENT**COETZEE AJ**

- [1] The applicant approaches this Court for an order condoning the late referral of her statement of case to the Labour Court.

Parties

- [2] The applicant is Chantal Boshoff.
- [3] The respondent is Curro Holdings Limited trading as Curro Academy Wilgeheuwel ("Curro") and employed the applicant from January to 31 March 2017.
- [4] The respondent raised a point in limine. According to the respondent the applicant referred the alleged unfair dismissal dispute to the CCMA outside of the 30-day period. Therefore, the CCMA had no jurisdiction conciliate or to determine the issue. As a result, the application for condonation must be dismissed as there was no valid referral to the CCMA.

Analysis of the point in limine

- [5] In the absence of an application by the respondent to set aside the certificate of outcome on the basis that the CCMA had no jurisdiction, the mere averment does not assist the respondent as was decided by the Labour Appeal Court in *SABC v CCMA & Others*[1]:

"[9] ... The third respondent, so the submission went, ought to have referred the dispute to the CCMA on or before 5 January

1998. His referral on 2 February 1998 was one month late. Since no condonation for the late referral was sought nor granted, the commissioner lacked jurisdiction to arbitrate the issues and the award is, therefore, a nullity.

[10] I am unable to uphold this contention in the light of the decision of this Court in *Fidelity Guards Holdings (Pty) Ltd v Epstein NO & others*. [2] In that case an employee referred a dispute about the fairness of his dismissal to the CCMA outside the statutory 30-day period from the date of dismissal within which he was required to have referred it in terms of section 191(1)(b) of the Labour Relations Act 66 of 1995 ("the Act"). Attempts were made to conciliate but no agreement was reached. The commissioner who had conciliated the dispute issued a certificate of outcome in terms of section 135 of the Act to the effect that the dispute remained unresolved. Thereafter the matter was duly arbitrated upon and an award was issued against the employer. The employer then launched an application in the Labour Court to review and set aside the award. This was based, inter alia, on the same ground as presently relied on by Mr Maserumule. The court, per Zondo JP, held as follows: [3]

“In my view the language employed by the legislature in s 191 is such that, where a dispute about the fairness of a dismissal has been referred to the CCMA or a council for conciliation, and the council or commissioner has issued a certificate in terms of section 191(5) stating that such dispute remains unresolved or where a period of 30 days has lapsed since the council

or the CCMA received the referral for conciliation and the dispute remains unresolved, the council or the CCMA, as the case may be, has jurisdiction to arbitrate the dispute. That the dispute may have been referred to the CCMA or council for conciliation outside the statutory period of 30 days and no application for condonation was made or one was made but no decision on it was made does not affect the jurisdiction to arbitrate as long as the certificate of outcome has not been set aside. It is the setting aside of the certificate of outcome that would render the CCMA or the council to be without the jurisdiction to arbitrate” (my emphasis)."

[6] The point in limine is dismissed.

[7] The second point in limine is that the respondent did not dismiss the applicant and that she resigned. In the absence of a dismissal the condonation application must be dismissed as the court has no jurisdiction in the absence of a dismissal.

[8] This point has no merit. This merely is a fact in dispute between the parties that must still be determined.

[9] This point in limine is also dismissed.

The delay

[10] The Commission for Conciliation Mediation and Arbitration issued a certificate of outcome on 12 May 2017 when the applicant referred the dispute to arbitration.

[11] The statement of claim was eventually served and filed on 1 September 2017. The applicant alleges that this was 14 court days late. The respondent contends it was 20 days late.

[12] The application for condonation was delivered on 14 September 2018, more than a year later.

The explanation for the delay

[13] The applicant first referred the dispute to arbitration.

[14] The arbitration was scheduled for 13 July

2017. The Commissioner issued a ruling on 24 July 2017 that the matter ought to be referred to the Labour Court as the applicant claimed that her dismissal related to her pregnancy and was automatically unfair. The applicant represented herself.

[15] Upon receiving the ruling of 24 July 2017, she decided to seek legal representation. On 2 August 2017 she met with her current attorney of record who advised that in view of the outcome of the ruling the matter should be referred to the Labour Court.

- [16] At the time she was heavily pregnant and gave birth on 25 August 2017. That contributed to the delay.
- [17] There is no explanation why the application for condonation was launched more than a year later.

Prospects of success

- [18] The applicant denies that she resigned as alleged by the respondent. She did not attend the disciplinary enquiry as the notice to attend indicated that if she elected not to attend, that the disciplinary hearing may proceed in her absence. According to her the respondent did not postpone the enquiry or continued in her absence. Neither did she resign.
- [19] According to her statement of claim she referred an alleged unfair dismissal claim to the CCMA on 27 March 2017 when she received a notification to attend a disciplinary hearing on 29 March 2017.
- [20] According to the respondent she informed the respondent prior to the disciplinary hearing that she would not be attending as she felt that she had already been dismissed by the respondent. The respondent then replied that the respondent would regard her to have resigned should she not attend the disciplinary hearing. She did not attend and therefore, according to the respondent, she had resigned.
- [21] The respondent further relies upon her conduct to show that she was not dismissed. She indicated her intention not to return to school by referring her alleged dismissal to the CCMA on 27 March 2017 without indicating a date of dismissal on the referral and by collecting her belongings on 31 March 2017.
- [22] She contends that the charges levelled against her were trumped up. The charges related to complaints from parents which allegedly had led to learners being taken out of school. The respondent never informed her who the parents were that complained or who the affected learners were. The respondent took almost 3 months to try to get her to sign a mutual separation agreement before she was called to a disciplinary enquiry.
- [23] Her case is that as there were no real complaints, the only conclusion is that she was dismissed because of her pregnancy, in the alternative, if she was not dismissed for a reason relating to her pregnancy, then the dismissal was unfair as the respondent never held a disciplinary enquiry and failed to identify the sources of the alleged complaint by parents.

Prejudice

- [24] She will suffer prejudice if her case cannot be determined on the merits. The respondent delayed the matter in that initially no notice to oppose or statement of defence was filed. The applicant obtained a default judgement that had to be rescinded.
- [25] The respondent denied having ever received the statement of case and successfully rescinded the default

judgment.

[26] The respondent pleads prejudice through the delay as it relies upon external witnesses that may not be available after a long delay.

My analysis

[27] The delay in filing the statement of case is relatively short and certainly not excessive. The delay in filing the condonation application is excessive.

[28] The explanation for the delay in filing the statement of case can be attributed to her wrongly referring the matter for arbitration then claiming an automatically unfair dismissal before the CCMA as the dismissal related to her pregnancy. That meant the CCMA had no jurisdiction to determine the dispute.

[29] At the time when she had to refer the matter to the Labour Court, she was heavily pregnant and in fact gave birth shortly before the statement of case had been served and filed.

[30] It is an adequate explanation for the delay in filing the statement of case. It is an inadequate explanation as to why the application for condonation only followed more than a year later.

The delay in launching the condonation application

[31] *Seatlolo and Others v Entertainment Logistics Service (A Division of Gallo Africa Ltd)*[4] the Court held that:

“It is trite law that an application for condonation must be brought as soon as the party becomes aware of the default. This principle has been emphasized by the Supreme Court of Appeal on numerous occasions (see Saloojee at 138H; Rennie v Kamby Farms (Pty) Ltd 1989 (2) SA 124 (A) at 129G; and Napier v Tsaperas 1995 (2) SA 665 (A) at 671B-D). This approach has been endorsed by the Labour Appeal Court which in fact advocates bringing the application for condonation on the same day it is discovered to be necessary. See in this regard inter alia Allround Tooling (Pty) Ltd v NUMSA & Others [1998] 8 BLLR 847 (LAC) at 849 H para 8; NEHAWU v Nyembezi [1999] 5 BLLR 463 (LAC) at 464D-F; and Librapac CC v FEDCRAW & Others (1999) 20 ILJ 1510 (LAC); [1999] 6 BLLR 540 (LAC) at 543.”

[32] The explanation must cover the full period of the delay. In *Ethekwini Municipality v Ingonyama Trust*[5] the Constitutional Court said the following:

“In a case where the delay is not a short one, the explanation given must not only be satisfactory but must also cover the entire period of the delay. Thus, in Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae), this Court said in this regard:

‘An application for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of the delay. And, what is more, the explanation given must be reasonable. The explanation given by the applicant is short of these requirements. Her explanation for the inordinate delay is superficial and unconvincing.’”

- [33] The applicant does not tender an explanation for the delay in launching the condonation application. This in itself is fatal to the application and the prospects of success need not to be considered.
- [34] A consideration of the prospects of success is done nevertheless to establish if it is in the interest of justice to grant condonation.
- [35] The respondent relies heavily upon the submission that the applicant has no prospects of success on the merits.
- [36] The applicant need not prove the success of her case. She would have prospects of success if she can prove what she alleges her case is.
- [37] The applicant's version in her statement of case is that when she received the notice to attend the inquiry, she felt that a decision to dismiss her had already been taken. For that reason, she made the referral to the CCMA on 27 March 2017, two days prior to the inquiry.
- [38] Her further explanation that she believed the disciplinary inquiry would proceed in her absence and lead to her dismissal contradicts her explanation why she on 27 March 2017 already referred the dispute to the CCMA.
- [39] The respondent's attempt to turn her non-appearance at the disciplinary enquiry into a deemed resignation is also not convincing. The respondent's attempt to construe a resignation is against the legal principle that a resignation is a unilateral act on the part of an employee.
- [40] The fact that she referred a dismissal dispute to the CCMA before the date of the disciplinary inquiry is indicative of the fact that she probably believed that the hearing would be biased against her. That does not mean that she had been in fact been dismissed. At best it may be indicative of a constructive dismissal in which case she does not allege having exhausted all avenues before resigning (which she denied).
- [41] In view of the denial that she was dismissed, the applicant needs to prove the dismissal and also has the onus to prove the dismissal.
- [42] At best for the applicant as her case is pleaded, she believed when she was notified of the hearing, that a decision had been taken to dismiss her at the disciplinary hearing. That means she does not allege that she had been dismissed, only that a dismissal might well follow pursuant to the disciplinary enquiry.
- [43] She does not explicitly plead a dismissal or the date (or period within) on which she was dismissed. That renders her prospects of success weak.
- [44] There is no special prejudice to any of the parties.
- [45] In the absence of an explanation for the delay in bringing the application for condonation and the weak prospects of success on the merits, the application fails.

Costs

[46] This Court has a wide discretion as to a cost order. Having regard to the considerations pertaining to a cost order, there is no reason why a cost order should be made.

Order

[47] I make the following order:

[47.1] The application to condone the late referral of the statement of claim is dismissed.

[47.2] There is no order as to costs.

F. Coetzee

Acting Judge of the Labour Court of South Africa

Appearances:

The parties attended a Zoom meeting on 21 August 2020 and agreed that the matter may be determined on the papers on 10 Sept 2020.

For the applicant: C Baillie of Bailie Janke Snyman Attorneys

For the Respondent: Adv P Kirstein

Instructed by: VFV Attorneys

[1] [2002] 8 BLLR 693 (LAC) at 696 para 9-10

[2] (2000) 21 ILJ 2382 (LAC)

[3] Para 12

[4] (2011) 32 ILJ 2206 (LC)

[5] 2013

(5) BSCLR 497 (CC).

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