

SOUTH AFRICA / JUDGMENT

Bouwer v Phillippi Villiage (Pty) Ltd (C1200/18) [2021] ZALCCT 28 (8 April 2021) [2021] ZALCCT 28

COURT

Labour Court Cape Town

BEFORE

Rabkin-Naicker

CASE / FILE NUMBER

C1200/18

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IN THE LABOUR COURT OF
SOUTH AFRICA, CAPE TOWN

Not Reportable

Case

no: C1200/18

In

the matter between:

STEAN
BOUWER
Applicant
and
PHILLIPPI
VILLAGE (PTY)
LTD
Respondent
Date heard: 20 January
2021 by means of virtual hearing
Delivered: 8
April 2021 by means of scanned email

JUDGMENT

RABKIN-NAICKER J

- [1] This is an opposed application for condonation for the late filing of the statement of claim in the above matter. There is also an opposed application for the admission of a further affidavit brought by the applicant and condonation for its late filing.
- [2] The statement of claim was filed on the 10 April 2019. The dispute between the parties was certified as unresolved on the 12 September 2018. The dispute was then referred to arbitration under the auspices of the CCMA and a Jurisdictional Ruling was issued on the 20 November 2018, finding that the CCMA did not have jurisdiction to hear the matter. The statement of claim was therefore filed some four month's late, calculated as it must be from the date that the Certificate of non-resolution was issued[1].
- [2] The delay cannot be regarded as insignificant and is not 'short' as submitted on behalf of the applicant, relying on the time period from the date of the Jurisdictional Ruling. The reasons for the delay are set forth in the founding affidavit deposed to by the applicant's attorney of record.
- [3] The respondent takes issue with the explanation given in the founding affidavit most particularly in relation to the period after the issuing of the Jurisdictional Ruling on the 20 November 2018 and 13 February 2019, when the applicant's attorney of record was instructed. It is submitted on behalf of the respondent that the following paragraphs of the founding papers contain inadmissible hearsay:

"8. The applicant's erstwhile attorney, Mr Eben Potgieter, was instructed to draft the Applicant's Statement of Claim.

9. During January of 2019 Mr Potgieter inform the Applicant telephonically that he (Mr Potgieter) was in hospital after being involved in a severe accident during the December 2018/ January 2019 holiday period, and that depending on doctors' orders he may not be in a position to continue representing the Applicant in this matter.
10. During late January 2019/ early February 2019 Mr Potgieter informed the Applicant that he would not be in a position to continue representing the Applicant in this matter."
- [4] No replying affidavit to the answering papers in the condonation application was filed. However, the applicant then filed a further 'confirmatory affidavit' some ten months after the founding affidavit was filed.
- [5] The considerations for admitting a further affidavit are:

"The factors that the court will take into account in the exercise of its discretion are the following: (a) the reason why the evidence was not produced timeously;

- (b) the degree of materiality of the evidence; (c) the possibility that it may have been shaped to 'relieve the pinch of the shoe';
- (d) the balance of prejudice to the applicant if the application is refused, and the prejudice to the respondent if it is granted;
- (e) the stage which the litigation has reached; (f) the 'healing balm' of an appropriate order as to costs; (g) the general need for finality in judicial proceedings; and (h) the appropriateness, or otherwise, in all the circumstances, of visiting the fault of the attorney upon the head of his or her client. [2]
- [6] Given the very long period it took for the applicant to file the confirmatory affidavit, that it was filed to relieve the 'pinch of the shoe' and (as set out below), my decision to consider the prospects of success in the condonation application, I exercise my discretion to refuse its admission. What the Court is left with, given the hearsay nature of part of the founding affidavit, is a lack of adequate explanation for about a month of the four month delay.
- [7] I am of the view that I should exercise my discretion to consider the prospects of success in the main case on the basis that this is not a case where the explanation for the entire period of delay in 'no explanation at all'. [3]
- [8] The founding affidavit deposed to by applicant's attorney of record deals with the prospects of success as follows:
- "24. The applicant is aggrieved by the fact he has been dismissed from the Respondent's employment and raises allegations in his Statement of Claim which, prima facie, make out a case to support his version....."*
- [9] The founding affidavit thus makes no prayer that material facts in the Statement of Claim be incorporated by reference into the founding affidavit in the condonation application. Nor does it make any further averments in relation to the merits than those set out above. This omission is made even more problematic given that the applicant did not file replying papers. In the answering affidavit the respondent had averred that the applicant had been dismissed for operational reasons and in compliance with a fair procedure.
- [10] Thus I must take account of the following: A not insignificant delay in referring the claim; an explanation for it that omits to cover a period thereof; and the applicant's failure to elaborate on his prima facie prospects of success or file replying papers in motion proceedings[4]. In these circumstances, I exercise my discretion to refuse condonation in this matter. Even if the problems for the applicant herein should be placed at the doors of his attorney, it is trite that there is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered in a condonation application.[5]

[11] In as far as costs are concerned, the applicant has already been ordered to pay wasted costs for the postponement of the trial on the 27 February 2020. I will apply the normal principles of law and equity regarding costs in this Court, taking into consideration that the applicant is an individual. I make the following order:

Order

1. The application for the admission of a further affidavit is dismissed.
2. The application for the condonation of the late referral of the Statement of Claim is dismissed.
3. There is no order as to costs.

H. Rabkin-Naicker

Judge of the Labour Court of South Africa

Appearances

Applicant: CJM Daniels instructed by Basson Blackburn Inc

Respondent: C&A Friedlander Inc

[1][1] Section 191(5)(b) of the LRA

[2] (See Erasmus Superior Court Practice at B1-47.)

[3] *Moila v Shai NO & others* (2007) 28 ILJ 1028 (LAC)

[4] The principles as set out in *Plascon Evans* apply

[5] *Saloojee NNO v Minister of Community Dev* 1965 (2) SA 135 (A)

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Prepared on 14 October 2026 · Esheria