

SOUTH AFRICA / JUDGMENT

Emmenes and Others v Cairnhall Hospital Investment Holding (JS1004/20) [2021] ZALCJHB 384 (20 October 2021)

[2021] ZALCJHB 384

COURT

Labour Court Johannesburg

BEFORE

F. Coetzee

CASE / FILE NUMBER

JS1004/20

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IN

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

Reportable

Not

of interest to other judges

Case

no: JS1004/20

In

the matter between:

KAREN
VAN
EMMENES First
Applicant
SUSANNA
MYRILAS Second
Applicant
SYLVIA
ELSE Third
Applicant
RHODA
VENTER Fourth
Applicant
and
CAIRNHALL HOSPITAL
INVESTMENT HOLDING Respondent
Heard: 6
October 2021
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 10h00 on 20 October 2021.

Summary: Condonation – late referral of statement of case. The applicants provided a detailed explanation for the delay and they have
excellent prospects of success. Condonation granted.

JUDGMENT

COETZEE AJ

- [1] The parties agreed to have a virtual hearing.
- [2] The applicants ask the Court to condone the late referral of their dispute to the Labour Court.

The delay

- [3] The applicants pleaded that the statement of case was filed 58 days late. The respondent denies this and calculated the delay to be 82 days. The respondent argued that the delay is 300 days. This however was not raised on the pleadings. The delay is indeed excessive, whether 58 or 82 days.

The explanation for the delay

- [4] The Commission for Conciliation, Mediation and Arbitration ("the CCMA") issued a certificate of non-resolution in respect of unfair discrimination on 29 January 2020.
- [5] The applicants consulted an attorney on 3 February 2020. As the second applicant had filed a separate referral to the CCMA under reference FSBF534-20, the attorney wished to first peruse the CCMA files to establish the factual position regarding both referrals. He did so on 4 February 2020 and the first and fourth applicants consulted him again on 6 February 2020.
- [6] The attorney informed them that the CCMA had furnished only the LRA 7.13 form and not the LRA7.11 referral form in respect of the alleged unfair discrimination referral. The attorney wished to peruse the LRA 7.11 referrals to establish whether it was necessary to refer a separate dispute regarding an automatically unfair dismissal based upon age.
- [7] The fourth applicant retrieved her LRA 7.11 referral form and provided the form to the attorney on 6 February 2020.
- [8] The CCMA had scheduled the unfair discrimination referral for arbitration on 25 February 2020 when the applicants' attorney was unavailable, and he undertook to seek a postponement which he agreed with the attorney for the respondent. The agreement to postpone was filed with the CCMA on 11 February 2020.

- [9] On 12 February 2020 the applicants conveyed through their attorney a settlement proposal to the respondent's attorney and sent him the 7.11 forms in respect of an automatically unfair dismissal dispute. The offer was rejected on 13 February 2020.
- [10] On 17 February 2020 the fourth applicant received an email from their attorney of record calling for a consultation on 20 February 2020. The applicants applied for condonation to the CCMA for the late referral of the dismissal dispute which was unopposed.
- [11] The lock-down commenced on 23 March 2020. The CCMA condoned the late referral on 26 March 2020 and the CCMA had to schedule the conciliation meeting which by 18 May 2020 had not happened.
- [12] On 18 May 2020 the applicants' attorney by email informed the CCMA that the 30-day period had expired requesting a certificate of non-resolution.
- [13] On 6 August 2020 the applicants' attorney by letter requested the respondent's attorney to agree to arbitration, but incorrectly referred to the unfair discrimination dispute that had been postponed by agreement. The respondent did not consent.
- [14] Between 14 August 2020 and 7 September 2020, the applicants' attorney addressed several emails to the CCMA to request a copy of the certificate in respect of the unfair dismissal dispute to refer the matter to the Labour Court.
- [15] On 9 September 2020 the applicants' attorney incorrectly referred the unfair dismissal dispute for arbitration to the CCMA, instead of the unfair discrimination dispute. On the same date the attorney asked the CCMA to set the unfair discrimination matter down for arbitration.
- [16] The CCMA scheduled the unfair discrimination dispute for 27 October 2020. During the proceedings the commissioner called for heads of argument as he was of the opinion that the CCMA did not have jurisdiction to arbitrate the unfair discrimination dispute. The commissioner, upon request, procured a certificate in the automatically unfair dismissal dispute. The CCMA backdated it to 28 July 2020 when it issued it to the applicants on 27 October 2020.
- [17] The applicants' attorney would only be able to file the heads by 3 November 2020 but assured the second and third applicants that the CCMA had jurisdiction to arbitrate their unfair discrimination dispute. The parties had agreed to refer the automatically unfair dismissal dispute to the Labour Court upon receipt of the certificate.
- [18] The applicants had agreed for the four of them to refer their unfair dismissal dispute to the Labour Court together so that they could share the costs as the second and third applicants had not found gainful employment.
- [19] The CCMA set the matter down for a hearing on 30 November 2020 and by agreement it was postponed to 23 April

2021. The respondent's attorney at the hearing contended that the CCMA did not have jurisdiction to arbitrate the unfair discrimination dispute. The commissioner advised the applicants after hearing evidence, that it was appropriate to refer the unfair discrimination dispute to the Labour Court with the unfair dismissal dispute as the facts related to both disputes.

[20] The second and third applicants withdrew their unfair discrimination dispute, and the disputes were referred to the labour Court on 20 May 2021

[21] The applicants submit that the delay was not as a result of a wilful disregard of the Court's rules.

Prospects of success

[22] The applicants' contracts of employment did not contain a retirement age which, allegedly, was unilaterally imposed by the respondent. According to them there was no agreed or implied retirement age or any policy to that effect. The respondent relied upon a unilaterally imposed retirement age and dismissed them because of their age.

[23] The respondent submits that the applicants agreed to a retirement age and referred to clause 2 of the contracts of employment that reads as follows:

"Die partye kom ooreen dat die werkgewer die reg het om, as die werknemer die ouderdom van 65 bereik het, in oorleg met die werknemer te besluit of hy/sy steeds op standaard funksioneer ..."

[24] The respondent relies upon this clause for the proposition that the parties agreed a retirement age of 65. Therefore, the applicants have no prospects of success and condonation must be refused. The respondent did not make any reference, in the opposing affidavit, of a normal retirement age. The respondent thus needs to stand and fall by its argument that there was an agreed retirement age as clause 2 of the agreements shows.

[25] The applicants deny that any assessment was done as to whether they could still function on standard. According to them the reliance upon an agreed retirement age only landed on the table after the respondent had consulted the respondent's attorney and they believe that could have well been the advice of the respondent's attorney.

[26] The respondent's opposition to the condonation application is based solely upon the alleged absence of prospects of success.

Prejudice

[27] The applicants maintain that they would be prejudiced if their matter cannot be adjudicated. The respondent did not make any allegations in this regard.

Analysis

[28] The relevant legal principles to be applied in an application for condonation are well established. This Court is required to exercise a discretion, having regard to the extent of the delay, the explanation for that delay, the prospects of success and the relative prejudice to the parties that would be occasioned by the application being granted or refused. The interest of justice will ordinarily reflect regard to all these factors.

[29] In *NUM v Council for Mineral Technology*[1] the LAC said the following:

" The approach is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefore, the prospects of success and the importance of the case. These facts are interrelated: they are not individually decisive. What is needed is an objective conspectus of all the facts. A slight delay and a good explanation may help to compensate for prospects of success which are not strong. The importance of the issue and strong prospects of success may tend to compensate for a long delay. The delay is excessive and calls for a good explanation and good prospects of success.

[30] And in *National Union of Metalworkers of SA on behalf of Thilivali v Fry's Metals (A Division of Zimco Group) and others*[2] the Court held that:

‘What is clear from the judgment in *Hardrodt* is that general principles applicable to condonation applications are even more stringently applied where it comes to a condonation

application for the late filing of a review application. In review condonation applications, the explanation that needs to be submitted

must be compelling and the prospects of success need to be strong. Where it comes to the issue of prejudice, the applicant in fact has to show that a miscarriage of justice will occur if the applicant's case is not heard. The reason for these more stringent requirements is that review applications occur after the parties have already been heard, presented their respective cases and a finding has been made. Under such circumstances, considerations of justice, fairness and expedition require that challenges of such findings must not be delayed and must be completed as soon as possible.’

[31] The applicants set out in detail the time periods and the steps taken before the matter was referred to the Labour Court. It makes sense to have the alleged unfair discrimination and the alleged automatically unfair dismissal disputes referred to be heard together. Initially the attempt was to have both disputes adjudicated in the CCMA and when the respondent refused to consent, to refer them to the Labour Court. The applicants' cost concerns are also valid. The explanation is acceptable

[32] Nothing turns on the prejudice to the parties.

- [33] The respondent relies upon the applicants' alleged lack of prospects of success. The clause that the respondent relies upon is a clause that entitles the respondent, when the applicants reached the age of 65 to, in consultation with them, determine their performance levels. They allege that nothing was done in consultation with them, or at all. This means their performance levels were not assessed. Instead, the respondent incorrectly relied upon the clause as if it constituted an agreed retirement age.
- [34] This can never be the meaning of the clause. The clause means what it says and that is that the employer at that age has the right to assess the performance levels of the applicants. The respondent's opposition to the prospects of success on the basis that the parties in the employment agreements agreed to a retirement age is without any merit.
- [35] The applicants have excellent prospects of success and it is in the interest of justice that condonation be granted.

Costs

- [36] The parties submitted that costs should not follow the result and in fact that no cost order should be made.

Order

- [37] I make the following order:

1. The applicants' late referral of their statement of case is condoned.
2. There is no order as to costs.

F. Coetzee

Acting Judge of the Labour Court of South Africa

Appearances

For the applicant: Tata Mokwayi

Of: Phatsoane

Henney Attorneys

For the Respondent: D P Huggett

Of: Huggett

Retief Incorporated

[1]

[1999] 3 BLLR 209 (LAC) at para 10

[2] (2015) 36 ILJ 232 (LC).

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