

SOUTH AFRICA / JUDGMENT

Fraser-MacDonald v Curro Holdings t/a Curro Mount Richmore (D295/20) [2024] ZALCD 15 (14 June 2024)

[2024] ZALCD 15

COURT

Labour Court Durban

BEFORE

M Makhura

CASE / FILE NUMBER

D295/20

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THE

LABOUR COURT OF SOUTH AFRICA, DURBAN

Not

Reportable

Case

No: D295/20

In the matter between:

MARINDA

FRASER-MACDONALD

Applicant

and

CURRO

HOLDINGS t/a CURRO MOUNT RICHMORE

Respondent

Heard:

12 June 2024

Delivered:

14 June 2024

The

judgment was handed down electronically by circulation to the parties' legal representatives by email. The date for hand-down is deemed to be 14 June 2024.

JUDGMENT

MAKHURA, J

- [1] The issue for determination in this matter is whether this Court should exercise its discretion and condone the late referral of the applicant's statement of claim. This issue is dependent on the dictates of the interest of justice. The application must succeed if it is in the interest of justice and fail if it is not. Whether it is in the interest of justice to grant condonation application in turn depends on the facts and circumstances of each case. The factors relevant for determining the interest of justice include the relief sought by the applicant in the main claim, the extent and cause of the delay, the effect of the delay on the administration of justice and the respondents, the reasonableness of the explanation for the delay, the prospects of success and the importance of the issue raised in the main claim.[1]
- [2] The applicant also applies for condonation for the late filing of her replying affidavit. The replying affidavit was filed a month outside the prescribed period and the application is unopposed. I have decided to grant this application so that the main condonation application is properly ventilated.
- [3] The applicant referred an automatically unfair dismissal claim in terms of section 187(1)(f) of the Labour Relations Act (LRA).[2] The dispute was referred for conciliation to the Commission for Conciliation, Mediation and Arbitration (CCMA) on 11 December 2019 and was declared unresolved on 6 February 2020. The statement of claim was served on the respondent on 1 July 2020 and filed on 14 July 2020.
- [4] The applicant avers that the statement of claim was served 55 days outside the prescribed period. The respondent contends that the statement was served 146 days after the date of conciliation. By the respondent's computation, the statement was served 56 days late. If the computation is made from the date the 30-day period expired from the date of the referral of the dispute to the CCMA (that is, 10 January 2020), the statement of claim was served about 70 days late, an additional 15 days. Nothing turns on this and the respondent did not raise this as an issue.
- [5] The explanation provided is that from 6 February 2020, the 90-day period expired on 7 May 2020. On 10 March 2020, the applicant, through her current attorneys of record who at all material times after conciliation represented her, sent a statement of claim to the respondent by fax and email respectively. The statement was not signed and did not have a case number as envisaged in rule 6(1) of the Rules of this Court.[3] The statement of claim is dated 28 February 2020.

[6] The applicant contends that on 17 March 2020, she submitted a Labour Court form 1 to the Johannesburg Labour Court in terms of which she applied for allocation of a case number. This form was sent by email. She received no response. She resent the form on 1 and 22 June 2020 respectively. On 30 June 2020, the applicant then sent the form to the Durban Labour Court. On 1 July 2020, the Registrar of the Durban Labour Court allocated the matter a case number and informed the applicant accordingly.

[7] Regarding the prospects of success, the applicant contends further that on 8 October 2019, the respondent's principal, Smith,

verbally instructed or requested her to resign on account that she had reached a retirement age of 65 years. In response, the applicant

argued that there was an existing agreement to retire at her own instance and not 65 years. She argued in a letter from her attorneys

to the respondent that:

'We confirm that there is no agreement regulating the retirement age ... nor was she informed at the inception of her employment that she will be required to retire at the age of 65.

We are instructed that both previous Principals Chrome and De Wet, had a verbal agreement with our client that she would not be required to retire at a certain age but rather when her capacity no longer allows for her to fulfil her duties as required.' [Emphasis added]

[8] The above contention found its way into her original statement of claim. The applicant contends in her original statement of case that when she was employed, she was not provided with a contract of employment nor was she provided with any policies. She therefore contends that she had a verbal contract of employment with the principals, Chrome and De Wet that she would not be required to retire on reaching a specific age but rather she could decide to retire "on her own instance and request".

[9] However, in her amended statement of case, the applicant abandoned her claim that there was no agreed retirement age and that she could retire at her own time. She contends that prior to commencing employment, she entered into a verbal agreement with the erstwhile principal, Chrome, to the effect that upon reaching the retirement age, she was:

'guaranteed to be assigned on a limited duration contract of another year and on the same terms, excluding benefits, to extend her retirement age to 66, with an option to renew it on a yearly basis at the Applicant's discretion if her health permits. The Applicant also entered into a similar verbal agreement with Principal De Wet when he was appointed as the Respondent's principal.' [Emphasis added]

[10] In addition, the applicant raised an inconsistency argument to the effect that other employees continued to work beyond the age of 65 years.

- [11] The respondent's case is that it provided the applicant with a written contract of employment for her to sign and return but she never did. It contends that the applicant was provided with a compact disk that contained all the policies, and that since 2016, she had access to all the policies via Sharepoint. The respondent contends further it has a retirement policy, which requires all employees to retire at the age of 65 and that the applicant had "reached the normal retirement age". It disputes that the principal has authority to conclude employment contract.
- [12] The respondent admitted that other employees continued employment beyond their retirement age but that this was not a continuation of or an extension of the retirement age. The respondent's case was that upon reaching retirement age, the employees would indeed retire and that they would be engaged on new fixed term contracts.
- [13] The explanation for the delay is but one factor to be considered in the enquiry. All factors must be taken into account. On the face of it, had the Johannesburg Labour Court responded to the applicant's email, perhaps the matter would have been allocated a case number and the statement delivered within the time period. However, this does not exonerate the applicant from her duty to provide a detailed and accurate account of the reason for the delay.
- [14] The period between 18 March 2020 and 31 May 2020, which is two and half months, is uncounted for. The closest the applicant has come to explaining this period is that it was during a national lockdown, the courts were not functioning and the Labour Court was "closed several times and we presume that is the reason why we struggled to obtain a case number". It is common knowledge that the President of the Republic of South Africa had on 15 March 2020 announced a declaration of a national state of disaster in terms of the Disaster Management Act,[4] to take effect from midnight on 26 March 2020. Until 30 April 2020, the country was under alert level 5 and places of work such as the Labour Court were closed during that period. However, from 1 May 2020, the alert level was reduced to 4, which permitted the opening of other workplaces including the Labour Court subject to compliance with health measures and regulations. This leaves the period from 1 May to 31 May 2020 unexplained. The applicant has not in my view provided full account of the delay.
- [15] Has the applicant established prima facie prospects of success? The dispute referred by the applicant is that of automatically unfair dismissal. The material averment to support this automatically unfair dismissal case have been summarised above.
- [16] At first, the applicant's argument was that there was no agreement regulating retirement age. This stance changed and she

conceded that there was a retirement age. The applicant stated that she concluded an agreement with the previous principals that she would work on a limited duration contract after she had reached retirement age. This is an admission that there is an agreed

retirement age, which is 65 years. Therefore, it is not necessary to consider whether 65 years is a normal retirement age for educators.

[17] The applicant, having admitted that retirement age is 65 years, then contends that she had an agreement with the previous principals that she would be employed on a limited duration contract of one year. However, she contends that this was an extension of her retirement age from 65 to 66. This extension, so she argued, was without the benefits as per the original employment contract. The respondent disputes that the principals had authority to conclude employment contracts. Axiomatically, the principals had no authority to extend the employment contracts and/or the retirement age.

[18] The applicant's case is incomprehensible. Firstly, she argues that the agreement was that she would be on a limited duration

agreement or fixed term contract. Secondly, that fixed term contract was an extension of her retirement age from 65 to 66. Thirdly, she would not be entitled to the benefits under the fixed term contract, despite the extension of her original contract.

[19] During the hearing, I asked Mr Higgs appearing for the applicant if the dispute relates to the termination of the original contract of employment as allegedly extended or whether it related to termination of the "limited duration contract". The answer to this question varied. At times, the dispute, according to Mr Higgs, is about the termination of the original contract and this would then change to the fixed term contract. Mr Higgs submitted that the fixed term contract was in existence for 3 months before it was terminated. The further difficulty with this fixed term contract argument is that although it was allegedly a one year limited duration, it had no start and end date because it was for the applicant to decide when to stop working.

[20] A proper diagnoses of the applicant's case is that the respondent either breached the terms of the agreement (or guarantee)

alternatively an agreement to agree to a fixed term contract upon reaching retirement age or that she legitimately expected to be offered a fixed term contract upon reaching her retirement age but the respondent did not offer her the fixed term contract. That is a different cause of action than the automatically unfair dismissal dispute that she referred to this Court. That dispute is not before this Court and the issue need not detain me any further. After conceding that the retirement age is 65 and having reached 65 in September 2019, it is unfathomable how the applicant still persists that her dismissal was automatically unfair because it was based on her age.

[21] The employees who were allegedly offered new contracts were 65 years and above. Therefore, the alleged inconsistency, even if proven,

cannot be based on age. Accordingly, the inconsistency claim alone does not ground an automatically unfair dismissal claim as envisaged

in section 187(1)(f) of the LRA.

[22] The applicant submitted that the door of justice should not be shut on her where she has demonstrated prima facie prospects of success and that the interest of justice favours the granting of the application. I disagree. The case is simply not one of automatically unfair dismissal as she claims. The termination of her contract of employment happened ex lege and is fair.

[23] The applicant's case is a non-starter. Based on the case as pleaded, there is no evidence that would sustain an unfair dismissal

claim based on discriminatory reason of age. The obvious poor prospects of success, the failure to explain a period of one month

and the diminished importance of the legal issues raised in the main claim weigh heavily against granting the indulgence. The trial court should not be burdened with a case where the applicant has woefully failed in interlocutory proceedings to show prima facie prospects of success in her main claim. The application stands to fail.

[24] Whether or not to award costs is an issue regulated in terms of section 162 of the LRA. The established legal principle is that costs do not follow the result.[5] The respondent has not made out a case for costs to be awarded against the applicant. Accordingly, there is no reason to deviate from the principle.

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

Order

1. The late delivery of the applicant's replying affidavit is condoned.
2. The condonation application for the late referral of the automatically unfair dismissal dispute is dismissed.
3. There is no order as to costs.

M. Makhura

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr. C. Higgs of Higgs Attorneys

c/o Steenkamp Van Niekerk Inc.

For the Respondent: Adv. P. Kirstein

Instructed by: Couzyn Hertzog & Horak Inc.

- [1] Brummer v Gorfil Brothers Investments (Pty) Ltd and Others [2000] ZACC 3; 2000 (2) SA 837 (CC) at para 3; Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae) [2007] ZACC 24; 2008
- (2) SA 472 (CC); 2008 (4) BCLR 442 (CC) at para 20; Grootboom v National Prosecuting Authority and Another [2013] ZACC 37; (2014) 35 ILJ 121 (CC) at para 22; Steenkamp and others v Edcon Ltd
- (2019) 40 ILJ 1731 (CC); [2019] 11 BLLR 1189 (CC) at para 36; Booï v Amathole District Municipality and Others
- [2021] ZACC 37; (2022) 43 ILJ 91 (CC) at para 27.
- [2] Act 66 of 1995, as amended. Section 187(1)(f) provides that a dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or, if the reason for the dismissal is that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground,
- including, but not limited to amongst others, age.
- [3] Rules for conduct of proceedings in the Labour Court, GN 1665, GG 17495 of 14 October 1996, as amended.
- [4] Act 57 of 2002.
- [5] Zungu v Premier of the Province of KwaZulu-Natal and others (2018) 39 ILJ 523 (CC); [2018] 4 BLLR 323 (CC) at paras 24 – 26; National Union of Mineworkers obo Masha and others v Samancor Ltd (Eastern Chromes Mines) and others [2021] 9 BLLR 883 (CC); (2021) 42 ILJ 1881 (CC) at paras 28 – 33; Union for Police Security & Corrections Organisation v SA Custodial Management (Pty) Ltd and others
- (2021) 42 ILJ 2371 (CC); [2021] 12 BLLR 1173 (CC) at paras 38 – 40.

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