

SOUTH AFRICA / JUDGMENT

Lempe and Others v Distell Limited (J235/2014) [2019]

ZALCJHB 208 (30 April 2019)

[2019] ZALCJHB 208

COURT

Labour Court Johannesburg

BEFORE

Prinsloo

CASE / FILE NUMBER

J235/2014

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THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J 235/2014

THABISO LEMPE AND 79 OTHERS Applicant and DISTELL LIMITED Respondent

Decided: In Chambers

Delivered: 30 April 2019

JUDGMENT APPPLICATION FOR LEAVE TO APPEAL

PRINSLOO J.

Introduction

- [1] On 22 December 2017, this Court handed down judgment in terms of which the Applicant's case was dismissed with costs.
- [2] On 8 April 2019, almost one year, two months and 16 days after the judgment was handed down, the Applicant filed an application for leave to appeal against the whole of the judgment and orders of this Court. The Applicant also filed an application for condonation for the late filing of the application for leave to appeal. Both applications are opposed by the respondent.
- [3] I will first deal with the issue of condonation.

Condonation

The test for the grant of condonation

[4] The relevant legal principles to be applied in an application for condonation are well established.

[5] This Court has a discretion, which must be exercised judicially on a consideration of the facts of each case and in essence it is a matter of fairness to both sides[1]. In *Melane v Sanlam Insurance Co Ltd*[2] it was held that:

‘... Among the facts usually relevant, are the degree of lateness, the explanation therefore, the prospects of success and the importance of the case. Ordinarily these facts are interrelated, they are not individually decisive, for that would be a piecemeal approach

incompatible with a true discretion, save of course that if there are no prospects of success there will be no point in granting

condonation. What is needed is an objective conspectus of all the facts.’

[6] In this Court however the principles have long been qualified by the rule that where there is an inordinate delay that is not satisfactorily explained, the applicant’s prospects of success are immaterial.

[7] This Court has conventionally applied the approach that in the absence of a satisfactory explanation for a delay, the applicant’s

prospects of success are ordinarily irrelevant.[3] This principle was confirmed in *National Education Health and Allied Workers Union on behalf of Mofokeng and others v Charlotte Theron Children’s Home*[4] where the Labour Appeal Court (LAC) held that without a reasonable and acceptable explanation for a delay the prospects of success are immaterial.

[8] In *Collett v Commission for Conciliation, Mediation and Arbitration*[5] the LAC confirmed that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial and without good prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused.

[9] The onus is on the applicant to satisfy the court that condonation should be granted. In employment disputes there is an additional

consideration which applies in determining whether the onus has been discharged, as was held in *National Union of Metalworkers of SA on behalf of Thilivali v Fry’s Metals (A Division of Zimco Group) and others*[6]:

‘There is, however, an additional consideration which applies in employment disputes in determining whether an applicant for condonation has discharged this onus. This is the fundamental requirement of expedition. The Constitutional Court has, as a matter of fundamental

principle, confirmed that all employment law disputes must be expeditiously dealt with and any determination of the issue of good

cause must always be conducted against the back drop of this fundamental principle in employment law.’

[10] The fundamental requirement of expedition is not to be ignored. In *Toyota SA Motors (Pty) Ltd v CCMA and Others*[7] the Constitutional Court emphasised that one of the fundamental purposes of the Labour Relations Act[8](LRA) was to establish a system for the quick adjudication of labour disputes. When it assesses the reasonableness of a delay, the court must not lose sight of this purpose.

[11] In summary; The Courts have endorsed the principle that where there is a delay with no reasonable, satisfactory and acceptable explanation, condonation may be refused without considering the prospects of success and to grant condonation where the delay is not explained, may not serve the interests of justice. The expeditious resolution of labour disputes is a fundamental consideration.

[12] Condonation for delays in all labour law litigation is not simply there for the taking. The starting point is that an applicant in an application such as the present seeks an indulgence from the court and bears the onus to show good cause.

[13] It is in this context that the application for condonation stands to be determined.

The degree of lateness

[14] Rule 30(2) of the Rules of the Labour Court provides that an application for leave to appeal is to be made within 15 days of the date of the judgment against which leave to appeal is sought. The judgment was handed down on 22 December 2017, and the 15-day period prescribed in the Rules, expired on 17 January 2018.

[15] In the application for condonation, the Applicant conceded that the delay is excessive. Indeed, the delay is inordinate and excessive.

[16] The degree of lateness should however not be considered in isolation.

Explanation for the delay

[17] Failure to comply with the prescribed time periods has to be explained and the reasonableness of the delay should be considered by having regard to the explanation for the delay.

[18] As the Applicant seeks an indulgence from the Court, they bear the onus to satisfy the Court that condonation should be granted. The Applicant has to provide the Court with a full explanation for every period of the delay. It is not sufficient simply to list significant events that occurred during the period in question as that does not assist the Court to properly assess the reasonableness of the explanation[9].

[19] The explanation for the delay has to be compelling, convincing, comprehensive, and should cover every period of the delay.

[20] In the founding affidavit before me in support of the application for condonation, the Applicants provided the following explanation for the delay:

20.1 After they had learned about the outcome of the case, a general meeting was held on 28 January 2018 where a decision was taken to challenge the outcome of the case. On 27 February 2018 a meeting was held with the Applicants' former attorney and at the consultation, the said attorney was asked to assist the Applicants in challenging the outcome of their case. The attorney undertook to look into the matter and a few days after the consultation, the Applicants received a letter from the attorney indicating that a deposit of R 50 000 was required to take the matter forward. After engagement with the attorney, the amount required was reduced to R 30 000.

20.2 By 20 May 2018 the Applicants had raised R 13 450 and approached their attorneys. At that point the attorneys advised the Applicants that they could no longer assist them with their matter.

20.3 On 25 May 2018, the Applicants went to the Labour Court for assistance and they were assisted by the pro bono office. They met with an attorney at the pro bono office who told them that they did not have any prospects of success and that they were way out of time.

[21] It is evident that on the Applicants' own version, they were told as early as May 2018 that they were already 'way out of time'.

[22] In June 2018, the Applicants approached a law firm in Randburg. A consultation was scheduled and they informed the attorneys of the amount raised, but were told that it was not sufficient for the deposit that was required.

[23] It is not evident from the Applicants' explanation what happened after the consultation in June 2018 as there is no explanation tendered for the entire period between July, August and September 2018.

[24] On 2 October 2018, the Applicants approached the EFF for assistance and they were told that the EFF does not assist in labour matters. It is not explained why the Applicant approached a political party for assistance in a labour matter.

[25] The Applicants stated that they continued with their endeavours to find assistance. This Court is not told what those 'endeavours' were and what happened during the period 2 October 2018 and March 2019, when they approached their current attorneys for assistance in April 2019. A period of six months remained completely unexplained and all that is tendered to this Court, is an unsubstantiated statement that endeavours were continued with.

- [26] A consultation was set up with the current attorney for 4 April 2019, when the Applicants handed their files to one Ms Ntuli, who advised them that the prospects of the matter would be considered and a decision would be taken on whether or not to assist the Applicants on a pro bono basis. On 5 April 2019, Ms Ntuli informed the Applicants that the matter would be dealt with on a pro bono basis and they consulted their current attorneys on 7 April 2019. The application was filed on 8 April 2019.
- [27] The Applicants explained that they did not know that they could have sought assistance from Legal Aid, the Wits Law Clinic and the like. They did not have money to prosecute the appeal and did not know about the organisations that could assist them for free. It is significant that the deponent to the affidavit however conceded that he was aware of Legal Aid, but he was under the impression that Legal Aid only assisted in criminal cases. He did nothing to confirm his impression and if he had made any effort to contact Legal Aid, he would have been informed that his impression was wrong.
- [28] It is however evident that the Applicants approached the pro bono clinic at the Labour Court as far back as May 2018 and the reason why the pro bono clinic was not prepared to assist them, was because they had no prospects of success.
- [29] I have already alluded to the fact that the Applicant should provide a full explanation for every period of the delay. The longer the delay, the more comprehensive the explanation should be.
- [30] The application for leave to appeal is more than one year late and in the founding affidavit there is no explanation for the period between July and October 2018 and from 2 October 2018 to April 2019 when the Applicants consulted their current attorneys of record. There is not a single averment made to explain the delay for a total period of nine months.
- [31] A further difficulty is that the Applicants do not explain what steps were taken during the aforesaid period and the Applicants did no more than to list certain events during a period of more than 14 months.
- [32] The explanation tendered for the period of delay is bereft of any detail and lacks particularity. Material periods of the delay remained completely unexplained and the Applicant has tendered no version as to what happened during those periods.
- [33] The Applicant has to provide an explanation for every period of delay in order to enable this Court to assess the reasonableness of the delay and the explanation for it. The Applicants failed to do so and the explanation tendered is inadequate and far from compelling, convincing or comprehensive.

Prospects of success

- [34] Having found that the delay is inordinate and the explanation tendered not compelling or adequate, I now turn to deal with the issue of prospects of success.

- [35] In the authorities referred to supra, the Courts have endorsed the position that the failure to provide a reasonable and acceptable explanation for the delay renders prospects of success immaterial.
- [36] In casu, and in light of the aforesaid authorities and given that the Applicant has not provided a comprehensive, compelling or convincing explanation for the delay, the prospects of success are immaterial, and thus need not be considered.

Prejudice

- [37] This Court has a discretion, which must be exercised judicially on a consideration of the facts of each case and in essence it is a matter of fairness to both sides.
- [38] In respect of prejudice, the Applicants submitted that they would be severely prejudiced if the application is not granted as they would be barred from pursuing their appeal. The Applicant's case is that the prejudice they stand to suffer outweighs any possible prejudice the Respondent may suffer. They, however did not explain why this would be the case.
- [39] On the other hand, the Respondent submitted in opposition that even though the Applicants decided in January 2018 to challenge the judgment on appeal, at no point did the Applicants or their legal representatives indicate such an intention to the Respondent. The Respondent accepted that the matter had been finalised and did not expect to receive an application for leave to appeal more than one year after judgment in the matter had been handed down. The delay in filing the application for leave to appeal is of significant prejudice to the Respondent. The Applicants were dismissed as far back as December 2013 and this application serves

before this Court in 2019, almost a period of six years has lapsed. Therefore, to prolong the litigation, while there is no justifiable

reason to do so, flies in the face of the object of expeditious resolution of labour disputes.

- [40] While the refusal to condone the late filing of the application for leave to appeal will have the result that the Applicants will be denied the opportunity to pursue an appeal, the Constitutional Court pointed out in *Toyota SA Motors (Pty) Ltd*[10] that excessive delays in litigation may induce a reasonable belief on the part of a successful litigant that the order or award had become unassailable. As the Constitutional Court observed, this principle applies with even greater force in labour disputes.
- [41] In casu, the Respondent is entitled to finality and it was reasonable for the Respondent to accept, after more than one year after the judgment was handed down, that the order had become unassailable.

[42] I further have to endorse the aim of the LRA namely; to resolve labour disputes speedily and without delay. Granting condonation in a case like this would not be in the interests of justice as it would undermine the statutory purpose of expeditious dispute resolution, another factor that weighs heavily in the Respondent's favour.

[43] On an objective conspectus of all the facts, the Applicant's application for condonation falls hopelessly short off the mark. The Applicant did not discharge the onus to show good cause and to provide an acceptable and plausible explanation for the delay. For the above reasons, it will not be in the interests of justice that the application for condonation be granted.

[44] In so far as costs are concerned, this Court has a broad discretion in terms of section 162 of the LRA to make orders for costs according to the requirements of the law and fairness. In my view, the interests of justice will be best served by making no order as to costs.

[45] In the premises, I make the following order:

Order

1.The application for condonation for the late filing of the Applicant's application for leave to appeal is dismissed;

2.There is no order as to costs.

Connie Prinsloo

Judge of the Labour Court of South Africa

[1] Civil Procedure in the Superior Court, Harms at B27.6.

[2] 1962

(4) SA 531 (A) at 532 C - F.

[3] See: NUM v Council for Mineral Technology [1999] 3 BLLR 209 (LAC).

[4] (2004) 25 ILJ 2195 (LAC) at para 23.

[5] (2014) 6 BLLR 523 (LAC).

[6] (2015) 36 ILJ 232 (LC).

[7] (2016) 37 ILJ 313 (CC).

[8] Act 66 of 1995 as amended.

[9] See: IMATU obo Zungu v SALGBC and Others

(2010) 31 ILJ 1413 (LC).

[10] (2016) 37 ILJ 313 (CC); [2016] 3 BLLR 217 (CC); 2016 (3) BCLR 374 (CC).

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