

SOUTH AFRICA / JUDGMENT

Ludick v Pharmacare Ltd t/a Aspen Pharmacare (JS527/17) [2018] ZALCJHB 151 (27 March 2018) [2018] ZALCJHB 151

COURT

Labour Court Johannesburg

BEFORE

Van Niekerk

CASE / FILE NUMBER

JS 527/17

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REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

CASE NO: JS 527/17

In the matter between:

CHRISTPHER LUDICK

Applicant

and

PHARMACARE LTD t/a ASPEN PHARMACARE

Respondent

Application heard: 16 March 2018

Judgment

delivered: 27 March 2018

VAN NIEKERK J

[1] This is an application to condone the late referral of a statement of claim.

- [2] It is trite that condonation is not there merely for the asking, nor are applications for condonation a mere formality (see NUMSA v Hillside Aluminium [2005] ZALC 25; [2005] 6 BLLR 601 (LC); Derrick Grootboom v National Prosecuting Authority & another [2013] ZACC 37). A party seeking condonation must make out a case for the indulgence sought and bears the onus to satisfy the court that condonation should be granted.
- [3] This court is required to exercise a discretion, having regard to the extent of the delay, the explanation proffered for that delay, the applicant's prospects of success, and the relative prejudice to the parties that would be occasioned by the application being granted or refused.
- [4] In this court, that formulation, which has its roots in *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A), has 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. In *National Union of Mineworkers v Council for Mineral Technology* [1999] 3 BLLR 209 (LAC) the LAC said the following:

... without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused.

- [5] This principle was recently reaffirmed in *Collett v Commission for Conciliation, Mediation and Arbitration* [2014] 6 BLLR 523 (LAC), a unanimous judgement of the LAC, Musi AJA held as follows:

There are overwhelming precedents in this court, the Supreme Court of Appeal and the Constitutional Court for the proposition that where there is a flagrant or gross failure to comply with the rules of court condonation may be refused without considering the prospects of success. In *NUM v Council for Mineral Technology* [1999] 3 BLLR 209 (LAC) at para 10, it was pointed out that in considering whether good cause has been shown the well-known approach adopted in *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532C-D ... Should be followed but:

'There is a further principle which is applied and that is 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 delay, an application for condonation should be refused.'

The submission that the court a quo had to consider the prospects of success irrespective of the unsatisfactory and unacceptable

explanation for the gross and flagrant disregard of the rules is without merit.

- [6] It is also well-established that once the party in default becomes aware that condonation is necessary, an application for condonation

must be filed without further delay (see *CWIU & another v Ryan & others* [2001] 3 BLLR 337 (LC)).

[7] The material facts are not in dispute. In November 2016, the applicant lodged a grievance concerning the level of his remuneration

compared with that of other employees. The grievance remained unresolved and a dispute was ultimately referred to the CCMA. On 10 February 2017, the CCMA issued a certificate of outcome recording that the dispute remained unresolved and that it could be referred to this court for adjudication. For reasons that remain unclear, the applicant referred the matter to arbitration. At the arbitration hearing, on 8 June 2017, the respondent objected to the CCMA's jurisdiction to arbitrate the dispute and on 22 June 2017, a jurisdictional ruling was issued to the effect that should the applicant wish to pursue the dispute, he may refer it in terms of s 10 (6) (a) of the Employment Equity Act. That section provides for the referral of disputes to this court for adjudication, in the absence of consent to arbitration. In the present instance, no such consent was ever sought or given. The jurisdictional ruling records that both parties' representatives, their current attorneys of record, were present at the hearing. The applicant did not dispute the jurisdictional point taken by the respondent.

[8] On 10 July 2017, three weeks later, the applicant filed a statement of claim in which he contends that the respondent's conduct in paying him 'disproportionate' remuneration, as compared to other employees on an equal or more junior level, violated the principle of equal pay for work of equal value and thus constituted an act of unfair discrimination. On 2 November 2017, the respondent filed a reply to the statement of claim. In the reply, the respondent took the point that the statement of claim had been filed outside of the 90-day period calculated from the date of the certificate of outcome. The respondent also contended

that the statement of claim had not been properly served since despite requests by the respondent's attorney of record that

any statement of claim be served on their offices, the applicant had failed to do so, and instead served by registered post to an address to which there was no conceivable prospect of postal delivery. To the extent that the respondent persists with the submission that the statement of claim was filed other than in compliance with the Rules, this is not relevant to the present application and I do not intend to give further consideration to it. The respondent also gave notice of its intention to except to the statement of claim and without filing formal notice of exception, called upon the applicant to file an amended statement of claim. A notice of amendment was filed on 11 December 2017, but the applicant has not yet filed an amended statement of claim.

[9] The application for condonation for the late filing of the statement of claim was filed only on 27 December 2017. In the founding affidavit, the applicant avers that the extent of the delay is 57 days, and thus not excessive. He also states, without elaboration, that he believed that the CCMA would be able to arbitrate the matter and referred the matter to arbitration on that basis. Between end-February and 5 June 2017 the applicant states that he underwent surgery and was not aware that the respondent would object to the CCMA's jurisdiction and further that 'as soon as' his attorneys received the jurisdictional ruling, a statement of claim

was drafted and filed.

- [10] Insofar as the applicant's prospects of success are concerned, he says no more than that he has strong prospects of success and documentary proof in his possession to the effect that employees on his level and lower level were earning 'up to 40% more than him'.
- [11] Having regard to the principles set out above, I will accept in the applicant's favour that the delay is one to the extent that he submits, and not the 167 days that elapsed between the date of the certificate and the date on which the respondent's attorneys contend that the statement of claim was served on them. In regard to the latter, there is no explanation on the papers as to why the applicant's attorneys failed to extend the respondent the courtesy that it sought of having the statement of claim served on its attorneys. There was clear communication by the respondent's attorneys to the applicant's attorneys on more than one occasion by email and telephone, to which the applicant's attorneys did not have the courtesy to respond.
- [12] It is simply not correct that as soon as the applicant's attorneys received the jurisdictional ruling, they drafted and filed a statement of case. the applicant's explanation fails to account for the fact that as early as February 2017, when the certificate of outcome was issued, it was made abundantly clear that should the applicant wish to pursue his dispute, he would have to refer the matter to this court for adjudication. The applicant and his attorneys ought to have been fully aware, at least by 8 June 2017, when the respondent's attorneys delivered a notice of objection to the CCMA's jurisdiction, that the CCMA had no jurisdiction to arbitrate the dispute. It appears from the commissioner's ruling that at the CCMA hearing, the applicant did not dispute that the CCMA had no jurisdiction. Yet the applicant had persisted with the misguided stance that led to the ruling dated 22 June 2017.
- [13] As I have noted, the statement of claim was filed only on 11 July 2017, in circumstances where the applicant and his attorneys must have known of the need to apply for condonation. Yet the application for condonation, which ought to have been filed as soon as the need for condonation was appreciated, was filed only at the end of December 2017, some five and a half months later, with no explanation proffered for the late filing of that application. In short, the explanation proffered by the applicant for what by any account, even on his version, is a significant delay, is not satisfactory.
- [14] Insofar as the applicant's prospects of success are concerned, these must be discerned from the pleadings. The founding affidavit in the condonation application incorporates no more than a bald assertion to the effect that the applicant considers that he has 'strong' prospects of success. It was incumbent on the applicant to have properly and fully recorded the reasons for this assertion. His failure to do so has left the court with the task of evaluating the applicant's prospects by reference to the pleadings. I have had great difficulty attempting to ascertain precisely the nature of the applicant's

claim. The Employment Equity Act was amended recently to provide specifically for claims for equal pay for performing the same or substantially the same work, or work of equal value, where the difference in pay is attributable, directly or indirectly, to one or more of the grounds specified in subsection 6 (1). At its most basic level, any claim that a differential in levels of remuneration for the same or similar work or work of equal value constitutes unfair discrimination must be rooted in one or the grounds on which unfair discrimination, direct or indirect, is prohibited. The applicant fails to state whether the discrimination that he alleges is direct or indirect, nor does he assert any specified ground on which he contends that the respondent has discriminated against him. In other words, it is an essential in an equal pay claim to assert and establish a link between the differentiation complained of (being the difference in remuneration for the same work or work of equal value) and a ground on which discrimination is prohibited. It is not enough, as the applicant is done, simply to point to a differential in income and assert that the payment of a lower rate to the claimant constitutes an act of discrimination. It is also not enough for the applicant to point to a differential in income and assert that in the absence of any other specified ground, the basis of the differentiation is arbitrary, and constitutes an act of discrimination on that basis. Even less is there scope for what the applicant refers to in his statement of claim as 'disproportionate' remuneration as a basis for an equal pay claim. Part II of the Employment Equity Act is directed at the prohibition against unfair discrimination on specified grounds, not income differentials in the abstract. To the extent that the applicant may rely on discrimination on an arbitrary ground (one of the grounds recognised by s 6 by way of a recent amendment to the section) this is not specifically pleaded, nor is any proper basis laid for a claim of discrimination on that ground. Discrimination of the now specified ground of arbitrariness requires the applicant at least to establish some factual basis to demonstrate that the difference in remuneration is arbitrary or capricious or that it manifestly lacks any reason or explanation. The applicant was warned of this shortcoming in his pleadings in the point in limine raised by the respondent, yet he has taken no steps to address it. In my view, the statement of claim, even in its amended form, fails to disclose a cause of action and accordingly, for present purposes, does not disclose any prospects of success.

[15] In my view, the applicant has failed to meet the threshold for condonation of the late filing of his statement of claim. The delay is not insignificant, and the explanation for the delay is unsatisfactory. On that basis alone, condonation stands to be refused. Even if I were to have regard to the applicant's prospects of success, *ex facie* the pleadings, there is significant doubt that the applicant has even pleaded a case that warrants consideration. Finally, in relation to costs, I would accept, with some hesitation, that the applicant has been *bona fide* in pursuing his grievance and the present application. This court is conventionally reluctant to penalise individual employees in those circumstances, and I see no reason to depart from that approach.

I make the following order:

1. Condonation for the late filing of the applicant's statement of claim is refused.

2. There is no order as to costs.

André van Niekerk

Judge

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