

SOUTH AFRICA / JUDGMENT

Manisi v Integritron Integrated Solutions (JS364/20) [2021] ZALCJHB 231 (12 August 2021) [2021] ZALCJHB 231

COURT

Labour Court Johannesburg

BEFORE

K Naidoo

CASE / FILE NUMBER

JS364/20

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IN

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

Reportable

Case

No.: JS364/20

In

the matter between:

THOZAMILE

ELLIOT

MANISI Applicant

and

INTEGRITRON

INTEGRATED

SOLUTIONS Respondent

Heard: 8

July 2021

Delivered: 12

August 2021 (In view of the measures

implemented as a result of the Covid-19 outbreak, this judgment was

handed down electronically by circulation

to the parties'

representatives by email. The date for hand-down is deemed to be 12

August 2021)

JUDGMENT

NAIDOO, AJ

Introduction

- [1] On 9 July 2020, the applicant referred an unfair dismissal dispute to this Court in terms of section 191(5)(b)(ii) of the Labour Relations Act[1] (LRA). The respondent's statement of response was delivered on 11 August 2020, thirteen days outside of the period prescribed by rule 6(3)(c) of the Rules for the Conduct of Proceedings in the Labour Court ("the Rules"). The respondent seeks condonation for this delay.
- [2] The applicant has opposed the application on three bases. He contends that the explanation tendered by the respondent is unsatisfactory; that the respondent has failed to address - in its founding affidavit in the application for condonation, its prospects of success; and that he will suffer prejudice if the application for condonation is granted.

Background**Facts**

- [3] The background facts of this matter are largely common cause. The applicant was dismissed by the respondent in or about March 2020, ostensibly on the basis of the respondent's operational

requirements. In his referral to this Court on 9 July 2020, the applicant has challenged the fairness of his dismissal on the basis

that there was no fair reason for the dismissal; that the respondent failed to follow a fair procedure; and that his dismissal was automatically unfair because the true reason for the dismissal amounted to discrimination on the basis of his race.

- [4] Having not received a response from the respondent within the period prescribed by rule 6(3)(b) of the Rules, the applicant then applied for default judgment on 4 August 2020.
- [5] The respondent then delivered its response to the applicant's statement of claim on 11 August 2020 and, on 12 August 2020, it delivered a substantive application for condonation for the late delivery of the statement of response.

Evaluation

- [6] It is now firmly established that the determination of an application for condonation confers upon this Court a discretion, to be exercised judicially on a consideration of various factors. [2] The practice of this Court in the consideration of those factors is consistent with the following dictum of the Appellant Division in *Melane v Santam Insurance Co Ltd*: [3]

“In deciding whether sufficient cause has been shown the basic principle 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 degrees of lateness the explanation therefor, 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 would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the Respondent's interest in the finality of the matter must not be overlooked.”

- [7] In the present matter, the extent of the delay is 13 days. This is not excessive. In its founding affidavit in the application for condonation the respondent, in its explanation for the delay, states that due to the Covid-19 pandemic it had, in July 2020, been operating on a skeleton staff in light of the restrictions placed on economic activity under the Regulations published under the Disaster Management Act[4], and that certain of its staff were also “self-isolating because of pre-morbidities and age factors”.
- [8] As a result, when the applicant’s statement of claim was served on the respondent by way of e-mail at approximately 13h51 on 9 July 2020, it did not immediately come to the attention of the relevant personnel at the respondent because the secretarial staff members responsible for processing the application timeously and referring the matter to the human resources department, were “working under a tight schedule, having been understaffed”.
- [9] The statement of claim was then only brought to the attention of the human resources department of the respondent three or four days after its receipt. Thereafter, the human resources department compiled a report and made recommendations to the management of the respondent regarding the merits of the claim and regarding whether the respondent should oppose the claim. This was done within the ten-day period prescribed by rule 6(3)(b).
- [10] Once the report was completed and submitted to the respondent, a decision was made, on 7 August 2020, to instruct attorneys to prepare the respondent’s opposition to the claim. The statement of response was then delivered on 11 August 2020.
- [11] In *Moses v Commission for Conciliation, Mediation and Arbitration and Others*,[5] this Court stated the following:

“It is trite that condonation is not a mere formality and there for the taking; rather, the applicant for condonation must provide a proper and full explanation for the period of the delay. In Independent Municipal & Allied Trade Union on behalf of Zungu v SA Local Government Bargaining Council & others (2010) 31 ILJ 1413 (LC) at para 13, the court held:

‘In explaining the reason for the delay it is necessary for the party seeking condonation to fully explain the reason for the delay in order for the court to be in a proper position to assess whether or not the explanation is a good one. This in my view requires an explanation which covers the full length of the delay.’”

[12] The explanation tendered by the respondent in the present dispute sets out in detail the circumstances under which it had been operating at the time and what steps the respondent took to process its opposition to the claim once the matter came to its attention. In my view, this explanation both addresses fully the entire period of the delay and is eminently reasonable.

[13] Turning then to the respondent’s prospects of success in the main claim, the applicant has submitted that the respondent has failed, in its application for condonation, to address the issue of prospects of success at all. In its founding affidavit in the application, the respondent deals with prospects of success in the following manner:

“13. [The] respondent was at all times intent on opposing the applicant’s claim and I also submit that it has good prospects of success. I have read and considered the respondent’s response filed on 11 August 220 and confirm that it accords with [the] respondent’s instructions and that it discloses a defence to the Applicant’s claim.”

[14] It is plain from a reading of the papers in the main claim that the respondent has put up a plausible defence. In relation to the retrenchment consultation process itself, it has set out the circumstances under which the process was conducted, including the selection criteria adopted, and in relation the allegations of unfair discrimination, it has set out substantial detail regarding why certain employees were chosen for retrenchment and others not.

[15] I am accordingly both satisfied that the respondent’s prospects of success are addressed in its founding affidavit in this application, albeit through a cross reference to the statement of response and a confirmation of those averments under oath, and that they are reasonable.

[16] In *Lentsane and Others v Human Sciences Research Council*[6] this Court had occasion to state the following in this regard:

*“[27] The applicants advance a case that the respondent’s statement of defence raises a case so weak that it is wholly without merit. That conclusion is not one which I am able to reach on a reading of the material before me. It seems plainly evident that there is a substantial case to be tried and, more particularly, in the context of terminations of employment for operational reasons, it must be seldom that a controversy truly is determined on a single element of the case. It cannot therefore be said that the respondent’s case is one that is without merit. It is useful to be reminded by the further remarks of Comrie AJA in *Rademan v Containerlink* in which he observes:*

'The prospects of success were addressed in the statements of case and response and also in the affidavits. They were in dispute. It is not possible on the papers to resolve that dispute or to hold that the appellant's prospects are excellent. Equally however it is not possible to hold that the appellant's prospects are poor or slender. It is not that the appellant's case on the merits disclosed a glaring weakness or that the respondent adduced a deadly piece of evidence. It is accordingly fair to conclude on the papers the appellant's prospects are reasonable.'

- [28] In my view, that commonsense dictum appropriately articulates the threshold for the evaluation of circumstances in this class of case.”
- [17] In this matter too, there quite clearly appears to me to be a substantial dispute between the parties that should be tried.
- [18] On the question of prejudice, the applicant’s counsel submitted that the applicant would suffer substantial prejudice if the application is granted because this will delay the finalisation of his dispute. He submitted further that the applicant is entitled to have his dispute resolved expeditiously and that the “further delay in finalising [the dispute] will prejudice his family”. On the contrary, he submits that the respondent will suffer no prejudice if the application is dismissed. Though no further details are provided as to the actual prejudice that the applicant will suffer if the application is granted, it is difficult to reconcile these submissions with the fact that the opposition to this application itself has already caused a delay of approximately a year and will result in further consequential delays in the enrolment of the dispute for trial.
- [19] In addition, the submission that the respondent will suffer no prejudice if the application is dismissed is manifestly false. If the application is refused, the respondent will be denied the right to fully ventilate the dispute and put before this Court its defence to the claim. It may as a result be held liable to pay substantial compensation in circumstances where it believes that the applicant’s dismissal was both substantively and procedurally fair.
- [20] In *Grootboom v National Prosecuting Authority and Another*[7] the Constitutional Court stated that the standard for considering an application for condonation is the interests of justice. It stated the following in this regard:

“I have read the judgment by my colleague Zondo J. I agree with him that, based on Brummer and Van Wyk, the standard for considering an application for condonation is the interests of justice. However, the concept “interests of justice” is so elastic that it is not capable of precise definition. As the two cases demonstrate, it includes: the nature of the relief sought; the extent and cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the importance of the issue to be raised in the intended appeal; and the prospects of success. It is crucial to reiterate that both Brummer and Van Wyk emphasise that the ultimate determination of what is in the interests of justice must reflect due regard to all the relevant factors but it is not necessarily limited to those mentioned above. The particular circumstances of each case will determine which of these factors are relevant.”

[21] In the present circumstances, I am satisfied that on a consideration of all of the factors set out in Grootboom, it is indeed in the interests of justice to grant condonation.

Costs

[22] Finally, on the question of costs, both parties seek costs. The general approach in this Court is that the ordinary rule of practice that costs follow the result does not apply to matters in this court.[8] Though the applicant's opposition to this application is in my view ill-conceived, I am mindful that he is an individual who has already endured substantial delays in the adjudication of his unfair dismissal dispute. On balance therefore, I see no reason to deviate from the general approach of this Court.

[23] In the circumstances, the following order is made:

Order

1. The application for condonation for the late delivery of the respondent's statement of response is condoned.
2. There is no order as to costs.

K. Naidoo

Acting Judge of the Labour Court of South Africa

Appearances:

For the applicant: Adv. FP Phamba.

Instructed by: WW

Sineke Attorneys.

For the respondent: Mr. Mr D Huggett (DH) of Huggett Retief Inc.

[1] No. 66 of 1995, as amended.

[2] Nature's Choice Products (Pty) Ltd v Food and Allied Workers Union and Others (2014) 35 ILJ 1512 (LAC); Motloi v SA Local Government Association (2006) 27 ILJ 982 (LAC) at para 16.

[3] 1962 (4) SA 531 (A) at 532C-F.

[4] 57 of 2002.

[5] (2019) 40 ILJ 2371 (LC).

[6]

(2002) 23 ILJ 1433 (LC).

[7]

(2014) 35 ILJ 121 (CC).

[8] Zungu v Premier of the Province of KwaZulu-Natal (2018) 39 ILJ 523 (CC).

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