

SOUTH AFRICA / JUDGMENT

Mpye v Kwikspace Modular Building (PTY) Ltd (JS968/19) [2020] ZALCJHB 270 (3 December 2020) [2020] ZALCJHB 270

COURT

Labour Court Johannesburg

BEFORE

S Mabaso

CASE / FILE NUMBER

JS968/19

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THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case

No: JS968/19

In

the matter between:

THINAVHUYO
NDIDINWANGANI MPYE
Applicant
and
KWIKSPACE
MODULAR BUILDING (PTY) LTD
Respondent

Heard:

03 December 2020

Delivered:

03 December 2020
EX-TEMPORE

JUDGMENT

MABASO, AJ

- [1] Before this Court, the principal condonation is about the late filing of the Applicant's statement of claim wherein also seeks Costs order against the Respondent, in the event of opposition. The second application is about the late delivery of the answering affidavit. The Applicant seeks an order to condone the late delivery of the statement of case. Section 191(11)(b) confers upon this Court a very wide discretion to condone non-observance of the time frame in section 191(5)(b) of the LRA. An Applicant has to show good cause. The wide discretion must be exercised judicially upon considering all facts before the Court, and it is trite that the Court has to consider the interest of justice. Standard factors are the degree of lateness, explanation thereof, prospects of success, the importance of the case, interest in the finality of the matter, the court's convenience, and avoidance of unnecessary delay in the administration of justice.
- [2] However, there are judgments of this Court, LAC, and Constitutional Court held that sometimes if a delay is excessive and no explanation has been provided, or the explanation is inadequate, the Court may refuse the condonation without considering the remaining factors. For example, in *Moila v Shai and Others* (2007) 28 ILJ 1028 (LAC), the LAC signposted thus:

Wherein an application for condonation the delay is excessive and no explanation has been given for the delay or an explanation has been given, but such explanation amounts to no explanation at all, I do not think it is necessary to consider the prospects of success;

Cf. *Collet v CCMA and Others* [2014] 6 BLLR 523 (LAC) at para 33.

- [3] Counsel for the Applicant has referred this Court to *Van Wyk v Unitas Hospital and Another* [2007] ZACC 24; 2008 (2) SA 472 (CC)(Van Wyk) to support their case. In contrast to the applicant's argument, I find paras 22 and 33 of this authority germane hereto, which read thus:

An applicant for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of delay.

And

The applicant has submitted that her application for leave to appeal bears prospects of success. Prospects of success pale into insignificance where, as here, there is an inordinate delay coupled with the absence of a reasonable explanation for the delay.

- [4] Firstly, I propose to deal with the Respondent's condonation application.

- [5] On 20 November 2020, when parties were before this Court, the matter was adjourned by agreement to allow them to exchanged further papers and come back today for oral arguments. Specifically, the Respondent's Counsel argued that they were not served with the Applicant's condonation application. The manner and periods to exchanged documents in these proceedings are not as prescribed by this Court's Rules but were issued by this Court to avoid further delays.
- [6] In the answering affidavit, the Respondent incorporates the condonation application, and in para 4.11, the deponent contends that:

On 28 November 2019, the applicant served its current statement of case and the notice of motion, affidavit and annexures on an employee of the respondent. Despite the Respondent having attorneys of record, appointed in terms of Rule 21(3), the Applicant served the Respondent. I attach hereto the application served on the Respondent on 28 November 2019 as Annexure A3.

- [7] Rule 21 of the Rules of this Court, which the Respondent relies on partly reads thus

"(1) A representative who acts on behalf of any party in any proceedings must notify the registrar and all other parties, advising them of the following particulars: the representative's name, the postal address and the place of employment or business; and if a fax number and the telephone number are available, those numbers."

- (2) ...

- (3) On receipt of a notice in terms of subrule (1) or (2), the address of the representative or the party, as the case may be, will become the address for notices to and for service on that party of all documents in the proceedings, but any notice duly sent or any service duly effected elsewhere before receipt of that notice will, notwithstanding that change, for all purposes be valid, unless the court orders otherwise."

- [8] It is common cause that in the previous application, under case number JS482/19, the representative of the Respondent was the same attorneys of record. I noticed that there was no notice of appointment in the file. When I asked the Respondent's Counsel if she has a copy, she said she does not have it as the instructing attorney lost it with other documents.
- [9] Proceedings under case number JS482/19, and these proceedings are two separate proceedings, and nowhere in the former is stated that should include the Applicant instituting further proceedings against the Respondent documents have to be served on their attorneys. Instead, Rule 21(3) is clear that attorneys become attorneys of records once they have served the notice of appointment. The previous application was disposed of around July 2019. Proceedings under case number JS 968/19 were instituted in November 2019. I, therefore, conclude that the Applicant was not required to serve the documents in these proceedings on the Respondent's attorneys. Furthermore, this is an interlocutory application in the dismissal dispute, and the Applicant properly served the papers at the Respondent's registered address.

[10] Period of lateness: Generally, suppose a condonation application is delivered, and a respondent delivers an answering affidavit out of time. In that case, condonation for the opposing papers' late delivery only necessary if the Applicant delivers an objection within ten thereafter; Cf. clause 11.4.2 of the Practice Manual. Same, the Respondent will have to show good cause. The Respondent received the condonation application in November 2019. And the answering affidavit was only filed last week, following the Court's indulgence. Therefore, it was filed 12 months out of time. This hearing was handled differently, and this Court issued time frames and manner of service. This Court allowed objection to the late filing of the answering affidavit to be raised orally before delivering the intended answering affidavit. As Counsel for the Applicant stated beforehand, he was objecting to the intended answering affidavit's late delivery. As a result, it was agreed that the Respondent was to file a condonation application. Based on the inordinate period of delay, the condonation application fails. Under the circumstances, no need to consider further requirements. Regarding costs, I propose to deal with it at the end.

[11] I now proceed to deal with the Applicant's condonation application. The applicant contends that she was dismissed in December 2018. Following her dismissal, she then referred a dispute to the CCMA for conciliation, claiming dismissal relating to operational requirements. The dispute remained unresolved by 29 January 2019. Instead of requesting arbitration, she chose to approach this Court for adjudicating the dismissal. This referral should have been done within 90 days from when the conciliation remained unresolved but was referred late. Therefore, she had to show good cause.

[12] The applicant had until around the end of April 2019 to deliver the referral. However, she declared the dispute in November 2019, which 7 months out of time.

[13] She adequately explains the delay between May and June 2019. Left with five months. The applicant asserts that on 17 July 2019 she instructed attorneys, as in paras 14.7 to 15 states that,

"... [D]irector of [the first attorneys], advised me that we need to consult as soon as it was practical for both of our diaries so that he could assist in the launching of the statement of claim in terms of Labour Relations Act and the applicable rules;

however, whilst I was waiting for [the Director] and/or his office to confirm the consultation for full instruction, I learned that he was in hospital after having been stabbed on 19 July 2019(two days after our conversation). As proof, I attach a charge sheet which proves that the perpetrator/ accused is facing a charge of attempted murder and that [the Director] is a complainant in the said matter...

. [the Director] stayed in hospital until around 5 August 2019. And when he was discharged, he was booked off to convalesce from home for a while. I am advised that [the Dorector] has not fully recovered, as he continues to be in and out of the hospital and/or in consultation with doctors.

[the Director] practise alone as his law firm and he has no other professional staff who could assist me in his absence, and, when he realised that the time was not on my side and his recovery was taking longer than expected, he advised me to look for other attorneys to help me launch this application.

It is on that basis that towards the end of October 2019, the last week of October to be precise, and just after the advice by [the Director], I was referred to the current attorneys of record, Lethabo Mokoena Attorneys, as people who may assist me with the matter going forward. I consulted with the Director, Adrineth Lethabo Mokoena who later advised that Counsel be appointed. And once they were appointed, papers were drafted and issued without further delay.”

- [14] The afore-passages confirm that Applicant approached [the Director] in July 2019, who was subsequently hospitalised following the stabbing incident and remained in hospital until 5 August 2019, but no explanation of what happened between 5 August and mid-October
2019. Furthermore, there is no explanation when [the Director] suggested that the current attorneys be appointed. Nor explanation of why she did not look for other attorneys then. The explanation about the period between July to October 2019 amounts to no explanation. The explanation of saying ‘I am waiting for the attorney who has been stabbed’ amounts to no explanation at all. The Applicant had options of either approaching the Legal Aid South Africa or any attorney then, but she failed to do so. Therefore, conclude that the applicant has not provided an unreasonable explanation.
- [15] As I have indicated that the delay is inordinate, as conceded by the Applicant’s Counsel. Therefore, being guided by the principle that I highlighted above, this Court does not need to consider prospects of success and other factors. Under those circumstances, the condonation application for the late delivery of the statement of case is not granted.
- [16] Costs: This Court has to be guided by s 162 of the LRA, which deals with the parties’ conduct in the proceedings. The Applicant is exercising her right by approaching this Court. How the Applicant’s representative has prosecuted this matter does not suggest that there is conduct that justifies that the Applicant should pay the costs regarding the condonation application.
- [17] This Court has considered para 4.11 of the Respondent’s affidavit and the unconvincing explanation by Respondent’s Counsel regarding why the notice was not made available. The Counsel had to communicate instructions from the instructing attorneys by advising this Court that they misplaced the office file. Be that as it may, I do not think that such calls for costs order against the Respondent considering the totality of the circumstances.
- [18] As a result, I make the following order: -
1. The Respondent’s condonation application is dismissed, with no costs order.
 2. The Applicant’s condonation is also dismissed, with no costs order.

S. Mabaso

Acting Judge of the Labour Court of South Africa

For the Applicant:

Mr Mokoena

Instructed by:

Lethabo Mokoena Attorneys

For the Respondent:

Adv K Wilson

Instructed by:

Weavind & Weavind INC

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