

SOUTH AFRICA / JUDGMENT

Nene v Shibo Saravan Bhava Palace (Pty) Ltd t/a KK Logistics (D1420/19) [2021] ZALCD 61 (19 August 2021) [2021] ZALCD 61

COURT
Labour Court Durban

BEFORE
MG Maeso

CASE / FILE NUMBER
D1420/19

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IN THE LABOUR COURT OF
SOUTH AFRICA, DURBAN

Not

reportable

CASE NO.: D1420/19

In

the matter between:

THEMBUYISE
FUNOKWAKHE
NENE APPLICANT
And
SHIBO
SARAVAN BHAVA PALACE (PTY) LTD
t/a
KK
LOGISTICS RESPONDENT
Heard: 1
July 2021
Delivered: 19
August 2021

JUDGMENT

1. Application was made to show good cause why the applicant's late referral of his unfair dismissal for operational reasons to the Labour Court should be condoned.
2. Although a Notice of Opposition was filed, an opposing affidavit was not filed although Mr Clifford Athman of Clifford Athman Attorneys appeared on behalf of the respondent.

BACKGROUND

3. The applicant alleged he was retrenched unfairly, and timeously referred an unfair dismissal dispute to the CCMA on the 5th June 2019.
4. The dispute was conciliated on the 3rd July 2019 and a Certificate of Non-Resolution was issued. The commissioner issuing the certificate, ticked the box on the certificate indicating the Labour Court as the appropriate forum should the dispute be referred further.
5. Mr Nene, appearing for the applicant suggested that the applicant being a lay-person, did not understand that the dispute had to be referred to the Labour Court and instead, the applicant referred the dispute to the CCMA for arbitration on the 15th July 2019. Unfortunately, this explanation was not contained in the founding affidavit deposed to in support of the application for condonation.
6. On the 16th August 2019, the applicant was made aware by the CCMA that the dispute must be referred to the Labour Court.
7. The applicant was, in accordance with section 191(5)(b) read with subsection (11) of the Labour Relations Act, obliged to refer his dispute to the Labour Court within 90 days of the date of the Certificate of Non-Resolution issued on the 3rd July 2019. Therefore, the referral had to be made to this court on or before the 4th October 2019.
8. The dispute was filed by the applicant with this court on the 19 November 2019, 46 days out of time and in the form of an application and not a statement of case. At the time the applicant was represented by his current attorneys. The reason for referring an unfair dismissal dispute in the form of an application was not explained even though the footnote to Rule 5 confirms that unfair dismissal disputes in terms of section 191(5)(b) of the LRA, should be referred by way of a statement of claim.

CONDONATION

9. As set out above the pleading filed with the court in furtherance of the alleged unfair dismissal was out of time and it is the period from the 4 October 2019 to the 19 November 2018 that must be explained before condonation can be granted.

10. The only explanation found in the founding affidavit is for the period 16th July 2019 to the 16th August 2019. This was described as time "wasted" given the applicant's misguided belief that he should refer his dispute to arbitration at the CCMA.
11. No explanation is given for the delay between the 16th August 2019 when the applicant was made aware that his dispute must be referred to the Labour Court, and the 19th November 2019 when the referral was filed. More importantly, the period between the 4th October 2019 and the 19th November 2019, being the period that must be condoned, is not explained at all.
12. It seems that at some stage during this period, the applicant was legally represented but the court is not told when this occurred and once having instructed an attorney, what steps, if any, were taken to comply with the Rule of this Court. There is simply no explanation for the default period that falls outside the 90-day period required by section 191(5)(b) read with subsection (11).[1]
13. The founding affidavit refers to the "wasted time" caused by the applicant referring the matter to the wrong forum, namely the CCMA, but on the applicant's own version, he was made aware on the 16th August 2020 that he had to refer the matter to the Labour Court.
14. The discretion by this court to condone must be exercised judicially upon a full and proper consideration of the facts of each case. Due consideration must be given to what will be fair to both sides.[2]
15. It is an accepted principal in this court that condonation is not merely for the asking [3] and that the Labour Relations Act is designed to promote quick resolution for disputes in the workplace.[4]
16. In this case, the onus rests on the applicant to satisfy the court that good cause exists for the delay. This requires a full, acceptable and reasonable explanation.
17. As indicated above, no explanation whatsoever has been submitted for the period of delay. The court is not told when the applicant took legal advice and what he did once he did so.
18. Therefore, the court is not in an informed decision to decide whether the delay was reasonable or not[5].
19. This therefore excludes the grant of condonation no matter what the prospects of success are.[6]

In the circumstances, it is ordered:

18.1 that the application for condonation is dismissed;

18.2 given that no opposing papers were filed, there is no order as to costs.

MG MAESO

Acting Judge of the Labour Court of South Africa

Appearances:

S Nene of Xaba Attorneys for the Applicant

C. Athman of Clifford Athman Attorneys

- [1] Samuels v Old Mutual Bank (2017) 38 ILJ 1790 (LAC) para 15
 - [2] Northern Assurance Company Limited v Somdaka [1960] (1) SA 588 (A)
 - [3] NUMSA and Another v Hillside Aluminum [2005] 6 BLLR 601 (LC)
 - [4] JGD Trading (pty) Ltd t/a Bradlows Furnishers v Larka NO [2001] 3 BLLR (LAC) para 13
 - [5] Melane v Santam Insurance Co Ltd 1962 (4) SA 531 (A)
 - [6] NUM v Council for Mineral Technology [1999] 3 BLLR 2009 (LAC) 211 G to H
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