

SOUTH AFRICA / JUDGMENT

Sarumi v Apmath Group Andrology Department (JS682/18) [2021] ZALCJHB 232 (12 August 2021) [2021] ZALCJHB 232

COURT

Labour Court Johannesburg

BEFORE

K Naidoo

CASE / FILE NUMBER

JS682/18

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IN

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG)

Not

Reportable

Case

No.: JS682/18

In

the matter between:

TEMITAYO

KAFAYAT

SARUMI Applicant

and

APMATH

GROUP – ANDROLOGY

DEPARTMENT Respondent

Heard: 6

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] The applicant seeks condonation for the late referral of her unfair dismissal dispute to this Court. The referral was made 38 days

outside of the time-period prescribed by section 191(11)(a) of the Labour Relations Act[1] (LRA).

[2] The respondent has opposed the application on two bases. First, it contends that the applicant has not fully explained the delay in referring the dispute to this Court and she has no prospects of success. And second, in respect of the delay in the delivery of the application for condonation itself - some two years after the need to do so was brought to the applicant's attention, it contends that no explanation at all is provided.

Background**Facts**

[3] The applicant was dismissed on 23 March 2018, having been found guilty of various acts of misconduct in an internal disciplinary hearing.

[4] On 26 March 2018, she referred a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). The dispute remained

unresolved after conciliation on 8 May 2018 and proceeded immediately to arbitration. Having not completed the arbitration proceedings on that day, the matter was postponed to 12 July 2018.

[5] When the matter reconvened on 12 July 2018, the presiding commissioner engaged the parties as to the true reason for the applicant's

dismissal and, on 16 July 2018, he delivered a written ruling in terms of which he found that the CCMA lacked jurisdiction to arbitrate the dispute because the reason provided by the applicant for her dismissal was one contemplated in section 187(1)(f) of the LRA. He found therefore that the dispute ought to have been referred to this Court for adjudication in terms of section 191(5)(b) (i) of the LRA.

[6] On the applicant's version, she then waited until 24 August 2018 until she received a copy of the certificate of outcome from

conciliation before taking steps to prepare her referral to this Court. She eventually did so on 14 September 2018, approximately

three weeks after receiving the certificate of outcome. Her explanation in this regard is that she was not aware that an application for condonation was necessary and, being self-represented, she would not otherwise have known that the time-period within which to refer the dispute to the Labour Court was running whilst the CCMA arbitration process was still in process.

- [7] The respondent then delivered its statement of response in this Court on 2 October 2018. In its response, the respondent expressly raised the issue of the late referral of the dispute to this Court and the court's lack of jurisdiction to adjudicate the dispute in the absence of an order condoning the late referral.
- [8] Despite this, no application for condonation was made. In oral argument at the hearing of this application, the applicant indicated that even upon receipt of the statement of response, she did not know that a formal application for condonation was required.
- [9] The matter was then set down on the trial roll for 11 November 2020. On that day, Prinsloo J postponed the matter sine die and directed the Applicant to deliver an application for condonation by 18 November 2020.
- [10] The applicant then delivered the application for condonation on 18 November 2020 and on 19 November 2020, the respondent delivered its answering affidavit to that application.

Evaluation

- [11] 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."

- [12] In the present matter, the dispute was certified unresolved on 8 May 2018. Following an initial, erroneous referral to arbitration and a consequent jurisdictional ruling issued on 12 July 2018, the dispute was then referred to this Court in terms of section 191(5)(b)(i) on 14 September 2018, some 38 days late.

- [13] Whilst not insignificant, this delay is not excessive. The applicant has explained this delay by indicating that, at least until 12 July 2018 when the CCMA commissioner delivered the jurisdictional ruling in terms of which she was directed to refer her matter to this Court, she was under the impression that the CCMA had been seized with the matter and that there was accordingly no need to refer any dispute to this Court for adjudication.
- [14] The jurisdictional ruling was issued approximately two months after the dispute was certified unresolved on 8 May 2018. Throughout that time, it was not unreasonable for the applicant to believe that the CCMA was still seized with the matter.
- [15] Once the jurisdictional ruling was received and it became clear that a referral to this Court was necessary, she then followed up with the CCMA as to when the certificate of outcome from conciliation will be issued. She eventually received the certificate of outcome on 24 August 2018 and proceeded to immediately prepare her statement of claim, which was then delivered approximately three weeks thereafter, on 14 September 2018.
- [16] The applicant is a self-represented lay litigant. Though some mention is made in the papers about the applicant having sought and obtained legal representation, it became clear during argument at the hearing of this application that at no stage did that in fact happen. Her engagement with a firm of attorneys in October 2018 did not get off the ground as there appeared to be some disagreement as to the specific terms of the engagement. From the inception of these proceedings therefore, the applicant has represented herself.
- [17] Both this Court and the Labour Appeal Court have previously recognized that in certain circumstances, a bona fide explanation for a delay based upon an erroneous referral to the CCMA may constitute a satisfactory explanation for the delay in a subsequent referral to this Court.[4] In this regard and in circumstances not dissimilar to the present, the Labour Appeal Court in *SATAWU obo Members v South African Airways (Pty) Ltd and Others*[5] stated the following:

“The uncontested explanation for the delay is that most of the period of the delay was taken up by the referral to arbitration. The remainder of the period was caused by the internal processes within the appellant in taking a decision to proceed with the claim and instructing attorneys accordingly. Although the period is lengthy, it has been, in my view, adequately explained and it would be unfair to punish the individual employees for a process they did not have direct control. Furthermore, the condonation application was filed two days after the filing of the statement of case. The mistake made in the court a quo that it was filed after five months, has been acknowledged by that court in its judgment on the application for leave to appeal.”

- [18] To my mind, the explanation tendered by the applicant in this regard, particularly in circumstances where she has not had the benefit of legal advice, is eminently reasonable.
- [19] The second period (relating to the late delivery of the application for condonation) between 14 September 2018 when the statement of claim was delivered and 18 November 2020 when the application for condonation was eventually delivered, is far more substantial. The

respondent submits that this period is unexplained and that in any event, the application for condonation was not brought as soon as the applicant became aware of the need to do so. In relation to the latter issue, the Respondent submitted that at best for the applicant, this was as early as 2 October 2018 when it delivered its statement of response. In that response, the respondent pleads (at paragraph 31) that “having regard to section 191(11)(a) of the LRA, the Statement of Case has been delivered late and, until and unless condoned by the above honourable Court, is not properly before it”.

- [20] In support of these submissions, the respondent referred the Court to the well-known case of *Allround Tooling (Pty) Ltd v NUMSA and others*[6] in which the principle that an application for condonation must be brought as soon as the need to do so becomes apparent, is affirmed.
- [21] In her founding affidavit, the applicant states, though short of detail, that she was not aware of the need to apply for condonation until the matter came before Prinsloo, J in this Court on 11 November 2020, presumably when the need to do so and the manner in which the application had to be brought were properly explained to her. This in itself is an explanation for the delay. In relation to paragraph 31 of the respondent’s statement of response in particular, she submitted that even upon perusal of that submission it was not apparent to her that she needed to bring a formal application for condonation. She referred in her founding affidavit also to the pre-trial conference held between the parties where the need to do so was also not brought to her attention. This is not seriously disputed by the respondent.
- [22] In *Xinwa and others v Volkswagen of South Africa (Pty) Ltd*[7] the Constitutional Court held as follows (at para 13):

“Pleadings prepared by lay persons must be construed generously and in the light most favourable to the litigant. Lay litigants should not be held to the same standard of accuracy, skill and precision in the presentation of their case required of lawyers.

In construing such pleadings, regard must be had to the purpose of the pleading as gathered not only from the content of the pleadings but also from the context in which the pleading is prepared. Form must give way to substance. While the applicants' notice of motion does not seek leave to appeal, what the applicants are seeking is quite clear. They are seeking to appeal against the finding by the LAC that their dismissal was procedurally fair and the consequential refusal to reinstate them and to award them compensation. Their application must therefore be construed as an application for leave to appeal directly to this court from the decision of the LAC. In addition, the applicants are seeking condonation for the late filing of their application for leave to appeal.”

- [23] The approach of the Constitutional Court to the assessment of pleadings prepared by lay litigants should in my view be followed in this matter too.[8] Though lacking the kind of detail one would expect of a litigant who acts on sound legal advice, it is clear that the applicant has at least made some attempt to explain this delay in her founding affidavit. This

explanation is premised upon her lack of understanding of the processes of and time periods set out in the Rules for the Conduct of Proceedings in the Labour Court. It is one that I consider in the present circumstances to be reasonable.

- [24] The issue of whether the application for condonation was brought as soon as the applicant became aware of the need to do so cannot be separated from the actual explanation tendered by the Applicant for the delay in bringing the application for condonation. I have already referred to those aspects of the applicant's submissions in which she indicates that she was not aware of the need to apply for condonation until the matter appeared on the trial roll of 11 November 2020, when it dawned upon her for the first time that a formal application for condonation was necessary. It is indeed probable that a lay litigant such as the applicant reading the respondent's statement of response may not have realised that it was incumbent upon her to bring a formal application for condonation, and that only when this was properly explained to her on 11 November 2020, did she fully appreciate what was to be done.
- [25] I am accordingly satisfied on the probabilities that until 11 November 2020, the applicant would not have known that she was required to bring a formal application for condonation. Once that became clear on 11 November 2020, it was done with the required level of urgency and in accordance with the time-period prescribed in the order of Prinsloo, J of that date.
- [26] Even if I am wrong as to whether the explanation tendered by the Applicant is indeed one that is reasonable, this Court has had occasion to adopt some degree of flexibility in circumstances where, absent a reasonable explanation for the delay, condonation may be granted in the interests of justice and in circumstances where the applicant's prospects of success are reasonable.[9]
- [27] The applicant has alleged that her dismissal is automatically unfair because the reason for the dismissal is that the respondent unfairly discriminated against her on the basis of her race. Her statement of claim provides substantial detail relating to various ostensibly racist utterances that certain of her colleagues are alleged to have made towards her which may be relevant to the determination of whether her dismissal was ultimately automatically unfair. The respondent has however put up a plausible defence. It has denied that the applicant's dismissal was in any way related to her race and has explained in detail the charges pursuant to which the Applicant was found guilty and the process it followed in disciplining her. In these circumstances, whilst it is not possible to hold that the applicant's prospects of success are excellent, it is similarly not possible to find that her prospects of success are wholly without merit.
- [28] The following remarks of Sutherland AJ (as he then was) in *Lentsane and Others v Human Sciences Research Council*[10] are particularly apposite 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."

[29] In the present matter, there similarly appears in my view to be a substantial issue to be tried and one in which the applicant's prospects of success appear to be reasonable.

[30] Moreover, this is not a matter where the applicant has had any prior opportunity to ventilate the merits of her dismissal dispute. If this application is refused, it is plain that the applicant will suffer substantial prejudice, not least of which will be to deny her the right to challenge the fairness of her dismissal in an appropriate forum. At all material times, the applicant has demonstrated a bona fide intention to do so. On the other hand, whilst I am mindful of the prejudice to the respondent that may be caused by a delay in

proceeding to trial some years after the applicant was dismissed and the resulting possibility of witnesses being unavailable as a result, I do not consider this sufficient to outweigh the prejudice that the applicant may suffer by not having an opportunity to ventilate her dispute at all. In addition, the opposition to this application itself has already caused a substantial delay in the proceedings and there will no doubt be further consequential delays in the enrolment of the matter for trial. The applicant ought not to be blamed for this. It is accordingly in my view in the interests of justice[11] to grant the application for condonation.

[31] Finally, on the question of costs, I am guided by the general approach in this Court that the ordinary rule of practice that costs follow the result does not apply to matters in this Court.
[12]

[32] In the premises the following order is made:

Order

1. The application for condonation for the late referral of the applicant's unfair dismissal dispute to this court 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: In person

For the respondent: Mr. Jayson Kent of Edward Nathan Sonnenbergs

[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), para 16.

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

[4] Motloi v SA Local Government Association (2006) 27 ILJ 982 (LAC); National Union of Metalworkers of SA and Others v Crisburd (Pty) Ltd

(2008) 29 ILJ 694 (LC); National Union of Metalworkers of SA and Others v SA Truck Bodies (Pty) Ltd

(2007) 28 ILJ 1603 (LC).

[5]

[2015] 2 BLLR 137 (LAC) at 16.

[6] [1998] 8 BLLR 847 (LAC).

[7]

[2003] 5 BLLR 409 (CC).

[8] See also: Randfontein Estates Ltd v Tembe and Others

(2003) 24 ILJ 2001 (LC).

[9] For example, see National Education Health and Allied Workers Union on Behalf of Mofokeng and Others v Charlotte Theron Children's Home (2004) 25 ILJ 2195 (LAC).

[10] (2002) 23 ILJ 1433 (LC).

[11] Grootboom v National Prosecuting Authority and Another (2014) 35 ILJ 121 (CC).

[12] Zungu v Premier of the Province of KwaZulu-Natal 2018

(6) BCLR 686 (CC).

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Prepared on 10 October 2026 · Esheria