

SOUTH AFRICA / JUDGMENT

Seakhoe v Pepkor Trading (Pty) Ltd (J2619/17) [2020] ZALCJHB 151 (20 August 2020) [2020] ZALCJHB 151

COURT

Labour Court Johannesburg

BEFORE

Van Niekerk

CASE / FILE NUMBER

J2619/17

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The

Labour Court of South Africa

(Held at Johannesburg)

(JUDGMENT)

Case No: J2619/17

In

the matter between:

MAKHALA

EVIDIA

SEAKHOE

Applicant

and

PEPKOR

TRADING (PTY) LTD

Respondent

Hearing: 14 August

2020 (via Zoom)

Date

of judgment: 20 August 2020. Judgment delivered by email by

16:00

JUDGMENT

VAN NIEKERK J

[1] This is an application to condone the late referral to this court of a dispute concerning the fairness of the applicant's dismissal by the respondent on 13 November 2015, almost 5 years ago. The applicant disputed the fairness of her dismissal and referred a dispute to the CCMA. On 12 November 2015, the CCMA issued a certificate to the effect that the dispute remained unresolved. On this basis, in terms of the applicable time limit, the applicant ought to have referred a dispute to this court for adjudication by no later than 10 February 2016. The statement of case was filed on 12 October 2017, some 20 months late. The matter came before this court on 5 November 2018, by way of an application for default judgment. My colleague Moshoana J refused to grant default judgement and directed the applicant to serve and file an application for condonation. That

directive was issued on 7 December 2018. The present application was filed only on 19 February 2020, more than a year later.

[2] The applicant is required to show good cause for the late filing of her statement of case. The court must necessarily take into account the degree of lateness, the reason for lateness, the applicant's prospects of success, any prejudice to the respondent and any other relevant factors. In regard to prospects of success, it is not necessary for an applicant to prove that he or she will succeed when the merits of the matter are considered; it is necessary only to provide a basis to establish that the applicant has a good chance of succeeding when the matter is heard. This requires an elucidation of

the prospects of success beyond a broad and sweeping statement to the effect that the applicant has good prospects – the averment must be substantiated. None of these factors is on its own decisive, and the court is required to exercise a discretion on the basis of an objective conspicuous of all of the relevant facts. 'Good cause' requires the applicant to provide an explanation to establish how and why the default occurred, for each period of the delay. Condonation is not to be had merely for the asking, a full and detailed account of the causes of the delay and their effects must be furnished so that the court is in a position to understand clearly the reasons for the delay and to assess the responsibility for it. Further, the application for condonation must be brought as soon as reasonably possible after the applicant becomes aware of his or her default.

[3] Although this court has emphasised that none of the factors referred to above is individually decisive, it has consistently been held in this court (and others) that where the delay is excessive and the explanation for the delay is not satisfactory, this in itself justifies a refusal to grant condonation. Put another way, if there is no reasonable and acceptable explanation for a lengthy delay, the applicant's prospects of success are immaterial, and without prospects of success, no matter how good the explanation for the delay might be, condonation ought properly to be refused.

- [4] In the present instance, the delay is inordinate. The explanation for the delay is one that is centred on the need to request cover from the applicant's legal insurer prior to appointing counsel. This was done in November 2016. A consultation was scheduled for late January 2017, but the applicant did not have the financial means to

travel to Johannesburg. It was only in May 2017 that counsel provided the correspondence attorney with a draft statement of claim. As I have indicated, the statement of claim was issued only on 12 October this 2017 and sent to the respondent by registered post on 17 October

2017. There is no explanation for the delay between May and October – unlike an affidavit, a statement of claim does not require the signature of the applicant. In this regard, it should be recalled that the rules of this court require statement of claim to be served prior to it being filed with the registrar. In this case, service occurred a week after filing and in circumstances where the respondent correctly points out that the statement of case was sent by registered post to a non-existent address. The result was that the respondent became aware of the matter only in January 2020, when it received the application for condonation.

- [5] The explanation for the delay is far from satisfactory. It fails to incorporate the whole period of the delay and seeks to ascribe blame to the applicant's insurer and legal representatives in circumstances where the applicant has failed to record any efforts that she made to follow up on the instructions that she had given. Further, there is simply no explanation for the filing of the present application for condonation more than a year after the applicant was

specifically directed by this court to file such an application. The applicant was represented by attorneys throughout, and it must have been apparent to them that they were required to respond to the court's directive within a reasonable time.

- [6] In the circumstances, and in line with the relevant authorities, the application for condonation stands to be refused without any consideration of the merits of the applicant's claim. However, even if I were to have regard to the merits, the respondent avers in its answering affidavit that the retrenchment process that culminated in the termination of the applicant's employment was one contemplated by section 189A of the LRA, which prohibits the applicant from now challenging any issue of procedural unfairness. Further, the respondent avers that the applicant refused an offer of reasonable alternative employment, opportunistically insisting that she be retrenched and paid a severance package before she would consider applying for the position. The applicant did not file a replying affidavit to challenge any of the averments made by the respondent, and in accordance with the rules regulating the determination of the factual issues in motion proceedings, I must accept the respondent's version. That being so, the applicant has no prospects of success in the main application.

- [7] Insofar as prejudice is concerned, as I have recorded, the applicant was dismissed some five years ago. The respondent's interest in finality outweighs any prejudice caused to the applicant by a refusal to condone the late referral of her dispute.
- [8] Insofar as costs are concerned, the present application borders on an abuse of the process of this court. I have given serious consideration to an order for costs against the applicant on a punitive scale. This is what has been referred to as a hopeless case, one that ought never to have been filed. However, I will accept that the applicant is an individual and that to some extent, her plight has been occasioned by the conduct of her insurers and legal representatives. On that basis, it seems to me that the interests of the law and fairness are best served by each party bearing its own costs.

I make the following order:

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

André van Niekerk

Judge of the Labour Court of South Africa

APPEARANCES

For the applicant: Adv. C Grant, instructed by Muller and Co (fax 0866026442; labour@mullervoight.co.za)

For the respondent: Ms T Moyo, Snyman Attorneys (tmoyo@labournet.com)

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Prepared on 10 October 2026 · Esheria