

SOUTH AFRICA / JUDGMENT

Zondi v Fountain Civil Engineering (Pty) Ltd (JS393/15) [2016] ZALCJHB 122 (24 March 2016) [2016] ZALCJHB 122

COURT

Labour Court Johannesburg

BEFORE

Tlhotlhamajane

CASE / FILE NUMBER

JS393/15

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THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JS393/15

TEBOGO

ELIAS

ZONDI

Applicant

and

FOUNTAIN

CIVIL ENGINEERING (PTY)

LTD

Respondent

Heard: 11 March 2016

Delivered: 24 March 2016

JUDGMENT

TLHOTLHALEMAJE, J

Introduction and

background:

- [1] This is an opposed application for condonation for the late filing of the Applicant's statement of case. In his statement of claim, the Applicant alleged that his dismissal based on the Respondent's operational requirements was unfair.
- [2] The Applicant referred an alleged unfair dismissal dispute to the CCMA on 13 May 2014. A conciliation meeting scheduled for 4 June 2014 could not resolve the dispute, and a certificate of outcome was issued. The Applicant's statement of claim was only filed and served on 6 July 2015.
- [3] To the extent that the dispute was to be referred to this Court, section 191 (5) (b) read with section 191 (11) (a) of the Labour

Relations Act[1] (The LRA), required that the referral should have been made within 90 days from the date that the certificate of outcome was issued. In this regard, the dispute was supposed to have been referred to this Court on no later than 12 September 2014. The referral was therefore some 9 months out of time.

The legal framework in respect of applications for condonation and discussion:

- [4] The Court's discretion when considering applications for condonation derive from the provisions of section 191 (11) (b) of the LRA and also Rule 12 of the Rules of the Conduct of Proceedings. Thus on good cause shown, the Court may condone the non-observance of the time frames stipulated in section 191 of the LRA or in its Rules.
- [5] The court in *Melane v Santam Insurance Co. Ltd*[2] identified the factors to be considered in applications for condonation as follows;

'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 degree 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, 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 prospects which are not strong. Or the importance of the issue and strong prospects may tend to compensate for a long delay. And the Respondent's interests in finality must not be overlooked"

The degree of lateness:

- [6] Nowhere in his founding affidavit did the Applicant deal with the issue of the extent of the delay. The statement of case was filed and served on 6 July 2015. A response to the statement of case, wherein the preliminary points were raised was filed and served on 15 July
2015. It is further trite that an application for condonation should be filed as soon as it becomes apparent to an applicant that such an application is necessary[3]. In this case, it took the Applicant until 15 February 2016 to file and serve an application for condonation, a further seven months since he was informed of the need to file such an application. When regard is had to the period of about nine months after the certificate of outcome was issued, combined with a further period of seven months it took the Applicant to file this application after being informed of the need to do so in the statement of response, the period of delay is excessive in the extreme. No attempt was made to explain the delay in filing the application between the date that the response was filed and 15 February 2016 when the application was filed.

The explanation for the delay:

- [7] To enable this Court to properly exercise its discretion, a party seeking condonation must set out all the facts and circumstances

relating to the delay, and most importantly, must provide a satisfactory explanation for each period of the delay. Any period of

delay that is unaccounted for, will result in condonation being refused[4].

- [8] The Applicant's explanation falls short in accounting for each period of the delay. He appears to blame the CCMA for the delay in referring the dispute. In this regard, his contention was that after a certificate of outcome was issued, he had written a letter to the CCMA Senior Commissioner to complain about the conduct of the Commissioner who had issued the certificate. The complaint was that it was only after the Applicant's Union representative had left that the Conciliating Commissioner had informed him that the matter involved more than one employee and it therefore had to be referred to this Court. In his affidavit, the Applicant nevertheless conceded that the more than one employee was involved in the consultations leading up to his retrenchment.
- [9] In further explaining the delay, the Applicant alleged that he was advised by a Commissioner to refer the matter for arbitration, which he then did on 2 September 2014. Only on 2 June 2015 did the Applicant make enquiries with his union, and he had established that the union was since deregistered. On 3 June 2015 he made enquiries with the CCMA and was informed that his matter could not be heard. He then approached the Court with his statement of claim.

- [10] The Respondent correctly pointed out that the Applicant's reasons are without basis and ought to be dismissed. At the time that the certificate of outcome was issued, the Applicant was represented by his then union which he conveniently omitted to mention by name. He or his union ought to have known that any complaint against the Commissioner insofar as the certificate of outcome was issued had no bearing on the referral of this dispute for adjudication. Having conceded that he was not the only employee affected by the retrenchments, and further being in possession of a certificate of outcome that would have enabled him to refer the dispute to this Court, the Applicant or his union clearly had no excuse to delay the matter, as there were no prospects that his complaint at the CCMA would have resulted with the certificate being set aside, as he believed that his matter should have been a subject of arbitration. His contention in regards to the complaint about a CCMA Commissioner is indeed mere redherring, and amounts to no explanation at all[5]. It is further improbable that a CCMA Commissioner in the face of a certificate of outcome indicating that the dispute should be referred to court would have advised him otherwise, and there was clearly no basis for referring the dispute for arbitration. To the extent that the Applicant seeks to give the deregistration of his erstwhile union as an excuse for the delay, it is apparent from his averments that from the date that the certificate of outcome was issued until 2 June 2015, he made no attempts whatsoever to establish the status of his matter from the union. Even if any lame attempt was made to blame the union, there is a limit beyond which a litigant cannot escape the results of his representative's lack of diligence[6].
- [11] The Applicant has failed to sufficiently give an account of the delay between when the certificate of outcome was issued on 4 June 2014 and 6 June 2015 when the statement of claim was filed. He also failed to give an account for the delay between 15 July 2015 after the response to the statement of case was received, and 15 February 2016 when he ultimately filed an application for condonation. To the extent that there might be merit in his explanation that he had referred the dispute for arbitration, there is still no explanation for the delay between 2 September 2014 when he had referred the dispute for arbitration, and 2 June 2015 when he ultimately found out that the dispute could not be arbitrated. It definitely does not take the CCMA a period of nine months to set down matters for arbitration, and it is apparent that the Applicant had either left the matter in the hands of his union, or made no endeavours at all in establishing the status of his matter at the CCMA during that period.

Prospects of success:

- [12] In *NUM v Council for Mineral Technology*[7], it was held that;

"... without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused"

[13] In the light of the excessive delay in referring the dispute, and further in the light of the unsatisfactory explanation proffered for the delay, it would not be necessary to deal with the Applicant's prospects in respect of the main claim. However, for the sake of completeness, it needs to be stated from the onset that the Applicant's prospects of success in the main claim are non-existent. The basis for this conclusion, and as also pointed out on behalf of the Respondent is the following;

- a) The statement of claim does not lay a basis upon which it can be concluded that the retrenchment of the Applicant was unfair. In his statement of claim, he alleges that he was not dismissed because there was no employment, but simply for the reason that the

Respondent sought to deprive him of his transfer benefits.

- b) The statement of case does not dispute the need and reasons for retrenchments, and the fact that the Respondent no longer had work

available for the Applicant and others in the Gauteng region. To this end, the Respondent had offered alternative employment in the Kwa-Zulu Natal region, which three other employees had accepted. When the Applicant refused to accept alternative employment, he was then consulted for the purposes of section 189 of the LRA. There is no merit in his contentions that the transfer was imposed on him, in that if the transfer was unsuitable for him, and in the absence of other alternatives, the Respondent was entitled to retrench him.

Other considerations and conclusion:

[14] Based on a conspectus of facts as elucidated above, it follows that the Applicant has not shown good cause as to why the late filing of his statement of claim should be condoned. It cannot be doubted that it is the Respondent that stands to suffer extreme prejudice should condonation be granted in circumstances where the delay in referring the dispute was inordinate in the extreme, where no satisfactory account of the delay has been given and further in circumstances where on the papers, the Applicant's prospects of success on the merits of the main claim are poor. In *Brummer v Gorfil Brothers Investments (Pty) Ltd*[8], it was stated that the interests of justice should be an overall consideration when dealing with applications for condonation. In the light of the factors considered and conclusions reached in that regard, the interests of justice dictate that the application for condonation should not be granted. Having further had regard to considerations of law and fairness, I am of the view that a cost order is not appropriate in this case.

Order:

- i. The application for condonation in respect of the late filing of the statement of claim is dismissed.
- ii. There is no order as to costs.

Tlhotlhalemaje, J

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr. A Mashila of RAWU

For the Respondent: Ms. A. Kadwa of Hajra Patel Inc

[1] Act 66 of 1995

[2] 1962

(4) SA 531 (A) at 532B-E

[3] See *Meintjies v HD Combrinck (Edms) Bpk* 1961 (1) SA 262 (A) at 263 H-264B

[4] See *NUMSA and another v Hillside Aluminium*

[2005] 6 BLLR 601 (LC)

[5] See *Moila v Shai N.O. and Others*

(2007) 28 ILJ 1028 (LAC) at para 34 where it was held that; ‘I do not have the slightest hesitation in concluding that this is a case where the period of delay is excessive and the appellant's

purported explanation for the delay is no explanation at all. I accept that the case is very important to the appellant. However,

the weight to be attached to this factor is too limited to count for anything where the period of delay is as excessive as is the case in this matter and the explanation advanced is no explanation at all. If ever there was a case in which one can conclude that good cause has not been shown for condonation without even considering the prospects of success, then this is it. Where, in an application for condonation, the delay is excessive and no explanation has been given for that delay or an “explanation” has been given but such “explanation” amounts to no explanation at all, I do not think that it is necessary to consider the prospects of success.’

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[6] Saloojee & another NNO v Minister of community Development 1965 (2) SA 135 (A). See also Buthelezi & others v Eclipse Foundries Ltd (1997) 18 ILJ 633 (A) at 638I–639A)

[7] 1999 3 BLLR 209 (LAC) at p211 paragraph G-H

[8]

[2000] ZACC 3; [2000] (2) SA 837 (CC) at 839 F

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