THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JS260/2022

In the matter between:

NDZALAMA, HLANEKI Applicant

and

ANOVA HEALTH INSTITUTE Respondent

Heard: 1 November 2024

Delivered: 11 December 2024

Summary: Application for condonation. Principles restated. Lengthy delay coupled with explanation so vague as to amount to no explanation at all. In addition, failure to demonstrate any prospects of success. Application dismissed.

JUDGMENT

DANIELS J

Introduction

[1] The applicant was dismissed by the respondent for operational reasons, and she alleges that the dismissal was unfair. She seeks condonation for the late referral of her dispute to this court. There are two periods of delay, the first relates to the referral to the court, and the second relates to the delay in applying for condonation.

Material facts

[2] The facts set out below draw heavily on the pleadings and documents of the respondent, which provides details not apparent from the statement of claim. The factual allegations pleaded by the respondent have not been established through evidence, and cannot be treated as such. Nevertheless is necessary to set them out just to make sense of the extremely vague allegations[1] made by the applicant in its pleadings:

2.1 The respondent is a not-for-profit company established in 2009. Its business focuses on increasing access to HIV services and treatment. It works alongside the Department of Health and its staff in clinics, and it promotes HIV care in communities.

2.2 The respondent operates on donor funding and its two largest donors are the United States Agency for International Development

[1] The facts set out in the statement of claim are as follows: (1) The respondent proposed a restructuring of its business on the basis that it has faced financial difficulties and constraints, thereby being unable to retain some of the employees in their employment, (2) The respondent convened a meeting alleged to have been consultation in terms of section 189 of the LRA, (3) The respondent neglected or failed to appoint a facilitator during the alleged consultation to facilitate a consultation process and recommend measures that fall short of dismissal, (4) The respondent had thereafter advertised available vacancies in its workplace and in so doing it has refused failed and/or neglected to avail the same to the applicant as alternative measures to avoid dismissal, (5) The respondent reversed its decision to retrench the applicant and wrote to the applicant that his absence from work shall be regarded as resignation and not as a result of the restructuring process.

("USAID") and the United States President Emergency Plan for AIDS Relief ("PEPFAR").

2.3 During 2018, the respondent received a 5-year funding grant from PEPFAR, channelled through USAID's APACE (i.e. the Accelerating Programme Achievements to Control the Epidemic) Activity.

2.4 The applicant was employed by the respondent as a dietitian within the APACE programme, based at the Capricorn District Municipality.

2.5 The respondent alleges that, during the middle of 2020, it was informed that funding would be reduced for the APACE program, by approximately R480 million. As a result, states the respondent, it needed to restructure its operations. This required, among other things, the respondent to explore a significant reduction of staff, and a new organisational structure.

2.6 The respondent addressed a notice to the applicant on 18 August 2021 in accordance with section 189(3) of the Labour Relations Act No. 66 of 1995 as amended (the "LRA").

2.7 The section 189(3) notice advised the applicant of its intention to restructure, and that 610 employees (of its total workforce of 4124 employees). The notice addressed various matters including the reasons for the restructuring, the alternatives considered, the proposed severance package, and the positions that might be affected. The applicant's position was identified as an affected position. Thereafter, consultation meetings were held with the affected employees as contemplated in section 189(2) of the LRA. It is unclear how many meetings were held. One of the alternatives to retrenchment explored was the offer of a voluntary severance

package. During the consultation process, says the respondent, it informed the applicant of the vacant positions made available through the restructuring process.

2.8 On 28 September 2021, the applicant notified the respondent that she had been paid her severance package. The respondent advised her that the package had been paid to her in error because it was intended for those employees who had volunteered for retrenchment.

2.9 The respondent alleges that the applicant handed in her tools of trade, on 1 October 2021, and three days later she sent an email to the respondent advising it that she was no longer an employee. The respondent stated that it believed that this constituted a resignation. However, when the applicant attended a consultation meeting on 26 October 2021, the respondent informed the applicant that it would not treat the applicant as having resigned. Shortly thereafter, the respondent issued to the applicant a notice of dismissal based on its operational reasons.

Referral to the Labour Court

[3] The applicant referred a dispute to the CCMA alleging that her dismissal was procedurally and substantively unfair (the "dispute"). After conciliation, on 30 November 2021, the CCMA issued a certificate stating that the dispute remained unresolved. The certificate also stated that, if the applicant wished to pursue the dispute she may refer the dispute to this court. Despite this, the applicant referred the dispute to arbitration. On 8 March 2022, the commissioner issued a ruling that the CCMA had no jurisdiction and the dispute must be referred to the Labour Court.

[4] The applicant delivered its statement of claim on or about 9 April 2022. On 26 April 2022, the respondent filed its statement of response. In the

statement of response, the respondent took two special pleas: (1) the dispute had been referred late and there was no application for condonation, and (2) the court cannot adjudicate the procedural fairness of the dispute because it was a large-scale retrenchment in accordance with section 189A of the LRA. Despite the respondent's special plea, informing the applicant that the referral was late and condonation was required, the applicant did not apply for condonation for another 11 months.

[5] The Registrar enrolled the special pleas on 3 March 2023. On that day, Rabkin-Naicker J directed the applicant to apply for condonation and ruled that the court had no jurisdiction to adjudicate the alleged procedural unfairness of the applicant's dismissal. The condonation application was filed on 14 March 2023.

[6] The dispute should have been referred to this court by 28 February 2022, but was only referred on 9 April 2022 – some 39 days late.

[7] The applicant's reasons for the delay in referring the dispute to this court, and its reasons for not applying for condonation immediately when it referred the dispute to this court, leave a lot to be desired. In its answering affidavit, the respondent pointed out many of the gaps in the explanation. Despite this, the applicant failed to address these issues in a replying affidavit. It appears that the applicant believes that condonation was merely for the asking.

Legal principles and analysis

[8] Before exploring the condonation application itself, it is necessary to set out the legal principles which govern such matters. They have been

conveniently summarised in *Grootboom v National Prosecuting Authority & another*[2] at paras 50 and 51 where Zondo J (as he then was) held:

> *[50] In this court the test for determining whether condonation should be granted or refused is the interests of justice. If it is in the interests of justice that condonation be granted, it will be granted. If it is not in the interests of justice to do so, it will not be granted. The factors that are taken into account in that enquiry include:*
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> *(a) the length of the delay;*
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> *(b) the explanation for, or cause for, the delay;*
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> *(c) the prospects of success for the party seeking condonation;*
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> *(d) the importance of the issue(s) that the matter raises;*
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> *(e) the prejudice to the other party or parties; and*
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> *(f) the effect of the delay on the administration of justice.*
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> *Although the existence of the prospects of success in favour of the party seeking condonation is not decisive, it is an important factor in favour of granting condonation.*
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> *[51] The interests of justice must be determined with reference to all relevant factors. However, some of the factors may justifiably be left out of consideration in certain circumstances. For example, where the delay is unacceptably excessive and there is no explanation for the delay, there may be no need to consider the prospects of success. If the period of delay is short and there is an unsatisfactory explanation but there are reasonable prospects of success, condonation should be granted. However, despite the presence of reasonable prospects of success, condonation may be refused where the delay is excessive, the explanation is non-existent and granting condonation would prejudice the other party. As a general proposition the various factors are not individually decisive but should all be taken into account to arrive at a conclusion as to what is in the interests of justice.*" (own emphasis)

[9] An important principle, emphasized in para. 51 of *Grootboom*, echoes that of Holmes JA in *Melane v Santam Insurance Co. Ltd*[3] where the learned judge stated: "*If there are no prospects of success there would be no point in granting condonation*". Accordingly, where the delay is excessive and

[2] (2014) 35 ILJ 121 (CC)

[3] 1962 (4) SA 531 (A) at 532

the explanation is so weak as to amount to no explanation at all, it is unnecessary to consider the prospects of success.[4]

[10] When dealing with an extensive delay, the explanation must be sufficiently full to enable the court to assess the motives of the applicant and the reasonableness of the explanation. In addition, the explanation should account for each period of the delay.[5]

[11] It is important to mention a further principle. Our courts have held that when an individual realises that he has not complied with a court rule or statutory time period, he should apply for condonation without delay.[6] In this regard, in *Napier v Tsaperas*[7] Grosskopf JA held: **"***His inaction may also be relevant when he should have realised but did not, that he has not complied with a Rule."* It goes without saying that an applicant's failure to apply for condonation with the necessary expedition undermines the other party's interest in the finality of a judgment, the avoidance of unnecessary delay in the administration of justice, and impacts the operations of the Court.

[12] Litigants frequently seek to lay the blame on their legal representatives. In this regard, it is trite that there is a limit to which a litigant can escape the result of his attorney's lack of diligence, but it is equally true that the facts of a matter will dictate whether or not the actions (or inactions) of a litigant's representative can be imputed to the litigant.[8] After all the choice of representative is that of the litigant.

[4] *Moila v Shai NO & others* (2007) 28 ILJ 1028 (LAC) at para 34

[5] *NUMSA & another v Hillside Aluminium* [2005] 6 BLLR 601 (LC) at para 12

[6] *Allround Tooling (Pty) Ltd v NUMSA & others* [1998] 8 BLLR 847 (LAC) at para 8

[7] 1995 (2) SA 665 (A) at 671

[8] *Govender & others v CCMA & others* (2024) 45 ILJ 1197 (LAC) at para 69

[13] Finally, in employment disputes, there is a further requirement – that of expedition. One of the purposes of the LRA is to ensure the expeditious resolution of employment law disputes The issue of good cause must therefore be considered against this back drop.[9]

Analysis of the condonation application

[14] It goes without saying that the matter is important to the applicant. The applicant believes that her constitutional right against unfair dismissal has been violated and she seeks to vindicate that right. Of course, in this context, one would have expected the applicant to put far greater effort into the condonation application – in particular to explain the reasons for the delays and her prospects of success.

[15] In the condonation application, the applicant suggests that the time period to refer the dispute to this court was calculated using the definition of day in the Rules of Court, when she should have used the definition of day in the CCMA Rules. The applicant states that she was given this advice, but does not reveal who gave such advice. In the absence of an allegation that this advice was given by her attorney, I find it hard to accept that such patently incorrect advice could have been dispensed by an attorney practising in this court.

[16] It is trite that the 90-day time period to refer disputes to this court is located not in the Rules of Court, nor in the Rules of the CCMA, but in section 191(11)(a) of the LRA. The trite rule when interpreting legislation is to begin with the ordinary grammatical meaning of the text.[10] One may

[9] *NUMSA on behalf of Thilivali v Fry's Metals (Pty) Ltd (A Division of Zimco Group) and Others* (2015) 36 ILJ 232 (LC) at para 36

[10] See *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para 18: "*The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the*

consult a dictionary if the ordinary meaning of a word is unknown. And, one may also have regard to the Interpretation Act No. 33 of 1957, section 4 of which provides guidance on how to compute a period when any particular number of days is prescribed in legislation.

[17] The applicant has been less than candid with her reasons for the delay. The court should not be placed in a situation where it must guess who provided the applicant with advice to approach the CCMA for arbitration, who advised her to ignore the CCMA certificate, and lastly who advised her that the special plea was incorrect - because she could rely on the definition of day in the Rules of the CCMA or the Rules of this Court. The applicant's decision to protect the source of this bad advice reflects extremely poorly on her. It is the applicant's duty to provide a full and candid explanation to this court. In this, she failed dismally. Absent these details, the explanation for the delay is so vague and weak that it amounts to no explanation at all. In this regard, the following is relevant:

17.1 The applicant states that she became aware that the referral was late only when the court issued its order on 3 March 2023. Quite properly, this was roundly rejected by respondent. The applicant's version is not only highly improbable, but must be rejected in light of the trite principle that, in motion proceedings, in the event of conflict, the court will accept the version of the respondent unless the respondent's allegations do not raise a real, genuine or bona fide dispute of fact or are so farfetched or clearly untenable that the court is justified in

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provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document." (own emphasis)

rejecting them merely on the papers.[11] The respondent's denial that the applicant only became aware that the dispute was late on 3 March 2023, is neither farfetched nor untenable. The respondent's version is accepted - that the applicant was aware that the referral to this court was late prior to 3 March 2023. At the very latest, the applicant should have been aware that the referral was late on 26 April 2022 when the special pleas were filed. This means that the delay in filing the condonation application, a period of 11 months, remains unexplained.

17.2 The applicant provides no explanation as to whether she, or her attorney, perused the CCMA certificate which stated that the dispute should be referred to this court.

17.3 The applicant provides no explanation as to why she, or her attorney, believed the CCMA had jurisdiction to arbitrate the dispute in the first place.

17.4 The applicant provides no explanation as to whether, when the CCMA ruled that it had no jurisdiction, she made any enquiries as to the time period to refer the dispute to this court.

17.5 The applicant doesn't try to explain why she didn't try to engage with the text of the LRA.

17.6 The applicant provides no adequate explanation as to why, when the statement of response informed her during April 2022 that her referral was made late, it took her a further 11 months to apply for condonation.

[11] *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E 635C

[18] Even if the source of the applicant's bad advice was her attorneys, that is not the end of the matter. Assuming that her legal team was negligent, there is a limit to which the applicant can rely on their negligence. This is dictated by the facts of the matter. Unfortunately, the applicant has not disclosed to the court who gave her the bad advice. Accordingly, the applicant cannot hide behind those who gave her bad advice.

[19] The respondent, and the court, are entitled to full and candid explanation for both periods of delay, but have not been favoured with one. In the circumstances, it is unnecessary to explore the applicant's prospects of success. Where there is no explanation at all for a lengthy delay, as in this case, it is unnecessary to consider prospects of success. Nevertheless, even if I had considered prospects of success, I would have found that there are none.[12]

[20] The delay in applying for condonation has caused prejudice to the respondent, and has undermined the administration of justice as well. The respondent states that, if condonation is granted, the dispute may only be enrolled for trial in 2025 or 2026, by which time none of the individuals who managed the retrenchment process are likely to be available. Even if they are available, it is trite that memories of witnesses are fragile and a trial heard several years after the fact is less than ideal.

[12] The allegations in the statement of claim and the founding affidavit itself do not reveal why the dismissal was substantively unfair. The allegations relate predominantly to procedural fairness, which this court has ruled cannot be pursued. The only allegation in the statement of claim which might sustain a claim that the dismissal was unfair is the allegation that alternative vacant positions were not offered to the applicant. Unfortunately, the applicant does not state what those positions were, or that she was qualified for those positions. The respondent alleges that it offered vacant positions to the applicant but she failed to apply for them. In the circumstances, applicant's pleaded case reveals no basis for the allegation that her dismissal was substantively unfair.

[21] The length of the delay is excessive. The delay includes the delay in referring the dispute to this court, a delay of either 39 days[13] or 55 days.[14] No explanation has been given for this period whatsoever, save to state that the dispute was referred to the CCMA for arbitration. However, the further delay, is much longer. The second period of delay extends from 9 April 2022 (when the statement of claim was filed without an accompanying condonation application) to 16 March 2023, when the condonation application was finally delivered. The explanation for the second period is that the applicant relied on the Rules of the CCMA or the Rules of Court to determine the 90-day period. The applicant does not explain who gave her such advice. Once again, the explanation is so weak, and so lacking in transparency, that it amounts to no explanation at all.

[22] In the final analysis, condonation must be refused. I have taken into consideration that the applicant seeks to vindicate her right against unfair dismissal. But this right must be weighed against all the other factors, as well as the interests of the respondent, and the court. Here, the delay is lengthy, the explanation for the delay is lacking in candour, and amounts to no explanation at all. The applicant's prospects of success, though this need not be considered given what is stated above, are weak. The prejudice to the respondent is articulated in its papers and is severe. Effectively, as a result of the delay, the respondent may be deprived of its right to a fair trial, in proceedings where it bears the onus to prove the dismissal fair. In addition, the respondent's right to finality in this dispute has clearly been frustrated. The delay negatively impacts on the administration of justice, in that this court's precious time and resources must be dedicated to an opposed application for condonation, which should never have been necessary.

[13] According to the respondent, see heads of argument at para 7.1

[14] According to the applicant, see founding affidavit at para 28, pleadings p11

Conclusion

[23] For the reasons set out above, the application for condonation is dismissed. There is no order as to costs.

Reynaud Daniels
Judge of the Labour Court of South Africa

Appearances:

For the Applicant
Letsela Nkondo Inc
Ref: JM Manale

For the Respondent
Norton Rose Fullbright
Ref: M Balie