



IN THE LABOUR COURT OF SOUTH AFRICA

CASE NO: D215/15

In the matter between:

KHAYELIHLE V. NZUZA

FIRST APPLICANT

SIZWE X. MKHIZE

SECOND APPLICANT

and

TOYOTA SA MOTORS (PTY) LTD

RESPONDENT

Heard: 26 November 2021

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court's website and released to SAFLII. The date and time of the hand-down is deemed to be 14h00 on 19 September 2022.

JUDGMENT

Hiralall AJ

Introduction

- [1] This is an application in terms of Clause 16.2 of the Labour Court Practice Manual¹ in which the applicants seek an order retrieving the file which was archived in terms of Clause 16.1 of the Practice Manual. The application is opposed by the respondent.
- [2] The respondent seeks condonation for the late filing of its answering affidavit and the applicant seeks condonation for the late filing of its replying affidavit.

Background

- [3] The applicants were dismissed by the respondent on 7 December 2014.
- [4] The affidavit of the applicants is scant in certain regards. The papers were not indexed and paginated. There is a mass of papers from which certain relevant facts are extracted.
- [5] It is common cause that the applicants filed a statement of claim in this court on 25 March 2015. The respondent filed a statement of defence in which it outlined certain points raised *in limine*. It appears that the applicants amended their statement of claim in their replication. The respondent filed an amended statement of defence on 22 August 2016.
- [6] The matter was nonetheless argued before Cele J as an exception, and an order granted on 3 February 2017 dismissing the exception.

¹ Labour Court Practice Manual

- [7] The respondent took the order so granted on appeal to the Labour Appeal Court. An order was granted by the Labour Appeal Court during the latter part of 2018. There is no copy of the Labour Appeal Court order on file.
- [8] Pursuant to the granting of the order of the Labour Appeal Court, the applicants filed an amended statement of claim on 7 December 2018. The applicants have not attached the amended statement of claim to their founding affidavit and aver that it can be found in the court file.
- [9] Be that as it may, the respondent did not file a further amended statement of defence but, more pertinently, the applicants did not prosecute their case further since then.
- [10] The applicants filed the application to retrieve their file from the archives on 27 July 2021.
- [11] The applicant's make the following averments in their founding affidavit in support of the application for retrieval or reinstatement:

'7. On 7 December 2018, our erstwhile attorneys filed an amended statement of claim on our behalf. I propose not to attach the Amended Statement of Claim in these papers for the purposes of this application. Same is on record in the file. Our erstwhile attorneys of record advised us that usually it takes 24 months for the Honourable Court to allocate trial dates.

8. After some time, our erstwhile attorney of record informed us that another firm of attorneys was standing in for him in our matter and will be assisted by Advocate Sibisi. We never received any report save for confirmation from our legal

representative at the time, namely, Mr Mjoli that everything was still in order. As time went by there was no contact from either our attorney or Advocate Sibisi. We made numerous attempts to get hold of our previous attorney of record and all attempts were in vain.

9. We then consulted with our attorneys of record on 1 June 2021. Our attorney established that our previous attorney MJ Mjoli has been suspended by the Legal Practice Council on 23 July 2020. Our attorneys of record were able to obtain a court order confirming that our previous attorney's suspension was ordered by the High Court on 23 July 2020 by way of a *rule nisi* which was later confirmed on 22 January 2021. I attach here to the court order dated 23 July 2020 and 22 January 2021. ...

10. Our attorney got hold of Miss Shazi, an attorney from Shazi and Associates, regarding the status of our matter. Our attorney spoke to Miss Shazi who categorically in our presence declared that she is not seized with our matter. Miss Shazi's assertion our *prima facie* accurate as there is no notice of her law firm placing it itself on record in our matter as we later learned once our attorney got hold of the court file.

...

16. As stated above, our erstwhile attorney of record while suspended by the Legal Practice Council on 23 July 2020. We found out about the suspension on 1 June 2021. The last time we spoke to our attorney was when he advised that Miss Shazi will assist us together with Advocate Sibisi. Prior to the start of 2021 we made numerous telephone calls to the office of our attorney and to his cell phone number to no avail.

17. At all material times after the filing of the amendment of the statement of claim we believed that our erstwhile attorney was complying with all the court rules and directives. We had no reason to believe that he had not complied and as such our matter was dormant. As time went by we then started making inquiries directly in the court in 2020. During the lockdown our attempts to make follow ups on the matter were stalled. When we discovered that our previous attorney had not been compliant with the rules of this Honourable Court we had to look for another attorney.

18. We struggled to get legal representation as we have no funds. We have been unemployed from the time of our dismissal. Various attorneys we consulted demanded exorbitant deposits which we could not afford. ...'

[12] The respondent makes the following averments:

'7. It is important to note that the application for revival in July 2021 has been brought some six and a half years after the dismissal.

8. The applicants on the 25th March 2015 filed a statement of claim and as correctly noted in their application, an exception was raised which was initially dismissed by the Honourable Court but then partially upheld by the Labour Appeal Court resulting in an amended statement of claim being filed on the 7th December 2018.

9. Notwithstanding this and the fact that the next step would have been for a pretrial to take place, no further steps have been taken until Ayanda Shazi & Attorneys wrote to our attorneys of record in an undated letter received on or

about the 10th December 2020, proposing settlement discussions, a copy attached marked A.

10. Ms Shazi made it clear that she was instructed by the applicants, and this correspondence is not put up in the applicant's application.

11. On or about that 12th January 2021, a redacted (though without prejudice, inadmissible aspects have been redacted) copy attached marked B in which an attempt was made to settle the matter and to the best of my knowledge, other than a letter acknowledging receipt from Ayanda Shazi & Attorneys on the 24th January 2021, no response was made to the offer made by the respondent.

12. Thereafter on or about the 23rd June 2021 Mhlanga Inc Attorneys wrote to our attorneys have record, a copy attached marked C which was responded to by our attorneys on the 2nd July 2021 indicating that the matter appears to have been abandoned as no steps had been taken for two and a half years, a copy attached marked D.'

Issues to be decided

[13] The following issues must be decided:

- 13.1 Application for retrieval of the matter from the archives
- 13.2 Application for condonation for the late filing of third respondent's answering affidavit and the applicants' replying affidavit

Evaluation

Application for condonation

[14] Clause 11.4.2 of the Practice Manual provides as follows:

‘Where the respondent or the applicant has filed its opposing or replying affidavits outside the time period set out in the rules, there is no need to apply for condonation for the late filing of such affidavits unless the party upon whom the affidavits are served files and serves a Notice of Objection to the late filing of the affidavits. The Notice of Objection must be served and filed within 10 days of the receipt of the affidavits after which time the right to object shall lapse.’

[15] It was not necessary for the filing of applications for condonation. However, to the extent that it is necessary the applications are granted.

Application for retrieval

[16] The Practice Manual provides as follows

‘16. ARCHIVING FILES

16.1 In spite of any other provision in this manual, the Registrar will archive a file in the following circumstances:

- in the case of an application in terms of Rule 7 or Rule 7A, when a period of six months has elapsed without any steps taken by the applicant from the date of filing the application, or the date of the last process filed;
- in the case of referrals in terms of Rule 6, when a period of six months has elapsed from the date of delivery of a statement of case without any steps taken by the referring party from the date on which the statement of claim was filed, or the date on which the last process was filed; and

- when a party fails to comply with a direction issued by a judge within the stipulated time limit.

16.2 A party to a dispute in which the file has been archived may submit an application, on affidavit, for the retrieval of the file, on notice to all other parties to the dispute. The provisions of Rule 7 will apply to an application brought in terms of this provision.

16.3 Where a file has been placed in archives, it shall have the same consequences as to further conduct by any respondent party as to the matter having been dismissed.

[17] In *Samuels v Old Mutual Bank*², the court stated as follows:

[16] Clause 16.2 does not specifically state that in an application for the retrieval of the file, a party who brings that application must show good cause why the file must be retrieved from the archive. It however states in no uncertain terms that the provisions of Rule 7 will apply in an application brought under the Clause 16.2. Clause 11.2.7 applicable to Rule 7 and 7A applications requires that a party who applies for a file to be removed from the archive must show good cause why the file must be removed from the archive. Furthermore, an applicant who applies for a file that has been archived for failure to comply with an order by a Judge to file a pre-trial minute, to be removed from archives, has to show good cause why such a file should be removed from the archives. There is therefore no doubt that showing good cause is a requirement for a file to be removed or retrieved from the archives in terms of Clause 16.2.

² *Samuels v Old Mutual Bank* (DA30/15) [2017] ZALAC 10; [2017] 7 BLLR 681 (LAC); (2017) 38 ILJ 1790 (LAC) (25 January 2017)

[17] In essence, an application for the retrieval of a file from the archives is a form of an application for condonation for failure to comply with the Court Rules, timeframes and directives. Showing good cause demands that the application be *bona fide*; that the applicant provide a reasonable explanation which covers the entire period of the default; and show that he/she has reasonable prospects of success in the main application, and lastly, that it is in the interest of justice to grant the order. It has to be noted that it is not a requirement that the applicant must deal fully with the merits of the dispute to establish reasonable prospects of success. It is sufficient to set out facts which, if established would result in his/her success. In the end, the decision to grant or refuse condonation is a discretion to be exercised by the court hearing the application which must be judiciously exercised.'

[18] In *SA Post Office Ltd v CCMA*³, the court stated as follows with regard to applications for condonation.

'In my view, each condonation application must be decided on its own facts bearing in mind the general criteria. While the rules are there to be applied, they are not inflexible but the flexibility is directly linked to and apportioned in accordance with the interests of justice; prejudice; prospects of success; and finally, degree of delay and the explanation thereof. The issue of delay must be viewed in relation to the expedition with which the law expects the principal matter to be resolved'

[19] In *Department of Home Affairs and Another v Ndlovu and Others*⁴, the Labour Appeal Court stated:

³ [2012] 1 BLLR 30 (LAC)

⁴ (DA11/2012) [2014] ZALAC 11; [2014] 9 BLLR 851 (LAC); (2014) 35 ILJ 3340 (LAC) (27 March 2014)

[7] Essentially in applications for condonation, what is needed is an objective conspectus of all the facts. Thus the importance of the issues between the parties and the strong prospects of success may tend to compensate for a long delay. In *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others*,^[1] the Court gave the following guiding exposition in matters such as the present one:

'It is appropriate that an application for condonation be considered on the same basis and that such an application should be granted if that is in the interests of justice and refused if it is not. The interests of justice must be determined by reference to all relevant factors including the nature of the relief sought, the extent and cause of the delay, the nature and cause of any other defect in respect of which condonation is sought, the effect on the administration of justice, prejudice and the reasonableness of the applicant's explanation for the delay or defect.'

[8] Of course it is well established that the factors in a condonation application "are not individually decisive but are interrelated and must be weighed one against the other." See *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531. In *Jansen v General Public Service Sectoral Bargaining Council and Others*, the Labour Court applying the decision in *PPWAWU and Others v AF Dreyer and Co (Pty) Ltd* [1] [1997] 9 BLLR 1141 (LAC) stated that:

'Even if it is found that explanation does not constitute a reasonable explanation it will not necessarily be regarded as an absolute bar to condonation.'

[20] I proceed to consider the application along these lines.

The delay

[21] The applicants were dismissed on 7 December 2014. The prosecution of their case was marred by the interlocutory application and the subsequent appeal to the Labour Appeal Court.

13. However, an examination of the delay from 7 December 2018 does not augur well for the applicants. According to the applicants, their attorney informed them that it usually takes 24 months for a date to be allocated. They have not stated when they were informed of this. It then appears that their attorney informed them prior to being suspended that another attorney would be handling the matter and that Advocate Sibisi.

14. Would be assisting. Pursuant thereto, according to the applicants as time went by they did not hear from their attorney, Mr Mjoli, or Advocate Sibisi although they made numerous unsuccessful attempts to get hold of Mr Mjoli. It then appears at paragraph 16 of the applicants' founding affidavit that the applicants were in fact informed by Mr Mjoli that they would be assisted by a Ms Shazi and Mr Sibisi. It is therefore surprising that when, as they contend, they were unable to reach Mr Mjoli, that they continued to make telephone calls to Mr Mjoli's office and his cell number. There is no explanation as to why they would not have contacted Ms Shazi or Mr Sibisi because the applicants were informed by Mr Mjoli that they would be assisting them.

15. More pertinently, the applicants rely on an assertion that Ms Shazi categorically declared in their presence that she was not seized with the matter and that she did not place herself on record in the matter, this in circumstances where the respondent's attorneys received a letter from Ms Shazi proposing settlement discussions on purportedly the applicants' instructions, and the applicants themselves stating that Mr Mjoli informed them that Ms Shazi would be dealing with the case.

16. The applicants have not proffered a reasonable explanation for a delay of 2 years and 6 months. Although the applicants' previous attorney was suspended from practice, the applicants have not been forthright with this court about the assistance which they received from Ms Shazi. On the applicants' own version, the probabilities are that they were in contact with Ms Shazi hence the undated letter from her to the respondent's attorneys. Although the applicants assert that Ms Shazi was not their attorney, there is no explanation for the letter either from the applicants or Ms Shazi.

17. It is clear that the applicants were aware, at the very least, by December 2020 that Mjoli was no longer handling their case, yet there was a further delay until their current attorneys filed the application for revival of the matter.

18. There is ample authority for the view that once the need for an application for condonation is identified, the application must be filed without delay⁵. In *Premier Valves (Pty) Ltd v McKie*⁶, the court stated as follows:

'[10] Equally important is that an application for condonation must be filed without delay and/or as soon as the applicant becomes aware of the need to do so. Thus, where the applicant delays filing the application for condonation despite being aware of the need to do so, or despite being put on terms, the Court may take a dim view, absent a proper and satisfactory explanation for the further delays.'

19. The applicants were clearly represented during December 2020 but there was no attempt to file the application to retrieve the matter from the archives.

⁵ *Premier Valves (Pty) Ltd v McKie*, Judgment dated 8 August 2020, LC, JS491/19; *All Round Tooling (Pty) Ltd v NUMSA* (1998) 8 BLLR 847 (LAC); *Rennie V Kamby Farms (Pty) Ltd* 1989 (2) SA 124 (A) At 129G

⁶ Judgment dated 8 August 2020, LC, JS491/19

20. In dealing with allegations of tardiness of legal representatives, the court in *Kgobe v the CCMA and others*⁷, stated as follows:

'[7] To the extent that the applicant blames the conduct of their previous attorney, solely for the delay in the late filing of the review application. It is trite that a litigant cannot hide behind the tardiness of his representative. In *Saloojee and another v Minister of Community Development* 1965 (2) SA 135 (A) at paragraph 141C-E, the court said "*there is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered . .*"

[8] In *Mngomezulu and Another v Mulima NO and Others* (JR2744/12) [2017] ZALCJHB 415 (7 November 2017) the court stated the following, at paragraph 12:

... In *National Union of Metal Workers vs Kroon Gietary and Staal* the court refused a condonation application wherein the deponent attributed the delay to his representative. The court quoted in approval the case of *Regal v African Superstate (Pty) Ltd* where the court held that there is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. A litigant is not entitled to hand over his matter to his attorney and wash his hands of it." '

21. The applicants' explanation that they continued to try unsuccessfully to call their attorney for two and half years is not reasonable, particularly when they were clearly in contact with the attorney to whom Mr Mjoli had referred them.

[22] In *Collett v Commission for Conciliation, Mediation and Arbitration*⁸ the Labour Appeal Court held as follows:

⁷ JR 1988/17, judgment of the LC delivered on 20 June 2018

⁸ [2014] 6 BLLR 523 (LAC)

There are overwhelming precedents in this court, the Supreme Court of Appeal and the Constitutional Court for the proposition that where there is a flagrant or gross failure to comply with the rules of court condonation may be refused without considering the prospects of success. In *NUM v Council for Mineral Technology* [1999] 3 BLLR 209 (LAC) at para 10, it was pointed out that in considering whether good cause has been shown the well-known approach adopted in *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532C-D ... Should be followed but:

'There is a further principle which is applied and that is without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without good prospects of success, no matter how good the explanation for delay, an application for condonation should be refused.'

The submission that the court a quo had to consider the prospects of success irrespective of the unsatisfactory and unacceptable explanation for the gross and flagrant disregard of the rules is without merit.' (my emphasis)

- [23] I am of the view that this is a suitable case in which to follow this route. There comes a time when a respondent, whether it is an employer or an employee, is entitled to believe that the case has been abandoned.
- [24] The respondent's attorneys submit correctly that the application for revival of the matter has been brought some six and half years after the applicants' dismissal. This is an egregious delay.
- [25] Given the extent of the delay and the poor explanation for it, the interests of justice would not be served if the application for condonation were to be granted now. A party is entitled to believe that after so many years the case has been abandoned. In *Toyota SA Motors (Pty) Ltd v CCMA and others*, CCT 228/14, speaking of an award, the court stated as follows:

'[45] Excessive delays in litigation may induce a reasonable belief, especially on the part of a successful litigant, that the order or award had become unassailable. This is so all the more in labour disputes. ...'

[26] Given the extent of the delay, the prejudice to be suffered by the respondent clearly outweighs that to be suffered by the applicants in this case.

[27] The balance of convenience does not favour the granting of the application for condonation.

Conclusion

[28] The applicants have not shown good cause for retrieval of the matter from the archives.

[29] I do not see that there should be a costs order against the applicants.

[30] In the result the following order is made:

1. The application for retrieval of the file from the archives in terms of Clause 16.2 of the Labour Court Practice Manual is dismissed.
2. Each party is to pay its own costs.



Narini Hiralall
Acting Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant: Mr Kirby-Hirst
Instructed by: MacGregor Erasmus Attorneys

For the Respondent: Mr Mhlanga
Instructed by: Mhlanga Inc. Attorneys

LABOUR COURT