



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JS394/15

In the matter between:

ERIKA LINGENFELDER

Applicant

and

UNITRANS SUPPLY CHAIN SOLUTIONS (PTY) LTD

Respondent

Heard: 5 February 2016

Delivered: 30 March 2016

JUDGMENT

TLHOTLHALEMAJE, J

Introduction:

- [1] This is an application for condonation for the late filing of the Applicant's statement of claim. The statement of claim was initially referred with a prayer for condonation to be granted but without a substantive application in that regard. Following an objection raised in the Respondent's response to the statement of claim, the present application for condonation was then filed. The application for condonation is opposed, and it was argued on the day of hearing in the absence of the Applicant.

The legal framework and evaluation:

- [2] In *Grootboom v National Prosecuting Authority and Another*¹, Bosielo AJ held that;

“... It is axiomatic that condoning a party’s non-compliance with the rules of court or directions is an indulgence. The court seized with the matter has a discretion whether to grant condonation”.

- [3] In exercising its discretion, the Court takes into account a variety of factors identified in *Melane v Santam Insurance Co Ltd*². These include the degree and extent of the failure to comply with the time frames; the explanation thereof; the parties’ prospects of success in respect of the main claim, and the importance of the case. These factors are interrelated, and are not individually decisive. It has however also been stated that in circumstances where the delay is excessive, and where no reasonable explanation has been proffered, no purpose would be served in considering other factors³. Similarly, irrespective of the nature of the delay and the explanation in that regard, no purpose would be served in granting condonation in circumstances where the applicant has not demonstrated any prospects of success on the merits of the main claim.
- [4] Other considerations to be taken into account include the prejudice parties would suffer should an indulgence be granted, the convenience of the court and interests of finality. In the end, taking into account of all these factors, it is the consideration of the interests of justice that should determine whether condonation ought to be granted or not⁴. It has however been acknowledged that a consideration of such applications is not necessarily limited to those factors themselves, as the particular circumstances of each case will determine which of these factors are relevant⁵.

The extent of the delay:

¹ 2014 (2) SA 68 (CC) at para [20]

² 1962 (4) SA 531 (A) at 532B-E

³ *Moila v Shai N.O. and Others* (2007) 28 ILJ 1028 (LAC) at para 34

⁴ *Brummer v Gorfil Brothers Investments (Pty) Ltd* [2000] (2) SA 837 (CC) at 839 F

⁵ *Grootboom* at para [22]

- [5] In this case the Applicant was dismissed on 14 November 2014. She subsequently referred a dispute to the National Bargaining Council for Road Freight and Logistics Industry (NBCRFLI). The matter was conciliated on 8 January 2014 and a certificate of outcome was issued. Neither a copy of the referral nor the certificate of outcome is attached to the founding affidavit. The Respondent's contention was that the certificate of outcome had reflected that the matter be referred to this court. The Applicant nevertheless referred the matter for arbitration, and on 7 April 2017, a jurisdictional ruling was issued to the effect that the Bargaining Council lacked the necessary jurisdiction to arbitrate the dispute.
- [6] The Applicant's statement of case was filed in this court on 1 July 2015. The Respondent contended that an incomplete statement of claim was served on it by the Applicant on 10 July 2015 with complete service only effected on 19 August 2015. The Respondent in its response filed on 28 August 2015 had raised a preliminary point to the effect that the statement of claim was filed without an application for condonation. Such an application was only filed and served on 3 November 2015.
- [7] The Applicant in her founding affidavit submitted that the delay was approximately 64 days, and that such a delay was not excessive and should be condoned. The Respondent however pointed out that the statement of case was about four months late as the Applicant had to file and serve the statement of claim by no later than 8 April 2015.
- [8] The Applicant alleged that the jurisdictional ruling came to her attention on 23 April 2015. However, the ruling allegedly issued by the Bargaining Council Commissioner is not attached to either the application for condonation or the statement of case, and it is thus not known when such a ruling was issued for the purposes of determining when this referral should have been lodged.
- [9] When it is taken into account that the alleged unfair dismissal of the Applicant took place on 14 November 2014, and further taking into account that there was a referral of the dispute for conciliation and for arbitration, and the fact that the arbitration proceedings took place on 7 April 2015 when the jurisdictional

ruling was issued, it can be inferred that at very least, as at 7 April 2015, the Applicant knew that the dispute had to be referred to this court. In the statement of case, the Applicant alleged that the ruling was issued on 12 April 2015, and it came to her attention on 23 April 2015. She had however filed her complete statement of claim on 19 August 2015, whilst an application for condonation was only filed on 3 November 2015. To the extent that it took the Applicant a period of about four months to file a completed statement of claim, and a further two months to file the application for condonation, it should be concluded that the delay was indeed excessive.

The explanation for the delay:

- [10] It is trite that an applicant must file and serve an application for condonation as soon as it becomes apparent that there is a need to do so. As far back as 28 August 2015 when the response to the statement of claim was filed, the Applicant was made aware of the need to file an application for condonation. She nevertheless only did so on 3 November 2015 and no attempt was made to explain this period of the delay, despite it being apparent that the Applicant was legally assisted when the statement of claim was filed.
- [11] The Applicant apportioned the blame for the delay due to the fact that the matter was initially referred to arbitration, and that it was only after the jurisdictional ruling was issued that she could refer the dispute to this court. The Applicant states that she always had the intention of pursuing the matter but due to her unemployment she was struggling financially and had to focus all her efforts into retaining her home which was ultimately auctioned on 8 May 2015. She stated further that she was unable to obtain the services of an attorney until after the finalisation of the case relating to her home.
- [12] The Applicant further explained the delay as being due to the fact that she did not fully understand the retrenchment process and subsequent conciliation and arbitration proceedings, and stated that it was only after she was able to secure the services of an attorney that she could refer the dispute.
- [13] Having taken account of the reasons advanced by the Applicant as above, I am of the view that these fall short, in that they do not give complete account for

each period of the delay. The basic premise of seeking a full account of the period of delay is that condonation is not there for the mere asking⁶. To this end, the Applicant failed to give an account of the delay in respect of the period when she came to know of the jurisdictional ruling, and when the statement of case was ultimately filed. She further failed to give an account of the period between when a statement of response was filed and when the application for condonation was ultimately filed.

- [14] It is not sufficient for the Applicant to simply aver that she struggled financially and did not have funds to secure the services of a legal representative. The issue of whether financial constraints can be an acceptable reason for the failure to comply with time frames received attention in *Gaoshubelwe and Others v Pie Man's Pantry (Pty) Limited*⁷, where this Court held that;

"In my view there is no rule that the explanation that the delay was occasioned by lack of funds should automatically lead to the dismissal of the application for condonation. If this was to be the case then in my view the Court would be ignorant of the economic reality that in most instances faces unrepresented dismissed employees. I do however agree that as a general approach that lack of funds should not on its own constitute reasonable explanation...."

- [15] Even if there is cause to believe that a lack of funds prevented the Applicant from complying with the time frames, at the very least, she was obliged to inform the court what steps were taken in ameliorating the effects of the lack of funds, and whether those steps were sufficient in seeking to comply with the time frames. In this case, the Applicant did not indicate what steps were taken prior to securing the services of legal representatives, when these services of the legal representative were secured and if so, the reason, this application could not have been filed and served immediately upon receipt of the Respondent's response to the statement of case, which indicated that there was a need to file this application.

⁶ See *Van Wyk v Unitas Hospital and another (Open Democratic Advice Centre as Amicus Curiae)* [2007] ZACC 24; 2008 (4) BCLR 442 (CC).

⁷ (2009) 30 ILJ 347 (LC)

[16] On the whole I am not satisfied with the explanation proffered by the Applicant for the failure to comply with the time frames in approaching the court. Inasmuch as the Applicant's lack of funds cannot be discounted as a reason, this explanation on its own is not sufficient for an indulgence to be granted. The explanation that the Applicant did not understand the conciliation or arbitration process after her retrenchment is equally unacceptable in that having referred the dispute to the Bargaining Council, and further after the certificate of outcome was issued, the Applicant would have been in a position to have understood what steps she needed to take thereafter, and in particular, after the jurisdictional ruling was issued.

Prospects of success:

[17] The Applicant stated that she had excellent prospects of success. She contended that the section 189 of the LRA process was flawed, and that there was no need to retrench her. She disputed being properly consulted and was of the view that her dismissal was a foregone conclusion prior to the commencement of the process. She also challenged the substantive fairness of her retrenchment.

[18] The Respondent denied that the Applicant had prospects of success. In this regard, it was submitted that the Applicant was employed by a labour broking company and placed at the Respondent's offices from January 2014 until April 2014 when she was employed permanently. The Applicant was employed essentially to handle two key accounts which were outstanding and that when these accounts were settled there was no need to retain her services. Thereafter, a section 189 of the LRA process was followed, including proper consultations with the Applicant. It was further contended that there were no suitable alternative positions for the Applicant within the company.

[19] I have had regard to the submissions made on behalf of the parties' in regards to the Applicant's prospects of success. I am not persuaded that on the papers, there is any merit in the Applicant's claim that her retrenchment was unfair. Furthermore, having had regard to the extent of the delay, the failure to proffer a reasonable and acceptable explanation for that delay, it is my view that it is

the Respondent that stands to suffer more prejudice should condonation be granted. This is in particular consideration of the Respondent's contention that its division where the Applicant was employed has since closed down and accordingly, delays in finalising the matter will be prejudicial to it.

Conclusion:

[20] Having had regard to the period of the delay, the non-satisfactory nature of the explanation proffered in that regard, the lack of prospects of success on the merits, and further having taken account of the other considerations pertinent to such applications, it is concluded that it would not be in the interest of justice to grant condonation. Further having had regard to considerations of law and fairness, a cost order is not warranted in this case. Accordingly, the following order is made;

Order:

- i. The application to condone the late filing of the statement of claim is dismissed.
- ii. The Applicant's claim as per her statement of claim is dismissed.
- iii. There is no order as to costs.



Tlhotlhalameje, J

Judge of the Labour Court of South Africa

APPEARANCES:

On behalf of the Applicant: No appearance.

On behalf of the Respondent: Ms M Chenia of Cliffe Dekker Hofmeyr Inc

LABOUR COURT