

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: JS 138/19

In the matter between:

BUSISIWE JOJO

Applicant

and

ELEMENT SIX PRODUCTION (PTY) LTD

Respondent

Heard: 10 May 2019

Delivered: 15 May 2019

Summary: Application for condonation for the late filing of a statement of case. No proper explanation for the delay tendered. Application dismissed.

JUDGMENT

PRINSLOO, J

Background facts

- [1] The Applicant was employed by the Respondent as a production superintendent. In September 2017 the Respondent embarked on a retrenchment process.
- [2] The Applicant was notified on 29 November 2017 that her services would terminate on 31 December 2017 due to the Respondent's operational requirements. The Applicant subsequently referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA).
- [3] The dispute was conciliated on 17 April 2018 and a certificate of outcome was issued on that date. The dispute was thereafter set down for arbitration on 25 July 2018, on which date a ruling was issued to the effect that the CCMA lacked jurisdiction to adjudicate the dispute.
- [4] The Applicant filed a statement of case as well as an application for condonation for the late filing of the statement of case on 28 February 2019.
- [5] The application for condonation is opposed.

The test for the grant of condonation

- [6] The relevant legal principles to be applied in an application for condonation are well established.
- [7] This Court has a discretion, which must be exercised judicially on a consideration of the facts of each case and in essence it is a matter of fairness to both sides¹.
- [8] In *Melane v Sanlam Insurance Co Ltd*² it was held that:

'.... Among the facts usually relevant, are the degree of lateness, the explanation therefore, the prospects of success and the importance of the case. Ordinarily these facts are interrelated, they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there will be no point

¹ 'Civil Procedure in the Superior Court, Harms at B27.6.

² 1962 (4) SA 531 (A) at 532 C - F.

in granting condonation. What is needed is an objective conspectus of all the facts.’

- [9] In this Court however the principles have long been qualified by the rule that where there is an inordinate delay that is not satisfactorily explained, the applicant’s prospects of success are immaterial. This Court has conventionally applied the approach that in the absence of a satisfactory explanation for a delay, the applicant’s prospects of success are ordinarily irrelevant.³ This principle was confirmed in *National Education Health and Allied Workers Union on behalf of Mofokeng and others v Charlotte Theron Children’s Home*⁴ where the Labour Appeal Court (LAC) held that without a reasonable and acceptable explanation for a delay, the prospects of success are immaterial.
- [10] In *Collett v Commission for Conciliation, Mediation and Arbitration*⁵ the LAC also confirmed that 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 the delay, an application for condonation should be refused.
- [11] The onus is on the applicant seeking condonation to satisfy the court that condonation should be granted. In employment disputes there is an additional consideration which applies in determining whether the onus has been discharged, as was held in *National Union of Metalworkers of SA on behalf of Thilivali v Fry’s Metals (A Division of Zimco Group) and Others*⁶:

‘There is, however, an additional consideration which applies in employment disputes in determining whether an applicant for condonation has discharged this onus. This is the fundamental requirement of expedition. The Constitutional Court has, as a matter of fundamental principle, confirmed that all employment law disputes must be expeditiously dealt with and any determination of the issue of good cause must always be conducted against the back drop of this fundamental principle in employment law.’

³ See *National Union of Mineworkers v Council for Mineral Technology* [1999] 3 BLLR 209 (LAC).

⁴ (2004) 25 ILJ 2195 (LAC) at para 23.

⁵ (2014) 6 BLLR 523 (LAC).

⁶ (2015) 36 ILJ 232 (LC).

- [12] The fundamental requirement of expedition is not to be ignored. In *Toyota SA Motors (Pty) Ltd v CCMA and Others*⁷ the Constitutional Court emphasised that one of the fundamental purposes of the LRA was to establish a system for the quick adjudication of labour disputes. When it assesses the reasonableness of a delay, the court must not lose sight of this purpose.
- [13] In summary: The Courts have endorsed the principle that where there is a delay with no reasonable, satisfactory and acceptable explanation for the delay, condonation may be refused without considering prospects of success and to grant condonation where the delay is not explained, may not serve the interests of justice. The expeditious resolution of labour disputes is a fundamental consideration.
- [14] Condonation for delays in all labour law litigation is not simply there for the taking. The starting point is that an applicant in an application such as the present seeks an indulgence and bears the onus to show good cause.
- [15] It is in this context that the application for condonation stands to be determined.

The degree of lateness

- [16] Section 191(11)(a) of the Labour Relations Act⁸ (LRA) prescribes a 90 day period for referral of a dispute to the Labour Court for adjudication. The 90-day period is calculated from the date a commissioner has certified that the dispute remained unresolved.
- [17] *In casu*, the dispute relating to unfair dismissal for operational requirements had to be referred within 90 days from 17 April 2018, thus it had to be filed by 16 July 2018. The statement of case was filed with this Court only on 28 February 2019, clearly outside the prescribed 90-day period.
- [18] The dispute relating to an unfair dismissal based on the employer's operational requirements was referred more than seven months late.

⁷ (2016) 37 ILJ 313 (CC).

⁸ Act 66 of 1995, as amended.

- [19] The delay is no doubt material. In fact, it is excessive given the context within which labour litigation takes place and the system that is designed to ensure the effective and expeditious resolution of labour disputes. This is even more so where the LRA provides for a period of 90 days to file a statement of case, which period is in itself generous and lengthy.
- [20] The degree of lateness is also material considering the fact that the dispute arose as far back as December 2017, when the Applicant was retrenched and almost 18 months later the matter is not one step closer to trial, let alone ready for trial. This is significant as the relief that the Applicant seeks is an order for retrospective re-instatement.
- [21] The degree of lateness should however not be considered in isolation.

Explanation for the lateness

- [22] A failure to comply with the generous period of 90 days, has to be explained and the reasonableness of the delay should be considered by having regard to the explanation for the delay.
- [23] As the Applicant seeks an indulgence from the Court and as she bears the onus to satisfy the Court that condonation should be granted, it is incumbent upon her to provide the Court with a full explanation for every period of the delay. It is not sufficient simply to list significant events that occurred during the period in question as that does not assist the Court properly to assess the reasonableness of the explanation⁹.
- [24] The explanation for the delay has to be compelling, convincing and comprehensive and should cover every period of the delay.
- [25] In the founding affidavit before me in support of the application for condonation, the Applicant provided the following explanation for the delay:

25.1 Following the CCMA ruling of 25 July 2018, one of the Applicant's colleagues informed her that he knew an attorney who would refer the matter for all of the dismissed individuals to the Labour Court.

⁹ See *IMATU obo Zungu v SALGBC and Others* (2010) 31 ILJ 1413 (LC)

The Applicant made enquiries with her colleague regarding a meeting with the attorney on 31 July and 6, 13 and 14 August 2018.

- 25.2 On 21 August 2018 the attorney called the Applicant and told her that a deposit was required before counsel could be appointed to draft a statement of case. It became clear to the Applicant that the attorney would not work on her matter without a deposit being paid. This prompted her to contact Scorpion Legal Protection (Scorpion) on 23 August 2018. Scorpion requested the Applicant to forward all the relevant documents as they would appoint an attorney to assess the merits of the matter before a decision would be taken on whether the matter should be referred to the Labour Court. The documents were received by Scorpion on 24 August 2018.
- 25.3 Scorpion appointed Talane Attorneys on 17 September 2018 to handle the Applicant's matter and the said attorneys drafted a legal opinion that was sent to Scorpion on 24 September 2018 and awaited further instructions. Talane Attorneys sent the legal opinion to Ms Boitumelo.
- 25.4 On 1 October 2018, the Applicant contacted Talane Attorneys to enquire about the progress of her matter when she learned that the said attorneys were still waiting for instructions from Scorpion. On 3 October 2018 the Applicant followed up with Scorpion, only to learn that Talane Attorneys had sent the legal opinion to Ms Boitumelo, who had since resigned from Scorpion. The Applicant was informed that Ms Makgatla was assigned to take over all the files that were handled by Ms Boitumelo.
- 25.5 On 19 October 2018, Ms Makgatla called the Applicant and informed her that new attorneys would be appointed to deal with her matter. On 22 October 2018 Marais Attorneys contacted the Applicant and told her that she had to consult with them as her matter had to be referred to the Labour Court urgently.

- 25.6 On 23 October 2018, the Applicant consulted at Marais Attorneys and she was informed that a statement of case would be drafted the very same day and filed and served to avoid the late filing of the statement of case. The Applicant believed that her matter was receiving urgent attention.
- 25.7 On 4 December 2018, the Applicant followed up with Scorpion as she was anxious to see a response from the Respondent. She was informed by Ms Makgatla that they had not received a statement of case from Marais Attorneys. Ms Makgatla undertook to follow up with Marais Attorneys and to revert to the Applicant.
- 25.8 When the Applicant followed up with Marais Attorneys, she was informed that they never received instructions from Scorpion to refer the matter to the Labour Court. On 14 December 2018, Ms Makgatla informed the Applicant that Marais Attorneys had not referred her matter to the Labour Court and that Scorpion would terminate their mandate and appoint another law firm to handle her matter. This would only happen the following year as most law firms had already closed for the festive holidays.
- 25.9 On 20 January 2019, Ms Makgatla contacted the Applicant and told her that they terminated the mandate of Marais Attorneys and that Scorpion would appoint new attorneys to deal with her matter urgently.
- 25.10 Scorpion appointed Mitti Attorneys on 18 February 2019, and instructed them to provide a legal opinion on the merits of the case. Mitti Attorneys consulted with the Applicant on 19 February 2019. Mitti Attorneys received instruction from Scorpion to proceed with the matter on 21 February 2019 and the statement of case was drafted and served on the Respondent on 22 February 2019.

[26] I have already alluded to the fact that the Applicant should provide a full explanation for every period of the delay. The longer the delay, the better the explanation should be.

- [27] The dispute relating to unfair dismissal based on the employer's operational requirements had to be referred by 16 July 2018. There is no explanation as to why the dispute was referred for arbitration, instead of adjudication by this Court. The Applicant has not attached the certificate of outcome to her application and this Court is in no position to understand why the matter was referred for arbitration. Be that as it may, the Applicant has to provide a convincing explanation for the period between 16 July 2018 and 28 February 2019.
- [28] The Respondent, in its opposing affidavit, took issue with the explanation tendered and raised concerns, *inter alia*, that the Applicant's case is that she was let down by various attorneys, yet she attached no proof to her affidavit to support the allegations she made.
- [29] The Applicant indeed made various allegations regarding the conduct of Scorpion and the attorneys they had appointed since September 2018, but she has not attached a single confirmatory affidavit to support her case. The Applicant made no effort whatsoever to obtain a statement or affidavit from any of the attorneys she mentioned in her affidavit or from Ms Makgatla of Scorpion. The allegations made are no more than the Applicant's unsupported say-so.
- [30] To the extent that none of the parties referred to deposed to a confirmatory affidavit, the allegations relating to them, constitute nothing but hearsay evidence, which this Court cannot attach any weight to.
- [31] There is no explanation as to what happened to the opinion drafted by Talane Attorneys on 24 September 2018 and why Talane Attorneys' mandate was terminated on 19 October 2018. There is further no explanation as to what happened with Marais Attorneys after they indicated on 23 October 2018 that a statement of case would be drafted the same day and served and filed expeditiously and why their mandate was terminated on 14 December 2018. These *lacunae* could have been filled had an affidavit been filed by any of the relevant parties to explain what had transpired. The explanation tendered by the Applicant raises more questions than providing any answers.

- [32] A further difficulty is that on the Applicant's own version, Marais Attorneys informed her on 23 October 2018 that a statement of case would be drafted the very same day and filed and served to avoid the late filing of the statement of case. Even if she was unaware of the fact that her statement of case had to be filed within a specific period, it is evident that she was informed on 23 October 2018 that her papers were to be drafted and filed urgently to avoid the late filing thereof. The Applicant cannot escape the consequences of this statement in her explanation and it is unlikely that the Applicant was after 23 October 2018 still unaware that there was a need to file her statement of case urgently.
- [33] The Applicant consulted Marais Attorneys on 23 October 2018 and followed up with Scorpion on 4 December 2018 when she was informed that her statement of case was not yet received from Marais Attorneys. When the Applicant subsequently followed up with Marais Attorneys, she was informed that they never received instructions from Scorpion.
- [34] The Applicant explained that this came as a shock to her. It is unexplained why it came as a shock because the Applicant stated that between 23 October and 4 December 2018 she maintained ongoing contact with the attorneys and Scorpion and she constantly enquired about the progress of her matter. This version is improbable for a number of reasons. Firstly, the Applicant provided no details as to when she contacted Marais Attorneys or Scorpion during the period 23 October and 4 December 2018. The only detail she provided is that she followed up with Scorpion on 4 December 2018 and thereafter she contacted the attorneys herself. Secondly, if the Applicant indeed maintained ongoing contact and constantly enquired about the progress of her matter, she would have known much earlier that no mandate was given to Marais Attorneys and that no statement of case was received by Scorpion. It could not have shocked her to find out that nothing had happened by 4 December 2018, if she indeed constantly enquired about the progress of her case.
- [35] The only reasonable inference is that between 23 October and 4 December 2018, the Applicant had not taken any step to ensure that her case is

attended to urgently, as she was by then aware that, that should have happened.

- [36] There is no explanation as to why it took Scorpion from 14 December 2018 to 18 February 2019 to appoint another attorney to deal with the Applicant's case.
- [37] It is evident that once Mitti Attorneys were appointed, the matter was dealt with expeditiously. It raises the question as to why this did not happen when attorneys were appointed on two previous occasions, which question remained unanswered in the explanation tendered.
- [38] It is evident that the explanation tendered for the period of delay is bereft of any detail and lacks particularity. Material periods of the delay remained completely unexplained and the Applicant has tendered no version as to what happened during those periods.
- [39] The Applicant has to provide an explanation for every period of the delay to enable this Court to assess the reasonableness of the delay and the explanation for it. The Applicant failed to do that and the explanation tendered is inadequate and far from compelling, convincing or comprehensive.

Prospects of success

- [40] Having found that the delay is inordinate and the explanation tendered not compelling or adequate, it leaves the issue of prospects of success.
- [41] In the authorities referred to *supra* the Courts have endorsed the position that the failure to provide a reasonable and acceptable explanation for the delay renders prospects of success immaterial.
- [42] *In casu*, and in light of the said authorities and given that the Applicant has not provided a comprehensive, compelling or convincing explanation for a material period of delay, the prospects of success are immaterial, and thus need not be considered.

Prejudice

- [43] The Applicant submitted that she would be prejudiced should the application for condonation fail. This is so because, she will not have an opportunity to present her case to this Court and the matter deserves to be heard. According to the Applicant, the Respondent will not suffer an prejudice as it could be compensated for any delay by way of an appropriate cost order.
- [44] The Respondent on the other hand submitted that if the Applicant indeed followed up with Scorpion as she alleges, it is apparent that Scorpion is to be blamed for the late filing of her statement of case. The Respondent should not be prejudiced by the negligent conduct of the Applicant's legal advisor and her remedy lies in a civil claim against Scorpion.
- [45] Furthermore, the Respondent submitted that one of the primary objects of the LRA is the effective and timeous resolution of labour disputes, that it followed a retrenchment process in which the Applicant was dismissed, on more favourable terms and attempting to alleviate the negative consequences of the dismissal to the greatest extent possible. The Respondent should not be compelled to incur further costs in defending this matter.
- [46] The refusal to condone the late filing of the statement of case will have the result that the Applicant will be denied the opportunity to pursue this case before Court. However, the Respondent's prejudice outweighs the Applicant's prejudice. It is evident that the Applicant has not pursued this matter diligently, and almost 18 months after the Applicant had left the Respondent's employ, the parties are not one step closer to finality in this matter. I have already alluded to the fact that the Applicant seeks retrospective reinstatement, which is another factor that would prejudice the Respondent where the dispute was referred late to this Court.
- [47] Most importantly, I have to endorse the aim of the LRA namely to resolve labour disputes speedily and without delay. Granting condonation in a case like this would not be in the interest of justice as it would undermine the statutory purpose of expeditious dispute resolution, another factor that weighs heavily in the Respondent's favour.

[48] On an objective conspectus of all the facts, the Applicant's application for condonation falls hopelessly short off the mark. The Applicant did not discharge the onus to show good cause and to provide an acceptable and plausible explanation for the delay. For the above reasons, it will not be in the interests of justice that the application for condonation be granted.

[49] In so far as costs are concerned, this Court has a broad discretion in terms of section 162 of the LRA to make orders for costs according to the requirements of the law and fairness. In my view the interest of justice will be best served by making no order as to costs.

[50] In the premises, I make the following order:

Order

1. The application for condonation for the late filing of the Applicant's statement of case is dismissed;
2. There is no order as to costs.

Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Ms Makgamatha of M M Mitti Inc Attorneys

For the Respondent: Mr J Olivier of Webber Wentzel Attorneys