



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JS 465/2022

In the matter between:

STEVE DE VILLIERS

Applicant

and

BERGVIEW CONVENIENCE CENTRE (PTY) LTD

Respondent

Heard: 06 February 2023

Delivered: 07 February 2023

(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 SAFLI. The date on which the judgment is delivered is deemed to be 07 February 2023.)

JUDGMENT

VAN NIEKERK, J

- [1] The applicant seeks condonation for the late referral of a dispute to this court in which she alleges that he was unfairly dismissed for a reason that is automatically unfair, i.e., his age. The state statement of claim was delivered

on 1 July 2022, some five months outside of the prescribed period of 90 calendar days established by section 191 (11) of the LRA.

[2] The general principles applicable to condonation are well-established. Condonation is not there merely for the asking, nor are applications for condonation a mere formality (see *NUMSA v Hillside Aluminium* [2005] 6 BLLR 601 (LC); *Derrick Grootboom v National Prosecuting Authority & another* [2014] 1 BLLR (CC)). A party seeking condonation must make out a case for the indulgence sought and bears the onus to satisfy the court that condonation should be granted.

[3] This court is required to exercise a discretion, having regard to the extent of the delay, the explanation proffered for that delay, the applicant's prospects of success, and the relative prejudice to the parties that would be occasioned by the application being granted or refused. Ordinarily, these factors are not individually decisive but are interrelated, and must thus be weighed one against the other. In this court, that formulation, which has its roots in *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A), has 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. In *National Union of Mineworkers v Council for Mineral Technology* [1999] 3 BLLR 209 (LAC) the LAC said the following:

... 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.

[4] In *Chetty v Baker McKenzie* (2022) 43 ILJ 1599 (LAC), the LAC held:

...in the absence of a full and reasonable (acceptable) explanation for the delay, the prospects of success are immaterial, and that if there are no prospects of success an application for condonation should be refused even if there is a good explanation for the delay. It is important that the explanation for the delay, considered objectively, must be sufficiently cogent to warrant a consideration of the prospects of success. There are those explanations that do not meet the objective standard. In such cases the court would be justified

in not considering the prospects of success, because they are immaterial, unless issues are raised that would justify the court's interference. The explanation for the delay must thus be full and reasonably clear, logical and convincing to excuse the default.

- [5] The application for condonation must offer an explanation for the full length of the delay (see *Independent Municipal and Allied Trade Union obo Zungu v SA Local Government Bargaining Council and others* (2010) 31 ILJ 1413 (LC)). In *eThekwin Municipality v Ingonyama Trust* 2013 (5) BCLR 497 (CC), the Constitutional Court said the following:

In a case where the delay is not a short one, the explanation given must not only be satisfactory but must also cover the entire period of the delay. Thus in *Van Wyk v Unitas Hospital and another (Open Democratic Advice Centre as Amicus Curiae)*, this Court said in this regard:

'An applicant for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of the delay. And, what is more, the explanation given must be reasonable.'

- [6] In essence, the explanation for the delay in the present instance is that the legal representative who initially represented the applicant in proceedings before the CCMA was no longer in a position to assist the applicant, on account of his appointment as a magistrate. The applicant then sought the assistance of various legal representatives. A family member assisted him to obtain a legal representative in Durban, who was ultimately not able to assist. A third representative was contacted during mid-February 2022, who also advised the applicant that she was unable to assist him. By this time, the applicant had exhausted his financial resources, but he says that he continued to contact attorneys in Durban, Pretoria and Johannesburg for assistance. During mid-March 2022, the applicant secured the assistance of his current attorney of record. The applicant was advised that he had a strong case and in the interim, and should secure sufficient financial cover. A further consultation was held at the end of April 2022 and by mid-May 2022, the applicant advised his attorney that he was in a financial position to secure an appointment with counsel. Counsel was consulted, and required further documentation. Further funds were sought and were secured only during the

first week of June 2022. The requested documents were furnished to counsel who drafted the statement of claim and the application for condonation.

- [7] The applicant submits that he has good prospects of success more particularly in that he was informed of the termination of his employment, on account of his age, on 22 July 2021, followed by a confirmation email on 27 July 2021. In essence, the applicant contends that there was no contractually agreed retirement date.
- [8] A delay of five months in the referral is not insignificant. In my view, the explanation for the delay amounts to no more than an attempt to find representation in circumstances where the applicant was hampered by a lack of funds. That is not in itself a satisfactory explanation. Many litigants approach this court without the benefit of a legal representative. Many seek assistance from Legal Aid SA or some other advisory office. Further, there are periods between November 2021 when the CCMA made a jurisdictional ruling in the matter to 29 June 2022, when the statement of case and condonation application were filed, that are not adequately explained. Of particular concern is the fact that the applicant consulted with his current attorney of record during March 2022, some three months before the statement of claim was filed. While I appreciate that the applicant was advised that he should obtain the necessary funds, the applicant's representatives at that stage must have realized that any statement of claim was already significantly late. This ought to have been drawn to the attention of the applicant and in particular, he or to have been advised of the urgency with which the matter is to be prosecuted. In short, it is not an acceptable explanation for a delay of the present sort simply to say that over a period of some nine months, legal representation was sort from various sources. The explanation for the delay is not satisfactory, and condonation stands to be refused on this basis alone.
- [9] In so far as the applicants prospects of success are relevant, the applicant appears to assume that an assertion to the effect that his contract of employment makes no reference to a retirement age of 65 constitutes a *prima facie* case, sufficient for present purposes to establish prospects of success. What this assertion overlooks is that in terms of section 187(2), a dismissal

based on age is fair if the employee has reached the normal or agreed retirement age for persons employed in that capacity. The employee appears to have taken the view, confirmed by his counsel when pressed on the matter, that it was for him to elect to retire. The undisputed contention by the respondent is that in its businesses, every employee retires at age 65 and that its employees are aware of this policy, that in terms of the applicable Bargaining Council main agreement which covers most of its employees, a retirement age of 65 is specified. I am not persuaded that on the papers before me, the applicant has established that his prospects of success in the main action are such that the late referral should be condoned, notwithstanding an unsatisfactory explanation for an insignificant delay.

[10] Having regard to all of the relevant facts and circumstances, condonation for the late referral of the applicant's dispute is refused.

I make the following order:

1. The application for condonation is dismissed.

André van Niekerk
Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv Y van der Laarse

Instructed by: Duvenhage Attorneys

For the respondent: Adv M Lennox

Instructed by: Murray Steward & Associates