

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE
(2) OF INTEREST
(3) REVISED

YES/NO

21/02/23

DATE

SIGNATURE



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JS283/2021

In the matter between:

GEOFFREY TSHITUNDU

Applicant

and

SIMBA (PTY) LTD

Respondent

Heard: 29 June 2022

Delivered: 21 February 2023

JUDGMENT

LEPPAN, AJ

Introduction

[1] This is an application to condone the late referral of an alleged automatically unfair dismissal dispute.

[2] The Applicant initially referred an alleged unfair dismissal dispute (dispute 1) and an automatically unfair discrimination dispute (dispute 2) to the Commission for Conciliation, Mediation and Arbitration (CCMA). Both disputes were conciliated by the CCMA on 17 December 2020 and certificates of non-resolution were issued on that same day.

[3] The only dispute that is before this Court is dispute 2, and for the purposes of this judgment, I will only be dealing with dispute 2. It is common cause that the Applicant's statement of case was to be filed on 17 March 2021, which is 90 days after the CCMA or commissioner has certified that the dispute remains unresolved.¹ However, the statement of case was filed 14 days later, on 31 March 2021.

[4] The Respondent opposes this application, *inter alia*, on the following basis:

4.1 The degree of lateness is excessive as the Applicant had 90 days to refer the dispute to the Labour Court.

4.2 The Respondent argues that it is highly unlikely that the reason that the Applicant failed to timeously refer his matter is due to the Respondent moving its offices from Boksburg to Rosebank and due to a lack of resources (no vehicle or money to travel).

4.3 The Respondent further points out that the Applicant neither addresses the degree of lateness nor the public interest of the matter.

4.4 The Respondent further challenges the Applicant's prospects of success.

[5] This Court is called upon to decide whether good cause has been shown as to why it should condone the non-observance of the applicable timeframes set forth in the Labour Relations Act² (LRA).³

Explanation of the delay

[6] It is a well-established principle in this Court that condonation cannot be granted for merely asking. A party seeking condonation must give a full explanation and reasons for their non-compliance. Although the delay in this matter is 14 days, the Applicant does not provide an explanation for the delay of the entire 14-day period.

¹ Section 191(11)(a) of the Labour Relations Act 66 of 1995, as amended.

² Act 66 of 1995, as amended.

³ Section 191(11)(b).

- [7] The Applicant submits that during the period of 17 December 2020 to 19 March 2021, he was still under the effect of his medication for his depression. Whilst this Court is not in the position to dispute this submission, the Applicant provides no supporting documentation in this regard. The Applicant simply does not explain how his depression medication prohibited him from timeously referring his dispute and how this was not the case when the matter was finally referred 14 days later.
- [8] This Court was not privy to any medical documentation that supported the above claims. The only medical documentation that this Court had sight of are the documents annexed to the statement of claim and the amended statement of claim, however, these documents do not explain how the Applicant's depression prohibited him from timeously filing and serving his statement of case.
- [9] With respect and sensitivity to the Applicant's personal circumstances, the mere claim that he did not timeously file his statement of case due to his depression is to be rejected as he attended to file same without any problem 14 days later.
- [10] The Applicant further submitted that another reason why he did not timeously file the statement of case is because on 22 March 2021, he went to the Respondent's offices in Boksburg where he was informed that the Respondent had then moved to Rosebank. Furthermore, he also held that, due to financial constraints, he was not able to serve the statement of case on the Respondent until 31 March 2021.
- [11] The Applicant starts his explanation of the delay on 19 March 2021, where he alleges that he approached a filing clerk of the Labour Court, who then informed him that the statement of case is to be served on the Respondent. There is no explanation for the delay between 17 March 2021 (when the statement of case was due) and 19 March 2021 (when he allegedly approached the Labour Court clerk). It is to be noted that the Applicant only attempted to serve the statement of case at the Respondent's Boksburg offices on 22 March 2021, despite 17 March 2021 being the deadline to serve and file the statement of case.

Furthermore, the Applicant did not consider or attempt other alternative means of serving the statement of case (such as fax or email).

- [12] The Applicant claims that he did not have funds to travel to the Respondent's new premises in Rosebank to serve the statement of case. The Respondent correctly argued that the mere claim of a lack of funds on its own cannot constitute a reasonable explanation for the delay – the Applicant needs to provide more. In this regard, the Applicant had to bring the Court into his confidence by explaining how and when he raised the funds when he finally did so on 31 March 2021. This was briefly touched on by the Applicant's attorney during argument, however, it was not pleaded.
- [13] The fact that the Applicant was unassisted and unrepresented at the time of this referral is noted and taken into consideration by this Court, however, the Applicant still has to cross the hurdle of prospects of success, which takes me to this next part.

Prospects of success

- [14] It is trite that a *bona fide* defence and good prospects of success are not sufficient in the absence of a reasonable explanation for the default.⁴ This principle has been interpreted as follows by the Labour Appeal Court (LAC) in *NUM v Council for Mineral Technology*:⁵

'There is a further principle which is applied and that is that 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...'

- [15] The case referred to above shows that in order to pass the hurdle of condonation, you have to have both a reasonable explanation for the entire period of the delay and prospects of success.

⁴ See: *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 765.

⁵ [1999] 3 BLLR 209 (LAC) at para 10.

- [16] I am of the view that the Applicant has no prospects of success. I briefly canvass the reasons below.
- [17] The Applicant was dismissed for gross insubordination. His defence is merely that his alleged outburst or insubordination was caused by his depression which was caused by the alleged ill-treatment from his manager. It is from this background that the Applicant referred an automatically unfair dismissal dispute in terms of section 187 (1)(f) of the LRA.
- [18] Section 187 (1)(f) of the LRA provides that a dismissal will be automatically unfair if the reason for the dismissal is that the employer unfairly discriminated against an employee, directly or indirectly, *inter alia*, on the grounds of disability and/ or an analogous arbitrary ground. Section 6 of the Employment Equity Act⁶ (EEA) includes a similar prohibition. The Applicant maintains that the dominant reason for this dismissal was the fact that he was suffering from depression. The primary contention raised by the Respondent is that the Applicant was in fact dismissed for misconduct and failed to show that he was dismissed for his depression.
- [19] The Applicant failed to show that there was any causal link between his depression and the misconduct which led to his dismissal.
- [20] An applicant seeking to establish that a dismissal is automatically unfair on any of the grounds listed in section 187 (1) of the LRA must meet the requirements of causation as articulated in *SA Chemical Workers Union and others v Afrox Ltd*⁷ as follows:

'The first step is to determine *factual* causation: was participation or support, or intended participation or support, of the protected strike a sine qua non (or prerequisite) for the dismissal? Put another way, would the dismissal have occurred if there was no participation or support of the strike? If the answer is yes, then the dismissal was not automatically unfair. If the answer is no, that does not immediately render the dismissal automatically unfair; the next issue is one of legal causation, namely whether such participation or conduct was

⁶ Act 55 of 1998, as amended.

⁷ (1999) 20 ILJ 1718 (LAC) at para 32.

the 'main' or 'dominant', or 'proximate', or 'most likely' cause of the dismissal... It is important to remember that at this stage the fairness of the dismissal is not yet an issue ...Only if this test of legal causation also shows that the most probable cause for the dismissal was only participation or support of the protected strike, can it be said that the dismissal was automatically unfair in terms of s 187 (1) (a).'

[21] It is common cause that the Applicant was grossly insubordinate as he even apologised for his misconduct. Section 187 of the LRA imposes an evidential burden upon the employee to produce evidence which is sufficient to raise a credible possibility that an automatically unfair dismissal has taken place.

[22] Utilising the principles referred to in paragraph 20 above, for the purposes of determining factual causation and legal causation, we have to adapt to the circumstances of this matter and ask the following questions –

22.1 would the dismissal have occurred had it not been for the Applicant's depression?; and

22.2 was the Applicant's depression the 'main' or 'dominant', or 'proximate', or 'most likely' cause of the dismissal?

[23] In my view, the answer to the first question is yes. The Applicant did not deny that he committed the misconduct. The answer to the second question is no. The Applicant does not deny the misconduct to which he was charged with, therefore the Applicant's depression was not the proximate or most likely cause of the dismissal.

[24] Of course, the argument can be raised, which it was not, of whether such sanction of dismissal was fair in light of the Applicant's circumstances, however, this is not the issue before this Court. This issue would be best suited to be addressed by the CCMA. It is accepted that depression may play a role in an employee's misconduct. It is not beyond possibility that depression might, in certain circumstances negate an employee's capacity for wrongdoing, however this is not pleaded by the Applicant.

[25] The Respondent correctly argued that the Applicant does not claim that his depression occluded his ability to conduct himself in accordance with an appreciation of the wrongfulness of his misconduct and that he had no self-control. He does not argue that, had he not been depressed, he would not have misconducted himself. He also does not argue that his state of mind (cognitive ability) and his will (conative ability) were not intact to the extent that he was unable to appreciate the wrongfulness of his conduct. This is proven by the fact that he apologised for his misconduct against Ms Kast. Thus, he was, at all material times aware of the wrongfulness of his misconduct. This takes us back to what the dominant or proximate reason for his dismissal was – misconduct. The overriding consideration must be the factor that most immediately brought about the dismissal.

[26] In *Legal Aid South Africa v Jansen*⁸, the LAC, whilst faced with similar facts to this case, held the following:

‘It may well be that, but for his depression factually (*conditio sine qua non*), the respondent might not have committed some of the misconduct; but, still, he has not presented a credible possibility that the dominant or proximate cause of the dismissal was his depression. The mere fact that his depression was a contributing factual cause is not sufficient ground upon which to find that there was an adequate causal link between the respondent’s depression and his dismissal so as to conclude that depression was the reason for it. The criteria of legal causation, it must be said, are based upon normative value judgments.’

[27] The Applicant did not even plead that the treatment accorded to him by the Respondent, in any way differed from the treatment accorded to other employees, or, more importantly, that the reason for any such alleged differential treatment was his condition of depression.

[28] I am of the view that Applicant has no prospects of success for an automatically unfair dismissal based on an unfair discrimination claim.

⁸ 2021 (1) SA 245 (LAC) at para 48.

[29] I am of the view that this matter is a misconduct matter that should have been dealt with by the CCMA.

Prejudice and Interest of justice

[30] I am of the view that it would not be in the interest of justice for this matter to go to trial when it should have been heard by the CCMA. Should this Court grant this condonation application, such order would be to the prejudice of the Respondent.

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

Order

1. The Applicant's condonation application is dismissed.
2. There is no order as to costs.



F Leppan

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: NT Mojapelo of Mojapelo Attorneys

For the Respondent: Adv. JD Withaar

Instructed by: Cowan Harper Madikizela Attorneys

LABOUR COURT