IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

Case No: C828/2018

In the matter between

JAMES EVANS **Applicant**

And

UNIVERSITY OF CAPE TOWN **Respondent**

Heard:

Delivered: **22 February 2019**

Summary: 13 March 2019

JUDGMENT

NIEUWOUDT, AJ

Introduction

[1] Mr Evans (the applicant) filed a statement of claim, claiming that the University of Cape Town (the respondent) had dismissed him because he had made a protected disclosure. There are a number of other averments and complexities in the matter, which require no more than a brief mention.

[2] The respondent adopted the view that the statement of case was delivered out of time. The applicant was of the opinion that the statement of case was not out of time but he nevertheless brought an application for condonation.

[3] The respondent's heads of argument were delivered out of time due to the fact that its attorneys had calculated the period using calendar days instead of court days. Mr Stansfield made an informal application from the bar for this oversight to be condoned. The applicant strenuously objected to this application but the Court granted it. The heads of argument were two days late and there was no prejudice as the Court had the opportunity to peruse them before the date of hearing.

[4] The applicant also contended that the affidavits filed by the respondent were invalid due to the fact that they were commissioned by employees of the respondent. The Court pointed out to the applicant that his affidavits also did not comply fully with the relevant legal requirements as the full names of the commissioners of oaths were not recorded. The Court decided to have regard to all the affidavits on the ground that the relevant legal prescripts were directory and not peremptory.

[5] Having dealt with these preliminary skirmishes, the facts of the matter, inasmuch as they are relevant to the condonation application, need to be recorded. They are gleaned from the statement of case, the response and affidavits filed in the

condonation application.

Facts

[6] The background facts recorded in the statement of case, which are not disputed in the response, are set out. It is permissible to refer to the statement of case because the applicant avers in his founding affidavit in support of the application for condonation that his prospects of success are good and he refers to his statement of case in that regard.

6.1 The applicant has been employed as a part-time athletics coach by the respondent since 1993.

6.2 During 2016 and 2017, the applicant reported a number of financial irregularities to various employees of the respondent, including his line manager. Amongst those implicated in the report were Mr Rogers, an employee in the sports department and a student, Mr Ochieng.

6.3 Early in 2017, the applicant instituted grievance proceedings against Mr Rogers and Mr Manise (who is the deponent to the opposing affidavit in the condonation application and is the respondent's Manager: Sports and Recreation.

6.4 During November 2017, the applicant launched an application for an interdict against the respondent in terms of the Protected Disclosures Act[1] (the PDA).

6.5 During January 2018, the respondent instituted disciplinary action against the applicant. It relied on some 40 incidents. Some of these incidents related to allegations against the applicant by Mr Ochieng and a substantial portion

[1] Act 26 of 2000 as amended.

thereof related to Messrs Manise and Rogers.

6.6 The documents filed by the applicant in his protected disclosures application served before the chairperson of the internal hearing.

6.7 The respondent summarily dismissed the applicant on 26 April 2018.

6.8 The relationship between Mr Rogers and the applicant had broken down irretrievably and Mr Rogers is extensively referred to in the applicant's protected disclosure application.

[7] The following material issues appear from the affidavits filed in the condonation application:

7.1 The applicant referred a dismissal dispute to the Commission for Conciliation, Mediation and arbitration (CCMA) on or about 26 April 2018. He contended in the referral that his dismissal was in retaliation for reporting corruption by the respondent's staff and students, that the dismissal came after he had sought an interdict in terms of the PDA and is thus an automatically unfair dismissal.

7.2 In the certificate of outcome, the conciliating Commissioner recorded that: "[A]pplicant believes his dismissal was instigated/as a result of reporting fraudulent activities and he has decided that the CCMA arbitrate the dispute as a pure dismissal dispute not [the word is unclear but appears to be 'within'] s187(1)(h)". The certificate is dated 16 May 2018.

7.3 The respondent contends that the applicant abandoned his automatically unfair dismissal dispute by proceeding with the dismissal dispute in the CCMA. This does not appear to be the case. It seems that the applicant kept both causes of action alive.

7.4 On or about 18 May 2018, the applicant completed a request for arbitration. In this document he unequivocally states that “[T]his also rendered the dismissal automatically unfair.” The Court interposes to state that the explanation by the applicant for referring the dispute to arbitration is not convincing. However, not much turns on this. It is also apposite to note that the applicant has a legal qualification and used to practice at the Bar, albeit a long time ago. He is clearly able to read and interpret statutory provisions to the extent that he can identify the requirements for the commissioning of affidavits. This places him in a much better position than an unrepresented litigant who does not have any, much less a legal, tertiary education but does not equate him to a represented litigant.

7.5 The applicant became concerned that the dispute may be an automatically unfair dismissal dispute. He states this and it is corroborated by the fact that on 9 July 2018, he sent an email to the respondent. This email records that the only reason why the matter should continue before the CCMA, namely that it would be dealt with expeditiously, would fall away (for a reason that is not particularly clear) and he requested that the matter be referred to this Court. It is probable that part of the motivation for this proposal was that the applicant was concerned that the CCMA would not have jurisdiction to arbitrate the dispute.

7.6 On 20 July 2018, the CCMA ruled that the respondent was entitled to be legally represented.

7.7 On 21 August 2018, the applicant delivered his statement of case in respect of an automatically unfair dismissal dispute.

7.8 The condonation application was served on 28 November 2018.

<u>Is condonation required?</u>

[8] The applicant submitted that condonation was not required. He submitted that the 90-day period in terms of s191(5) of the Labour Relations Act[2] (LRA) only started running once the 30-day period for conciliation had lapsed. He seems not to have considered the fact that s191(5) refers to both the expiry of the 30-day period and the date on which the CCMA certified that a dispute remained unresolved. He did have regard to s191(11) which clearly requires that the referral should be made within 90 days after the commissioner had certified that the dispute remained unresolved. Despite the aforegoing, he preferred his interpretation without checking what any decisions on the issue provided.

[9] A condonation application was thus required as the matter was referred outside the 90-day period.

The test for condonation

[10] The test for condonation is well known and need not be set out, save for the specific aspects that require decision in this matter. They are:

10.1 What, if any, is the import of the fact that an applicant for condonation did not bring such application as soon as it was brought to his attention that condonation is required?

10.2 The explanation for the delay.

10.3 What material should the applicant in a condonation application place before the court to show that he has prospects of success?

10.4 Prejudice

10.5

[11] The Court deals with these issues in turn.

[2] Act 66 of 1995 as amended.

What is the impact of bringing a condonation application late?

[12] In *Seatlolo and Others v Entertainment Logistics Service (A Division of Gallo Africa Ltd)*[3] the Court held that:

> "It is trite law that an application for condonation must be brought as soon as the party becomes aware of the default. This principle has been emphasized by the Supreme Court of Appeal on numerous occasions (see Saloojee at 138H; *Rennie v Kamby Farms (Pty) Ltd* 1989 (2) SA 124 (A) at 129G; and *Napier v Tsaperas* 1995 (2) SA 665 (A) at 671B-D). This approach has been endorsed by the Labour Appeal Court which in fact advocates bringing the application for condonation on the same day it is discovered to be necessary. See in this regard inter alia *Allround Tooling (Pty) Ltd v NUMSA & others* [1998] 8 BLLR 847 (LAC) at 849 H para 8; *NEHAWU v Nyembezi* [1999] 5 BLLR 463 (LAC) at 464D-F; and *Librapac CC v FEDCRAW & others* (1999) 20 ILJ 1510 (LAC); [1999] 6 BLLR 540 (LAC) at 543."

[13] In *Seatlolo*[4] the respondent had pointed out to the applicants that they required condonation and the applicants did not heed that fact. The respondent in this matter, in its response dated 4 September 2018, expressly took the point that the referral was late and that in the absence of a condonation application, this Court did not have jurisdiction to entertain the dispute.

[14] Despite the aforegoing, the applicant only served the application for condonation on 18 November 2018 and filed on 6 December 2018.

[15] The import of this is that the applicant has to explain not only the first (short) period of default, but the whole period, which spans some 15 weeks. This is a fairly lengthy period of the delay and requires a good explanation and/or strong

[3] (2011) 32 ILJ 2206 (LC) at para 10.

[4] Ibid.

prospects of success.

The explanation for the delay

[16] The explanation for the delay is largely contained in the replying affidavit, incorrectly styled “affidavit in support of condonation application”. The respondent did not submit that the Court should not have regard to these facts and the Court will deal with them to the extent that they are material. The following issues are of relevance (there are many aspects that are of absolutely no relevance and do not deserve mention):

16.1 The first period of a few days was caused by an incorrect interpretation of the relevant statutory provisions. This is an acceptable explanation and had the applicant brought the application for condonation when the respondent pointed the requirement for it to him, the period of delay would have been short and the explanation would have been acceptable.

16.2 There is no explanation why the applicant did not heed the warning expressed by the respondent that the Court did not have jurisdiction due to the fact that the referral was late and not accompanied by a condonation application. The applicant simply stuck to his view that the referral was in time and that he did not require condonation.

16.3 The rest of the applicant’s explanation, if the emotional statements are excluded, deal with the fact that the applicant devoted a lot of time in order to prepare for the argument of his application in terms of the PDA and to get the respondent to participate in a pre-trial conference. The applicant contends that he had to do all of this himself. The Court accepts this contention. However, the applicant does not say how much time per day or how many days he devoted to these activities and how they precluded him

from drafting an affidavit that eventually was eight pages long. There is a question mark behind this explanation which is exacerbated by the fact that the applicant managed to prepare a replying affidavit of nearly double the length of the founding affidavit in a period of six days.

[17] It is probable that the applicant did not deliver his condonation application earlier because he held the view that condonation was not required. In the practice note and in argument, his position continued to be that he did not require condonation.

[18] In summary thus, the applicant, despite the fact that he is not experienced in labour law matters, interpreted the LRA as not requiring condonation up to a point, presumably the pre-trial conference, whereafter he became concerned about the correctness of the position. This concern was not sufficient to cause him to abandon the position but it was sufficient to cause him to submit a condonation application. This is not an entirely acceptable explanation, but is not *mala fide* either.

Prospects of success

[19] The applicant deals with this aspect in the affidavit in support of his condonation application by submitting that his prospects of success were good. He stated that, as set out in his statement of case: the respondent had not followed its own procedures during the hearing, the ground for his dismissal was not recognised by the LRA, and that the respondent had used the fact that he had brought an application in terms of the PDA against him.

[20] The Court sees no merit in the contention that the ground for the dismissal of the applicant is not recognised by the LRA. Further, it would serve no purpose

for this Court to devote time to the procedural unfairness issues in the matter if the dismissal is not automatically unfair. This leaves the contention that the dismissal was automatically unfair because the applicant had made a protected disclosure.

[21] In dealing with this ground, the question whether an applicant for condonation may incorporate other pleadings by reference in his founding affidavit, arises. In *Nature's Choice Products (Pty) Ltd v Food and Allied Workers Union and Others*[5] the applicant for condonation (which was the respondent in that matter) incorporated its response by reference in the affidavit in support of its application for condonation. The Labour Appeal Court (LAC) held that this was permissible.

[22] The next question that arises is what the substance of the material placed before the Court should be in order to satisfy the requirement that the applicant must show that he has prospects of success.

[23] In *Nature's Choice*[6] the LAC further held that:

> "It has also been held in respect of rule 27 of the High Court Rules, that the applicant should satisfy the court on oath that it has a bona fide defence. In this regard, it has been held that the least that the applicant must show is that his or her defence is not patently unfounded and that it is based on facts which, if proved, would constitute a defence."

[24] In *Mould v Roopa NO and Others*[7] the court recognised that the employer

[5] (2014) 35 ILJ 1512 (LAC).

[6] Id n 5 at para 21.

[7] (2002) 23 ILJ 2076 (LC) at para 34.

carried the onus to prove the fairness of a dismissal. This, it held, was not a licence for an employee to remain silent about the prospects of success. The court held:

> "The facts leading to the dismissal and the reasons why the applicant alleges that the dismissal was unfair should be pleaded in such detail as to enable the court to assess whether, prima facie, there are prospects of success. An applicant must provide in an application for condonation such information about the prospects of success that, if proved in the main action, it would be entitled to relief. Thus, if an applicant can anticipate the opposition's evidence it must plead it in its founding affidavits. If it cannot, then it must deal with it in reply. This approach does not shift the onus of proving the fairness of the dismissal away from a respondent employer."

[25] The application by the High Court of the test when considering whether a default judgment should be rescinded may give some further content to the substance of the evaluation of prospects of success. In *Grant v Plumbers (Pty) Ltd*[8] the court stated the following:

> "Having regard to the decisions above referred to, I am of opinion that an applicant who claims relief under Rule 43 [the then applicable rescission provision] should comply with the following requirements:
>
> (a) ……
>
> (b) ……..
>
> (c) He must show that he has a bona fide defence to plaintiff's claim. It is sufficient if he makes out a prima facie defence in the sense of setting out averments which, if established at the trial, would entitle him to the relief asked for. He need not deal fully with the merits of the case

[8] 1949 (2) SA 470 (O) at 476 to 477.

> and produce evidence that the probabilities are actually in his favour. (Brown v Chapman (1938 TPD 320 at p. 325).)
>
> There is a sharp conflict on the affidavits as to whether applicant or the company is legally liable for the amount claimed in the summons. It is not desirable at this stage to enter into a discussion of the merits of the principal action. I am satisfied, however, that applicant has made out a bona fide defence to respondent's claim i.e. he has made sufficient allegations in his petition, which if established at the trial would entitle him to succeed in his defence that he is not personally liable for the amount claimed in the summons."

[26] This case sets out the test quite neatly and has been followed in numerous subsequent decisions. The decisions in *Nature's Choice*[9] and *Mould*[10] show that this test is applicable to labour disputes.

[27] Thus, it seems that the party seeking the indulgence, which in this case is the applicant, has to place sufficient material before the court to show that the facts averred in the founding affidavit or (in appropriate circumstances), the replying affidavit in the condonation application (which may incorporate by reference the facts averred in the statement of case or response) would, if proven at the trial, entitle him to success.

[28] Has the applicant satisfied this test? He stated that he reported financial irregularities during 2016 and 2017. During November 2017, he launched an application for an interdict in terms of the PDA against the respondent. During January 2018, the respondent instituted disciplinary proceedings against him and a number of issues relating to his disclosures and his grievances served before the chairperson. The respondent does not dispute these averments but contends that the applicant was dismissed on the basis of incompatibility and

[9] *Supra* n 5.

[10] Id n 5.

misconduct.

[29] This begs the question of whether the incompatibility and misconduct that caused the dismissal of the applicant was caused by the disclosures made by the applicant.

[30] The issue of the incidence of the onus and evidentiary burden in automatically unfair dismissal cases was dealt with in *Kroukam v SA Airlink (Pty) Ltd* [11] where the LAC found that an employee bears an evidential burden to produce evidence which is sufficient to raise a credible possibility that an automatically unfair dismissal has taken place, after which the employer is required to produce evidence to show that the reason for the dismissal did not fall within the circumstance as envisaged in s 187 of the LRA for constituting an automatically unfair dismissal.

[31] The applicant has set out enough averments in his statement of case as referred to in his founding affidavit in the condonation application to raise a credible possibility that he was dismissed because of his disclosures. The respondent has not in its opposing affidavit or statement of response set out any more than a positive statement that the applicant was dismissed for incompatibility and misconduct. There are no facts to support this position. Accordingly, the obligation which *Kroukam*[12] places on an employer, has not been discharged by the respondent.

[32] In view of the aforegoing, the applicant has at least shown that he has reasonable prospects of success.

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[11] (2005) 26 ILJ 2153 (LAC) at para 28.

[12] *Id* n 11.

Prejudice

[33] The applicant contended, as applicants would invariably do in unfair dismissal cases, that he would suffer prejudice in the sense that the doors of the court would be closed to him if the application for condonation was declined.

[34] The respondent focused its submissions under this heading on the cost and effort to which it had been put by having to defend the matter first in the CCMA and now in this Court. This is not a factor that would play a great role in deciding whether condonation should be granted or not.

[35] The question of prejudice would not sway the decision in this matter in favour of either party.

Conclusion

[36] Applying the test as set out in *Melane v Santam Insurance Co Ltd*[13], the Court concludes that:

36.1 The combined period of the delay in delivering the statement and application for condonation is quite long but this Court has condoned longer periods of delay.

36.2 The explanation for the delay is not totally unacceptable.

36.3 The applicant has shown that he has reasonable prospects of success in

[13] 1962 (4) SA 531 (A) 532 C-F).

the automatically unfair dismissal case.

36.4 Prejudice is a neutral factor.

[37] Further, the administration of justice has not particularly been affected by the default of the applicant. It is not likely that the trial in this matter would be much delayed by the delay in delivering the condonation application.

[38] Condonation should thus be granted.

[39] In the result, the following order is made.

Order

1. The application for condonation is granted.

2. The Registrar is directed to enrol the matter for trial on an expedited basis.

H Nieuwoudt

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: In person

For the Respondent: Mr G Stansfield

Instructed by: Cliffe Dekker Hofmeyr Inc