



REPUBLIC OF SOUTH AFRICA
IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN
JUDGMENT

Not Reportable

C59/2017

In the matter between:

LUYANDA HELESI

Applicant

and

THE SOUTH AFRICAN POLICE SERVICES

First Respondent

LT. SC KUTLER

Second Respondent

Date heard: May 4 2022

Delivered: July 20 2022 by means of email; deemed delivered on July 21 2022 at 10.00hr

JUDGMENT

RABKIN-NAICKER J

- [1] This is an opposed application for condonation of the late referral of a statement of claim. The dispute has a long history.
- [2] The applicant referred an unfair discrimination claim to the Safety Security Statutory Bargaining Council which ruled that it did not have jurisdiction to arbitrate the dispute on the 1 February 2017, and certified that the Labour Court was the forum in which the matter should be adjudicated. It should be noted that the unfair discrimination claim arose in 2016. The dispute was then referred

to the Labour Court, accompanied by an application for condonation, on the 3 February 2017. Pursuant to a special plea by the first respondent, the referral was withdrawn on the day of hearing, on March 2 2018, on the understanding that the CCMA was the body with jurisdiction to conciliate the dispute.

- [3] The applicant was granted condonation by the CCMA for the late referral of the dispute on 26 September 2018. The first respondent did not attend the condonation hearing, nor did it attend the conciliation and a certificate of non-resolution was issued on the 2 May 2019.
- [4] The applicant then referred the matter to this Court with an application for condonation in November of 2019. In June 2020, the first respondent filed answering papers opposing the condonation application, as well as a condonation application for the late filing of its answer. On the 12 June 2020, the first respondent referred a rescission application in respect of the CCMA's condonation ruling. This application to the CCMA was accompanied by a condonation application. On the 27 October 2020, condonation was refused for the late filing of the rescission application.
- [5] In this Court, the application before me was postponed *sine die* on the 27 July 2020, given the pending rescission application.
- [6] The applicant is employed by the first respondent in the position of Warrant Officer. The genesis of the dispute between the parties was the failure of the applicant to be appointed to an advertised position of Commander of the Counter Intelligence Division for Land Borders of the first respondent. A white candidate was appointed in his stead (the second respondent).
- [7] In the founding affidavit before me, the applicant considers the extent of the delay of bringing the matter to Court as being a two month period i.e. between the date of the certificate of non-resolution issued by the CCMA, and the launching of his action. The first respondent submitted before me, correctly with respect, that the application for condonation should have covered the entire period from the date of the applicant's referral to the bargaining council in February 2017. In the answering affidavit to the condonation application, the first respondent appears to accept a three month period however.

[8] The certificate of non-resolution was issued by the CCMA on the 2 May 2019, and the condonation application before me was signed by the applicant on the 31 October 2019. Applicant's explanation for the delay is founded on obtaining assistance from his legal insurer Scorpion. The details and dates explaining the reasons for the delay are scarce. The explanation reads as follows:

"I submit that my application for condonation is filed approximately 2 months late.

I took the following steps to pursue my rights after the matter was unresolved at the CCMA:

I went my legal insurer, Scorpion, to ascertain what amount of legal cover I have in place.

Subsequent the correspondence, the legal insurer had requested my attorneys to furnish a merit report for further assessment regarding cover for the said referral. (see attached Merit Report).

I had to wait for the assessment process to be finalized.

I received telephonic confirmation that there is sufficient cover in place.

My Legal insurer, Scorpion Legal Protection (Pty) Ltd, referred my matter to my attorney, for further assistance in the referral of my matter.

My attorneys of record had requested the legal insurer for confirmation as to whether the matter had enjoyed cover for this application to the above Honourable Court. They had moved into different office building at the end of August 2019 and had encountered problems with their IT systems and telephone lines for over 3 weeks which hindered effective communication. In early October 2019 their office received telephonic confirmation that there was adequate insurance cover in place.

I did not have the necessary funds to appoint a private attorney to assist me.

I contacted my representative at Ismail & Dayha Attorneys in October 2019 and signed the condonation application on October 2019."

- [9] In submission on behalf of the applicant, it was argued that the referral was not some 900 days late but in the region of 3 months. I am unable to understand what the basis for such an argument is. The decision of the applicant to withdraw his claim in the Labour Court and tender wasted costs, was taken on advice that the Labour Court did not have jurisdiction to adjudicate the matter, given that the dispute had not been conciliated at the CCMA. The same dispute which arose in February 2016 (the date on which an internal grievance was declared unresolved) remained subject to the time periods set out in the Employment Equity Act¹. That is why the applicant had to apply for condonation at the CCMA. For the same reason, his application for condonation in this Court had to cover and detail all the relevant periods of the delay.
- [10] In view of the above, the explanation before this Court of an extremely lengthy delay, cannot be considered as a reasonable one. Even on the applicant's incorrect premise of a three month delay, the explanation is lacking in adequate detail. I am therefore of the view that it is not necessary for me to consider the prospects of success in the main referral.² It was argued on behalf of the applicant that the first respondent had also been tardy and failed to properly defend the matter. This is true. However, the applicant is *dominus litus* and bears the onus to show sufficient cause for the Court to grant condonation. While the first respondent failed in its duties as a litigant, it was not put on notice for its failure to file an answering affidavit timeously, as the Practice Manual of the Labour Court requires³. It was therefore not incumbent on the first respondent to apply for condonation.
- [11] A further important consideration for the Court, is the principle of speedy resolution of disputes which is foundational to labour dispute resolution. The Labour Relations Act 1995 exhorts expeditious finality in labour disputes.⁴ It is over six years since the dispute arose.

¹ i.e. within six months of the alleged act or omission constituting alleged unfair discrimination in terms of section 10(2).

² *Colett v Commission for Conciliation, Mediation & Arbitration & others* (2014) 35 ILJ 1948 (LAC) paragraph 38.

³ Clause 11.4.2

⁴ *Republican Press (Pty) Ltd v Chemical Energy Paper Printing Wood & Allied Workers Union & others* 2008 (1) SA 404 (SCA); (2007) 28 ILJ 2503 (SCA) per Nugent JA

[12] In all the above circumstances, I am of the view that the application for condonation must fail. I make the following order:

Order

1. The application for condonation is dismissed.
2. There is no order as to costs.



H. Rabkin-Naicker

Judge of the Labour Court of South Africa

Appearances

Applicant: Aarninkhof Attorneys

First respondent: A Mosam SC with MR Mokwala instructed by the State Attorney