



Of interest to other judges

**THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG**

Case no: JS 487/15

In the matter between:

**PHILPPUS JOHANNES LODEWYK
OLIVIER**

First Applicant

and

**THE GEMEENSKAPLIKE KERK
KANTOOR OF THE AFRIKAANSE
PROTESTANTSE KERK**

First Respondent

**THE AFRIKAANSE PROTESTANSE
KERK RING VAN MIDDLEBERG EN
RING VAN POTGIETERSRUS**

Second Respondent

**CHURCH COUNCIL OF
AFRIKAANSE KERK
GROBLERSDAL CONGREGATION**

Third Respondent

Heard: 19 August 2016

Delivered: 23 August 2016

Summary: (Condonation – excessively late referral of automatically unfair dismissal claim – condonation application filed excessively late, compounding late referral – applicant legally represented throughout)

JUDGMENT

LAGRANGE J

Introduction

- [1] The applicant, Mr P J L Olivier ('Olivier') was employed as a minister by the third respondent, the church council or the Afrikaans Protestant church Grobblersdal Congregation ('the church'), from 2011 until his dismissal on 18 November 2014. Olivier has applied for condonation for the late referral of his statement of claim in which he contends, *inter-alia*, that his dismissal was automatically unfair under section 187 (1) (f) of the Labour Relations Act 66 of 1995 ('the LRA') on account of it being for a reason relating to sexual orientation, conscience, and or alternatively belief.
- [2] He was found guilty by the church on two charges of four grounds of misconduct he was charged with. The first is that, he had contravened the ninth biblical commandment prohibiting the bearing of false witness against another. In part, this concerned his allegedly false statements that the church had refused to assist him financially and that he had allegedly made fraudulent representations regarding his competence to lawfully conclude marriages. The second charge he was found guilty of was publicly associating himself with a firm which openly supports homosexuality by publishing a post on his Facebook page to the effect that he was employed by the firm. This was in breach of the churches' Articles of Legitimacy, which is a document authorising a person to act as a minister of the church. In terms of the church's doctrine, homosexuality is still regarded as a sin.

Condonation application

Extent of the delay

- [3] Although there might be a question mark over whether the applicant did in fact refer his alleged automatically unfair dismissal claim to conciliation or whether he simply referred a non-specific claim of unfair discrimination

under the Employment Equity Act 55 of 1998 ('the Equity Act'), it would seem on the affidavits that he had referred his unfair dismissal claim to the CCMA. Accordingly, for the purposes of this judgement, it is assumed that Olivier's dismissal was referred to conciliation by the CCMA and that, except for the need to condone the late referral, the absence or otherwise of a referral of the dismissals dispute as such to the CCMA is not an issue the court is concerned with.

- [4] What is not in dispute is that, a certificate of outcome was issued on 8 January 2015. Accordingly, the referral of the dispute to this Court should have been done within 90 days of the certificate being issued in terms of section 191 (5) (b) read with section 191 (11) (a) of the LRA. However, it was only referred on 3 July 2015, making it just under three months late, which is nearly double the time for making a referral provided for in the LRA. When the referral was eventually made, it was acknowledged in the referral that it was late and an undertaking was made that a condonation application would be filed 'in due course'. What constituted due course in the minds of the applicant's legal representative was clearly a very flexible concept because the condonation application was only filed on 9 March 2016, some eight months after the late referral.
- [5] The original delay in making the referral and the additional delay in filing the condonation application are both very excessive. The delay in filing the condonation application simply compounds the original delay because the case cannot progress until the late referral has been condoned. It is trite law that a condonation application should be made at the time the late referral is filed and a failure to do so as soon as it became apparent that there had been a delay is a further reason for refusing condonation when there is no good explanation why it was not done timeously.¹

Explanation for the delays

- [6] Olivier said is that his attorney instructed counsel to draft the statement of claim on his behalf "immediately after the certificate of outcome was

¹ *Librapac CC v FEDCRAW & others (1999) 20 ILJ 1510 (LAC)* at 1513, para [13].

issued”, and that his attorney “continuously pressurised counsel to deliver the statement of claim that Council seem(s) to be extremely busy and kept on making excuses for the delay in drafting the statement of claim”. According to the timeline, counsel and the attorney had already consulted by 20 January and Olivier already had his second consultation with his attorney on 6 February. It then took just over five weeks to hand the documentation to counsel. No explanation is provided why this took so long to do. Judging from the schedule of documents attached to the statement of claim, the documentation was not extensive. A further two weeks went by before there was a telephonic consultation between counsel and the applicant’s attorney and nearly six weeks after that, further documentation was provided to counsel. No justification is advanced for these long periods of apparent inactivity. A week after the further documents are provided Olivier consults again with the attorney and nearly two weeks thereafter further documents are provided to counsel. Olivier does not elaborate on why it took so long to provide counsel with all the documents and there is no explanation provided why the statement of claim could not be drafted earlier with the documentation that was at hand at the time or what was so critical about the outstanding documents that nothing could be done before they were obtained.

- [7] Olivier said that his attorney contacted council regularly by SMSes and emails between the sporadic interactions described above. Copies of those messages are attached to the founding affidavit. As far as the email correspondence is concerned, none of the attached correspondence until an email from Olivier to his attorney on 25 May 2015 appear to deal with this case at all. It is also noteworthy that the email from Olivier on 25 May attaches what is described as “die beskrywing van die saak” or a description of the case as requested by his attorney and counsel. It is startling that this document was only being provided well over a month and a half after the statement of case should have been filed. Further, none of the SMS’s or emails appear to refer to the alleged need for further documentation before the draft statement of case could be settled. Also absent from those communications is any reference to the fact that the deadline for filing the statement of case was approaching or had passed.

Anyone reading these messages would not be aware that any deadline was an issue of concern until a message is sent on 2 September, nearly two months after the statement of claim had been filed, in which the applicant's attorney writes to counsel:

"Hi Corne, gee my asb. 'n lui, ons moet praat oor Phillip Olivier, die kondonاسie aansoek moet asap uit, dit vat nou baie lank en ek's bang ons brand vingers..."²

- [8] The applicant makes no attempt to explain why, despite it being apparent that the referral was late at the time it was made, the condonation application was not filed at the same time. The sum explanation provided for a delay of eight months in filing the condonation application is the following:

"After the late filing of the statement of claim Council undertook to draft the application for condonation but due to work pressure was not able to do so. Eventually during October 2015 my attorney advised me to instruct different counsel to draft the application for condonation so is to ensure that the documents before court are in order. I agreed with my attorney and new counsel was instructed to draft the said application. However Council was not available to do so until the beginning of 2016."

In other words, it took the applicant and his attorney at least two months to realise that the appointed counsel was not going to do what he or she had been briefed to do, and when they did, the counsel who was appointed was not able to deal with the application until the following year. As things turned out, the new counsel did not even deal with the application at the beginning of the year but only did so by the beginning of March 2016. No explanation is given why the applicant and his attorney persisted so long in using the first counsel who appears to at least have been partially responsible for the statement of case being late in the first place to draft the condonation application, without even insisting on it been prepared by a certain date failing which other counsel would be appointed. Likewise, no explanation is given how it happened that the availability of the second

² This might be loosely translated as: "Hi Corne, please give me a ring. We must talk about Phillip Olivier. The condonation application must be issued as soon as possible. It has now taken very long and I am afraid we are burning our fingers."

counsel who was briefed to finalise the condonation application was not determined beforehand when the urgency of finalising the application should have been uppermost in their minds.

- [9] The hectic work schedules of clients is not an acceptable explanation for failing to act timeously in meeting litigation deadline.³ *A fortiori*, professionals who accept instructions have a duty to make sure that they do what is required of them without putting their client at risk of being non-suited because they prioritise other work. Quite apart from the conduct of Olivier's attorney and counsel, he also gives no account of his own understanding and concern, or lack thereof, about the progress of his referral, or why he did not put any pressure on his attorney to expedite the condonation application.
- [10] In essence, what the applicant has tendered as an explanation is merely a chronology of intermittent small steps taken over a period of three months in with there are significant unexplained periods of inactivity in between those steps. What it reveals is an indifferent attitude towards the statutory time limits on the part of the applicant and his legal team. An explanation based on neglect cannot constitute a reasonable explanation. Moreover, the reasons for each part of the delay are not set out in any detail.⁴ In addition, the broadbrush description of the reason for the eight month delay in filing the condonation application, which is quoted above, is breathtakingly vague.
- [11] Recently, the LAC has emphasised that the absence of a proper explanation where there has been a flagrant disregard of the time limits is sufficient basis to dismiss a condonation application irrespective of the merits:

"[38] There are overwhelming precedents in this court, the Supreme Court of Appeal and the Constitutional Court for the proposition that where there

³ *Bonga v Minister of Defence & others (2006) 27 ILJ 799 (LC)* at 804, paragraph 20.

⁴ On the importance of providing a full explanation and the risk that a failure to explain any part of the delay may lead to a condonation application being dismissed see *NUMSA & another v Hillside Aluminium [2005] 6 BLLR 601 (LC)* at 603-606, especially at paragraphs 12 and 19.

is a flagrant or gross failure to comply with the rules of court condonation may be refused without considering the prospects of success. In *NUM v Council for Mineral Technology* it was pointed out that in considering whether good cause has been shown the well-known approach adopted in *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532C-D should be followed, but —

'[t]here 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 good prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused'.

[39] The submission that the court a quo had to consider the prospects of success irrespective of the unsatisfactory and unacceptable explanation for the gross and flagrant disregard of the rules is without merit.⁵

[12] It is also important in this regard to bear in mind that the resolution of labour disputes envisaged in the LRA is intended to be an expeditious process and parties cannot litigate at their leisure. In this regard, a useful summary of the legislative policy and jurisprudence which supports this approach is set out in the Labour Court judgement of ***Makuse v Commission for Conciliation, Mediation & Arbitration & others***.⁶

[13] For the reasons above I am satisfied that this is a case where there really is no reasonable explanation before the Court for the inordinate delays in finalising the referral and filing of the condonation application, and that this is a case where the matter ought to be dismissed on this ground alone. Even if I am wrong in this regard and consideration is given to the merits of the matter, and if I ignore the fact that the prospects of success were not specifically pleaded on affidavit as they should have been, I do not think condonation ought to be granted in any event. My reasons for this are set out below.

⁵ ***Colett v Commission for Conciliation, Mediation & Arbitration & others*** (2014) 35 ILJ 1948 (LAC) at 1955-1956.

Merits and other considerations

- [14] It was urged on me by the applicant's counsel to consider the fact that the case potentially deals with important constitutional issues. It is true that where the case concerns an important matter of principle that the absence of a properly explained delay may be excused.⁷ Thus in the *Charlotte Theron* case, a delay of four months in referring a dispute involving a racist job allocation policy was excused on this ground. In that instance, part of the reason for the delay was that the Court appeared to accept that the applicants could not have been aware of the significance of the delay and their attorney had difficulty consulting with them because they were geographically scattered at the time. The question which arises is, can an applicant and his representatives be excused for adopting a casual approach in the referral of his claim because he appears to have some prospect of challenging his dismissal on a constitutional ground?
- [15] The paradox is that, despite the importance of the claim as contended for by the applicant, neither he nor his representatives themselves treated it as such in prosecuting it, but ask that the court should ignore their own indifference in pursuing the matter and treat it with the seriousness it should have deserved. While there will be instances where there is a weak explanation for the delay such as in the *Charlotte Theron* matter, I do not think that establishes a general principle that an applicant can simply be excused their own neglect provided the case raises an important issue. At the very least, in a situation where a party is legally represented from the start, one would expect that party to also demonstrate by its own conduct the importance attached to the prosecution of the case which it asks the court to recognise.
- [16] Notwithstanding the potentially important issue raised by the case, I do not think that the court can simply turn a blind eye to the negligent way it has been prosecuted. Much of the blame may be attributable to the applicant's attorney and former counsel involved in preparing the statement of case

⁷ See *National Education Health & Allied Workers Union on behalf of Mofokeng & others v Charlotte Theron Children's Home (2004) 25 ILJ 2195 (LAC)* at 2201, paragraph 26

and the condonation application, but he also gives no account of his own role in allowing the matter to proceed at a snail's pace. Insofar as he might have been the victim of his legal representatives' conduct, then he will have a claim against them for professional negligence.⁸

[17] It is true that the church has not pleaded any specific prejudice it might suffer owing to the delay, but I do not think that is a decisive factor in this instance.

Order

[18] The application to condone the late referral of the applicant's statement of claim is dismissed.

[19] No order is made as to costs.



Lagrange J
Judge of the Labour Court of South Africa

⁸ *Arnott v Kunene Solutions & Services (Pty) Ltd* (2002) 23 ILJ 1367 (LC) at 1374 paragraph 38

APPEARANCES

APPLICANT: G J Scheepers instructed by J H Cavanagh
Attorneys

RESPONDENT: R Grundlingh instructed by Bester &
Rhodie Inc.

LABOUR COURT