Reportable

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT JOHANNESBURG

Case No: JS 457/2016

In the matter between:

DITSE EMILY MDLULI **Applicant**

and

INTERNATIONAL UNION FOR CONSERVATION OF NATURE **Respondent**

Heard: 27 October 2017

Delivered: 7 November 2017

Summary: (Condonation – negligence of legal representatives – applicant acted reasonably – appropriate cost order)

JUDGMENT

LAGRANGE J

Background

[1] This is an application for condonation for the late filing of a statement of claim.

[2] The respondent also raised a special plea relating to jurisdiction on the basis that the applicant had referred her unfair dismissal dispute to the CCMA on 9 September 2015 before her last working day on 18 September 2015. Consequently, the referral to conciliation was made before any of the dates which could have constituted the date of her dismissal determined as by section 190 of the LRA. Nonetheless, at the hearing of the condonation application and the special plea, the special plea was withdrawn, correctly in my view[1].

Condonation application

The degree of lateness

[3] A certificate of outcome was issued on 17 November 2015 and the referral to this court should have been made by 15 February 2016. However the referral was only made on 25 July 2016, making it five months late, which excessively late. A proper condonation application itself was only filed on 22 December 2016 after the applicant had appointed new attorneys of record, having been seriously led down by her original representatives.

The explanation for the delay.

[4] In the certificate of outcome issued on 17 November 2015, the Commissioner indicated that the dispute could be referred to arbitration, which is what the applicant's erstwhile attorneys did.

[5] The matter was enrolled timeously for an arbitration that was due to be heard on 19 April 2016. The respondent's attorneys wrote to the applicant's erstwhile attorneys, Hlahla Inc, on 8 February 2016 requesting the withdrawal of the referral to arbitration. The request was motivated on the basis that section 191 (5) (b) (ii) and 191 (12) of the Labour Relations Act 66 of 1995 ('the LRA') applied to her dismissal because the respondent employed more than 10 employees, and her retrenchment had

[1] In PPWAWU v Nasou-Via Afrika (A division of the National Education Group (Pty) Ltd),590 dealing with the situation where a dismissal dispute is referred prematurely,591 the court held that section 190(1) "should only be invoked as a means of determining whether the 30-day period prescribed by section 191(1) of the Act has expired, and should not be invoked to find that a referral is premature, when in fact the full dismissal dispute was conciliated".

been part of a process which had involved the consultation and dismissals of more than one employee. Accordingly, the matter should not have been referred to arbitration. The respondent also warned that it would seek a cost order against the applicant if the referral to arbitration was not withdrawn. However, it was only a week before the arbitration the applicant was advised by Mr Hlahla ('Hlahla') that the respondent was objecting to her dispute being heard by the CCMA. To make matters worse, she was advised that the respondent's objection was ill founded. However, on 19 April, the Commissioner agreed with the respondent and held that he didn't have jurisdiction to the matter as the dispute fell within the provisions of section 191 (12) of the LRA, a ruling which ought to have been foreseen by Hlahla.

[6] The applicant had inquired from Hlahla, how long they had to refer the dispute and was erroneously advised that it was 90 days from the 19 April. Even if Hlahla believed that he had 90 days after 19 April to make the referral, he in fact took 94 days to do so. In any event, by 2016 he ought to have known the referral was already late when the ruling was handed down. There was a time when there was some confusion about whether the 90 day period for referring a dispute to this court under section 191 (11) of the LRA commenced only from the expiry of the issue of the certificate of outcome or whether it commenced after a later jurisdictional ruling by an arbitrator to the effect that the dispute could not be determined by arbitration. However, any such doubts were unequivocally settled by the Constitutional Court judgement in ***F & J Electrical CC v Metal and Electrical Workers Union of South Africa obo Mashatola and others***[2] which was handed down on 17 February 2015. In that case, the respondent union had also referred a dismissal dispute to court late in the belief that the 90 day period only commenced running after an adverse jurisdictional ruling by an arbitrator. The Constitutional Court unequivocally set the record straight:

> "The union contended that the referral of the dispute to the Labour Court was within the prescribed period. It seems that this contention was based

[2] [2015] 5 BLLR 453 (CC)

> on a misconception that the 90-day period was to be reckoned from the date of the ruling of the CCMA. That is not so. In this case the period had to be reckoned from the date when the certificate was issued. In the absence of a finding that there was good cause for the failure to refer the dispute within the prescribed period, the Court had no jurisdiction to adjudicate the dispute."[3]

Though it is not unreasonable for the applicant not to have known this, it is inconceivable that any legal professional practising in this area of law would not be aware of such an important judgement more than a year after it was handed down.

[7] In the second week of May 2016, the applicant contacted Hlahla to find out when she could sign the statement of case to ensure that it was filed timelessly and was informed that he wanted to appoint counsel and required a deposit of R 30,000. An email from herself to Hlahla on 17 May 2016 asking for confirmation of the amount went unanswered. She struggled to get hold of him and it was only at the end of May that she was told that counsel had not yet been appointed and her statement of case was not ready. On 1 June she received a letter from Hlahla requiring payment of the deposit before he would proceed further with the matter. Notwithstanding this, Hlahla did instruct counsel, one Advocate Tema, and the applicant arranged to consult with him on 4 July.

[8] When it became clear to her that they were reluctant to do anything further until she paid a deposit, on 7 July she advised Hlahla that she would make a deposit on 8 July. As matters turned out the confirmation of a deposit was sent to Hlahla on 14 July. Shortly after this, the applicant claims that she received a statement of case which had been revised and was told by her attorney that he would see to it that it was served and filed. She does not know why it was not filed within the 90 day period after the jurisdictional ruling, albeit that as a matter of law, the referral was long overdue already.

[9] The applicant says that she was unaware of the need to file a condonation application until this was pointed out by her current attorneys of record.

[3] At 461, para [30].

However, she was aware that the referral might be late but claims that when she raised it with Hlahla, he indicated that any delay would be very short and the court would be requested to excuse it. She also says she was under the impression that the statement of case had addressed the condonation question. The statement of case did indeed request condonation of the late referral, but did not rely on an apparent misconception that the 90 day period only commenced running from the date of the jurisdictional ruling. Instead, the condonation sought, was premised on an assumption that the referral should have been made within a month and therefore was "42 days" late. Arithmetically, this calculation makes no sense at all unless the statement of case was drafted towards the end of June in anticipation it would be served then. This tends to suggest it was held back by Hlahla pending the receipt of funds from the applicant.

[10] The applicant remained unaware of the status of her matter until after Hlahla withdrew the day before a pre-trial conference was set down before court. She was not informed by him of the pre-trial conference but by the respondent's attorneys, who had already written to Hlahla in August 2016 asking him to submit a pre-trial conference agenda. On 7 November 2016, the day before the matter was set down before a judge for a pre-trial conference, her erstwhile attorney of record withdrew as attorney of record. His failure to convene a pre-trial conference led to the court awarding costs to the respondent.

[11] A pre-trial minute was eventually concluded on 24 October 2016 between the applicant's current attorneys of record and the respondent's attorneys. In the pre-trial minute, it was agreed that the applicant would file a condonation application "as soon as possible" for the late referral of her statement of claim. However, it took nearly two months before this was done and no explanation whatsoever for this additional lengthy delay was provided either by the applicant or her new attorneys of record. It is trite law that a party that has not filed a condonation application timelessly should do so as soon as possible.

[12] Nonetheless, the very reason the referral was late in the first place and the reason for the bulk of the delay which necessitated the condonation application was caused by the apparent negligence of the applicant's erstwhile attorneys and not by her own conduct. She maintained ongoing contact with them and enquired about the progress of the referral. She was assured that if it was late, the degree of lateness would be slight and was clearly misled about the true extent of the delay.

[13] I am satisfied that although it is true that an applicant cannot escape the consequences of poor legal advice, in this instance she had no reason to believe anything was seriously amiss. This was compounded by the fact that she was not kept informed about correspondence from the respondent's attorneys. As things stand, I am satisfied that her explanation for the delay in filing her referral is reasonable.

Prospects of success

[14] I agree that the deponent to the respondent's replying affidavit could not personally depose to the factual basis of the merits of the applicant's claim. On the applicant's version, it would appear that she has some prospect of establishing that her retrenchment was a *fait accompli* by the time it was raised for discussion because her post was made redundant by an earlier restructuring, when the prospect of her retrenchment should have first become apparent.

Prejudice

[15] The respondent has alleged it will suffer prejudice in general terms but did not cite any specific fact which will make it difficult to defend itself against the claim and it would not have been unaware of the possibility the applicant might still pursue her claim in the Labour Court.

Conclusion

[16] Taking the above into consideration, I am satisfied that the late referral of the statement of claim should be condoned.

[17] On the question of costs, given that the primary cause of the condonation application having to be brought lies with the applicant's erstwhile attorney of record, it is appropriate to follow the example of this court in the case of ***Van Dyk v Autonet (A Division of Transnet Ltd)***[4] and consider a cost order *de bonis propris* against Hlahla Inc. As in that case, I am also satisfied that the opposition to the condonation application was not frivolous.

Order

[1] The applicant's late referral of her statement of claim is condoned.

[2] Within 15 days of receipt of this order, the appicant's erstwhile attorneys of record, Hlahla Inc. must show good cause why they should not be ordered to pay costs *de bonis propris* to the respondent for its costs incurred in opposing the condonation application on account of failing to timeously refer the applicant's statement of claim.

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Lagrange J

Judge of the Labour Court of South Africa

[4] (2000) 21 ILJ 2484 (LC) at 2489, para [19]

APPEARANCES

APPLICANT:	G van der Westhuizen instructed by MacRobert Attorneys
RESPONDENT:	W P Bekker instructed by Gildenhuys Malatji Inc.