IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JS1107/18

In the matter between:

VANIMALA CHETTY **Applicant**

And

BAKER MCKENZIE **Respondent**

Date heard: 29 December 2018

Delivered: 04 February 2020

JUDGMENT

CONRADIE, AJ

[1] The applicant (Chetty) is an attorney and former partner at the respondent (Baker McKenzie).

[2] She resigned from Baker McKenzie on 16 September 2017 and alleged that her resignation was in fact a constructive dismissal.

[3] She referred two disputes to this court. In the one she seeks an order that her dismissal was automatically unfair in terms of section 187(1)(f) of the

Labour Relations Act 66 of 1995 (the LRA). In the other she seeks an order that she was discriminated against by Baker McKenzie as contemplated in section 6(1) of the Employment Equity Act 55 of 1998 (EEA) based on her race and gender.

[4] The automatically unfair dismissal dispute is late by some 11 months and requires condonation. Baker McKenzie opposes the application for condonation.

[5] In my view, Chetty has not put up a reasonable and acceptable explanation for the delay and I have decided not to grant her condonation. This judgment therefore only deals with Chetty's explanation for the delay and Baker McKenzie's response.

Chetty's explanation for the delay

[6] Chetty provided the following explanation for the late filing of her automatically unfair dismissal claim:

6.1 She resigned on 16 September 2017.

6.2 On 16 October 2017 she referred an unfair dismissal (constructive dismissal) dispute to the CCMA.

6.3 On 14 November 2017 the CCMA issued a certificate of non-resolution.

6.4 The matter was referred to arbitration on 8 February 2018 and was set down for 7 May 2018, but was subsequently postponed by agreement.

6.5 The arbitration was set to resume on 20 and 21 June 2018. In preparation for the arbitration it became apparent to her attorneys at the time, Hoosen Wadiwala Inc (HWI), that there was an inextricable nexus between the allegations of discrimination based on race and gender and her constructive dismissal dispute. Prior to this, the unfair dismissal dispute was pursued on the basis of "reasons unknown".

6.6 She was advised that she could not pursue any case of unfair discrimination if such a case had not been referred to the CCMA. Because of this, and with a view to further exploring the possibility of settlement, the arbitration did not proceed on 20 and 21 June but was postponed by agreement.

6.7 The arbitration was subsequently set down for 31 July 2018.

6.8 The settlement did not materialize and on 27 July 2018 she referred an additional dispute to the CCMA in terms of the EEA, alleging that she was discriminated against. In her referral, she stated that the dispute arose on 26 April 2018.

6.9 As the EEA discrimination dispute was late, she applied to the CCMA for condonation. She did this on 16 August 2018 and at the same time applied to have the EEA discrimination dispute consolidated with the constructive dismissal dispute.

6.10 On 7 September 2018 the CCMA granted condonation for the late referral of the EEA discrimination dispute but refused to consolidate the dispute with the constructive dismissal dispute.

6.11 On 1 October 2018 the unfair discrimination dispute was conciliated and a certificate of non-resolution was issued.

6.12 She was advised that a discrimination dispute and any dismissal dispute based on discrimination had to be referred to the Labour Court for adjudication. She was "then" referred to Sean Snyman (Snyman) who advised her that her constructive dismissal case was founded on the same allegations of discrimination based on race and gender. The discrimination was not only a contravention of the EEA but also the very issue that rendered her continued employment intolerable. As such the constructive dismissal would be an automatically unfair dismissal dispute as contemplated by section 187(1)(f) of the LRA and had to be referred to the Labour Court.

6.13 She was also advised by Snyman that if the constructive dismissal dispute was to be arbitrated in the CCMA and if she were to raise discrimination as it's basis, the CCMA would lack the jurisdiction to entertain the matter. It was apparent to her that she needed to refer both disputes to the Labour Court.

6.14 As the certificate of outcome in respect of the unfair discrimination dispute was issued on 1 October 2018 she had until 30 December 2018 to refer this dispute to the Labour Court.

6.15 A statement of case covering both the automatically unfair dismissal and the EEA discrimination dispute was prepared. She claims that it was served and filed on 21 December 2018.

6.16 As Snyman was acting as a Judge in the Labour Court, he was only available after 14 December 2018 to assist in the finalisation of her statement of case. In addition to this, the parties were exploring settlement in the matter from time to time between June and November 2018.

Baker McKenzie's Response

[7] Baker McKenzie's response can be summarised as follows:

7.1 On 16 September 2017, the same day Chetty resigned, it received a letter from Chetty's attorneys at the time, HWI, which contained the following allegations relating to discrimination:

> *"24.6 Regarding the BM Article 11 equity partner evaluation process, our Client has the impression that the standards and process applied to evaluation of Messrs van der Merwe and Du Plessis were different to and less onerous than those that applied to her and the refusal to support a 12 month deferral (usually a formality in the past) seems both unfair, discriminatory, and part of a process of victimisation".*
>
> *"24.7 It has become apparent that our Client has presented both a significant challenge as well as a threat to the white male leadership in BMSA by refusing either to agree or be complicit in decisions of which she is not supportive as she believed these to be detrimental to the best interests of BMSA".*
>
> *"24.8 The conduct perpetrated against her ignores the key BM values of promoting racial and gender diversity, inclusion and transformation and is in fact discriminatory, which leaves our Client to believe that BM has misinterpreted South African constitutional values in similar vein as was evidence in the publicised Bell Pottinger saga".*
>
> "*34 Our client similarly reserves her rights formally to engage both with the Black Lawyers Forum as well as the South African Human Rights and Gender Commissions regarding the discriminatory manner in which she has been victimised and mistreated*.

"*37 Our Client is of the view that the action taken against her is extremely unfair, discriminatory, highly prejudicial reputationally and has caused an irretrievable breakdown in the working relationship".*

7.2 In her condonation application at the CCMA, Chetty alleged that it had become apparent to her attorneys that there was an "*inextricable nexus*" between the allegations of discrimination based on race and gender and her constructive dismissal dispute. To this she added that she had a consultation with her attorneys three months earlier in March 2018 where she was informed that her exit was "*maliciously motivated on the basis of race as well as gender"* and this was later highlighted in a letter to Baker McKenzie. This proved that Chetty was aware, at the outset, that she could have referred the automatically unfair dismissal dispute to the Labour Court.

7.3 Chetty's unfair discrimination dispute stated that the dispute arose on 26 April 2018.

7.4 Chetty's statement of case was only served and filed on 7 January 2019 and not on 21 December 2018 as claimed by Chetty.

7.5 There was a significant delay between the filing of the statement of case and the subsequent application for condonation for the late filing on 1 March 2019.

7.6 In the condonation ruling of 7 September 2018, Chetty was once again alerted to the fact that the unfair dismissal dispute should be referred to the Labour Court if she were to allege the reasons were due to discrimination, as the CCMA would then lack jurisdiction to entertain the matter.

7.7 Chetty's reliance on the fact that her new attorney, Snyman, was unavailable till 14 December 2018 is no excuse. She could simply have sought the assistance from another available attorney from the same *"law firm and consultancy with multiple practitioners"*. There is no explanation for her not doing so.

7.8 Although sporadic settlement discussions took place between June 2018 and November 2018, this was not an overriding or acceptable explanation for Chetty's failure to refer the matter to the Labour Court since the settlement discussions were a parallel process and did not affect the referral process.

7.9 In the same vein, on 20 November 2018 it sent Chetty a without prejudice letter informing her that the settlement attempts did not affect any time periods in respect of claims. Additionally, it raised the same point in its opposing affidavit in the application for condonation for the late filing of the discrimination dispute in the CCMA.

Analysis

[8] Whether I accept Chetty's date or that of Baker McKenzie in respect of when the automatically unfair dismissal dispute was delivered to this court does not really matter. On either version the delay is more than 11 months, which is excessive.

[9] It is clear from the letter from HWI to Baker McKenzie dated 16 September 2017 that Chetty was of the view that she was the victim of discrimination.

[10] Even though discrimination was not the sole cause for Chetty's complaint it loomed large. Yet she proceeded to refer an ordinary constructive dismissal dispute on 16 October 2017 and only pursued an unfair discrimination dispute on 27 July 2018. In my view, Chetty did not require legal advice to tell her that she was the alleged victim of unfair discrimination. As early as 16 September 2017 she had a clear sense that she was discriminated against. This is a matter of fact and not law. The role of her attorneys would have been to advise her on whether or not what she experienced amounted to discrimination in the legal sense and what legal options were available to her in order to seek redress.

[11] In addition to Chetty being aware of potential discrimination and not requiring legal advice to tell her this, I find it highly unlikely that HWI would not have discussed a discrimination based claim with her and the legal requirements for such a claim. It is apparent from the 16 September letter that HWI had detailed instructions from Chetty. The letter is 11 pages long and

meticulously details the circumstances in which Chetty joined Baker McKenzie, her commitment to the values of the firm, her contribution to growing the firm in the area of competition law, the circumstances surrounding the "administrative leave", the attempts to "exit" her, the threatened disciplinary process and of course the overarching complaint of discrimination. The letter is not the product of an inexperienced labour lawyer. In fact, it is not in dispute on the papers that Mr Wadiwala of HWI is as an experienced labour lawyer who would have knowledge and experience of the appropriate forums and procedures for the hearing of labour disputes.

[12] It is telling that Chetty at no point deals with the termination of HWI's mandate and the reasons for the termination. We know that it was HWI that advised Chetty, in preparation for the arbitration which was scheduled for 7 May 2018, of the inextricable link between her allegations of discrimination based on race and gender and her constructive dismissal. This advice must have given rise to the decision to refer the unfair discrimination dispute to the CCMA which happened on 27 July 2018 along with a condonation application. The referral was done by HWI. After condonation was granted the unfair discrimination dispute was subjected to conciliation on 1 October 2018. HWI seems to disappear somewhere around this point because the next thing that Chetty says in her papers is that she was advised that an unfair discrimination dispute had to be referred to the Labour Court. The origin of the advice and when it was received is not disclosed although she says that she was "then" referred to Snyman for assistance.

[13] According to Chetty, *"Following consultation with Snyman, he advised me, which advice I accepted, that my constructive dismissal case was founded on the same allegations of discrimination based on race and gender. In simple terms, the discrimination was not only a contravention of the EEA, but was also the very issue that rendered my continued employment to be intolerable"*. Two things stand out for me. Firstly, Chetty does not tell us when she consulted Snyman. Baker McKenzie alludes to this in its answering papers, but Chetty still does not clarify this in her replying papers. Secondly, the advice from Snyman quoted above is the exact advice which HWI gave her in the lead up to the 7 May 2018 arbitration.

[14] The only date which Chetty does give us in respect of Snyman is 14 December 2018 which is when his acting stint in this court ended. It was only after this date that he could assist her with the final completion of the statement of claim which was filed within a week thereafter. The words "final completion" are noteworthy. Does it mean that Snyman worked on the statement of case prior to the commencement of his acting term? If so, the date of the consultation or consultations with Snyman are once again important, as well as the date on which he commenced his acting term. Does it mean that someone else prepared a draft statement of case for Snyman to settle? As Baker McKenzie has argued, Snyman is part of a large firm and someone else in the firm could have assisted Chetty. In any event, an appropriate counsel could have been briefed by Snyman's firm or another firm of attorneys could have been approached. However, for reasons that have not been provided, Chetty chose to wait for Snyman.

[15] It should also be mentioned, although the decision which I have reached does not depend on it, that Chetty is an attorney and although her area of expertise is not labour law she must have appreciated the need to refer her automatically unfair dismissal dispute to this court without delay given the circumstances. In addition to this, one would have expected Chetty to have been even more diligent on the issue of condonation, given that shortly before approaching this court she had to apply for condonation in the CCMA, which was opposed, for the late referral of the unfair discrimination dispute.

[16] The delay in bringing this condonation application is also cause for concern. This delay was occasioned by Snyman's non-availability as he was on leave and his desire to amend the statement of case. He returned from leave on 21 January 2019 and the amended statement of case and condonation application was only filed on 1 March 2019. I can see no reason why the condonation application was not submitted along with the original statement of case. The fact that there was an intention to amend the statement of case is no justification for not timeously bringing the condonation application. Nothing in the condonation application was dependant on the contents of the amended of statement of case.

[17] The settlement negotiations between June 2018 and November 2018 are also not of assistance to Chetty. Settlement negotiations are a parallel process and are by their very nature uncertain. There is no guarantee that parties will settle. Time limits prescribed by the LRA are not simply overridden on the basis that there are settlement discussions. In any event, Chetty herself stated in her affidavit of 15 August 2018, in support of her condonation application for the late referral of her unfair discrimination dispute to the CCMA, that she *"realised that settlement was not a serious prospect in the near future.*"

[18] Everything said and done, although Chetty knew prior to 7 May 2018 that the constructive dismissal dispute was founded on allegations of race and gender discrimination she chose to only file her automatically unfair dismissal dispute at the end of December 2018 or beginning of January 2019 on the respective versions. She has failed to put up a reasonable and acceptable explanation for this.

[19] While there are numerous cases dealing with condonation, the following cases are particularly appropriate to the current case.:

a. In *Collett v Commission for Conciliation, Mediation & Arbitration*[1] the LAC stated that:

"There are overwhelming precedents in this court, the Supreme Court of Appeal and the Constitutional Court for the proposition that where there 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 (1999) 3 BLLR 209 (LAC) at para 10, 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 532 C-D... should be followed but:

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

[1] [2014] 6 *BLLR* 523 (LAC).

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."[2]

b. "In eThekwini Municipality v IngonyamaTrust[3]*, the court said the following where the explanation furnished did not cover the entire period and part of the delay was unexplained:*

As stated earlier, two factors assume importance in determining whether condonation should be granted in this case. They are the explanation furnished for the delay and prospects of success. In a proper case these factors may tip the scale against the granting of condonation. In a case where the delay is not a short one, the explanation given must not only be satisfactory but must also cover the entire period of the delay. Thus in Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae), this Court said in this regard:

"An applicant for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of delay. And, what is more, the explanation given must be reasonable..."[4]

"Strictly, according to the applicable authorities, in the absence of a satisfactory explanation for an unreasonable delay, it is not necessary for the court to embark on an inquiry into the prospects of success. (See Collett v Commission for Conciliation, Mediation & Arbitration (supra)".[5]

[20] In the circumstances, the condonation application must fail.

Order

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

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BN Conradie

Acting Judge of the Labour Court of South Africa

[2] At para 6.
[3] 2013 (5) *BCLR* 497 (CC) at para 28.
[4] At para 11.
[5] At para 12.

Appearances:

Applicant: RJC Orten of Snyman Attorneys

Respondent: A Redding SC

Instructed by: Adams & Adams