

THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JA129/23

In the matter between:

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES

First Appellant

DEPARTMENT OF CORRECTIONAL SERVICES

Second Appellant

and

SIFISO NENE

Respondent

Heard: 16 May 2024

Delivered: 13 June 2024

Coram: Musi JA, Van Niekerk JA, Govindjee AJA

JUDGMENT

Govindjee, AJA

Introduction

[1] This appeal considers whether the Labour Court erred in granting condonation for non-compliance with the provisions of the Institution of Legal Proceedings Against Certain Organs of State Act, 2002¹ (the Act). The respondent (Mr Nene) was employed by the second appellant (the Department) in 1994. Some two decades later he was dismissed for misconduct. Following an unsuccessful attempt to hold the Department responsible for an unfair dismissal before the General Public Service Sectoral Bargaining Council, Mr Nene instituted a claim for damages, based on breach of contract, in the sum of R9 million.

¹ Act 40 of 2002.

[2] The Department raised various matters in response, including a special plea of non-compliance with the Act. During November 2019, and following an order of court clarifying the basis of the claim and the need to seek condonation, Mr Nene applied for condonation due to his non-compliance with sections 3 and 4 of the Act. The explanation proffered for the delay was the failure to appreciate the applicability of the Act to claims arising from employment. The Department opposed the application. It claimed that Mr Nene had failed to give a full and proper account of the extensive delay, that his prospects of success were weak and that he had not shown good cause to merit condonation.

[3] On 12 March 2021, the Labour Court granted an order condoning Mr Nene's failure to comply with the provisions of the Act. Remarkably, the Department's request for reasons for this order was only brought to the attention of the presiding judge some 17 months after it had been requested, due to an administrative error. The Labour Court granted condonation, in essence, based on the following considerations:

'In these circumstances, it is quite apparent that Mr Nene is flailing about for some relief pursuant to his dismissal. He has only enjoyed intermittent legal representation and has, for a long time, appeared confused about the legal basis for his claim (not the facts giving rise to it). The interests of justice do not favour closing the doors of court to a litigant in these circumstances... The delay is long. The explanation for the delay is not ideal, but is plausible...'

[4] On the merits, the Labour Court held that Mr Nene had raised a triable issue with prospects of success. His *bona fides* were accepted due to a lack of legal representation and Mr Nene's demonstrated commitment in attempting to follow court orders directing various forms of conduct. In addition, the Department would not be prejudiced by an order granting condonation.

[5] The Department applied for leave to appeal some three weeks after receipt of the reasons for the order of the Labour Court and filed heads of argument a fortnight later. The application only came to the attention of the presiding acting judge more than six months later. It took a further month for the Labour Court to consider this

application, and to draft the single, terse, paragraph granting leave, without any meaningful explanation of the reasons for this decision.

The Act

[6] It is open to an organ of state to consent to the institution of legal proceedings absent written notification, or upon receipt of a notice that does not comply with the provisions of the Act. That aside, legal proceedings for the recovery of a debt may not be instituted against an organ of state unless the creditor has given written notice of intention to institute the legal proceedings in question.² The notice must briefly describe the facts giving rise to the debt and the particulars of the debt within the knowledge of the creditor. It must be served on the organ of state within six months from the date on which the debt became due.³ Failure to do so timeously typically necessitates an application for condonation.

[7] A court may grant an application for condonation if it is satisfied that the debt has not been extinguished by prescription; good cause exists for the failure by the creditor; and the organ of state was not unreasonably prejudiced by the failure.⁴ These requirements are conjunctive and must be established by Mr Nene.⁵ Interpreting these stipulations requires appreciation of s 39(2) of the Constitution of the Republic of South Africa, 1996, so that a generous and purposive interpretation may be given. With that in mind, the crux of the present appeal is whether the Labour Court erred in finding good cause to condone Mr Nene's delay in serving the statutory notice.

Analysis

[8] It is common cause that Mr Nene was dismissed on 19 September 2014. His submission is that this was baseless, thereby justifying his claim for damages. In the language of the Act, this was the time that the debt became due, given that he had

² S 3(1) of the Act.

³ S 3(2) of the Act. The manner of service of the notice is prescribed in s 4 of the Act.

⁴ S 3(4) of the Act.

⁵ *Minister of Agriculture and Land Affairs v CJ Rance (Pty) Ltd (Rance)* 2010 (4) SA 109 (SCA); [2010] 3 All SA 537 (SCA) at para 11.

knowledge of the identity of the organ of state and of the facts giving rise to the debt.⁶ He was accordingly obliged to serve notice of the intended legal proceedings on the Department within six months from this date.⁷ An application for condonation for non-compliance with the notice requirement was filed more than four and a half years outside this time period.

[9] It was nevertheless open to the Labour Court to grant condonation for this delay and leave for the institution of the claim.⁸ Before doing so, however, it had to be satisfied that the various prerequisites for such an order were met. It is common cause that the debt had not been extinguished by prescription. The Department's case is that the Labour Court erred in finding good cause for Mr Nene's failure to serve the statutory notice timeously, and disregarded the unreasonable prejudice occasioned as a result of his conduct. Considering the nature of the discretion exercised by the Labour Court, and its statutory underpinning, it is this Court's prerogative to reconsider whether the statutory requirements for condonation were fulfilled and to substitute the Labour Court's decision if necessary.⁹

[10] To satisfy the requirement of "good cause", an applicant for condonation is required to furnish an explanation of the default "*sufficiently full to enable the court to understand how it really came about, and to assess his / her conduct and motives*".¹⁰ The explanation must cover the entire period of the delay and must be reasonable.¹¹ The interests of justice also necessitate consideration of the merits of the case, and Mr Nene's prospects of success.¹² It has been held that strong merits may mitigate fault, whereas an absence of merits might render mitigation pointless:¹³

'... that the merits are shown to be strong or weak may colour an applicant's explanation for conduct which bears on the delay: an applicant with an overwhelming case is hardly likely to be careless in pursuing his or her

⁶ S 3(3) of the Act.

⁷ S 3(2)(a) of the Act.

⁸ S 3(4)(a) and s 3(4)(c) of the Act.

⁹ *Premier, Western Cape v Lakay (Lakay)* 2012 (2) SA 1 (SCA) at para 14.

¹⁰ *Madinda v Minister of Safety and Security* 2008 (4) SA 312 (SCA) at para 11.

¹¹ *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)* 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 at para 22.

¹² *Rance* above n 5 at para 37.

¹³ *Madinda* above n 10 at para 12.

interest, while one with little hope of success can easily be understood to drag his or her heels.'

[11] It follows that the court must be placed in a position to assess the merits of the matter, and to balance that factor with the cause of the delay:¹⁴

'A paucity of detail on the merits will exacerbate matters for a creditor who has failed to fully explain the cause of the delay. An applicant thus acts at his own peril when a court is left in the dark on the merits of the intended action...'

[12] The third dimension of s 3(4)(b) requires Mr Nene to satisfy the court that the Department was not unreasonably prejudiced by his failure to serve the notice timeously. The proper approach to determining this issue has been settled by the SCA:¹⁵

'This must inevitably depend on the most probable inference to be drawn from the facts which are to be regarded as proved in the context of the motion proceedings launched by an applicant. The approach to the existence of unreasonable prejudice ... requires a common sense analysis of the facts, bearing in mind that whether the grounds of prejudice exist often lies peculiarly within the knowledge of the respondent. Although the onus is on an applicant to bring the application within the terms of the statute, a court should be slow to assume prejudice for which the respondent itself does not lay a basis.'

[13] This Court's task is to determine whether Mr Nene has produced acceptable reasons for nullifying, in whole, or at least substantially, any culpability on his part which attaches to the delay in serving the notice. The set standard is not proof on a balance of probabilities, but rather the overall impression made on a court which brings a fair mind to the facts set up by the parties.¹⁶ Each case depends on its own facts, which must be assessed in a balanced fashion.¹⁷ Ultimately, the standard for considering an application for condonation is the interests of justice.¹⁸

¹⁴ *Rance* above n 5 at para 37.

¹⁵ *Madinda* above n 10 at para 21.

¹⁶ *Madinda* above n 10 at para 8.

¹⁷ *Lakay* above n 9 at para 17.

¹⁸ *Grootboom v National Prosecuting Authority and Another* 2014 (2) SA 68 (CC); [2014] 1 BLLR 1 (CC) at para 22. Depending on the circumstances, this may include consideration of: the nature of the

[14] Mr Nene represented himself in these proceedings and steadfastly attempted to vindicate his conduct. He made an impassioned plea for the Labour Court's decision to be upheld, in order to afford him the opportunity to pursue his claim on the merits. This Court is alive to the likely effect of an adverse decision on Mr Nene, and the impact on his constitutional right to access to court in order to advance the merits of his claim. With that in mind, it is appropriate to recognise the rationale for permitting special requirements for the institution of action against a state body. Didcott J framed the position as follows in *Mohlomi v Minister of Defence*.¹⁹

'Rules that limit the time during which litigation may be launched are common in our legal system as well as many others. Inordinate delays in litigating damage the interests of justice. They protract the disputes over the rights and obligations sought to be enforced, prolonging the uncertainty of all concerned about their affairs. Nor in the end is it always possible to adjudicate satisfactorily on cases that have gone stale. By then witnesses may no longer be available to testify. The memories of ones whose testimony can still be obtained may have faded and become unreliable. Documentary evidence may have disappeared. Such rules prevent procrastination and those harmful consequences of it. They thus serve a purpose to which no exception in principle can cogently be taken.'

[15] Mr Nene placed scant information before the Labour Court in support of his application for condonation. This makes it difficult to measure the components of the enquiry into good cause properly. With respect to the reasons for the extensive delay, he relied almost exclusively on his own erroneous belief that the Act did not apply to employment claims. That submission completely avoids any engagement with the period of 10 months that elapsed subsequent to receipt of the Department's special plea raising non-compliance with the Act. Even accepting that Mr Nene did not appreciate the legal position prior to that time, he was obliged to launch the

relief sought; the extent and cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the importance of the issue to be raised and the prospects of success. The sufficiency of the explanation offered, the *bona fides* of the applicant and any contribution by other persons or parties to the delay and the applicant's responsibility therefor may also be relevant: *Madinda* above n 10 at para 10.

¹⁹ *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC); 1996 (12) BCLR 1559 at paras 11-12.

application for condonation as soon as possible after becoming aware of the true position, so as to alleviate possible further prejudice to the Department.²⁰

[16] Considering the core issue at hand, it was also remiss of Mr Nene not to furnish full details as to the legal advice he received, however limited or misguided this may have been, and to explain his own conduct in pursuing his claim as the months elapsed.²¹ Absent such information, the Labour Court's synthesis of its perceptions as to Mr Nene's intermittent legal representation, and his apparent confusion as to the nature of his claim, was unsubstantiated.²²

[17] On the merits, Mr Nene's case rested squarely on the bald averment of breach of contract linked to the premature termination of his employment with the Department. The application is bereft of even the most basic factual averments that might have been expected in this respect. The Labour Court failed to consider the Department's version that Mr Nene's employment terminated by operation of law, and its conclusion that Mr Nene enjoyed prospects of success was unfounded.

[18] The result is that even on the most generous reading, the application fell short of providing a satisfactory demonstration of good cause for the extensive delay. It failed to cover the entire period of the delay and the apparent lack of prospects suggests that granting condonation would be futile. To compound matters, the issue of prejudice to the Department was left completely untouched in Mr Nene's papers. The Labour Court failed to give proper consideration to this dimension of the enquiry and, absent any cogent submissions on the point, erred in concluding that there was no unreasonable prejudice to the Department. There was also no assessment of the combined weight to be attributed to the three elements of s 3(4)(b) of the Act, contrary to the settled position.²³

²⁰ *Madinda* above n 10 at para 28. Cf *MEC for Education, KwaZulu-Natal v Shange (Shange)* 2012 (5) SA 313 (SCA); [2012] ZASCA 98 at para 24.

²¹ *Madinda* above n 10 at para 11. The papers reveal that Mr Nene was represented by TS Nkosi Attorneys at the time his statement of case was filed, during June 2017, and when the Department served its statement of defence, including a special plea pertaining to non-compliance with the Act, on 16 January 2019. He was represented by Advocate TC Matambuye at the time he applied for condonation approximately ten months later, during November 2019.

²² Cf *Shange* above n 20 at para 16 and following.

²³ *United Plant Hire (Pty) Ltd v Hills and Others* 1976 (1) SA 717 (A); [1976] 2 All SA 253 (A) at 720E – H.

[19] In exercising its discretion to grant condonation, the Labour Court acted injudiciously by ignoring various material factors, as described. The consequence was that condonation for non-compliance with a statutory requirement was granted absent good cause, in a manner prejudicial to the Department and not in the interests of justice. As a result, the appeal must succeed. Considering the circumstances, and despite the outcome, it would be unfair for Mr Nene to be saddled with the costs of either the Labour Court application or these proceedings.

Administrative delays

[20] It is close to a decade since the dismissal that has culminated in these proceedings. Much of this period may be attributed to Mr Nene's own vacillation between claims based on breach of contract and unfair dismissal, his delay in complying with the Act's requirements in respect of notice, and his failure to seek condonation as soon as this obligation became apparent. No further remarks on those delays and failures is warranted and an assessment of the conduct of those legal practitioners that have purported to assist Mr Nene during this time is outside the reach of this judgment. Regrettably, it is necessary to comment on aspects of the functioning of the Labour Court with reference to the delays experienced by the parties in bringing this matter to finality.

[21] Courts are constitutionally obliged to operate in a manner that enhances their accessibility and effectiveness.²⁴ The Office of the Chief Justice (OCJ) is a department mandated to render support to the Chief Justice, as the head of the judiciary, and obliged to develop administrative policies to support the judicial function. Its mission is to provide support to the judicial system to ensure effective and efficient court administration services. The OCJ's service delivery charter (the charter) promises a certain standard of services that stakeholders, including citizens of the country, might expect from the courts, specifically including the Labour Court. Some of the key services referenced by the charter include the issuing of court orders and the processing of applications for leave to appeal "*in person and by a legal representative*". The OCJ, through the charter, accepts the responsibility for the provision of administrative support and management of the courts. This includes

²⁴ S 165(4) of the Constitution of the Republic of South Africa, 1996.

facilitating the resolution of labour matters “*by providing accessible, efficient and quality administrative support to the Superior Courts throughout the country*”. One of the commitments included in the charter is the finalisation of applications for leave to appeal within three months from the date of filing.

[22] Such promises ring hollow when considering the administrative errors that resulted in the Department’s request for reasons for the Labour Court decision going astray, and resurfacing some 17 months later. To make matters worse, it is apparent that the application for leave to appeal only came to light more than six months after the application, as well as heads of argument, had been filed.

[23] In the context of the earlier periods of delay, one might have expected the presiding acting judge to prioritise and expedite the matter, especially given the inclination to grant leave. Instead, a further delay of almost a month ensued. That aside, the judgment granting leave to appeal failed to provide even the most basic explanation for this decision. This was wholly inadequate for purposes of assisting this court to appraise the underlying decision and to arrive at a just outcome.

[24] While periods of delay are occasionally unavoidable, or due to the lackadaisical approach of one or more of the parties, the extensive period of time that has been wasted in the preceding proceedings for unknown reasons is lamentable. Litigants are entitled to have their disputes decided by a court or, where appropriate, another independent and impartial tribunal or forum following a fair public hearing. This requires legal proceedings, including applications for leave to appeal, to be conducted and finalised in a generally expeditious manner through the proper application of law. Delays of the kind that have manifested in this matter remain unacceptable. Uncomfortable as this may be, such shortcomings must be raised and enquired into so that they do not become tolerated as the norm, and especially so that appropriate steps may be taken to eliminate them in future. This inevitably requires close co-operation amongst administrative personnel, presiding officers and those in leadership positions.

Order

[25] The following order is made:

1. The appeal is upheld, with no order as to costs.
2. The order of the court below is set aside and substituted with the following:
 - ‘1. The application to condone non-compliance with s 3(2)(a) of the Institution of Legal Proceedings Against Certain Organs of State Act, 2002 (Act 40 of 2002) is dismissed. There is no order as to costs.’

Govindjee AJA

Musi JA et Van Niekerk JA concur.

Appearances:

For the Appellant: MB Lecoge SC

Instructed by: State Attorney, Johannesburg

For the Respondent: In person