



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JA111/2019

In the matter between:

CASHBUILD (PTY) LTD

Appellant

and

POTO, P S N.O

First Respondent

**COMMISSION FOR CONCILIATION MEDIATION AND
ARBITRATION**

Second Respondent

NKOMO, STEVEN

Third Respondent

Heard: 25 February 2021

Delivered: 2 March 2021

Coram: Waglay JP, Savage and Molefe AJJA

JUDGMENT

SAVAGE AJA

[1] This appeal, with the leave of the Court *a quo*, is against the judgment and order of the Labour Court (Lekale AJ) handed down on 16 February 2018, in terms of which the review application brought by the appellant, Cashbuild (Pty) Ltd, was dismissed with costs.

[2] The third respondent, Mr Steven Nkomo ('the employee') was employed as a sales coordinator at the appellant's Moloto branch, reporting to the branch manager, Ms Patricia Mokoena. He was dismissed from his employment on 5 November 2014 for gross insubordination after he failed to comply with Ms Mokoena's instruction not to comply with a customer's request to collect roof tiles which she had purchased. When Ms Mokoena confronted the employee he informed her that the customer had

insulted him and he had decided to do what was necessary to make the customer happy.

[3] Aggrieved with his dismissal, the employee referred an unfair dismissal dispute to the second respondent, the Commission for Conciliation Mediation and Arbitration ('the CCMA'). In the arbitration award dated 20 March 2015, the first respondent ('the commissioner') found the employee's dismissal substantively unfair. The employee was retrospectively reinstated into his employment with the appellant with a final written warning for insubordination valid until 4 November 2015.

[4] After the Labour Court on review found the commissioner's decision to be reasonable and dismissed the review application with costs, on 5 March 2018 the appellant filed an application for leave to appeal. Leave to appeal was granted on 16 July 2018. Yet, the appellant filed its notice of appeal on 15 November 2019, fifteen months late, with the appeal record filed thereafter on 14 February 2020.

[5] Rule 5(1) of the Rules of the Labour Appeal Court Rules ('the Rules') requires an appellant to deliver a notice of appeal within fifteen (15) days of leave to appeal being granted '*or any longer period that may be allowed by the court, on good cause shown*'. Rule 5(8) requires that:

'The record must be delivered within 60 days of the date of the order granting leave to appeal, unless the appeal is noted after a successful petition for leave to appeal....'

[6] Since the appellant failed to lodge the record of appeal within the period prescribed in Rule 5(8), without an extension of time having been granted, the appellant is deemed, in terms of Rule 5(17),¹ to have withdrawn the appeal.

[7] The appellant consequently applied for the reinstatement of the appeal and condonation for the late filing of the application for leave to appeal and the appeal record. The employee opposed both applications. The appellant claimed to have been unaware that its application for leave to appeal had been granted. In his affidavit in support of the applications for reinstatement and condonation, the

¹ Rule 5(17) states: 'If the appellant fails to lodge the record within the prescribed period, the appellant will be deemed to have withdrawn the appeal, unless the appellant has within that period applied to the respondent or the respondent's representative for consent to an extension of time and consent has been given. If consent is refused the appellant may, after delivery to the respondent of the notice of motion supported by affidavit, apply to the Judge President in chambers for an extension of time. The application must be accompanied by proof of service on all other parties. Any party wishing to oppose the grant of an extension of time may deliver an answering affidavit within 10 days of service on such party of a copy of the application.'

appellant's attorney, Mr Sean Snyman, stated that when an unnamed individual from his firm first followed up with the registrar's office, the file was "*still with the Judge*" and that in a subsequent follow up in September 2018, the file could not be found. In January 2019 and again in May 2019, Mr Snyman stated, without further explanation, that "*there was still no luck in finding the file*". Thereafter, the attorney who dealt with the matter, Ms Thandi Moyo, went on maternity leave from the beginning of July 2019. On her return on 1 November 2019, she found an email addressed to her dated 10 July 2019, which attached a letter from the employee's attorneys indicating that leave to appeal had been granted the previous year and enquiring whether the appellant intended to pursue the appeal.

[8] On 4 November 2019, the appellant's attorneys found the file at the Labour Court and the notice of appeal and record of the appeal were filed thereafter. In his affidavit, Mr Snyman stated that the matter concerns a matter of importance to the appellant and that if the appeal was not to be reinstated and condonation granted, serious prejudice would be suffered by the appellant.

[9] The employee, through his attorneys, opposed the reinstatement and condonation applications given the extensive delay. Issue was also taken with the appellant's failure to file any confirmatory affidavit to confirm the events deposed to by Mr Snyman, which, it was submitted, were lacking in detail and "sketchy"; and with the claim that the appellant's attorneys would fail to oversee the work of an attorney who was on maternity leave. Since the transgression did not warrant the ultimate penalty of dismissal, it was submitted the appellant's prospects of success are not good and that the applications should be dismissed with costs.

Discussion

[10] A court has an inherent discretion to grant condonation and reinstate an appeal where the interests of justice demand it and where the reasons for non-compliance with the time limits have been explained to the satisfaction of the court.² However, the grant of condonation and the reinstatement of an appeal are not applications to be granted simply on the asking. The appellant must provide a full and frank explanation for the reasons for the delay, demonstrate that it bears some

² *Steenkamp and Others v Edcon Limited* [2019] ZACC 17; 2019 (7) BCLR 826 (CC); (2019) 40 ILJ 1731 (CC); [2019] 11 BLLR 1189 (CC) at para 26, with reference to *Grootboom v National Prosecuting Authority* [2013] ZACC 37; 2014 (2) SA 68 (CC); 2014 (1) BCLR 65 (CC) at para 20.

prospect of success³ and show that it will suffer prejudice if the delay is not condoned.⁴ This list is not exhaustive since it is a conspectus of the facts that is to be considered, with each factor not individually decisive but interrelated. In *Melane v Santam Insurance*⁵, the Court emphasised that in an application for condonation – ‘The basic principle is that the court has a discretion, to be exercised judicially upon a consideration of all the facts, as in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case...’.

[11] As was made clear in *Toyota SA Motors (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration*,⁶ time periods in the context of labour disputes are important in that they are aimed at bringing about the timely resolution of such disputes. A delay undermines the primary objects of the Labour Relations Act and risks causing detriment to workers and/or employers.

[12] The bald claim that the appellant’s attorneys periodically attended at the Labour Court only to be unable to find the file for months on end, without any detail as to further efforts made to determine whether leave to appeal had been granted, does not constitute a satisfactory explanation for the excessive delay in this matter. Such explanation indicates not only an extreme indifference and absence of any urgency to the matter, but also a total lack of regard for the Rules of Court. Furthermore, the fact that an attorney was on maternity leave does not constitute satisfactory explanation why a letter sent to the appellant’s attorneys was not received and why, in spite of having been alerted to the fact that leave to appeal had been granted no further steps were taken to prosecute the appeal during this period.

[13] As to the prospects of success, the task of the Labour Court was to determine whether the decision reached by the commissioner was one that a reasonable decision-maker could not reach.⁷ It found that the commissioner’s findings fell within the ambit of reasonableness required. The evidence on record does not show that that finding was wrong or that the employee’s misconduct, in failing to adhere to an instruction of his superior, was of such a degree that it warranted dismissal rather

³ *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)* [2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC) at paras 20 and 22.

⁴ *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others* [2000] ZACC 3; 2000 (2) SA 837 (CC); 2000 (5) BCLR 465 (CC) at para 3.

⁵ 1962 (4) SA 531 (A) at 532C-F.

⁶ [2015] ZACC 40; (2016) 37 ILJ 313 (CC); 2016 (3) BCLR 374(CC) at para 1.

⁷ *Sidumo & another v Rustenburg Platinum Mines Ltd & others* (2007) 28 ILJ 2405 (CC) at para 110.

than the application of progressive discipline. Consequently, the Labour Court's decision to dismiss the review application, having regard to the findings of the commissioner, was not without foundation and the prospects of success in this appeal are limited. The importance of the matter is no more than a neutral factor given the facts and any prejudice to be suffered by the appellant were the applications not to be granted is self-created given the unreasonable and unacceptable delay in prosecuting this appeal.

[14] For all these reasons, the appellant has failed to make out a case for the relief it seeks. Accordingly, the reinstatement and condonation applications must fail. Having regard to considerations of law and fairness, no order of costs is made.

Order

[15] In the result, the following order is made:

1. The application for reinstatement of the appeal is dismissed.

SAVAGE AJA

Waglay JP and Molefe AJA agree.

APPEARANCES:

FOR THE APPELLANT:

S Snyman

Snyman Attorneys

FOR THE THIRD RESPONDENT:

B Mthimunya

Baphasile Mthimunya Attorneys