



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA89/2020

SMITH CAPITAL EQUIPMENT (PTY) LTD

Appellant

and

ISAAC MERGUI

Respondent

Heard: 30 September 2021

Delivered: 27 October 2021

Coram: Waglay JP, Davis JA and Kubushi AJA

JUDGMENT

KUBUSHI AJA

Introduction

[1] This appeal turns on the condonation application that served before the court *a quo*, concerning the late filing by the respondent (Isaac Mergui) of Statement of Case. The Statement of Case contained two claims, one relating to the respondent's dismissal and the other is a claim in terms of the Employment Equity Act. The court *a quo* condoned the late filing of the respondent's Statement of Case with respect to his dismissal claim and appears to imply that the claim with regard to the EEA, was a matter that could be raised at trial.

- [2] Aggrieved by the judgment and order of the court *a quo*, the appellant, Smith Capital Equipment (Pty) Ltd, is before us, with leave of the court *a quo*, to appeal against the whole judgment and order.

Preliminary Issue

- [3] Before the commencement of the hearing, the appellant's counsel brought to the attention of the court that the respondent's Practice Note and Power of Attorney were filed a day before the hearing of the appeal when in fact they ought to have been filed approximately eighteen (18) months before the hearing of the matter, without applying for condonation. The appellant's Power of Attorney was also found not to be on record. As regards the filing of the Practice Note, there was no issue as the appellant had filed its Practice Note. The appellant's counsel did not necessarily object to the late filing of the respondent's Power of Attorney, as such, a ruling was made by the court that the appellant should file its Power of Attorney within the week and that subject to receipt thereof, both Powers of Attorney were accepted into the record. The appellant's Power of Attorney has since been filed.

Factual Background

- [4] The appeal intrinsically stems from the erroneous referral by the respondent of an alleged automatically unfair dismissal dispute ("the dispute") to the Commission for Conciliation, Mediation and Arbitration ("the CCMA") for conciliation and to the Metal and Engineering Industry's Bargaining Council ("the MEIBC") for arbitration. In actual fact, the dispute should have been referred to the MEIBC for conciliation,¹ and ought to have been referred to the Labour Court for adjudication.²

¹ Section 191(1)(a) of the Labour Relations Act 66 of 1995 (LRA) reads as follows:

"If there is a dispute about the fairness of a dismissal or a dispute about an unfair labour practice, the dismissed employee or the employee alleging unfair labour practice may refer the dispute in writing to –

(i) a council, if the parties to the dispute fall within the registered scope of that council; or
(ii) . . ."

² Section 191(5)(b)(i)

"If a council or a commission has certified that the dispute remains unresolved, or if 30 days have expired since the council or the commission received the referral and the dispute remains unresolved-

(a) . . .

- [5] Briefly, the respondent, who was employed by the appellant as a Quality Manager, was dismissed from his employment allegedly because he had reached the normal retirement age of 65 years, alternatively 66 years as *per* the new Human Resources Policy, and had failed to reach an agreement with his employer as to how to continue further in his employment.
- [6] Not satisfied with his dismissal, the respondent referred the dispute to the CCMA for conciliation when in fact the dispute should have been referred to the MEIBC. As required, the CCMA transferred the dispute to the MEIBC. However, it was found that the MEIBC received the dispute after the prescribed thirty (30) day period had expired and as such in terms of s191(5) of the LRA, the matter could proceed to the next process without the need to hold a conciliation. The respondent applied for arbitration with the MEIBC instead of referring the dispute to the Labour Court for adjudication, as a result, the matter was dismissed due to lack of jurisdiction.
- [7] The respondent then served his Statement of Case which he subsequently, with the assistance of a newly instructed legal representative, amended. The appellant duly responded to the initial Statement of Case and the amended Statement of Case.
- [8] The parties held a pre-trial conference where it was agreed that the respondent would apply for condonation for the late filing of the Statement of Case, which condonation was accordingly applied for. In the judgment that ensued, the court *a quo* found in favour of the respondent and granted the condonation. Dissatisfied with the decision of the court *a quo*, the appellant applied for and was granted leave to appeal the whole judgment and order; hence the appeal before us.
- [9] The Appellant's case, as set out in its notice of appeal and as was argued on behalf of the appellant before us, is that, the court *a quo* should not have granted the condonation application on the basis of the following grounds,

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- (b) The employee may refer the dispute to the Labour Court for adjudication if the employee has alleged that the reason for dismissal is –
- (i) Automatically unfair;
 - (ii) . . . ”

namely, the excessive delay by the respondent in referring the dispute to the court *a quo* coupled with lack of a reasonable explanation for such delay as well as the lack of prospects of success on the merits, and the late filing of the condonation application that was served almost one (1) year after the initial referral. In addition, the failure by the respondent to apply for condonation in respect of the new dispute (claim in terms of the EEA) that was raised in the amended Statement of Case.

The Issue to be Determined

[10] There were, initially, two issues that required determination by this court. The first was whether the condonation application was properly granted by the court *a quo*. The second was whether the court *a quo* acted correctly in deferring the issue of whether the amended Statement of Case was properly before the court, to trial. Underlying this question was whether the respondent ought to have applied for condonation of the late referral of the new dispute raised in the amended Statement of Case.

[11] I deal herein only with the first issue, as the second issue was eventually abandoned by the appellant's counsel when through a question from the bench during argument, counsel could simply not state why amongst other things the respondent needed to apply for condonation for that claim.

Thus, the issue on appeal related to the condonation application in respect of the Statement of Case.

Discussion

[11] Ordinarily, the Labour Court has authority, on good cause shown, to condone the non-observance of the timeframe within which a dispute may be referred to the Labour Court for adjudication.³

[12] It has been held that there is no comprehensive definition of what constitutes good or sufficient cause for the granting of the indulgence of the non-observance of timeframes. The overriding consideration is that the matter rests

³ Section 191 (11) (b) of the LRA.

in the judicial discretion of the court, to be exercised with regard to all the circumstances of the case.

- [13] The test for condonation is trite and well established. The court has a discretion which must be exercised judicially on a consideration of the facts of each case. The court in *Melane v Santam Insurance Co Ltd*,⁴ when setting out the principles applicable to condonation had this to say –

“In deciding whether sufficient cause has been shown, the basic principle is that the court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. . .”

- [14] It is a well-settled principle that the power to interfere on appeal in matters of discretion is strictly circumscribed. For a court of appeal to interfere with the decision of the court *a quo* where a discretion has been exercised, the test is whether the court *a quo* acted improperly and unreasonably or that it acted capriciously, or upon the wrong principle or with bias, or whether the discretion exercised was based on unsubstantial reasons or whether the court *a quo* adopted an incorrect approach.⁵

- [15] In argument before us, it was submitted on behalf of the appellant that the court *a quo* exercised its discretion improperly in that it made several errors in its judgment that constitutes sufficient reasons for this court to interfere with the court *a quo*'s decision. One of such errors is the fact that the court found that the statement of case was filed thirty (30) days late when it was fifty-six (56) days out of time.

- [16] In addition, it was submitted, the court *a quo* in its judgment, mentions that there is no explanation provided by the respondent for filing the condonation application almost one year after the referral to the Labour Court. However, despite having criticised the fact that there was no explanation provided by the respondent for the period of delay, the court *a quo* made a finding, incorrectly so it was argued, that there are reasonable prospects on the merits that would compensate for the lack of the explanation and, granted condonation.

⁴ 1962 (4) SA 531 (A) 532B.

⁵ See *Kemp t/a Centralmed v Rawlins* (2009) 30 ILJ 2677 (LAC) at para 55.

[17] The principles upon which the court exercises its discretion have been stated as follows in *Byron v Duke Inc*:⁶

[2] The principles governing condonation applications and the factors which weigh with this Court are well-known and have been often restated. The main principles are succinctly formulated in *Federated Employers Fire & General Insurance Co Ltd and Another v McKenzie* 1969 (3) SA 360 (A) at 362F - H as follows:

‘(T)he factors usually weighed by the Court include the degree of non-compliance, the explanation therefor, the importance of the case, the prospects of success, the respondent’s interest in the finality of the judgment, the convenience of the Court and the avoidance of unnecessary delay in the administration of justice.’ (my emphasis)

[18] In paragraph 7 of its judgment, the court *a quo* expressed itself as follows:

“[7] This being an application in terms of the provisions of section 191 (11) (b) of the Labour Relations Act (LRA), it is incumbent on the applicants to demonstrate good cause to the satisfaction of the Court for condonation to be granted. This Court exercises a discretion when deciding whether to condone the late filing of a statement of claim or not. In the exercise of that discretion, the Court must consider a number of factors including: the degree of delay and the reasons or explanation in that regard; the applicants’ prospects of success on the merits of the main claim; and the prejudice that the parties will suffer should condonation be granted or refused. In the end, the question is whether it would be in the interest of justice to grant or refuse condonation.

[19] It is clear from the reading of this passage of the court *a quo*’s judgment that it was mindful of the fact that its discretion must be exercised on judicial grounds, and in doing so, it properly directed itself to all the relevant facts and principles pertaining to this case. The question is whether such discretion was exercised improperly justifying interference by this court.

[20] From the reasons that follow hereunder, I am of the view that the court *a quo* exercised its discretion judicially and properly. From the above passage, it is

⁶ 2002 (5) SA 483 (SCA) para 2.

clear that the court *a quo*, in the exercise of its discretion, considered all the principles required. Even though the court erred in the determination of the period of delay (34 days as against 56 days), this in itself is not sufficient to find that the court *a quo* failed properly or at all to exercise its discretion. It further considered whether there was a reasonable explanation furnished by the respondent for such lateness and, although it found the explanation inadequate, it was satisfied that the respondent had reasonable prospects of success

[21] As already stated earlier in this judgment, in order to determine whether good cause is shown, the following factors together with any other relevant factors are taken into account: the degree of lateness, the reasons for the lateness, the prospects of success, any prejudice that the respondent may suffer, and the respondent's interest in finality.⁷ These factors are interrelated. Thus, a slight delay and good explanation may help to compensate for prospects of success which are not strong, and strong prospects of success may tend to compensate for a long delay.⁸

[22] In coming to the conclusion it made in regard to the prospects of success on the merits of the claim, the court *a quo* made the following findings:

[22] On the whole, having had regard to the nature of the delay which is about 34 days, and the explanation proffered in that regard, I am satisfied that even if the delay in bringing this application was not explained, there is no reason to suggest that the applicant's claim enjoys no prospect of success. On a totality of the circumstances of this case, the interests of justice would dictate that the late filing of the Statement of Claim be condoned.'

[23] It is my view that the appellant's insistence that there are no prospects of success on the merits of the claim, on the basis that there is no arguable case, is unsustainable. On its own version, the appellant's case is that in its answering affidavit to the respondent's founding affidavit on the condonation application, the appellant placed a different version to that proffered by the respondent. The

⁷ *Melane v Santam Insurance Company Limited* 1962 (4) SA 531 (A) at 552.

⁸ *Melane v Santam* supra.

respondent failed to file a replying affidavit dealing with the different versions in the appellant's answering affidavit. Accordingly, as the appellant's counsel submitted, the two versions remained in dispute, placing the trial court in a position to determine the true facts of the matter.

[24] The fact that there are disputes of fact on the papers, speaks for itself that there is an arguable case that should be referred to trial to resolve the disputes. It is a well-known principle of our law that where there are substantial disputes of fact, as is the case in this matter, such disputes must only be resolved at trial.

[25] As regards the requirement of prejudice, the court *a quo*, in paragraph 21 of its judgment, made the following findings, with which I am in alignment:

"[21] In regards to considerations of prejudice and the conclusions reached in relation to the prospects of success, it cannot therefore be correct as suggested by the respondent [appellant on appeal], that it would suffer prejudice if it was compelled to defend this claim. It is appreciated that the delay in ultimately finalising this matter lies at the door of the applicant. However, other than the unexplained delay in filing this application, it cannot be said that this is a case where the applicant did little or nothing in prosecuting this claim, even at the stage when he was not legally represented."

[26] It is on all the above reasons that I have to conclude that there is no reason for this court to interfere with the decision of the court *a quo* and, as such, the appeal falls to be dismissed.

Costs

[27] The usual approach in matters of this nature is that costs do not simply follow the result.⁹ In any event, the respondent as the successful party has not applied for costs. I, therefore, find it not necessary to delve further on this issue but to follow the usual approach of not making a costs order.

⁹ *Bester v Small Enterprise Finance Agency SOC Ltd & others* [2019] ZALAC 73; (2020) 41 ILJ 877 (LAC).

Order

[28] In the circumstances, I make the following order

1. The Powers of Attorney for the appellant and the respondent are accepted into the record.
2. The appeal is dismissed.
3. There is no order for costs.

Kubushi AJA

Waglay JP and Davis JA concur.

APPEARANCES:

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