



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

JA11/20

ASSOCIATION OF MINEWORKERS AND CONSTRUCTION

UNION OBO OF SHUPPING AND 17 OTHERS

Appellant

and

Africa Mining and Crushing SA (Pty) Ltd

Respondent

Heard: 30 September 2021

Delivered: 02 November 2021

Coram: Waglay JP, Davis JA and Kubushi AJA

JUDGMENT

KUBUSHI AJA

Introduction

- [1] This is an opposed appeal against the whole of the judgment and order of the court *a quo* handed down on 4 December 2019. The appeal is before us, leave to appeal having been refused by the court *a quo* but granted on Petition by this Court.
- [2] The appeal pertains to the condonation application wherein the appellant, the Association of Mineworkers and Construction Union, sought condonation, on behalf of its members, for the late referral of a dispute to the court *a quo* for adjudication. The court *a quo* refused to grant the condonation and made no order as to costs.

Factual Matrix

- [3] The common cause facts between the parties are that on 14 December 2018, the members of the appellant were issued with a notice of a disciplinary enquiry charged with taking part in an unprotected strike and/or gross refusal to work due to a related grievance.
- [4] Subsequent to a disciplinary enquiry that followed, eighteen (18) members of the appellant were dismissed. An unfair dismissal dispute was referred to the Commission for Conciliation Mediation and Arbitration (“CCMA”) by the appellant on behalf of the said members. The matter was set down for conciliation on 19 February 2019 but the conciliation was unsuccessful and the matter remained unresolved. A certificate of non-conciliation was issued and the matter was referred to arbitration.
- [5] At the arbitration proceedings it became apparent that the CCMA did not have the requisite jurisdiction to arbitrate the dispute. As a result, a ruling was issued by the commissioner concerned for the matter to be referred to the Labour Court.
- [6] The appellant served a Statement of Case on 7 August 2019 which it filed in the Labour Court on 8 August 2019. On 14 August 2019, the appellant served and filed an application for condonation which was set down for hearing on 29 November 2019. In the judgment that was handed down on 4 December 2019, the court *a quo* refused condonation and made no order as to costs. The appellant is dissatisfied with the judgment and order of the court *a quo*, and has approached this Court in an attempt to overturn the order.
- [7] Consequently, the issue for determination before us was whether there was a misdirection on the part of the court *a quo* in refusing to grant the condonation application. Underlying this question 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 or not the discretion exercised was based on

unsubstantial reasons or whether the court *a quo* adopted an incorrect approach.¹

Discussion

- [8] The court *a quo*, in refusing to grant the condonation, made a finding that firstly, the degree of delay, which it found to be seven (7) months, was too excessive; secondly, that the appellant failed to provide any explanation for such excessive delay and lastly that there were no prospects of success on the merits of the case.
- [9] It is common cause between the parties that the court *a quo* held incorrectly that the delay involved was seven (7) months as opposed to the period of two (2) months and three (3) weeks asserted by the appellant in its papers. This finding by the court *a quo* lies at the heart of the appeal.
- [10] As such, when arguing before this Court, both counsel for the parties were in agreement that there was a fundamental error on the part of the court *a quo* in considering that the delay was seven (7) months when in fact it was two (2) months, and that, such error, vitiated the court *a quo*'s thinking about the matter in its entirety. Counsel were also in agreement that under such circumstances, this Court was at liberty to revisit the matter and exercise the discretion afresh.
- [11] The submissions by counsel that the fundamental misdirection of the court *a quo* vitiated its thinking about the matter and entitled this Court to consider the discretion afresh, is correct. It is trite that, where the wide discretion of a court below has not been judicially exercised, either for example, as a result of the incorrect application of the law or of the facts, the appeal court is required to consider the matter on the facts that were before the court *a quo* and to determine if the discretion was correctly exercised, what would the correct decision have been.²

On that basis, this Court was, therefore, at liberty to exercise the discretion afresh.

¹ See *Kemp t/a Centralmed v Rawlins* (2009) 30 ILJ 2677 (LAC) at para 55.

² See *Ferguson and Others v Rhodes University* 2018 (1) BCLR 1 (CC) para 21.

[12] The test for condonation is trite and well established. The Constitutional Court in *Grootboom v National Prosecuting Authority and Another*,³ set out the test succinctly as follows:

“[50] In this Court the test for determining whether condonation should be granted or refused is the interests of justice. If it is in the interests of justice that condonation be granted, it will be granted. If it is not in the interests of justice to do so, it will not be granted. The factors that are taken into account in that inquiry include:

- (a) the length of the delay;
- (b) the explanation for, or cause for, the delay;
- (c) the prospects of success for the party seeking condonation;
- (d) the importance of the issue(s) that the matter raises;
- (e) the prejudice to the other party or parties; and
- (f) the effect of the delay on the administration of justice.’

Although the existence of the prospects of success in favour of the party seeking condonation is not decisive, it is an important factor in favour of granting condonation.

[51] The interests of justice must be determined with reference to all relevant factors. However, some of the factors may justifiably be left out of consideration in certain circumstances. For example, where the delay is unacceptably excessive and there is no explanation for the delay, there may be no need to consider the prospects of success. If the period of delay is short and there is an unsatisfactory explanation but there are reasonable prospects of success, condonation should be granted. However, despite the presence of reasonable prospects of success, condonation may be refused where the delay is excessive, the explanation is non-existent and granting condonation would prejudice the other party. As a general proposition the various factors are not individually decisive but should all be taken into account to arrive at a conclusion as to what is in the interests of justice.”

[13] The question, therefore, is whether it is in the interest of justice that condonation be granted in this matter.

³ 2014 (2) SA 68 (CC); 2014 (1) BCLR 65 (CC); [2014] 1 BLLR 1 (CC); (2014) 35 ILJ 121 (CC) paras 50 and 51.

- [14] It was argued on behalf of the appellant that condonation should be granted based on the grounds that: the two (2) months delay is not excessive; there is an explanation proffered for the delay in the appellant's papers; there are prospects of success for the appellant; it is in the interests of justice and the respondent would not be prejudiced.
- [15] Conversely, on behalf of the respondent, it was submitted that condonation should not be granted based on the grounds that: firstly, the delay for the two (2) months was not adequately explained for the whole period; secondly, if there was a delay the prospects of success on the merits do not make up for such a delay; lastly, the interests of justice, which is the paramount consideration, will not be served if this matter is allowed to proceed three years after the first occurrence of the dispute.
- [16] For the reasons that follow hereunder, it is my view that it is in the interest of justice that condonation be granted.
- [17] Firstly, counsel for the respondent approached the requirement for the explanation for the delay on a wrong footing in his submission that the explanation proffered by the appellant is inadequate as it does not cover the whole period of the delay.
- [18] In my understanding, counsel did not, in his submission, necessarily dispute that the two (2) months' period of delay was excessive, save to lament that if the initial period of ninety (90) days is included it downplays the appellant's laxity in handling the dispute. Once it is accepted that the period of delay is not excessive, the approach is different. The test is whether an explanation has been tendered and not whether a satisfactory explanation has been proffered.
- [19] It cannot be disputed that the appellant has furnished an explanation in his papers that served before the court *a quo*. The reasons for the appellant's lateness are set out at length in paragraphs 9 to 19 of the appellant's founding affidavit.

- [20] The interests of justice sometimes demand that if there is an explanation prospects of success on the merits ought to be considered. The door should not just be closed without considering the merits.
- [21] There appears to be no dispute that there are reasonable prospects of success on the merits of this case. I did not understand the respondent's counsel to be arguing that the appellant has no prospects of success on the merits of the case. What the respondent is contending for is that the prospects of success did nothing to salvage what it considers to be the inadequate explanation proffered by the appellant. In addition, the fact that there are diametrically opposed versions before the court means that there is an arguable case that warrants referral to trial for resolution of the disputes.
- [22] I am in agreement with the argument by the appellant's counsel that it would be prejudicial to the eighteen (18) members of the appellant if the condonation is refused as it would result in the slamming of the doors of justice in their face and deny them an opportunity to ventilate the matter. This prejudice will far outweigh any prejudice that might be suffered by the respondent as the respondent would still be offered the opportunity to defend the matter.
- [23] I find the contention by the respondent's counsel that the respondent would suffer prejudice if the case is allowed to continue due to the fact that the case has to date hereof taken three years, to have no merit. The delay so far would have no effect particularly on the administration of justice as the parties have filed their statement of claim and statement of defence. The matter is ripe for hearing and can be finalised as soon as possible. Thus the prejudice the respondent may suffer as a consequence of the delay can be addressed by the court at the trial.
- [24] Considering the objective conspectus of all the facts in this instance, all the boxes have been ticked. The period of delay is short and there is an explanation proffered. Further, the Court will not lose sight of the fact that the appellant has always persisted on proceeding with the matter. It did not sit back and do nothing but erroneously referred the matter for arbitration instead of adjudication. But for this error it is self-evident that the matter would have been

referred to the Labour court timeously. Also, there are reasonable prospects of success and the respondent will suffer no real prejudice. It is therefore in the interests of justice that condonation be granted. Even if the respondent's argument is to be accepted that the explanation tendered is not reasonable or adequate, in *Grootboom*, it was held that if the period of delay is short and there is an unsatisfactory explanation but there are reasonable prospects of success, condonation should be granted. Either way, whether on the version of the appellant or on the version of the respondent, condonation should be granted.

[25] I am, therefore, of the view that condonation should be granted.

Costs

[26] Both parties argued for an award of costs in their favour should they succeed in this Court. The Constitutional Court in *Union for Police Security and Corrections Organisation v South African Custodial Management (Pty) Ltd and Others*,⁴ has affirmed the trite principle that in labour matters costs do not simply follow the result. There is nothing forthcoming from this matter that justifies a departure from this important precedent. As such I make no order as to costs.

Order

[27] In the premises I make the following order –

- 1 The appeal is upheld.
- 2 The order of the court *a quo* is set aside and replaced with the following order:

“The condonation for the late filing of the statement of claim is granted”.
- 3 There is no order of costs.

⁴ [2021] ZACC 26.

Kubushi AJA

Waglay JP and Davis JA concur.

APPEARANCES:

FOR THE APPELLANT: A L Cook

Instructed by LDA Incorporated

FOR THE RESPONDENT: S Grobler

Instructed by Phatshoane Henney Attorneys