



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA 95/20

In the matter between:

VANIMALA CHETTY

Appellant

and

BAKER MCKENZIE

Respondent

Heard: 11 November 2021

Delivered: Deemed to be the date the judgment is emailed to the parties on 04 April 2022.

Coram: Waglay JP, Coppin JA et Kubushi AJA

JUDGMENT

COPPIN JA

- [1] This is an appeal against the order of the Labour Court (Conradie AJ) ("the court a quo") dismissing the appellant's application seeking condonation for bringing an automatically unfair dispute claim more than 10 months late. Leave to appeal was granted on petition to this Court. There is a cross-appeal by the respondent against the court a quo's order in respect of the costs- it directed that there was no order in respect of the costs. The respondent contends that the appellant should have been ordered to pay the costs.

- [2] The court *a quo* dismissed the condonation application on the sole basis of the appellant's explanation for the lateness, having concluded that the delay was excessive and that the explanation was not reasonable and acceptable.
- [3] It is common cause that the appellant's statement of case, including the automatic unfair dispute claim, was served and filed in the Labour Court on 21 December 2018. In terms of section 191(11) of the Labour Relations Act¹ ("LRA"), such a claim (dispute) had to be referred to the Labour Court within 90 (ninety) days of the date the Commission for Conciliation, Mediation and Arbitration ("CCMA") certified that it was unable to settle the dispute. The CCMA's certification in this instance occurred on 14 November 2017. Therefore, the appellant's claim/dispute was due to be filed in the Labour Court before 12 February 2018. It was thus referred about 10 months and two weeks later than the due date.
- [4] While not taking issue with the conclusion that the delay was excessive, the appellant essentially contends that the court *a quo* erred in dealing with the explanation in isolation and without taking into account the other relevant factors, particularly, the prospects of success of her claim. The appellant contends that the court *a quo* made several material factual errors, failed to consider pertinent facts and was "unduly harsh on and critical" of her.
- [5] The respondent, in response argues, essentially, that the court *a quo* "exercised a judicial discretion" properly, in line with precedent of the Constitutional Court and this Court to the effect that where an applicant for condonation does not give any, or an acceptable explanation for the delay, the prospects of success are not material, and that, in any event, the appellant did not show that her claim has good prospects of succeeding.
- [6] The appeal is thus essentially about the exercise of the court's discretion in such applications for condonation, and the cross-appeal is about the exercise of the court's discretion in respect of the costs in such applications.

¹ Act 66 of 1995.

- [7] It is trite that in such matters the appellate court will only interfere if it finds that the lower court has not exercised its discretion properly or judicially, in that it has either exercised it capriciously, or upon a wrong principle, or has not brought its unbiased judgment to bear upon the issue(s) to be decided, or has not acted for substantial reasons². Applicant must demonstrate that the discretion was exercised improperly or unreasonably. This is also the position in labour matters.³

Condonation

- [8] It is established that a failure by an applicant for condonation to provide a reasonable and acceptable explanation for a material delay, or any explanation at all, might render the prospects of success irrelevant. However, that rule has been held by this court not to be an inflexible one. In *SA Post Office*⁴ the position was stated as follows:

“It is also generally accepted that if an applicant does not provide an acceptable explanation for its delay, the court need not consider the other factors and refuse condonation. This again is not an inflexible rule. It applies where the other factors do not in themselves raise issues that could necessitate the court’s interference to grant the indulgence sought.”⁵

- [9] The position as stated by this court in *NUM v Council for Mineral Technology*⁶ still pertains, namely, that in considering whether good cause has been shown in an application for condonation the approach in *Melane v Santam Insurance Co Ltd*⁷ should largely be adopted (i.e subject to an important qualification which is dealt with infra⁸). In terms of that approach, the court has a discretion that has to be exercised judicially upon a consideration of all the facts and

² See, *inter alia*, *Tjospomie Boerdery (Pty) Ltd v Drakensberg Botteliers (Pty) Ltd & another* 1989 (4) SA 31 (T) at 40A-J.

³ See, *inter alia*, *NUMSA & others v Fibre Flair CC t/a Kango Canopies* [2000] 6 BLLR 631 (LAC) at 633H- 634C; *Coates Brothers Ltd v Shanker & others* [2003] 12 BLLR 1189 (LAC) para 3; *PLSmidth Buffalo (Pty) Limited v Hlakola* [2019] 4 BLLR 363 (LAC) para 16.

⁴ *SA Post Office Ltd v Commission for Conciliation, Mediation and Arbitration and others* (2011) 32 ILJ 2442 (LAC).

⁵ Para 22.

⁶ *National Union of Mineworkers v Council for Mineral Technology* [1999] 3 BLLR 209 (LAC) para 10.

⁷ 1962 (4) SA 531 (A).

⁸ See also *Moloi v Macsteel Service Centres SA (Pty) Ltd* (JS993/2019) [2022] ZALCJHB 12 (8 February 2022).

that, basically, it is a matter of fairness to both sides. Amongst the relevant factors to be considered are the degree of lateness, the explanation therefor, the prospects of success and the importance of the case. In terms of this approach, a slight delay and a good explanation might compensate for weak prospects of success and the importance of the case and strong prospects may compensate for a long delay.

- [10] However, the further principle applicable in conjunction with the broad approach of *Melane* is that in the absence of a full and reasonable (acceptable) explanation for the delay, the prospects of success are immaterial, and that if there are no prospects of success an application for condonation should be refused even if there is a good explanation for the delay⁹. It is important that the explanation for the delay, considered objectively, must be “sufficiently cogent to warrant a consideration of the prospects of success.”¹⁰ There are those explanations that do not meet the objective standard. In such cases the court would be justified in not considering the prospects of success, because they are immaterial, unless issues are raised that would justify the Court’s interference. The explanation for the delay must thus be full and reasonably clear, logical and convincing to excuse the default¹¹.

The explanation

- [11] The central question here is, thus, whether the explanation furnished by the appellant for the delay in bringing the unfair dismissal claim to the Labour Court meets the fullness and reasonable cogency requirements. If it does, then the Labour Court in the exercise of its discretion ought to have considered the prospects of success of that claim.
- [12] The appellant correctly does not take issue with the description of the delay as being “excessive”. Being about 11 months late is indeed inordinate and called for a full and reasonable (acceptable) explanation.

⁹ See *Council for Mineral Technology* (above) para 10.

¹⁰ *Ibid.* paras 10 and 18.

¹¹ See, *inter alia*, *Grootboom v National Prosecuting Authority and another* [2014] 1 BLLR (CC);(2014) 35 ILJ 121 (CC) para 23.

[13] In essence, the appellant contends that although she is an attorney her expertise was confined to the area of competition law and that she knows nothing of Labour Law; that she had sought advice concerning the loss of her employment right from the outset, because doing these matters on her own was “like asking a cardiologist to do brain surgery”; that she had not been advised by her erstwhile attorneys, HWI, that the unfair dismissal claim, which essentially has as its basis, unfair discrimination based on her race and gender, could be referred to the Labour Court for determination after conciliation, as an automatically unfair dismissal claim; that she only became aware of that fact after she had engaged a new attorney, Mr Sean Snyman, who had advised her accordingly; that her erstwhile attorneys, HWI, had not given the same advice, but had advised her that only a constructive dismissal dispute ought to be pursued and that a separate case for discrimination was only to be pursued at a later stage.

[14] Accordingly, so explained the appellant, as advised by HWI, initially, only a constructive dismissal case (for reasons unknown) was referred to the CCMA and proceeded with until it was about to be arbitrated in that forum in June 2018; that even when her erstwhile attorneys realised in June 2018 that an unfair discrimination claim was to be referred to the CCMA they still advised the appellant that it was to be consolidated with her constructive dismissal dispute, so that the two claims could be arbitrated simultaneously in the CCMA; and that it was Mr Snyman who advised her that both those claims were to be referred to the Labour Court for resolution.

[15] In addition, the appellant explained why she had to wait for Mr Snyman, to whom she had been referred specifically for assistance, to complete his spell as an acting judge in the Labour Court before proceeding with the matter. She explains that Mr Snyman acted as a judge in the Labour Court from 15 October 2018 to 14 December 2018 and was not able to assist her during that period. She also states the reasons why the condonation application was only brought on 1 March 2019 and why Mr Snyman first wanted to amend her statement of claim before filing the amendment together with the condonation application. According to her, Mr Snyman was on leave from December 2018

until 21 January 2019, following his acting spell, and that the condonation application was “brought as soon as possible”. She states that the amendment was comprehensive and that in the period of six weeks, i.e. from 21 January 2019 to 1 March 2019 the amendment had to be affected and the condonation application also had to be prepared.

- [16] The appellant further contended that settlement discussions held between the parties in the period June to November 2018, and the postponement of the unfair dismissal arbitration during that period, and for that reason, also contributed to the delay. She maintained that, ultimately, litigation in the wrong forum, i.e. the CCMA, and impliedly, the advice she got from her erstwhile attorneys, had contributed to the difficulties which she experienced subsequently in complying with the time period for referral to the Labour Court.

The court a quo’s assessment of the explanation

- [17] According to the court *a quo*, it is clear from a letter dated 16 September 2017, written by HWI to the respondent, that the appellant was of the view that she was a victim of discrimination; that even if the discrimination was not the sole complaint “it loomed large”, yet she only started pursuing an ordinary constructive dismissal dispute on 16 October 2017 and an unfair discrimination dispute on 27 July 2018.
- [18] The court *a quo* was of the view that the appellant did not require legal advice in order for her to become aware that she had been unfairly discriminated against, and that such awareness would be a matter of fact and not law. It found that the appellant’s attorneys could only have advised her on whether what she had experienced was legally actionable. Accordingly, it found that it was “highly unlikely” that HWI would not have discussed a discrimination based claim with her as well as the requisites for such a claim. According to the court *a quo*, it was apparent from the said letter that HWI had meticulous and detailed instructions, including an employment history and of the appellant’s alleged attempts to get rid of her. This letter of the appellant, so reasoned the court *a quo*, is apparently not that of an attorney not

experienced in the area of Labour law; and that it was accepted on the papers that the attorney at HWI, who was dealing with her matter, had the necessary knowledge to advise her appropriately concerning her rights and legal position, including the appropriate forum and the correct procedures for the exercise of those rights.

[19] The court *a quo* found it “telling” that the appellant in her application for condonation did not give the reason for terminating the mandate of HWI. According to the court *a quo*, HWI was to advise her of the “inextricable link” between the allegations of discrimination based on race and gender and her constructive dismissal; and that it was their advice that must have resulted in the referral of an unfair discrimination dispute to the CCMA, together with a related condonation application; and conciliation of the dispute on 1 October 2018. According to the court *a quo*, it is around that time that HWI disappeared from the scene; that the appellant did not explain the reason for their disappearance and merely mentions in the papers that she had been advised that an unfair discrimination dispute had to be referred to the Labour Court; and that she did not mention the source of that advice. The court *a quo* concluded that the advice the appellant said she got from Mr Snyman, was exactly the same as that HWI had given her in the lead up to the arbitration of 7 May 2018. The court *a quo* was also critical of the fact that the appellant did not state when, let alone exactly when, she had consulted Mr Snyman, and of the fact that even though the respondent had raised this matter in their answering papers the appellant had failed to clarify the position.

[20] According to the court *a quo*, the only date in respect of her interaction with Mr Snyman that the appellant provided is the date “14 December 2018”, i.e. the date just after Mr Snyman’s acting period in the Labour Court had ended. It was also critical of the appellant’s failure to explain whether Mr Snyman worked on the appellant’s statement of claim before his acting spell started and was only able to complete it after 14 December 2018, or whether he worked on it during his acting stint, since it was filed a week after 14 December 2018, or whether someone else assisted with it, since Mr Snyman is part of a large firm. The court *a quo* reasoned that the appellant could have

been assisted by such a person, or even by counsel, who could have been briefed, but that the appellant, for reasons that have not been provided, chose to wait for Mr Snyman.

- [21] The court *a quo* was also critical of the appellant's contention that she was not a Labour law expert. It found that as an attorney, she must have appreciated the need to refer the automatically unfair dismissal dispute to the Labour Court without delay; and that one would have expected the appellant to have been more diligent regarding the issue of condonation for the late referral of a dispute, since sent shortly before that, she had to apply for condonation for the late referral in the CCMA. The court *a quo* seemed to be concerned that there was a delay in bringing the condonation application in the Labour Court. And it found that the delay in the referral of the dispute seems to have been caused solely by Mr Snyman's unavailability. It also considered the fact that even though Mr Snyman returned from leave on 1 January 2019, the condonation application was only filed on 1 March 2019. According to the court *a quo*, no reason, let alone a cogent reason, was given by the appellant why the condonation application could not have been filed earlier than that, because nothing in the condonation application depended on the amendment of the statement of claim.
- [22] In addition, the court *a quo* found that the delay allegedly caused by the settlement negotiations "is also of no assistance" to the appellant because the time periods prescribed in the LRA are not suspended "or overridden" by settlement negotiations. The court *a quo* expressed the view that such negotiations, by their very nature, are conducted as a matter proceeds and that, in any event, in this instance the appellant herself did not consider the settlement of the dispute to have been "a serious prospect in the near future".
- [23] The court *a quo* found that, ultimately, the appellant knew before 7 May 2018 that the unfair dismissal dispute was founded on allegations of discrimination based on race and gender, but chose to file the dispute relating to the automatic unfair dismissal only at the end of December 2018, or the beginning of January 2019, and that she had "failed to put up a reasonable and acceptable explanation for this."

Appellant's arguments on appeal

- [24] Mr Snyman, on behalf of the appellant essentially argued the following: that even if the court *a quo* had its “own reservations about the explanation provided by [her], as a whole, [it] simply set the bar too high”; that the “entire period of the delay was properly explained”; and that “even if their explanation was not the best, there was at least an explanation and that required prospects of success to be considered.”
- [25] It was further contended by Mr Snyman that the appellant had not simply sought condonation but had given “what at least can be said to be a full explanation for the entire period of the delay”; that it cannot be ignored that the respondent had agreed to the postponement of the proceedings in the CCMA in June and July 2018 and that further proceedings be held in abeyance “until the discrimination condonation issue” (i.e. in the CCMA) had been concluded. According to this argument, in the end, litigation in the wrong forum accounted for the bulk of the period of the delay, which according to Mr Snyman, constituted an acceptable explanation for the delay, and that “[o]verall considered, the explanation as it stood, was sufficiently reasonable to excuse the default.”
- [26] In addition to arguing that the court *a quo* ought to have considered the prospects of success in those circumstances, Mr Snyman also submitted that the court *a quo* did not consider the aspect of prejudice. In this regard, Mr Snyman, essentially argued that because the appellant alleges that “her fundamental rights as a female of colour had been violated by the respondent on the basis of pure racism...[t]he case must be answered in court ... [p]ublic interest demands it.” He argued that the consequence of refusing condonation “is that the respondent is getting away with the racist conduct, which cannot be tolerated.”
- [27] In conclusion, Mr Snyman submitted that the court *a quo* “erred in fact and in law” in dismissing the appellant’s condonation application “by not exercising the required judicial discretion.” The appellant, accordingly, sought an order upholding the appeal, setting aside the court *a quo*’s order and substituting it

with one granting the appellant condonation for the late referral and delivery of the automatically unfair dismissal claim.

The respondent's submissions

- [28] In essence, the respondent's arguments were in support of the court *a quo*'s approach and findings. Counsel for the respondent submitted in summary, that the court *a quo* did not fail to exercise its discretion and that its decision "is not only reasonable, but followed the applicable tenants of the law ... [t]here has been no misdirection which would entitle a court of appeal to intervene". The respondent accordingly sought a dismissal of the appeal with costs.

Discussion

- [29] Having considered the appellant's explanation for the delay it is difficult to fault pertinent observations and findings made by the court *a quo* in that regard. Since the delay was excessive it was incumbent upon the appellant to give a full and reasonable explanation for the delay for the entire period of the delay. If that threshold was not met the prospects of success were immaterial, in the absence of issues being raised that would warrant the Court's interference on the basis that is in the interest of justice to do so. The court *a quo* did not set a higher standard for condonation but was exercising its discretion judicially in accordance with the law pertaining to condonation of the kind sought by the appellant. The issue of prejudice to the other party is inherent in the aspect of the delay and need not be considered separately or expressly. It cannot be found that the court *a quo* did not exercise its discretion properly, or unreasonably.
- [30] The appellant resigned from her employment on 16 September 2017. She then referred the dispute to the CCMA in terms of which she alleged that she had been constructively dismissed. She made no mention at all of unfair

discrimination. The appellant was assisted at all times by her erstwhile attorneys. A certificate was issued on 14 November 2017 to the effect that the constructive dismissal dispute could not be resolved at conciliation. Shortly before the ninety-day period elapsed the dispute was referred to arbitration at the CCMA. The arbitration itself was postponed a few times.

- [31] On 27 July 2018, and while the constructive dismissal dispute was pending, the appellant referred another dispute to the CCMA in which she, for the first time in that forum, claimed that the respondent had discriminated against her in contravention of the Employment Equity Act¹² (EEA). In that referral, she claimed that the discrimination dispute had arisen on 26 April 2018. This was significant, because that is more than seven months after her resignation.
- [32] The appellant, assisted by their erstwhile attorneys, applied on 16 August 2018 in the CCMA for condonation for the late referral of the unfair discrimination dispute to that forum and she also sought to consolidate the resolution process of that dispute with that of the dispute she referred initially. On 7 September 2018, the CCMA granted the condonation sought but refused to consolidate the matters. And it is only on 21 December 2018 that the appellant referred the automatic unfair dismissal (discrimination) dispute to the Labour Court.
- [33] The appellant essentially explained that she did not refer the automatic unfair dismissal dispute earlier because (either) she did not appreciate that she had been discriminated against by the respondent (or was not aware of her rights in that regard). How she alleges she became aware of this, bears mentioning. She states that it became apparent to her attorneys in the course of preparing for the hearing in the CCMA on 20 and 21 June 2018 that “there was an inextricable nexus between allegations of discrimination based on race and gender”, which she believed was perpetrated by the respondent, and her constructive dismissal. According to the appellant, until then the constructive dismissal dispute had been pursued on the basis of “reasons unknown”. However, that statement is inconsistent with what the appellant stated in her request that the constructive dismissal dispute be arbitrated. There she stated

¹² Act 55 of 1998.

that the unfair conduct on the part of the respondent had made her working conditions intolerable. That is clearly not for “reasons unknown”.

- [34] It is also significant that from the appellant’s own explanation, despite becoming aware in June 2018 of the “inextricable link” between the dismissal and the unfair discrimination, which rendered her dismissal automatically unfair, she did not refer the automatic unfair dismissal dispute to the Labour Court until about 21 December 2018, that is for a period in excess of five months.
- [35] The appellant’s explanation for the failure to refer that dispute to the Labour Court timeously is, generally, vague. It implies that she had not been properly advised by her erstwhile attorneys, but even that is not clear and unequivocal. She does not explain when and why they ceased to represent her and when exactly she got the advice that made it apparent to her that she had to refer an automatic unfair dismissal claim, together with an unfair discrimination claim under the EEA, to the Labour Court.
- [36] The appellant does not give an explanation, let alone a clear and unequivocal and acceptable explanation, for this delay in bringing the automatic unfair dismissal dispute to the Labour Court. If the delay was purely due to Mr Snyman’s unavailability, because of his spell as an acting judge, it would not be a reasonably acceptable explanation, in any event.
- [37] The appellant’s explanation, wholly considered, not only lacks essential detail, but gives the impression that promptness was not a priority, and that the referral of the claim to the Labour Court, as well as the bringing of the application for condonation, which is the subject of this appeal, was not pursued with the kind of urgency that is required of a matter that is submitted to be of such great importance to the appellant.
- [38] The appellant’s version of her knowledge of the alleged discrimination was justifiably and reasonably criticised by the court *a quo* and by counsel for the respondent. The appellant is a qualified and experienced lawyer and one would have expected her to have been aware of any discrimination, including that directed at her race and gender perpetrated against her by the

respondent, promptly when or after it occurred. It is rather questionable that she would only have become aware that she had been discriminated against (as she alleges) about a year after she had resigned, and only when it became apparent to her erstwhile attorneys in June 2018 that there was “an inextricable link” between (allegations) of discrimination, that she believed had been perpetrated by the respondent, and her constructive dismissal.

[39] The respondent’s counsel argued that the appellant’s averment that she only became aware of the respondent’s alleged discriminatory conduct (i.e. based on race and gender) was in June 2018 cannot be true because in their letter dated 16 September 2017 to the respondent her erstwhile attorneys referred to the respondent’s conduct as “discriminatory”. In the body of that letter they further make clear what they mean by that. The concluding paragraph of the letter states: “Our client is of the view that the action taken against her is extremely unfair, discriminatory, highly prejudicial reputationally and thus caused an irretrievable breakdown in the working relationship.”

[40] The letter dated 16 September 2017 thus confirms, at least, two aspects: firstly, that as long ago as September 2017, shortly after the appellant had resigned from the respondent, she and her erstwhile attorneys claimed that she had been unfairly discriminated against in contravention of the law and that there was an inextricable link between the alleged discrimination and her resignation (i.e. alleged dismissal); and secondly, they were therefore in a position then to conclude that the appellant had an automatically unfair dismissal claim.

[41] Counsel for the respondent’s also pointed to a critical contradiction in the appellant’s version that she had put up in the CCMA condonation proceedings and her version in the condonation proceedings which is the subject of this appeal. She attached the founding affidavit in the condonation proceedings in the CCMA to a replying affidavit in the latter proceedings.

[42] In the CCMA condonation proceedings, the appellant implied that it is just before the hearing in the CCMA, that is before 20 and 21 June 2018, that her erstwhile attorneys became aware of the “inextricable nexus” between her

alleged discrimination and the constructive dismissal and, significantly, she also stated there that in March 2018 (i.e. three months earlier) she had been “informed” that her “exit was maliciously motivated on the basis of race as well as gender.” This was conveyed by her erstwhile attorneys to the respondent in a letter dated 23 March 2018. According to her version in that founding affidavit, in a further letter of her erstwhile attorneys to the respondent, dated 26 April 2018, it was alleged on her behalf that “it has become apparent that the intolerable working conditions which formed the basis of the constructive dismissal were occasioned by racial discrimination, gender discrimination...”

[43] Thus, the appellant’s version in the CCMA proceedings seemingly contradicts the version she put up in the court *a quo*. In the former, she became aware as early as March and April 2018 of the alleged discrimination based on her race and gender, and of its link to her constructive dismissal, whereas her version in the court *a quo* was that such awareness only came in June 2018.

[44] In the light of all of those factors, it could justifiably be concluded that the appellant’s explanation for the delay in bringing the automatic unfair dismissal claim in the Labour Court was not *bona fide*, reasonable and acceptable. The court *a quo* cannot be faulted in the exercise of its discretion in refusing condonation and for regarding the prospects of success, in those circumstances, as being immaterial. In any event, on the papers, it is not possible to determine that the appellant’s prospects of succeeding in her discrimination claim are even reasonable. The discrimination claim is highly contested. It does however appear that the appellant is not left without a remedy as she appears to be pursuing a claim for (alleged) unfair discrimination in terms of the EEA in the Labour Court.

The cross-appeal

[45] The respondent contends that the court *a quo* erred in failing to award costs against the appellant in respect of the unsuccessful condonation application. It was submitted that such an award should have been made in light of the extremely late application for condonation and the “mendacious explanation” given by the appellant for the failure to comply with the time limits, because

such conduct should not be countenanced. This cross-appeal is in my view totally spurious.

[46] The issue of costs is also a matter that was squarely within the discretion of the court *a quo*. It is accepted in labour matters that the rule that costs follow the result does not apply and that, instead, the making of costs orders depends on the facts, the law and fairness. It can hardly be contended that the court *a quo* did not apply its mind when ordering specifically that there should be no costs order. I am not persuaded that there is a basis upon which this court can interfere with that order.

[47] In the result, the following is ordered:

47.1 The appeal and the cross-appeal are dismissed

47.2 There is no costs order.

P Coppin

Judge of the Labour Appeal Court

Waglay JP and Kubushi AJA concur in the judgment of Coppin JA.

APPEARANCES:

FOR THE APPELLANT: Mr S Snyman of
Snyman Attorneys

FOR THE RESPONDENT: Mr A Redding SC
Instructed by Adams & Adams