

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO JA65 / 98

In the matter between:-

SACCA (PTY) LTD

Appellant

and

THIPE K.M.

First

Respondent

MALULEKE

Second

Respondent

JUDGMENT

MOGOENG AJA

- [1] This is an appeal against the order of the Industrial Court which effectively condoned the Respondent's late filing of a statement of case.
- [2] There are essentially two issues which fall for consideration, namely whether or not:
- (a) the ruling which allowed the application to be proceeded with is a pure or simple interlocutory order, which is not appealable; and
 - (b) the Respondents' filing of a statement of case some three years of the referral of the dispute to the Industrial Court requires no condonation or is condonable, even in the absence of an application for condonation, simply because the appellant did not bar the Respondents after the expiry of the *dies*.
- [3] Logic dictates that I deal with the first issue first. The reason being that an affirmative answer to question (a) would render any further discussion of question (b) unnecessary since it would dispose of the entire appeal.

The Appealability of Interlocutory Orders

- [4] For the purpose of this judgment, it is not necessary to deal with the meaning and nature of interlocutory orders. I am called upon to decide whether this order is appealable or not.

- [5] There can be no doubt that the decision to allow the Respondents to proceed on the merits, notwithstanding the late filing of the statement of case was an order in the ordinary sense of the word which, if wrong, could be corrected on appeal. The real question is whether it can be corrected forthwith and independently of the outcome of the main proceedings or whether the Appellant is constrained to await the outcome of the main proceedings before the decision can be attacked as one of the grounds of appeal in which event the decision of the Industrial Court under consideration would be a pure or simple interlocutory order or ruling.
- [6] “ The question which is generally asked ... is whether the particular decision is appealable. Usually what is being asked relates not to whether the decision is capable of being corrected by an appeal court, but rather to the appropriate time for doing so. In effect the question is whether the particular decision can be placed before a court of appeal in isolation, and before the proceedings have run their full course.” (Nugent J *Liberty Life Association of South Africa Ltd v Niselow* (1996) 17 ILJ 673)(LAC) at 676H).
- [7] In determining the nature and effect of a judicial pronouncement, not merely the form of the order must be considered but also, and predominantly, its effect. (See *South African Motor Industry Employers' Association v South African Bank of Athens Ltd* 1980 (3) SA 91 (A) at 96H).
- [8] A judgment or order is a decision which, as a general principle, has three attributes; firstly, the decision must be final in effect and not susceptible of alteration by the

court of first instance;

secondly, it must be definitive of the rights of the parties;

thirdly, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings. (See *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 532J-533A; *Van Streepen & Germs (pty) ltd v Transvaal Provincial Administration* 1987 (4) SA 569 (A) at 586I-587B.)

[9] It follows, therefore, that unless an interlocutory order has a final and definitive effect on the main action it is not a judgment or order. It amounts to a simple interlocutory order which is not appealable. (See *South African Druggists ltd v Beecham Group P/C* 1987 (4) SA 876 (T) at 880B-C, a Full Bench decision which was cited with approval in *Zweni* above). Simple interlocutory orders were equated with rulings in *Sistag Maschinen Fabriek AG and Another v Insamor (Pty) Ltd* 1989 (1) SA 406 (T) at 408D-F. I endorse the view that their nature and effect is essentially the same.

[10] The courts have made a subtle shift from a strict adherence to the abovementioned requirements and adopted a more pragmatic and flexible approach to a situation where a party seeks to appeal against some preliminary or interlocutory decision which is made by a court before it has arrived at a final conclusion on the merits of the dispute between the parties. Harms AJA had the following to say in *Zweni supra* at 531J-532A:

“ The emphasis is now rather on whether an appeal will necessarily lead to a more expeditious and cost-effective final determination of the main dispute between the

parties and, as such, will decisively contribute to its final resolution.”

- [11] Having referred to this passage Mahomed CJ captured the essence of the less rigid and modern approach in the following terms in *Beinash v Wixley 1997 (3) 721(SCA) at 730D-F*:

“ What the court does is to have regard to all the relevant factors impacting on this issue. It asks whether the decision sought to be corrected would, *if decided in a particular way*, be decisive of the case as a whole or a substantial portion of the relief claimed, or whether such a decision anticipates an issue to be dealt with in the main proceedings. The objective is to ascertain what course would best ‘bring about the just and expeditious decision of the major substantive dispute between the parties’ (*Pretoria Garrison Industries v Danish Variety Products (Pty) Ltd 1948 (1) SA 839 (A) at 868; Van Streepen & Germs supra at 585E-J*).” (emphasis supplied)

- [12] The effect of the foregoing approach in the circumstances of the present case would be as follows:

Firstly, the order ‘condoning’ the failure of the Respondents to file the statement of case in time is for the purpose of the main proceedings, dead and buried. No evidence would be led which could have a direct or indirect bearing on that order, no opportunity exists for argument to be presented on it, and it is therefore final in effect and not susceptible to alteration by the Industrial Court.

Secondly, if the decision sought to be corrected was decided in favour of the Appellant, thereby refusing ‘condonation’, that order would certainly have been

definitive of the rights of the parties. That is precisely what the effect of the order of this court would be should the appeal be upheld.

Thirdly, had 'condonation' been refused or should this appeal succeed, such an order would necessarily lead to a more expeditious and cost effective final determination of the entire dispute between the parties. The Appellant would get the same relief as in the main proceedings namely the dismissal of the application.

[13] Accordingly, the granting of 'condonation' in this matter was the question at issue which was open to be decided in the ordinary course of the main proceedings. That order practically put an end to the issue in question immediately it was made and it did not leave the issue open until final judgment.

[14] I am therefore satisfied that an order granting 'condonation' of the late filing of a statement of case is

in nature
and effect
an
appealable
interlocuto
ry order. In
Era Bricks
(Pty) Ltd v
Building
Constructi
on and
Allied
Workers
Union and
Others (25
March
1997 case
no NH
11/2/1296
4),
Myburgh
JP decided
that the
granting of

condonatio

n is

appealable.

Kroon JA

adopted

the same

approach

in *Gilbey*

Distillers

& Vintners

v Mandla

Shinga (9

March

1999 case

No DA

14/98)

[15] This court is, therefore, at liberty to entertain the appeal against the order made by the court *a quo*.

Does failure to act in terms of Rule 29 (4) and (5) render condonation unnecessary?

[16] The order sought to be corrected in this appeal is very much in the nature of an order

granting condonation for the late filing of a statement of case. No condonation was sought by the Respondents in the court *a quo*.

- [17] The relevant facts of this case are that the Respondents were dismissed by the Appellant on 5 February 1993. The dismissal was upheld by the chairman of the appeal hearing on 22 April 1993.
- [18] On 29 June 1993 the Respondents referred the dispute, arising from their dismissal, to the Industrial Court in terms of s 46(9) of the Labour Relations Act 28 of 1956 (“the Act”).
- [19] Pursuant thereto, the Registrar of the Industrial Court wrote a letter dated 16 July 1993 to the Respondents, advising them of the case number allocated to their case and the other matters which required their attention.
- [20] As a result of this advice, the Respondents delivered a further referral to the Industrial Court which was received on 18 August 1993. That was the end of the correspondence from the Respondents to the Registrar of the Industrial Court.
- [21] On 11 August 1995 one of the Industrial Court’s presiding officers decided that the file relating to the foregoing application be closed and that it be placed in the archives as the matter had become ‘stale and inactive for too long and therefore aborted by court’.

- [22] It was not until 28 February 1997 that Respondents served and filed their application in terms of Rule 29(1) of the rules of the Industrial Court.
- [23] Appellant filed its reply on 11 March 1997 in which it, inter alia, objected to the matter being heard on the basis that Respondent waited for too long before the notice of application itself was filed. It subsequently advised the Respondents to file an application for condonation, explaining the delay. The Respondents refused to do so.
- [24] At the time of the hearing, the Appellant took the point in limine it had been threatening to take. In response, the Respondents submitted that the application was referred to the Industrial Court in time and that it was only the filing of the application which was late. The essence of the Respondents' contention was that Rule 29 (4) entitled the Appellant to bar the Respondents. Appellant failed to utilise this remedy and was therefore estopped from trying to prevent them from prosecuting their application. The court *a quo* ruled in favour of Respondents for this very reason.
- [25] Unlike Rule 29 (1), Rule 10 of the Magistrates' Court Rules creates a sanction for failure to prosecute an action. Be that as it may, the principle which applies to a defendant/ respondent's failure to compel compliance and take further related steps in terms of the Rules is the same. The significance or effect of a failure to bar a plaintiff/ applicant was dealt with by Smalberger JA in *Manyasha v Minister of Law and Order 1999 (2) SA 179 (SCA) at 187A-B* in the following self- explanatory terms :

“ The fact that a defendant who has entered an appearance to defend and requested further particulars, or filed a plea, can utilise the Rules to compel a plaintiff to

respond and take further steps in the prosecution of the action does not alter the plaintiff's position. It may suit a defendant, for tactical or other reasons, simply to sit back and do nothing. But the Rule is not designed to penalise a defendant for inaction or a failure to take steps and bring a matter to finality."

[26] Section 46(9) stipulates the time limit within which an Industrial Council or a Conciliation Board should attempt to settle a dispute. Rule 29(1) takes it a step further by making provision for the time limit within which an applicant must deliver a notice of application which has come to be known as a statement of case. On the other hand Rule 29(4) sets out the punitive measures at a respondent's disposal in the event of an applicant failing to deliver a statement of case as indicated by Rule 29(1). I think it was in the same spirit that the President of the Industrial Court issued Practice Note 5/1994 which provides, inter alia, that ' matters which have remained dormant for an unreasonable length of time will be regarded as closed and the files dispatched to the archives'.

[27] The question then arises as to what purpose these provisions were intended to serve in the first place? There can be no doubt that the Rules of any court, which constitute the procedural machinery of the courts, are intended to expedite the business of the courts, (*Hudson v Hudson & Another* 1927 AD 259 at 267; *Viljoen v Federated Trusts Ltd* 1971 (1) SA 750 (O) at 754D -E; *LF Boshoff Investments (Pty) Ltd v Cape Town Municipality* (2) SA 481 (NM) at 491D - E; *SOS Kinderdorp International v Effie Lentin Architects* 1993 (2) SA 481 (NM) at 491D-E). Consequently, they must be interpreted and applied in a spirit that will enhance and facilitate the work of the

courts and enable the litigants to resolve their disputes in as speedy and inexpensive a manner as possible (*Ncoweni v Bezuidenhout* 1927 CPD 130; *SOS Kinderdorp supra* at 491D - F; Herbstein & Van Winsen, *The Civil Practice of the Supreme Court of South Africa*, 4th ed. (Juta) at 33).

[28] Rule 29(1) does not create an obligation to file a statement of case within the specified time limit. However, an applicant is obliged to file it within a reasonable time. The period of fourteen days is sufficiently brief to serve as a meaningful indication of what should be regarded as a reasonable time within which to file a statement of case. Coupled with the remedial measures at a respondent's disposal, Rule 29 as a whole goes a long way to underline the urgency which must characterise the resolution of labour disputes. After all, the Industrial Court was established primarily to facilitate a speedy resolution of labour disputes. I think that one of the primary purposes of Rule 29 is to penalise a supine applicant. A subsidiary or complimentary purpose may be to bring about finality, both administratively and otherwise, to matters where applications are referred to the Industrial Court but nothing done to actively pursue them. Sub-rules (4) and (5) make it clear that such inactivity as in this case is worthy of censure. (See *Manyasha supra* at 186H - I).

[29] The Appellant was not only courteous enough to warn the Respondents, well in advance, that it intended to take a point in limine regarding their delay, but it also advised the Respondents to apply for condonation and explain away their delay, so as to protect their own interests. They spurned the opportunity on the basis that condonation was not required since the Appellant did not bar them as provided for in

Rule 29 (4).

[30] The Respondents' failure to file their statement of case in time or within a reasonable time and their consequent remissness to prosecute their application as well as the refusal to explain the delay makes it very difficult to understand why they were granted the indulgence. A delay of three years four months is by all standards grossly unreasonable. The import of Rule 29 (4) and (5) has been misconstrued. The failure of the Appellant to bar the Respondent, and thereafter to apply that the application be dismissed, did not render the provisions of Rule 29 (1), directory though they may be, inconsequential. It did not excuse the Respondents' failure to actively pursue their application. I am satisfied that the point in limine should have been upheld.

[31] The Respondents' power of attorney was filed late. An application for condonation was made. The explanation furnished for the delay is satisfactory. Condonation is therefore granted.

[32] Accordingly I make the following order;

a) The appeal is upheld with costs.

b) The order in the court *a quo* is set aside and is replaced with the following order:

“(i) The point in limine is upheld.

- (ii) The application is dismissed due to an undue and unfair delay in the prosecution thereof.
- (iii) No order as to costs.”

c)Application for condonation of the late filing of the power of attorney is granted and the Respondents are ordered to pay the costs occasioned by it.

MOGOENG AJA