

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

HELD AT DURBAN

Case No: DA 12/2001

In the matter between:

TOYOTA SA MARKETING

Appellant

And

ZELDA SHMEIZER

Respondent

JUDGMENT

Van Dijkhorst, AJA:

1. The respondent, who describes herself as a styling manager, approached the Labour Court in Durban for an order against her employer, the appellant, declaring that the appellant's conduct in refusing to bring the respondent's remuneration in line with that of other managers in her grade amounts to unfair discrimination on the grounds of sex in terms of section 6 of the Employment Equity Act 55 of 1998 and that the appellant's act of unilaterally removing the

respondent's manager title amounts to unfair conduct in terms of section 2(1)(b) of Schedule 7 to the Labour Relations Act 66 of 1995. She further sought an order that the appellant be directed to remunerate her as a styling manager with full retrospective effect.

2. Her statement of case was filed on 12 October 2000. The appellant did not respond timeously. Its response to the respondent's statement of case was filed some 59 days later. The appellant sought condonation for the lateness of its response. This application was strenuously opposed. The Labour Court refused condonation. This is an appeal against that refusal.
3. The facts set out by Mr E J van Rensburg, the appellant's industrial relations manager, in the founding affidavit in support of the application for condonation are as follows:

The respondent's statement of case was allegedly telefaxed on 11 October 2000 to the appellant's human resource manager on telefax number 9121553. That fax number is, however, that of the finance manager and the papers did not come to the notice of the human resource manager. Only on 4 December 2000 did the human resource manager, Mr Eddie Smit, receive a notice of set down from the Labour Court dated 15 November 2000 indicating that the matter had been set down for hearing on the unopposed roll of 6 February 2001. That was the first indication the appellant had of these proceedings. The appellant's attorneys were

instructed and a copy of the application was uplifted from the Court file on 8 December 2000.

4. Steps were taken to ascertain whether the appellant had received the application as alleged. The secretary in the finance department had no recollection of receiving the application. Only after the respondent's attorneys had uplifted a copy of the pleadings from the Court file did a brown envelope which contained a copy of the pleadings find its way to the deponent's office. The envelope had been sent to the appellant by registered post. There was no record of when the envelope had actually been received by the appellant.
5. It is surmised that because the document was addressed to Toyota (South Africa) Marketing this created confusion amongst the appellant's employees. The marketing division of the appellant operates from Johannesburg and any document addressed to Toyota Marketing is forwarded to Johannesburg. This would cause extensive delay before it becomes apparent that the document should have been addressed to the deponent himself.
6. The appellant's offices closed on 15 December 2000 for the annual holiday and employees only returned to work on 9 and 10 January 2001. Only once the appellant had reopened in 2001 could proper instructions be taken in regard to the allegations raised by the respondent. On 20 December 2000 the appellant's

attorneys had given notice of the appellant's intention of opposing the application and the application for condonation was served on 22 January 2001 together with the response, some 59 days late.

7. The deponent submits that the delay is not excessive given the circumstances and complexity of the matter and sets out facts in support of his statement that the appellant has good prospects of success on the merits of the case. He further submits that the respondent did not suffer any prejudice as a result of the delay because she is currently employed and is receiving monthly income and, should she be successful, her salary can be retrospectively adjusted. The deponent states that the respondent herself is partially to blame in creating confusion which ensued with the service of the statement of case. She is aware that the deponent handles all employee disputes, yet the documents were addressed to Toyota Marketing, which is situated in Johannesburg whereas the appellant's business where the deponent and the respondent are employed is at Isipingo Beach.
8. The respondent in her answering affidavit to the application for condonation denies the allegations about the fax number and attaches proof of delivery from the Prospecton Post Office which indicates that the brown envelope referred to by the deponent was uplifted by the appellant on 17 October 2000 and that it is apparent from the postage slip attached to the affidavit of service that the envelope was marked for the attention of the human resource manager at the

appellant in Durban. She states that there is no reason why the correct person should not have had the statement of case by no later than 31 October 2000. She makes the unsubstantiated allegation that she is severely prejudiced by the delay.

9. Whatever the position may be, the undisputed facts are that the responsible functionaries within the appellant only became aware of the respondent's application to the Labour Court on 4 December 2000, probably due to the negligence of someone or other in the appellant's organization.
10. In the Labour Court Ngcamu AJ held that the period of seven weekdays between 8 and 15 December 2000, that is after the papers had been uplifted by the attorneys, and the period between 10 and 22 January 2001, that is the period after the appellant had reopened, had been left unexplained. There was also no information on whether the human resource manager of the appellant had gone on leave. The Court was therefore dissatisfied with the explanation for the delay. Ngcamu AJ also held that no prospects of success had been shown as the appellant's explanation in its response to the statement of claim that the respondent fell within a certain band of employees or managers and was therefore paid a lesser salary, was no answer at all. The learned Judge also rejected the argument that there was no prejudice on the part of the respondent because she was in employment. He held that it is important for the Court to have this matter sorted out immediately and speedily and if it was sorted out earlier, even before

coming to Court, the respondent would have got more salary.

11. The learned Judge's last two findings can be disposed of immediately.. Any loss of salary can be remedied retrospectively as stated by the appellant. On appeal the appellant's counsel gave the following undertaking on its behalf: "In addition to any other powers vested in the trial Court, the company (appellant) will give effect to any award in relation to retrospectivity from 6 February 2001 to date of judgment of the Labour Appeal Court." This puts paid to an argument of prejudice caused by this application and the appeal arising therefrom.

There was no particular sense of urgency about this matter. The learned Judge's conclusion that the appellant had not shown any prospects of success was based on his understanding that the appellant's defence to the respondent's claim was simply that the respondent fell within a certain band of managers. That was not the appellant's complete defence as disclosed. The claim was based on the allegation that she and certain male managers were doing work of equal value but that she was paid a lower salary than they were because she was a woman. In its response the appellant denied this and referred to its use of the Peromnes Broad Band system. If the denial was proved to be well founded, that would be a complete defence. Accordingly the learned Judge erred in concluding that no prospects of success had been shown.

12. Counsel differed as to the test to be applied by this Court in this appeal against what was referred to as the exercise by the Labour Court of its discretion to

condone the late filing of the appellant's response to the statement of claim. With reference to the judgments in *Ex parte Neethling and Others* 1951 4 SA 331 (A); *Tjospomie Boerdery (Pty) Ltd v Drakensberg Botteliers (Pty) Ltd* and another 1989 4 SA 31 (T) and *Bookworks (Pty) Ltd v Greater Johannesburg Transitional Metropolitan Council* and another 1999 4 SA 799 (W) and the principles therein set out counsel for the appellant contended that the appeal should be a full rehearing, whereas counsel for the respondent submitted that our powers were curtailed by the fact that it was a discretion that was at issue.

13. The principles expounded by the Full Bench in the *Tjospomie* and *Bookworks* judgments in respect of the approach in the civil Courts on appeal against the exercise of a discretion by a lower Court can be summarized as follows as far as here relevant:

The test to be applied depends on the nature of the discretion appealed against. A "narrow" discretion (incorrectly so named as the discretion of the trial Court is not limited but the power of the Court of appeal to interfere is) exists where the Court will on appeal only set the order aside if the lower Court did not exercise its discretion judicially e.g. acted capriciously, or upon a wrong principle, was biased or did not act for substantial reasons. This is more akin to a review than an appeal. Examples are where the trial Court is or is deemed to be in a better position to adjudicate than the Court of appeal would be. This may involve a value judgment, like compensation or a costs order, or the regulation of the

proceedings (though the given examples of a postponement and amendment of pleadings may not be final judgments or orders and thus not appealable).

As opposed to the narrow discretion there is the ordinary discretion where the trial Court is obliged to have regard to a number of features in coming to its conclusion. The Court of appeal which has all the relevant information on record will in this case approach the matter as a normal appeal, i.e. a rehearing on the record, and having regard to its own view of its merits substitute its own decision for that of the trial Court when it considers it more appropriate.

14. In terms of section 158(1)(f) of the Labour Relations Act 66 of 1995 the Labour Court “may subject to the provisions of this act, condone the late filing of any document with, or the late referral of any dispute to, the Court.” In my view the so-called discretion which the Labour Court has in terms of section 158(1)(f) to condone the late filing of any document is the normal discretion, namely a power to act judicially in accordance with the principles of law and equity in a given set of circumstances. The provisions of section 167 of the Act constitute the Labour Appeal Court as a superior Court with authority, inherent powers and standing in relation to matters within its jurisdiction equal to that of the Supreme Court of Appeal. Section 174 inter alia empowers it to confirm, amend or set aside the judgment or order that is the subject of the appeal and to give any judgment or make any order that the circumstances may require. There is nothing in this wording that limits the powers of this Court on appeal. On the contrary, it is empowered to make appropriate orders. This Court is in as good a position as the Labour Court was to adjudicate upon this matter. There is no reason to limit its powers on appeal. It follows that this appeal is a rehearing on the record, and should we differ from the Court a quo, an appropriate order will have to be

substituted.

15. The legal principles applicable to applications for condonation for non compliance with the time limits laid down in rules are well known. A reference to the abundance of authority is not necessary. The appellant had to show sufficient cause for the relief sought. The decision is to be based on fairness having regard to all the relevant facts. These are usually the degree of lateness, the explanation therefor, the prospects of success and the importance of the case. Ordinarily they are inter-related and not individually decisive. But if there are no prospects of success, the granting of condonation would be pointless. *Melane v Santam Insurance Co Ltd* 1962 4 SA 531 (A) 532C. To these four categories of relevant facts may be added the convenience of the Court, the avoidance of unnecessary delay in the administration of justice and the respondent's interest in the finality of her judgment. *United Plant Hire (Pty) Ltd v Hills and Others* 1976 1 SA 717 (A) 720E. And still this list is not a *numerus clausus*. The present case demonstrates that, as set out hereunder.

16 This brings me to the question of the delay. Certainly the explanation therefor could have been more detailed and candid. It transpired that the appellant's statement that the telefax number 9121553 was that of the finance manager only, is incorrect. It is shared by the general manager- human resources. Both share one secretary. It is left unexplained why false information was placed before Court.

There is no explanation why the telefax of 10 October 2000 which was received, was not attended to. There is no explanation that the papers were in fact forwarded to

Johannesburg, and if they were, by whom, by whom they were received there and by whom returned and when. There is no explanation why the attorney, who on 4 December 2000 became aware of the matter, did not take steps till 20 December 2000 when the notice of opposition was filed and did not see to it that the response was filed till 22 January 2001. There is no evidence that the offices of this firm closed for the Christmas holidays. There is no explanation why the human resource manager could not have filed the response immediately after 4 December 2000. Its contents is of such general nature that minimum research would be required to gather this information.

I must conclude that the appellant is either not entirely frank with the Court or that its attitude is that time limits are not to be taken seriously and that condonation will be granted as a matter of course no matter how sloppy the application is drawn. This conclusion would lead to the refusal of the application without further ado, but for one important consideration which is dealt with hereunder.

17 There is a problem with both the claim and the response thereto. As mentioned previously, the respondent alleges in her statement that the work performed by her and the other 5 managers within her band is of equal value, yet she earns the least remuneration. She is the only woman. Therefore she is being discriminated against on the basis of her gender. The appellant's refusal to bring her remuneration "in line with all the managers" in her grade amounts to unfair discrimination. She claims inter alia that the appellant be directed "to remunerate the Applicant as a Styling Manager". What the others in her band earn and what the remuneration of a styling manager is, is left unexplained. The defence to the claim is as follows: Following the Peromnes Broad Band system the managerial band has a linear pay scale from a maximum to a medium to a minimum. It includes a number of disciplines. There are various pay levels influenced by market relation, years of service, and date of commencement in the function. The respondent's position was re-evaluated in terms of the appellant's evaluation procedure on 30 August 2000. The results showed she was correctly banded. All the managers in that band earn different levels of remuneration. There is no information on the pay scales in the band, the remuneration of the individual managers, market relativity, years of service of the managers or their individual functions. No particulars are given of the re-evaluation.

18 In fact, the Court is entirely in the dark on these pleadings as to the detail of the respective cases. The phrase in prayer 6.1 "to bring the applicant's remuneration in line with all the managers in the applicant's grade" is vague and embarrassing when regard is had to the fact that the managers all earn different salaries. Prayer 6.3 that "the Respondent is directed to remunerate the applicant as a Styling Manager" is vague as the remuneration is not defined in the papers. Should these prayers be granted by default it will create more problems than it will solve and lead to further litigation. The appellant's input is indispensable to the formulation of an order that is both fair and effective. In short, this matter should not be adjudicated by default. In this case the proper administration of justice compels the granting of the application for condonation.

19 The appeal must therefore be upheld. As far as costs are concerned: the original application was caused by the appellant's dilatoriness. It should bear those costs. The appellant's application is defective in its explanation of the delay and the appeal is successful despite its demerits. It is proper that this Court expresses its disapproval thereof by a punitive costs order.

20 The following order is made:

20.1 The appeal is upheld.

20.2 The order of the Court a quo is set aside and the following order is substituted:

“The late filing of the respondent's response to the applicant's statement of claim is condoned. The applicant in the application for condonation (Toyota) is ordered to pay the respondent's (Shmeizer's) costs of this application.”

20.3 The appellant is ordered to pay the respondent's costs of appeal.

Van Dijkhorst AJA
I concur

Zondo JP
I concur

Nicholson JA

For Appellant: Adv L C A Winchester SC

instructed by Shepstone & Wylie

For Respondent Adv M Pillemer SC

instructed by Deneys Reitz

Date of hearing: 12 March 2002

Date of judgment: 4 October 2002