

**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)**

CASE NO. JA 3/04

In the matter between:

MOTLOI JOY

APPELLANT

and

**SOUTH AFRICAN LOCAL GOVERNMENT
ASSOCIATION**

RESPONDENT

J U D G M E N T

Mc CALL AJA

- [1] This is an appeal against the judgment of the Labour Court refusing an application by the appellant for condonation, in terms of s 158 (1) (f) and s 191 (11) (b) of the Labour Relations Act, No. 66 of 1995 (“**the Act**”) of her failure to refer the dispute regarding her dismissal by the respondent to the Labour Court for adjudication within the period of 90 days specified in s 191 (11) (a) of the Act.

Chronology

- [2] Although the respondent opposed the appellant’s application for

condonation, and this appeal, it at no stage filed any opposing affidavits. The appellant's allegations in her statement of claim, her affidavit in support of the application for condonation and in her petition for leave to appeal were not contested. The sequence of undisputed relevant facts is, therefore, as follows:-

- a) The appellant was appointed as Labour Relations Officer in the service of the respondent with effect from 1 October 1997.
- b) By letter dated 11 June 1998 the appellant was informed by the respondent that on 5 June 1998 the Management Committee had resolved that her contract be terminated with immediate effect for her refusal to be deployed to the offices of the Northern Province Local Government.
- c) The appellant referred a dispute about her dismissal to the Commission for Conciliation, Mediation and Arbitration ("**the CCMA**") on 10 July 1998, within the 30 days specified in s 191 (1) (b) (i) of the Act.
- d) The conciliation meeting was held on 16 August 1998 and a certificate was issued on 16 September 1998 that the dispute remained unresolved as at that date.
- e) The matter was then referred to arbitration but, apparently through no fault of the appellant, the matter was finally argued only on 10 July 2000. On that occasion the respondent's attorney submitted that the Commissioner who was assigned to arbitrate the dispute had no jurisdiction to arbitrate because the appellant's dismissal was due to her refusal to accept a demand to be transferred from Pretoria to

Pietersburg. It was, therefore, he argued, an automatically unfair dismissal in terms of s 187 (1) (c) of the Act, which should have been referred to the Labour Court in terms of s 191 (5) (b) (i) of the Act.

- f) The Commissioner accepted the respondent's argument and held that the CCMA did not have jurisdiction to hear the matter.

The Commissioner's ruling was apparently served on the appellant on or about 26 July 2000. It was unaccountably headed "**RESCISSION AWARD**".

- g) The appellant alleges, in her second application for condonation, that the matter was then referred to the Labour Court on or about 11 August 2000, under case No. J3052, together with an application for condonation of the late referral.
- h) The appellant further alleges that the respondent filed a counter "**application of exception to the applicant's statement of claim in terms of Rule 30 (1) of the Rules of the High Court**".
- i) Neither the appellant's first statement of claim nor the exception form part of the record on appeal. However, it appears from a written order dated 19 October 2000 that the matter was heard on 17 October 2000 in the Labour Court when the learned Judge upheld the exception and set aside

the appellant's first statement of claim as an irregular step. He further ordered: **"2. In the application for condonation the respondent has not filed an answering affidavit. The applicant is granted leave to file a new statement of claim together with a new application for condonation. The matter is then to proceed in terms of the Rules."**

- j) The appellant alleges, in her second application for condonation: **"After further consultation in order to comply with all the requirements of the above Honourable Court, the applicant identified that since the conciliation certificate was issued under a description of unfair dismissal in terms of section 191 (1) of the Labour Regulations Act 66 of 1995 as amended, that may restrict the above Honourable Court to adjudicate. As a result, a notice to suspend the Applicant's application in this regard was filed and served to the Labour Court and the respondent on/or about 27 October 2000 respectively, with the view of addressing and/or to cure the issue of conciliation certificate with the CCMA, in order to confer the above Honourable Court jurisdiction to adjudicate."**
- k) There is indeed attached to the appellant's founding affidavit in the second application for condonation, marked "AA 10" a notice under case No. J 3052/00 headed **"NOTICE OF**

INTENTION TO SUSPEND THE APPLICANT'S APPLICATION", in which the appellant gives notice "of intention to suspend the applicant's application in the above matter until further notice". After setting out the terms of the aforementioned order upholding the exception, the notice continues: **"TAKE NOTICE FURTHER THAT the above dispute is in relation to s 187 (1) (c) of the LRA 66 of 1995 as amended (Automatic unfair dismissals).**

It appears that the matter was referred to the CCMA under s 191 (1) (b) of the LRA, and the conciliation certificate from the CCMA was issued in related to a dispute about unfair dismissals. As a result, the Applicant shall first have to contact the CCMA with the view of curing the defect in the said conciliation certificate, in order to confer jurisdiction to the above Honourable Court." This notice is addressed to the Registrar of the Labour Court and the respondent's attorneys.

- l) It is therefore apparent that the appellant was advised that because the Commissioner's certificate dated 16 September, 1998 referred to a dispute "concerning an alleged unfair dismissal" and not to an automatically unfair dismissal in terms of s 187 (1) (c) of the Act, the appellant should, before proceeding further with the application for condonation, contact the CCMA with a view to "curing the defect" in the certificate, in case the point was taken that the terms of the certificate restricted the Labour Court's jurisdiction to hear the matter.

- m) The appellant alleges that an application **"with the view to**

cure the defect was filed and served to the CCMA and the respondent on/or about 10 November 2000” (my emphasis). She annexes a copy of this application to the CCMA, dated 9 November 2000, which was accompanied by an affidavit. In the affidavit she sets out the facts and the perceived problem about the certificate and says: **“the applicant hereby submit an application to the CCMA, for condonation of late referral of the said dispute for conciliation, with the view of curing the defect in the said conciliation certificate, in order to confer jurisdiction to the Labour Court, to determine the matter.”**

- n) The appellant alleges that: **“Despite the said application filed on/or about 10 November 2000 including on numerous occasions the CCMA being contacted by the applicant to set down a date and/or consider to determine the said referred matter, the applicant was told to be patient as the CCMA was dealing with the backlog.”** She says that the matter was finally set down for 31 July 2002 when she was notified that the CCMA was unable to interfere with the certificate.
- o) On 20 August 2002 the appellant then brought the second application to the Labour Court for condonation of the late referral of the dispute, (which I have referred to as her second application for condonation). It is the Labour

Court's judgment on that application which is the subject matter of this appeal. The second application for condonation was brought under a new case number, JS 934/02, and was accompanied by a new statement of claim. The respondent filed a notice of intention to oppose on 27 August 2002, but, as I have said, no answering affidavit.

- p) It would appear that only the appellant filed heads of argument in the Court a quo and judgment on the application was given on 30 October 2002.

The Court *a quo*'s Reasons for Judgment

- [3] In his judgment the learned Judge in the Court a quo referred to the fact that in real terms the appellant's statement of claim was nearly four years out of time. He said that no explanation was provided as to why, after the exception was upheld against the appellant, she did not file a statement of claim which removed the cause of embarrassment.
- [4] Furthermore, he said, other than the appellant's *ipse dixit* nothing was placed before the Court to show that the appellant "**exercised some degree of diligence to attempt to ensure that the CCMA attended to the matter with some urgency**".
- [5] The learned Judge considered the prejudice to the respondent, one

of whose witnesses has since died.

- [6] In the end result, he found that not only was the appellant's explanation for the delay unsatisfactory but that the merits were also "**extremely suspect**". After referring to the fact that the matter only related to a single dismissal he refused the application for condonation.

Argument on Appeal

- [7] In argument before us the attorney for the respondent supported the finding of the Court a quo that there was an insufficient explanation for the delay. He submitted that the appellant's referral of the matter back to the CCMA was "**illogical and unreasonable**". Accepting that the appellant had acted on legal advice, he submitted that, in the circumstances of this case, the appellant could not rely on the conduct of her representative in giving her incorrect advice. He was prepared to concede, however, that whenever it was within her own power to do so, the appellant had acted timeously.
- [8] With regard to the fact that one of the respondent's witnesses had since died, the attorney for the respondent correctly conceded that there was no merit in this point. The witness in question was Mr Shoots Naidoo who had died before the dispute came before the CCMA for arbitration. Naidoo's unavailability as a witness could, therefore, not have had any bearing on the outcome of the matter

had the appellant proceeded with the amendment of her original claim instead of referring the matter of the certificate back to the CCMA.

- [9] As far as the prospects of success are concerned, the attorney for the respondent submitted that the Court a quo had not made a finding in that regard and it was unnecessary to do so as the appellant's explanation for the delay was hopelessly inadequate.

Interference on appeal with the discretion exercised by the Court a quo.

- [10] Sections 158 (1) (f) and 191 (11) (b) of the Act both provide that the Labour Court “**may**” grant condonation for the late referral of a dispute and the latter provision says it may do so “**on good cause shown**”. It was not argued that the order refusing the condonation was not appealable. In my view it clearly was. In terms of s 166 of the Act a party to proceedings before the Labour Court may, with leave, appeal to the Labour Court against any final judgment or final order of the Labour Court. As a general rule the appealability of an order of the Court a quo depends on whether it has a final and definitive effect. See *Trope and Others v South African Reserve Bank* 1993 (3) SA 264 (A) at 269F; *Maize Board v Tiger Oats Ltd and Others* 2002 (5) SA 365 (SCA) at 370.

In *Beznbo International Agencies (Pty) Ltd v Samuel A. May (Pty) Ltd* 1971 (3) SA 349 (T) at 352A-C Nicholas J in an *obiter dictum*,

said:-

“Where an extension of time in the making of an application is refused, however, that amounts in effect to the refusal of the application, and it seems to me that the question of the appealability of the order refusing the extension must in such a case depend upon the appealability of an order refusing the application. Thus, in *Evander Caterers (Pty) Ltd v Potgieter* 1970 (3) SA 312 (T), the Court allowed an appeal by a defendant against the judgment of the magistrate’s court refusing to extend, under the provisions of Rule 60 (5) (b), the period of six weeks within which he might under Rule 49 apply for the rescission of a default judgment obtained against him by the respondent. There can be no doubt, in my view, that that order was appealable. The refusal of the extension was equivalent in effect to the dismissal of an application for rescission and, in terms of Rule 46 (7), if an application for rescission of a default judgment is dismissed “the default judgment shall become a final judgment”. There was, therefore, an order bearing directly upon and affecting the decision in the main suit.”

- [11] In the present case, too, the refusal of the application for condonation had the effect of refusing the appellant’s claim for relief. Putting it another way the refusal of the application for condonation had a final and definitive effect on the appellant’s claim. The order was, therefore, appealable.

- [12] The Court in *Shepstone & Wylie and Others v Geyser NO 1998 (3) SA 1036 (SCA) at 1044J-1045D* referred to the power of the Court on appeal to interfere with the exercise of a discretion conferred on a Court of first instance. It touched upon the distinction between discretion in the strict or narrow sense and discretion loosely so called. The nature of the discretion will determine the extent to which the Court on appeal may interfere. Hefer JA said, at 1045C-D:-

“Accordingly, whenever such a Court is asked to interfere, the nature of the discretion must first be ascertained. This will not be a simple exercise where a discretion is conferred in a statute by the use of the word ‘may’ which, standing on its own, is not particularly informative.”

- [13] The distinction between the two types of discretion was analysed by Stegmann J in *Tjospomie Boerdery (Pty) Ltd v Drakensberg Botteliers (Pty) Ltd and Another 1989 (4) SA 31 (T) at 36C-G and 40*. Again, in *Bookworks (Pty) Ltd v Greater Johannesburg Transitional Metropolitan Council and Another 1999 (4) SA 799 (W) at 804H-805B*, Cloete J identified the two types of discretion conferred upon a Court by the use of the word “**may**”. He did so by reference to the nature of the power conferred upon the Court by each type of discretion. Regarding a narrow discretion he said, at 805G-H:-

“It is difficult to discern a general principle underlying all cases in which a discretion conferred on a court of first instance has been categorised as narrow. What does seem clear is that where the court of first instance is in a better position than an appeal Court to decide a question which involves the exercise of a value judgment, especially a question of procedure (I use the word in a fairly loose sense), an appeal Court will be reluctant to interfere.”

- [14] A clue as to the distinction between the two types of discretion is to be found in the following passage from the judgment of EM Grosskopf JA in *Media Workers Association of South African and Others v Press Corporation of South Africa Ltd* (‘Perskor’) 1992 (4) SA 791 (A) at 800E-G:-

“The essence of a discretion in this narrower sense is that, if the repository of the power follows any one of the available courses, he would be acting within his powers, and his exercise of power could not be set aside merely because a Court would have preferred him to have followed a different course among those available to him. I do not think the power to determine that certain facts constitute an unfair labour practice is discretionary in that sense. Such a determination is **a judgment made by a Court in the light of all relevant considerations. It does not involve a choice between permissible alternatives.** In respect of such a judgment a Court of appeal may, in principle, well come to a

different conclusion from that reached by the Court *a quo* on the merits of the matter.” (My emphasis.)

- [15] In *Knox D’Arcy Ltd and Others v Jamieson and Others* 1996 (4) 348 (A) which dealt with an appeal in respect of an interim interdict EM Grosskopf JA, said at 361H-J:-

“In the present context the statement that a Court has a wide discretion seems to mean no more than that **the Court is entitled to have regard to a number of disparate and incommensurable features in coming to a decision.**” (My emphasis.)

- [16] In my judgement the discretion conferred on the Court of first instance in deciding whether or not to grant condonation for the late referral of a dispute is a wide discretion or a discretion “**loosely so called**”. The Court of first instance is required to arrive at a decision “in the light of all relevant considerations” such as the length of the delay, the prospects of success in the main application, the possible prejudice to the parties and the blame attaching to the parties. (cf. the *Knox D’Arcy Ltd case (supra)* at 362B-C.) The Court on appeal is in as good a position as the Court a quo to decide whether or not good cause has been shown for granting condonation, and, that being so, it may substitute its decision for that of the Court a quo if “it considers its conclusion more appropriate” (see the *Bookworks (Pty) Ltd case (supra)* at 805A-D).

- [17] It is apparent from the chronology set out at the beginning of this

judgment that there were two long periods of delay in finally bringing this matter before the Labour Court, namely:

- a) the period of almost two years between 16 August 1998 when the certificate was issued to the effect that the dispute remained unresolved and 26 July 2000 when the Commissioner ruled that the CCMA did not have jurisdiction; and
- b) the period of approximately 21 months between the setting aside on exception of the appellant's first statement of claim, on 19 October 2000, and the date on which the CCMA notified the appellant that it was unable to interfere with the certificate, namely 31 July 2002.

[18] As far as the first period is concerned, it has not been suggested that any blame for that delay can be laid at the door of the appellant. The delay appears to have been a delay in the functioning of the CCMA.

[19] It is true that the second delay was a result of incorrect advice given to the appellant by her representative. It is not apparent from the record precisely who that representative was. The appellant refers in her affidavit in support of the second application for condonation and in her petition for leave to appeal to acting as she did after "**further consultation**". The appellant was, at the time, being represented by Mr Khoza from her trade union. He argued

the case before us on appeal and obviously has some knowledge of labour law. No doubt the appellant depended upon him for guidance on procedural matters.

- [20] Although the advice was, as it turned out, incorrect, it cannot, in my view, be said that it was wholly unreasonable to advise the appellant to go back to the CCMA on the issue of the certificate. Firstly, it was becoming apparent that the respondent was not adverse to taking any legal points which could block the appellant's case. It had objected to the jurisdiction of the CCMA, and, when the appellant had then sought relief in the Labour Court, it had excepted to her statement of claim. Secondly, when the appellant sought to suspend the case before the Labour Court and refer the matter back to the CCMA, towards the end of October 2000, the decision of this Court in *National Union of Metal Workers of SA & Others v Driveline Technologies (Pty) Ltd & Another* (2000) 21 ILJ 142 (LAC) had only very recently been handed down and had probably not been reported. In that case it was decided, contrary to statements made by the Labour Court in *National Union of Metalworkers of SA & Others v Cementation Africa Contracts (Pty) Ltd* (1998) 19 ILJ 1208 (LC) at 1214J – 1215A, that a party wishing to take a dismissal dispute further is not bound by the conciliating commissioner's description of the dispute in the certificate of outcome (16\58A-C and F-G). Although there is nothing in the papers which indicate why those advising the appellant at the time thought that the Labour Court would not have had jurisdiction to adjudicate a claim for an

automatically unfair dismissal if the Commissioner's certificate was not corrected, it may be that they were influenced by those statements of the Labour Court in the *Cementation Africa Contracts* case.

[21] In so far as it was argued that the appellant had ample time to realise the correct position without waiting for the ruling made by the CCMA many months later, the fact of the matter is that the respondent was in as good a position as the appellant to take steps to avoid any further delay, had it seriously wished to do so. It had been given the appellant's Notice of Intention to suspend the pending application and a copy of the appellant's misconceived application to the CCMA to cure the perceived defect in the certificate. It did not object to the suspension of the proceedings before the Labour Court nor did it communicate to the appellant the view that it was not necessary to get a new certificate. It merely sat back and did nothing, despite the fact that the appellant had shown every intention to persist with her case.

[22] In my view the learned Judge in the Court *a quo* was not justified in criticising the fact that only the appellant's *ipse dixit* was before the Court regarding the steps taken by the appellant to prompt the CCMA to deal with the matter. What she said she did do is referred to in item (n) in paragraph 1 of this judgment. That was said by her on oath and was not disputed. It ought, therefore, to have been accepted by the learned Judge. It demonstrates that the cause of the delay was, once again, the CCMA and that the

appellant had done everything reasonably possible to cause the CCMA to deal with the matter. After all, it was in the appellant's own interest to have the matter expedited and she must be believed when she says that the CCMA was contacted on numerous occasions.

[23] In all the circumstances I am of the view that the appellant did provide a reasonable and acceptable explanation for the delay in finally filing a new statement of claim. The fact that she did so under a new case number is neither here nor there and did not cause any prejudice to the respondent.

[24] Turning to the prospects of success, I am of the opinion that the appellant has shown that she has some prospects of success. It is not entirely clear whether her dismissal was for misconduct or operational requirements, and it is not necessary to decide that issue at this stage. If the dismissal was for misconduct, the question may arise as to whether or not the appellant's refusal to relocate warranted a summary dismissal. Furthermore, the respondent may have to show that it was a condition of the appellant's conditions of service that she could be transferred from Pretoria to Polokwane against her will or that the instruction to relocate was a lawful and reasonable one. There is a suggestion by the appellant that she was told to relocate to Polokwane because Mr Naidoo was "**not happy**" about her "**presence in Pretoria**". If that is so the dismissal may have been for operational requirements. In the circumstances the appellant may well be able

to establish that she was entitled to some compensation for her dismissal.

[25] In my judgement, therefore, the appellant did make out an adequate case for condonation. The fact that the matter related to a single dismissal should not, in the circumstances, have weighed against the appellant.

[26] In the result I make the following order:-

- (a) The appeal is upheld.
- (b) The decision of the Court a quo refusing the appellant's application for condonation is set aside.
- (c) The late referral of the appellant's dispute with the respondent to the Labour Court is condoned.
- (d) The respondent shall deliver its response to the appellant's statement of claim within fourteen (14) days of the date of this order.
- (e) The appellant's costs, if any, of appeal and of the application for condonation which gave rise to this appeal shall be paid by the respondent.

In view of the long delay in finalising this matter, the Registrar of the Labour Court is directed to give preference to this case in

allocating trial dates.

McCALL AJA

I agree.

ZONDO JP

I agree.

NICHOLSON JA

Appearances

For the appellant: Retail and Allied Workers Union (Mr Khoza)

For the respondent: Mabuza Mabunda Inc. (Mr. B I Baloyi)

Date of Hearing: 17 August 2005

Date of Judgment: 9 December 2005