

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

APPEAL COURT CASE NO: JA 37/05

In the matter between:

CARDOSO CIGARETTE DEPOT (PTY) LTD APPELLANT

and

MARIA GUILHERMINA DA SILVA DIAS RESPONDENT

JUDGMENT

LEEUEW AJA:

Introduction:

[1] This appeal, with the leave of this Court, is against a judgment of Oosthuizen AJ sitting at the Labour Court in Johannesburg. The Appellant (the employer) who was the First Respondent in the Court *a quo*, appeals against the following order granted on 22 February 2005:

“[1] The award made by the Third Respondent on 1 June 2003, refusing to condone the Applicant

late referral of the unfair dismissal dispute initiated by her, is set aside;

- [2] Such award is substituted by a finding reading as follows:

“The Applicant’s failure to refer her dispute within the time period specified in section 191 (1) (b) (i) of Act 66 of 1995 is condoned.”

- [3] First Respondent is ordered to pay the costs occasioned by its opposition to this application.”

- [2] The Respondent (the employee) was employed by the appellant as a Manager. She was dismissed for alleged incompetence. She felt aggrieved by such dismissal which she regarded as unfair. A dispute arose between the two parties about the fairness or otherwise of the dismissal. The employee referred the dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA), for conciliation.

- [3] The employee was dismissed on the 5th February 2003. The employee referred the dispute to the CCMA on 10 March 2003, which was three (3) days out of the thirty (30) days period prescribed by section 191 (1) (b) (i) of the Labour Relations Act No 66 of 1995 (“The Act”) for the referral of such a dispute to conciliation.

- [4] The employee filed an application to the CCMA for the condonation of the late referral of the dispute simultaneously with the referral on 10 March 2003. A commissioner of the CCMA ("the commissioner") refused to grant the application for condonation and ordered the employee to pay costs.
- [5] The employee took the commissioner's ruling to the Labour Court on review. The application was launched in terms of section 145 (2) (a) (i) and (ii) of the Act. The Labour Court, through Oosthuizen AJ, granted the review application and set aside the commissioner's decision and granted the employee condonation for the late referral of the dispute to the CCMA. The appeal is against that order.

The facts surrounding the delay

- [6] In the employee's affidavit filed in the CCMA in support of her condonation application, the reasons advanced for the late referral of the dispute were that:
- (a) the employee, who stayed in Polokwane had paid her son a visit in Welkom in the Free State Province on the 6th March 2003;
 - (b) Whilst in Welkom, the employee injured her small toe and could not drive herself back to Polokwane on Monday;
 - (c) She referred the dispute to the CCMA on Monday the 10th March 2003;

- (d) it is not clear whether she had returned from Welkom before or on the 10th March; and
- (e) She was not aware of the fact that in terms of the Act she had to refer the dispute within a period of thirty (30) days after her dismissal.

[7] In its affidavit filed in the CCMA in support of the appellant's opposition of the employee's condonation application, the appellant's answer to the employee's explanation for her delay was that between the 5th and 27th February 2003, the employee was able to drive, did drive and could have referred the dispute during that period, that is before she got injured in her toe. In other words the appellant was saying that had the employee referred the dispute between 5 and 27 February 2003, the referral would have been on time and because she did not do so then, it was no excuse that she failed to refer it within the prescribed 30 day period. The appellant submitted that the employee had failed to show good cause for her failure to comply with the 30 days requirement. In her replying affidavit filed in the CCMA the employee stated that she was not aware that she has to refer the dispute within 30 days although she had intended to refer it to the CCMA as soon as possible. She submits that her failure to refer the dispute before 27 February is not relevant "as this application is an application for condonation for (sic) the late filing which it has been established is three days late which three days is calculated from 8 March 2003 to 10 March 2003.

[8] With regard to the prospects of success, the employee did not say much in her affidavit. All she said was: "I never did anything to deserve what I got." With regard to prejudice that she would suffer if her condonation application was refused, the employee said that she would not have income and it would be difficult for her at her age to obtain another job.

[9] In its opposing affidavit in the CCMA, the appellant made the following points in par 7 thereof regarding the appellant's prospects of success:

- (a) the employee had been employed by the appellant as a manager when she was dismissed;
- (b) the appellant was dismissed for "incapacity due to poor performance;"
- (c) as at the date of her dismissal, the employee had a final warning "on 2 October 2002;"
- (d) the employee failed "to comply with directions, instructions, advice and guidance given to her during the counselling hearing on 2 October 2002 where it was agreed that she will (sic) have a period of 3 months to correct her performance failing which she would be dismissed;" and
- (e) the final counselling session had taken place on the 5th February 2003 where it had become evident that the employee "did not comply with any directions and instructions given to her previously and that her performance in fact deteriorated further. Her

services were terminated without notice and she was not required to continue working.”

[10] In par 10 of the appellant’s opposing affidavit in the CCMA, a number of references are made to occasions when, according to the appellant, the employee had been counselled for poor performance without any improvement on her part. Indeed, it is stated that she even tried to avoid inquiries from the Head Office which she knew related to her performance. Dates are given for some if not all of those alleged counselling sessions. It is even stated that in October 2002 it was agreed with her that she would have three months within which to improve but that she had not improved by the expiry of that period.

[11] With regard to the employee’s case on prejudice if the condonation application was refused, the appellant pointed out, in effect that her failure to improve her performance after she had been given ample opportunity to improve meant that such prejudice as she would suffer if condonation was refused was justified. The appellant pointed out that it would also be seriously prejudiced, if it was forced to have to oppose the employee’s unfair dismissal claim if condonation was granted, particularly because it had gone “far beyond the parameters of fairness” in dealing with the employee.

[12] In response to the appellant’s criticism that she did not deal with the prospects of success in any serious way in her

founding affidavit, the employee states that she was assisted by the CCMA's staff at the help desk to prepare her founding affidavit, that she is a lay person on legal matters, and that it was her "understanding that the documentation and specifically paragraph 4 thereof must be completed as briefly as possible." She goes on to say: "The Commissioner will note that only two lines is provided in this respect." She said that she gave fuller details in the referral form. She says that in paragraph 3 of the referral form she had disputed that she was incapacitated with regard to the performance of her functions. She also states that she stated therein that she did not "agree with the way" in which her "dismissal was conducted." In this regard she clarified that she was referring to procedural fairness.

[13] The employee denied that any counselling sessions had taken place but admitted that normal meetings had been held between herself and Mr Caradoso, the appellant's managing director but that those meetings were "as in normal course of business" between the two of them. She says that those meetings related to the "valuation of the Pietersburg Branch and not counselling sessions for her as such.

[14] The employee also referred to a meeting that was held about 23 April 2002 "to discuss issues with regard to the sufficient (sic) running of the branch, the administration of the branch and service delivery to clients of the employer" but she says that that "was in no way a formal counselling meeting conducted

with myself.” With regard to a statement made in the appellant’s opposing affidavit that a Mr Fernandes had to be sent to the Pietersburg branch to help out, the employee says that Mr Fernandes was seconded there as a Trainee Manager and not in any other capacity. She then says:

“The specific reason for his secondment to the Polokwane Branch was due to the fact that our administrative staff, due to, amongst others, inexperience, could not cope adequately with the administrative burden of the office.”

She denied that she was given a warning and that she was given three months to improve or be dismissed. She admits that there was a counselling session on 5 February 2003. That is the one pursuant to which she was dismissed.

[14] With regard to the appellant’s case on prejudice, the employee stated that:

- (a) she did not understand how the appellant could be prejudiced by the granting of condonation particularly if regard was had to the degree of lateness and the prejudice that she would suffer if condonation was refused.
- (b) She had been employed by the appellant for over 17 years and the prejudice that she would suffer if condonation was refused far outweighed the prejudice that the appellant could suffer if condonation was granted.

[15] The commissioner after hearing argument presented by both parties, refused the condonation application. With regard to the employee's explanation for the delay, the commissioner had the following to say in her ruling:

"It is common cause that Applicant was dismissed on 5th February 2003. She referred the dispute to the CCMA on 10th March 2003. She furnishes reasons for the delay only in regard to the period 6th to 10th March 2003. Applicant does not explain the reasons why she did not refer the dispute to the CCMA before the 6th March 2003 despite that she knew through out that she had been dismissed. It is not in dispute that Applicant was in Polokwane on 25th February 2003. If she wanted to refer the dispute there is no explanation as why she did not refer the dispute then. I do not accept Applicant's reasons for the delay in the circumstances."

[16] With regard to prejudice that either party would suffer if condonation was refused or granted the commissioner did not say anything in his award. On the prospects of success, the commissioner stated that the employee had not said much in her founding affidavit but that in her replying affidavit she had denied that there had been counselling sessions although she admitted that certain meetings had taken place but that those did not relate to her being counselled. The commissioner then concluded: "Since both the prospects of success and the explanation for the delay are not in the applicant's favour, I cannot grant condonation in this matter." He then refused condonation and ordered the employee to pay costs because

he was of the view that the employee had acted frivolously in referring the dispute for conciliation.

[17] As already stated earlier, the Labour Court set aside the commissioner's ruling and granted the employee condonation. The Court a quo, gave the following reasons for its decision:

17.1 The fact that the Respondent was not aware of the requirement that the dispute had to be referred to the CCMA within thirty (30) days and this, was not placed in dispute by the appellant;

17.2 the court a quo stated that the lack of knowledge of the applicable time period can be sufficient reason for filing late especially if the referral was a few days late as in this case;

17.3 the Respondent was incapacitated by **“a foot injury accounted for virtually the entire period by which her referral was late”**; and that

17.4 with regard to the prospects of success on the merits, based on the material presented before the commissioner, he (the commissioner) could not have found that the **“prospects of success were good, or bad.”**

The appeal

- [18] The question before us is whether or not the Court a quo was correct in reviewing and setting aside the decision of the commissioner for refusing to grant condonation for the late referral to the CCMA of the dispute for conciliation.
- [19] I have absolutely no hesitation in concluding that the Court a quo was correct in its decision. This is so because the dispute was at the stage of conciliation and the employee was late by only three days in referring the dispute to the CCMA for conciliation – a very slight delay –. Furthermore, she had an explanation for the delay. That explanation was not unreasonable. In actual fact it was acceptable. The commissioner took the view that because the employee had left the matter till late in the statutory 30 days period, she ought to have explained why she had not referred the dispute during the best part of the statutory 30 days period. The commissioner refused the employee condonation because of her failure to furnish an explanation for that failure to refer the dispute before the 27th February 2003. In my view the commissioner misconceived the inquiry which he had to make in this case. I elaborate below.
- [20] Sec 191 (1) (b)(i) of the Act, gives a dismissed employee 30 days within which to refer her dismissal dispute to the CCMA for conciliation. That means such an employee has a right to refer the dispute to the CCMA on the 1st or the 15th or, the 29th

or even the 30th day of the 30 day period envisaged in sec 191 (1) (b)(i) of the Act. If the employee refers the dispute on the last day of the 30 day period, he or she cannot be required to explain why he or she did not refer it on the 1st, 12th or 15th day of that period. He or she is entitled even to plan to refer it to the CCMA on the 30th day. That is on the last day of the 30 day period. If something happens on the 29th day which prevents him or her from effecting the referral on the 30th day, he or she must provide an explanation on what happened on the 29th day which caused him or her to be late and need not explain why he or she had not referred the dispute some days earlier. She does not need to explain that because she would have been within his or her rights not to refer it at that earlier stage and he or she could not have foreseen that something would happen later and prevent him or her from referring the dispute on the 29th or 30th day of the statutory period of 30 days. Of course, I am here not referring to a situation where there are reasonable grounds for the employee to believe that he would probably not have time to refer the dispute on the 29th or 30th day of the statutory period. Obviously, in such a case the employee would have to explain why he or she did not refer the dispute earlier in the 30 day period when he or she knew or ought to have known that he or she would not be able to refer it on the 29th or 30th day of the period.

- [21] In the present matter, the employee did not have to explain why she had not referred the dispute earlier than the 7th March

2003. This has to be so because, had she not been indisposed, she would have referred the dispute on the 30th day and that referral would have been on time. What happened or did not happen before the 7th March 2007, has nothing to do with her failure to refer the dispute on the 30th day as she had planned.

[22] With regard to the employee's explanation for her failure to refer the dispute to the CCMA timeously, the commissioner was required to decide whether the undisputed fact that the employee injured her foot a day or two before the expiry of the statutory 30 day period as a result of which she could not drive herself from Welkom to Polokwane provided an acceptable explanation for the employee's failure to refer the dispute on the last day or during the last two days of the 30 day period. The only answer to that question was that that was an acceptable explanation because there is no reason to think that the employee would not have referred the dispute to the CCMA on the last day of the 30 day period if she had not injured her foot. The commissioner rejected the employee's explanation because he focused on the period which was not in issue. In my view the commissioner misconstrued the inquiry in this regard and committed a gross irregularity justifying the reviewing and setting aside of his ruling.

[23] If the commissioner had not misconstrued the inquiry, he would have concluded that the explanation for the delay was

acceptable and, since the delay was extremely short, namely three days which included a week-end, there can be no doubt that he would have granted condonation. It may well be that the appellant has a strong case against the employee on the merits but, once the explanation for the delay is good and the delay is only one working day and two week-end days, condonation should clearly be granted. Accordingly, the Court a quo was right to make the order that it made.

[24] The commissioner also considered the prospects of success and concluded that there were no reasonable prospects of success and that, for that reason, the application for condonation fell to be dismissed.

[25] I am sure that the commissioner considered the issue of prospects of success because usually that is one of the factors to be taken in consideration in condonation applications. I do not think that the commissioner ever considered whether the issue of prospects of success was relevant to a consideration of whether or not to condone the late referral of a dispute to conciliation.

[26] At conciliation, the commissioner is not required to, and has no power, to decide whether dismissal is fair or unfair. For this reason I doubt that prospects of success should be considered when dealing with a condonation application for the late referral of a dispute to conciliation as opposed to arbitration or

adjudication. Even if such issue was relevant, I have no doubt that it should play a very limited role. The commissioner gave the issue a lot of weight.

[27] In my view, when one has regard to all of the above, there can be no doubt that the appeal should fail. The appeal is dismissed with costs.

LEEuw AJA

ZONDO JP

JAPIE AJA

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