

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

HELD AT:

JOHANNESBURG

CASE NO: JA34/08

DATE: 2010-02-19

In the matter between

BASSON, MACHIEL PETRUS

Appellant

10 And

**SANTIE OOSTHUIZEN N.O.
THE COMMISSION FOR CONCILIATION
AND ARBITRATION
GRIFFIN, VERONICA**

**1ST Respondent
2nd Respondent**

3RD Respondent

Coram: DAVIS JA, JAPPIE JA, TLATETSI AJA,

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J U D G M E N T

DAVIS JA: This is an appeal with the leave of the court *a quo*, against an order of Francis J of 14 February 2008, in which the learned Judge dismissed an application for condonation, review and declaratory order with costs.

Briefly the facts were as follows:

On 30 September 2002, the first respondent heard a case in which the third respondent contended that she had been constructively

dismissed on 1 August 2001 whilst in the employ of the appellant. The appellant made no appearance and accordingly the arbitration award had the effect of a default award to the effect that the first respondent had been constructively dismissed and that the appellant should be required to pay compensation in the amount of R168 000; being R14 000 for 12 months together with a certain amount of leave pay, two week's notice pay, thus totalling an amount of R178 946,52.

As I have mentioned, the appellant did not enter an appearance at the arbitration hearing. On 20 May 2004, Mr Pitzer who was
10 employed by the appellant as his representative, the latter having being referred to him by Scholtz attorneys as an expert in labour matters, brought a rescission application on behalf of the appellant regarding this default award.

This was instituted on 8 June 2004. On 7 November 2004, Commissioner Smith, a member of second respondent, dismissed the rescission application for want of a founding affidavit. On 25 February 2005, the second respondent sent by registered post to appellant, an application in terms section 143 of the Labour Relations Act 66 of 1995 (LRA), which certified the award. On 2 June 2005, the
20 second respondent varied the award of first respondent by way of a change of citation of the parties to Veronica Griffen and Machiel Basson and confirmed the award of compensation, being in an amount of R178 946, 52.

On 28 June 2005, appellant and his representative Mr Pitzer signed affidavits which appeared to be in support of an application to object to the variation of the original award of second respondent.

Notwithstanding this award was certified on 4 July 2006. On 5 July 2006, the registrar of this court issued a writ of execution against the appellant's immovable assets. On 22 August 2006, the sheriff in Brakpan served a writ on appellant. The appellant stated that he did not own any immovable properties that were executable, a contention which was subsequently proved to be incorrect. On 1 September 2006, the
10 registrar of the Labour Court issued a writ of execution against immovable properties owned by appellant. On 18 September 2006, the sheriff attached immovable property and on 19 September 2006, a review application was brought by one Pitzer on behalf of the appellant. On 9 October 2006, appellant brought an urgent application which sought to gain the relief, which I have outlined, before the court *a quo*.

It is trite law that in terms of section 145(1)(A) of the LRA, a review application should be brought within six weeks of the date that the award was served on the applicant. In terms of section 145(1) (A), on good cause shown, a court may condone the late filing of the
20 application.

There is no doubt that this particular application for review has been brought at an extremely late hour. As I have mentioned, an application for rescission of the award was launched, as I have indicated, on 20 May 2004. When that was dismissed, it appears that little activity was generated by appellant, at least until 28 June 2005,

when affidavits were signed dealing with an objection to the variation of the original award. No explanation is given as to why there were such extraordinary delays of more than a year after the launch of this rescission application.

A reasonable litigant faced with a default award and with the potentially disastrous financial consequences which such an award would bring upon a person (allegations which are made by appellant in this case), would have acted with a measure of expedition and if not, with a plausible explanation as to the delay. From 2005 onward, the
10 explanations proffered concerned the incompetence and lack of diligence of Mr Pitzer. That particular argument was employed to shine the culpable light exclusively on Mr Pitzer and to contend that this court cannot allow the adverse consequences envisaged, upon an innocent litigant who has been placed in a position of jeopardy by an incompetent representative.

It is correct that where a representative of a litigant has behaved in an unprofessional manner, this is to be taken into account in consideration to whether an application for condonation should succeed. In this case, there was a lengthy period in which no
20 explanation was proffered and no activity or even enquiry was initiated by the appellant to indicate any interest in the matter. Thus blaming Pitzer alone can never be sufficient cause for condonation.

Realising his difficulty, Mr Grundlingh, who appeared on behalf of appellant, submitted that the time limits to evaluate condonation should not be considered from 2002 and even from 2004 when the rescission

application failed, but rather from the final certification of the award or its variation by the first and second respondents in May 2006. On this basis, Mr Grundlingh contended that it was only on 22 August 2006, when the sheriff of Brakpan served a writ on appellant, that the latter finally realised the legal consequences which had been initiated by the award in 2002 and how these would work to his significant financial disadvantage.

The question arises as to what the appellant did on 22 August 2006 to obtain relief. Assuming, if one is so prepared in
10 favour of the appellant to ignore the sequence of events from 2002 to 2007, the short answer is, appellant still did nothing. On 18 September 2006, the sheriff finally attached the immovable property, I might add, appellant had stated on 22 August, that he did not any immovable property. Having being caught out on 18 September 2006, appellant finally roused himself and approached a firm of attorneys to prosecute this urgent application. But no explanation was proffered as to why no activity took place in the period from 22 August 2006 to 18 September 2006.

It is trite law that condonation is not for the asking. Courts must
20 exercise a discretion judicially in granting condonation application. The LRA was designed for expeditious, speedy and fair resolution of labour disputes. It means that, when a party sits on its proverbial hands for as long as appellant and then finally comes forward with an application, whatever other considerations have to be taken into account in a condonation application, expedition has to be an important factor. It is

simply unacceptable for labour disputes to limp for almost a decade and then for courts to grant condonation applications on the slimmest and flimsiest of grounds.

In effect this means that there will be cases when condonation applications are justified, when prospects of success are clear, where a justifiable explanation is rendered, all of which will then be factors to be weighed in the decision as to whether to exercise a positive discretion. But the length of the process and the dilatory nature of one of the parties, which only exacerbates the length of dispute, is most important
10 factor, particularly in a case such as present.

Mr Grundlingh sought to circumvent this difficulty. He submitted that the award was unreasonable with regard to the amount of the compensation, particularly a year's compensation being based upon a gross amount of salary of R14 000 per month. Further, first Respondent was not entirely clear as to whether R14 000 was the precise remuneration, nor whether the maximum compensation was justified in this case.

The short answer to these contentions is that the first respondent based her conclusion on the only evidence that was available to her,
20 which in the circumstances cannot be considered to be unreasonable. The obvious recourse for appellant was to proceed by way of an application for rescission of a default award which for reasons, already indicated, was not successfully done.

The second argument concerns the application for a declaratory order. The question of the declaratory order is itself problematic

because I am uncertain as to its purpose. It appears that the basis for this order is to contend that, as the third respondent was not an employee, first respondent did not have the jurisdiction to hear the matter.

It is possible to argue, and it has been done, that the question of whether a person is an employee, is a jurisdictional fact of a kind which has to be decided upon prior to the second respondent being visited with appropriate jurisdiction. There are clear options open to a party which wishes to object to jurisdiction on the basis of an argument that
10 the complainant is not an employee. A party could place proper evidence before the second respondent in order that an informed decision can be so made. T

A second option would be to approach a court prior to the matter being heard by the second respondent in order to obtain an order that there is no jurisdiction visited upon second respondent because the complainant in the particular case cannot be considered to be an employee in terms of the LRA.

Again, all this depends on the expeditious prosecution of such an argument which manifestly did not take place in this case. That kind of
20 relief can only take place in the event that this court is satisfied that condonation should be granted.

In my view, there is no basis by which condonation should be granted in this case, even if one takes the more generous approach to the chronology as was urged upon us by appellant's counsel.

In the result, I would dismiss the appeal with costs.

JAPPIE, JA)

TLALETSI, AJA) Concur.

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