



REPUBLIC OF SOUTH AFRICA

Not Reportable

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, PORT ELIZABETH

Case no: PA3/2012

In the matter between:

FIDELITY SECURITY SERVICES

Appellant

and

PATRICK SIBOBI

First Respondent

JOSEPH M. NTSOANE

Second Respondent

Heard: 28 August 2014

Delivered: 12 December 2014

Summary: Condonation for the late filing of record- appellant's explanation for the delay in filing record unsatisfactory – prospects of success – appellant contending jurisdiction of the Labour Court to interpret settlement agreement – bargaining councils and/or CCMA not competent to interpret orders of the Labour Court in terms of section 24(8) of the LRA – no prospects of success- Condonation for the late filing of the record dismissed – appeal dismissed.

Coram: Waglay JP, Murphy et Dlodlo AJJA

JUDGMENT

DLODLO AJA

Introduction

- [1] This is an appeal against the Labour Court judgment (Lagrange J) in terms of which, the Appellant was ordered to comply with the portion of the court order dated 7 September 2009 (which dealt with reinstatement). The Labour Court

ordered the Appellant to pay the Respondents their full salary calculated at the salary the Respondents were earning prior to their dismissal (calculated over the period from the date of reinstatement to the date of the hearing of the application).

[2] The Respondents referred separate disputes to the Commission for Conciliation Mediation and Arbitration ("the CCMA") relating to their alleged unfair dismissal by the Appellant. The disputes were resolved at the conciliation meeting held under the auspices of the CCMA and two settlement agreements were concluded. I hasten to add that the settlement agreement in respect of each Respondent was identical. For completeness purposes, the material term of the settlement agreements was that the Appellant would reinstate the Respondents on the same terms and conditions of employment governing the employment relationship prior to 11 July 2008 and 19 June 2008 respectively; the Appellant would pay an amount of R6 450.00 to each of the Respondents as a result of the retrospective effect of their reinstatement; and that the Respondents were required to report for duty on 17 October 2008.

[3] Curiously, under the heading of "other", the parties recorded at clause 6 of the settlement agreement that:

'The offer of reinstatement is pending on the criminal case against the applicant.'

[4] The Respondents approached the Labour Court seeking an order that the settlement agreements be made an order of Court. The matters were brought before Cele J in 2009 and the settlement agreements were made an order of Court. The Appellant subsequently paid the outstanding amounts (after settlement agreements became an order of court) as the Sheriff threatened to execute on the strength of the then order of Court.

[5] The Respondent alleged that the Appellant failed though to comply fully with the settlement agreements in that it failed to reinstate the employees on the date specified in the settlement agreements. This failure prompted the Respondents to approach the Labour Court for a further order in terms of which:

(a) The Appellant would be declared to be in contempt of the order of the Labour

Court of 7 September 2009; (b) The Appellant would reinstate the Respondents in its employ; (c) The Appellant would pay the Respondents their full salaries calculated as and from 17 October 2008 to the date of their reinstatement; (d) The Writ of execution would be authorised in the amounts payable to the Respondents; and (e) That the Appellant would be ordered to pay their costs.

- [6] The application came before Lagrange J who granted the order prayed. The Appellant then brought an application for leave to appeal relying on the provisions of section 24(8) of the Labour Relations Act 66 of 1995, challenging the jurisdiction of the Labour Court to interpret the settlement agreement.
- [7] First and foremost it is imperative that I deal with the condonation application brought by the Appellant. The Appeal lapsed on about 30 October 2013, a point correctly taken by the Respondents. On 17 October 2013, the Appellant filed an application for the reinstatement of the Appeal. The Respondents filed their opposition to this application on 12 December 2013 setting out grounds why they opposed the application. There has been an inordinate delay in the processing and prosecution of this appeal. The law is clear in matters such as the instant one.
- [8] In *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others*,¹ the Constitutional Court gave the following guiding exposition in matters wherein condonation is sought:

'It is appropriate that an application for condonation be considered on the same basis and that such an application should be granted if that is in the interests of justice and refused if it is not. The interests of justice must be determined by reference to all relevant factors including the nature of the relief sought, the extent and cause of the delay, the nature and cause of any other defect in respect of which condonation is sought, the effect on the administration of justice, prejudice and the reasonableness of the applicant's explanation for the delay or defect.'

I consider *infra* the explanation tendered by the Appellant why condonation should be granted. Before I do so, it may be necessary to mention in passing

¹ [2000] 5 BLLR 465 (CC) at para 33.

that it is well established that the factors in a condonation application “*are not individually decisive but are interrelated and must be weighed one against the other.*” See *Melanie v Santam Insurance Co Ltd*². In *Jansen v General Public Service Sectoral Bargaining Council and Others*,³ the Labour Court applying the decision in *PPWAWU and Others v AF Dreyer and Co (Pty) Ltd*,⁴ stated that: “Even if it is found that explanation does not constitute a reasonable explanation it will not necessarily be regarded as an absolute bar to condonation.”

[9] The Appellant was required in terms of Rule 5(8) of the rules of the Labour Appeal Court to deliver the record within 60 days calculated from the date of the order granting leave to appeal. That did not happen. The record was filed some 14 months late. In fact, the 60 day period expired on or about July 2012.

[10] Mr Francois Engelbrecht Le Roux, the Appellant’s attorney of record and the deponent to the affidavit in the condonation application, explains that the reason for the delay was that he had informal discussion with Mr Marius Van Zyl, the Respondents’ attorney of record. According to Mr Le Roux, he together with Van Zyl shared the view that the matter was capable of settlement hence the discussion and the exchange of some correspondence.

[11] In an endeavour to explain this, Mr Le Roux stated the following in his Affidavit:

‘13 The premise of our discussions was that we would try to resolve the matter in an endeavor to avoid it running its course, and without incurring the associated delay and costs. My firm understanding from my interaction with Mr Van Zyl, albeit not expressed in so many words, was that I would not have to take the usual steps associated with prosecuting the appeal, at least until such time as it became apparent that we had reached deadlock as far as the settlement is concerned.

14 Under the circumstances I did not formally seek Mr Van Zyl’s consent to extension of the 60-day period referred to in rule 5 (8), since I was firmly under the impression that such agreement had implicitly been given. For the

² 1962 (4) SA 531 (AD).

³ unreported decision, case number JR1470/08 at para 5.

⁴ [1997] 9 BLLR 1141 (LAC).

same reason, given the absence of the refusal of consent for purposes of rule 5 (8).

15 I should add that there is a substantial level of trust between Mr Van Zyl and myself, to the extent that we occasionally meet on a partly social and partly professional basis over coffee in order to discuss matters in which we seek each other's views."

Mr Le Roux averred that he was alarmed to receive a letter from the Respondents' attorney that the Appeal had lapsed. Mr Le Roux hastened to add that he does not suggest that Mr Van Zyl acted *mala fide* in his dealing with him but clearly Mr Van Zyl did not share his (Mr Le Roux's) conclusion that prosecution of the appeal could be left in abeyance pending finalisation of their efforts to settle the matter. On the other hand, Mr Van Zyl explained in his Affidavit opposing condonation application that he made certain proposals of settlement but no response was forthcoming from Mr Le Roux and his client. Mr Van Zyl referred this Court to a letter he wrote to Mr Le Roux in which he cautioned the Appellant to process the appeal without delay. This letter is dated 15 May 2012. This was also ignored by the Appellant. It is needless to mention that there are other letters and e-mails forwarded by Mr Van Zyl to Mr Le Roux which were similarly ignored. Mr Van Zyl is (in my view) rather accommodative in stating that "*I have reason to believe that while Mr le Roux was serious in his attempts to engage his client in settlement negotiations, the Appellant simply had no intention in settling the matter.*"

[12] In deciding whether sufficient cause has been shown in condonation application, the basic principle is that this Court has a discretion which must always be exercised judicially upon a consideration of all the facts. In essence, it is a matter of fairness to both sides. Relevant facts are the degree of lateness, the explanation thereof, the prospects of success and the importance of the case. Importantly, if there are no prospects of success there would be no point in granting condonation. See *Melane v Santam Insurance Co. Ltd supra*.

[13] What the Appellant has tendered as an explanation is hopelessly wanting. A prudent attorney would have filed the appeal record timeously before engaging in an attempt to settle the matter. The explanation is simply not acceptable. It

hardly informs the Court why the rule requiring the filing of the appeal record within a period stipulated was not complied with. Furthermore, the correspondence were largely from the Respondents rather than the Appellant. The Appellant's correspondence also has no reference to any settlement discussions. Clearly as Van Zyl tactfully records, the settlement was only being debated in Mr Le Roux's mind. There is no indication that his client was aware of any proposals or was even considering any proposals to settle the dispute.

[14] Even though the explanation for the delay has been found wanting, I am obligated to consider whether the prospect of success on appeal are sufficient to justify the granting of this application. A brief factual background of this matter was set out *supra*. This appeal concerns a point of law. The point in issue is whether the trial judge erred in assuming jurisdiction pertaining to the interpretation and enforcement of the settlement agreement concluded by the parties. The Appellant's contention is that the Court *a quo* was wrong in assuming jurisdiction and that he should have referred the matter to the CCMA for interpretation in terms of section 24(8) of the LRA. It is absolutely not feasible for a commissioner of the CCMA to make a ruling and finding on issues which served before the Court *a quo* and on which the Court *a quo* had already ruled. How a CCMA commissioner would differ from the interpretation and judgment already handed down by the Court *a quo* defies one's imagination.

[15] The Labour Appeal Court in *South African Post Office Ltd v Communication Workers Union obo Permanent Part-time Employees*⁵ and in *The Public Servants Association of South Africa obo Members v T.T. Gwanya NO and Another*⁶ held that where a court makes a settlement agreement an order of court, then the settlement may either be a contract concluded between the parties to resolve the litigation between them by way of agreeing to terms and conditions on how the future is to be regulated or it may be one that is prescriptive and sets out exactly what duty a party to a settlement has to perform or refraining from performing. The former could speak of the parties agreeing to negotiate something or the other, and, the later may for example

⁵ [2014] 12 BLLR 1203 (LAC).

⁶ Unreported matter case no. JA36/12 judgment delivered on 27 November 2014.

simply state that one party must pay the other a specified sum of money by a certain date.

[16] In this matter, the agreement made an order of court is clearly one that falls within the latter category as it states that the Appellant will reinstate the Respondents from a particular date and pay each of them a specified sum of money. These issues are not open to interpretation they are clear and unequivocal. The phrase that the "offer of reinstatement is pending a criminal case" is neither here nor there. As the agreement which was concluded was that the Appellant reinstates the Respondents and Respondents accept the reinstatement.

[17] In the circumstances, as the court order was not a contract open to interpretation, the Respondents were in fact entitled to execute thereon and to institute contempt proceedings in respect of the failure by those in authority at the Appellant from complying with the court order.

[18] Therefore, the Appellant has no prospects of success on appeal. Condonation for the late filing of the appeal record cannot in the circumstances of this case be granted.

Order

[19] In the result, the following order is made:

- (a) The application to reinstate the appeal is dismissed.

Dlodlo AJA

I agree

Waglay JP

I agree

Murphy AJA

APPEARANCES:

FOR THE APPELLANT:

Adv GL van der Westhuizen

Instructed by Chris Unwin Attorneys

FOR THE RESPONDENTS:

Mr M Van Zyl

Instructed by Francois Roux Attorneys