



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JA55/2013

In the matter between:

ARTHUR LAYANI KHOSA

Appellant

and

ABSA BANK LIMITED

Respondent

Heard: 06 November 2014

Delivered: 15 January 2015

Summary: Condonation application – principles restated – reasonable prospects of success and interest of justice justifying the granting of condonation - condonation granted- Labour Court's judgment set aside - appeal upheld.

Coram: Waglay JP, Dlodlo AJA et Setiloane AJA

JUDGMENT

DLODLO AJA

Introduction

- [1] This is an appeal against the order of the Labour Court (Basson, J) handed down on 12 March 2013 in terms of which the Appellant's application for condonation for the late referral of his dispute to the Labour Court was refused. The Respondent opposed the appeal on grounds, *inter alia*, that the condonation application itself is late; it is not in the interests of justice to grant condonation; and that there were no prospects of success in the main claim.

- [2] By way of background, the factual matrix of this matter is as follows: The Appellant was employed by Absa Brokers (Pty) Ltd which later on changed its name to Absa Insurance and Financial Advisors (Pty) Ltd. The Appellant was dismissed from the employ of the Respondent on 29 February 2012 on the basis of the Respondent's operational requirements. The Appellant referred an alleged unfair dismissal dispute to the Commissioner for Conciliation, Mediation and Arbitration ("CCMA") on 20 March 2012. The certificate of outcome indicating that the dispute remained unresolved was issued on 12 April 2012.
- [3] In terms of section 191(11) (a) of the Labour Relations Act 66 of 1995 ("LRA") the Appellant was obliged to refer his dispute to the Labour Court within 90 days of the CCMA certifying that the dispute remained unresolved. Thus the Appellant's statement of claim was due to be delivered on or before 11 July 2012. The statement of claim was delivered on 3 September 2012. The referral to the Labour Court was thus 54 days late.
- [4] The Respondent delivered the Statement of Defence on 6 September 2012. In the Statement of Defence a preliminary point was raised regarding the Appellant's failure to apply for condonation. The condonation application was delivered on 28 January 2013. That was 147 days after the delivery of the statement of Claim.
- [5] One of the factors to determine whether or not the condonation application ought to have been granted is whether it was in the interests of justice to do so. See: *NEHAWU obo Mafokeng and Others v Charlotte Theron Children's Home*¹. Also an application for condonation must be brought as soon as the party which applies for it becomes aware of the default. See: *Seatlolo and Others v Entertainment Logistics Service (A Division of Gallo Africa Ltd)*.²
- [6] This Court has endorsed the abovementioned approach advocating the bringing of the application for condonation as soon as the litigant becomes aware of the need to do so. See: *Allround Tooling (Pty) Ltd v NUMSA and Others*; ³ *NEHAWU*

¹ [2004] 10 BLLR 979 (LAC).

² [2011] JOL 27264 (LC).

³ [1998] 8 BLLR 847 (LAC).

*v Nyembezi*⁴ and *Librapac CC v Fedcrow and Others*.⁵ I emphasize that a condonation application must itself be pursued with diligence. However, one must always bear in mind that most individual litigants (such as the Appellant in the instant matter) depend wholly on the advice and expertise of their legal representatives. The individual litigant hardly knows about time limits within which disputes must be referred.

[7] I say the above well-aware of numerous authorities to the effect that the negligence of a legal representative is not considered an acceptable excuse for the delay. In this matter it is clear that the Appellant and his legal team did not believe that the statement of claim was filed out of time and that the Appellant had to apply for condonation. This was so because the appellant initially referred the matter for arbitration to the CCMA. The CCMA refused to arbitrate the dispute on the grounds that it did not have the necessary jurisdiction to entertain the dispute. Once the CCMA made a finding that it did not have the jurisdiction to entertain the dispute the Appellant referred his matter to the Labour Court. In doing so, the Appellant and his legal representative were under the mistaken belief that because they filed their statement of case within 60 days of the CCMA dismissing its referral for lack of jurisdiction, the referral to the Labour Court was made in time and there was therefore no need to apply to apply for condonation. The Appellant thus contended that calculation for purposes of the referral should start on the day the CCMA made a ruling that it did not have jurisdiction. The Appellant although wrong in its belief cannot be said to lack *bona fides*.

[8] In *Num v Council for Mineral Technology*⁶ this Court stated the principle applicable to a condonation application as follows:

‘.....without a reasonable and acceptable explanation for the delay, the prospects for success are immaterial and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused’.

⁴ [1999] 5 BLLR 463 (LAC) at 464 D-F.

⁵ [1999] 6 BLLR 540 (LAC) at 543.

⁶ [1999] 3 BLLR 209 (LAC).

The above principle was also pronounced upon in *Melane v Santam Insurance Co Ltd*.⁷ In the instant matter, the Appellant set out his case in the Statement of Claim. This, read together with the Statement of Defence filed on behalf of the Respondent, puts forth a *prima facie* case for the Appellant. I differ from the contention of the Respondent that the Appellant has not shown prospects of success. In my view, the Appellant did indeed show that there are prospects of success if he were to be allowed to prosecute his claim against the Respondent.

- [9] In *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others*,⁸ the court stated the following:

'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.'

- [10] It is trite that the factors to be considered in a condonation application are not individually decisive but are interrelated. I agree with the statement to the effect that even if it is found that the explanation put forth does not constitute a reasonable explanation, it will not necessarily be regarded as an absolute bar to condonation.⁹ What is needed is indeed an objective conspectus of all the facts; the importance of the issue and strong prospects of success may tend to compensate for a long delay.¹⁰

- [11] I also differ from the Respondent on the assertion made, on its behalf, that it is not in the interests of justice that this matter should be allowed to proceed. What interests of justice will be served by denying the Appellant an opportunity to state his case before Court? Why should the "doors of justice" be closed on him,

⁷ 1962 (4) SA 531 (A).

⁸ 2000 (5) BCLR 465 (CC).

⁹ *PAPWAWU and Others v AF Dreyer and Co (Pty) Ltd* [1999] BCLR 1141 (LAC); *Toyota Marketing v Schneider* [2002] 12 BLLR 1164 (LAC) at para. 15.

¹⁰ *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A.D).

particularly where, *prima facie*, there appears to be a reasonable prospects of success? Certainly it is in the interests of justice that both the Appellant and the Respondent be allowed an opportunity to ventilate their respective issues before Court. I would accordingly grant condonation in the instant matter.

Order

[12] In the result, I make the following order:

(a) The appeal is upheld and the order of the Court *a quo* is altered to read:

“The Condonation application is hereby granted with no order as to costs.”

(b) There is no order as to costs.

Dlodlo AJA

I agree

Waglay JP

I agree

Setiloane AJA

APPEARANCES:

FOR THE APPELLANT:

Mr R F Mafuyeka

Instructed by Mafuyeka & Associates Inc.

FOR THE RESPONDENT:

Adv FA Boda

Instructed by Cliffe Dekker Hofmeyr Inc

LABOUR APPEAL COURT