



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: JA 61/14

In the matter between:

ACADEMIC AND PROFESSIONAL STAFF

ASSOCIATION ("APSA") obo 26 MEMBERS

Appellant

and

CITY OF TSHWANE METROPOLITAN

MUNICIPALITY ("CTMM")

Respondent

In re:

ACADEMIC AND PROFESSIONAL STAFF

ASSOCIATION ("APSA") obo 26 MEMBERS

Appellant

and

UNIVERSITY OF SOUTH AFRICA ("UNISA")

First Respondent

CITY OF TSHWANE METROPOLITAN

MUNICIPALITY ("CTMM")

Second Respondent

Heard: 19 November 2015

Delivered: 16 February 2016

Summary: Condonation application - one of the respondents not opposing the condonation application – court *a quo* despite indicating that it would not consider condonation against the non-opposing party refused condonation in favour of all respondents – court *a quo* misdirecting itself – principle related to condonation application restated – appellant having prospects of success against non-opposing party – condonation granted.

Coram: Tlaletsi DJP; Coppin JA and Savage AJA

JUDGMENT

TLALETSI DJP

Introduction

- [1] This appeal is against the judgment of the Labour Court (Molahlehi J) in which that court dismissed with costs, an application for condonation (the Condonation Application) for the late filing of the Statement of Claim brought by the appellant.
- [2] The appellant is a Trade Union duly registered in terms of the Labour Relations Act¹ and is acting on behalf of its members. The respondent is the City of Tshwane Metropolitan Municipality, a municipality duly constituted in terms of the Local Government Municipal Structures Act.²

Factual background

- [3] The appellant referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). The dispute was between the appellant acting on behalf of its members and the respondent (which was cited as the second respondent in the Labour Court) as well as the University of South Africa (UNISA), which was the first respondent in the Labour Court. The aforesaid referral was set down for conciliation on 30 May 2011 before a commissioner appointed by the CCMA. On the same day, the commissioner

¹ Act 66 of 1995.

² Act 117 of 1998.

issued a Certificate of Outcome endorsing that the dispute remained unresolved and that the matter could be referred to the Labour Court for adjudication. Included in the certificate was an endorsement to the effect that the point *in limine* raised by UNISA on 15 November 2012 had not been decided.

- [4] On 31 August 2011, the appellant served and filed a Statement of Claim against UNISA and the respondent in the Labour Court. The said Statement of Claim was issued three days late because the 90 day period within which the Statement of Claim had to be issued expired on 29 August 2011, calculated from 20 May 2011 which is the day on which the Certificate of Outcome was issued by the commissioner.³
- [5] On 14 September 2011, UNISA served and filed its response to the Statement of Claim. In the response, UNISA *inter alia*, raised a point *in limine* challenging the Labour Court's jurisdiction to entertain the dispute on the basis that the referral was made out of time. In due course, the respondent filed its response to the Statement of Claim. In the course of time, the parties exchanged further correspondence between themselves to move the litigation forward. In addition, pre-trial meetings were held during the period 1 November 2011 to 12 December 2011 and 2 February 2012. A pre-trial minute was finally concluded on 8 February 2013.
- [6] On or about 4 March 2013, UNISA served and filed an application to dismiss the appellant's referral in terms of Rule 11.⁴
- [7] On 9 March 2013, the appellant filed the Condonation Application for the late filing of the Statement of Claim. Subsequently, on 14 March 2013, the appellant delivered an Answering Affidavit in response to UNISA's Rule 11 application.
- [8] UNISA filed an answering affidavit in opposition to the Condonation Application on 15 March 2013. The respondent did not file any papers to oppose the

³ Section 191(11) (a) of the Labour Relation Act.

⁴ Rule 11 of the Rules for the conduct of the proceedings in the Labour Court.

Condonation Application. On 2 April 2013, the appellant filed its Replying Affidavit to the Condonation Application.

- [9] The Condonation Application as well as the Rule 11 application was set down for hearing on 4 September 2013. During the presentation of the arguments, the respondent's counsel addressed the Labour Court. She placed on record that the respondent was not opposing the Condonation Application and that they would abide by the court's ruling. She concluded that they only appeared to observe the proceedings or on what is commonly called "a watching brief".
- [10] The appellant's explanation for the delay of three days in filing the Statement of Claim was attributed to the fact that there are a considerable number of employees involved in the dispute. It took a lot of time to compile the information required to prepare the case. The fact that the employees were working different shifts and locations made it difficult to arrange for consultations. Furthermore, interpreters had to be used in the consultations since not all employees were conversant in the English language resulting in consultations being prolonged.
- [11] The appellant contended further that all the individual employees had at all relevant times expressed their serious desire to persist with their claims of unfair dismissal. On the prospects of success, the appellant contended that it had good prospects of success for the following reasons: there are two groups of employees; the first group was employed by UNISA and the second group by both UNISA and the respondent. They mentioned that they were invited to apply for positions as bus drivers by advertisements issued by and displayed on the premises of UNISA; they submitted themselves to an interview process conducted by UNISA; they were handed letters of appointment to the positions of bus drivers by UNISA. These letters informed them of the salaries they were to earn as bus drivers; they reported to UNISA's employees who also gave them instructions relating to the tasks they had to perform as bus drivers. They also received separate remuneration/salaries for the performance of their services in their capacity as bus drivers.

[12] With regard to the second group allegedly employed by both UNISA and the respondent, the appellant alleged that they performed their services as bus drivers under the auspices and control of the respondent's employees and were remunerated on a monthly basis by the respondent. The appellant attached salary advices of some of the employees to demonstrate that their income tax payments, Unemployment Insurance Fund contributions as well as the Bargaining Council levies were deducted from their salaries by the respondent as their employer.

[13] In response to the appellant's allegations, UNISA disputed that it employed the employees as bus drivers but that some of them were employed in positions ranging from overseeing its estates to assisting with space and parking matters and that it was in fact the respondent who employed them as bus drivers. UNISA contended further that the respondent's stance that it had a "sub-contractor arrangement" with the individual employees is opportunistic because all the affected individuals were in fact employed by the respondent as bus drivers. The allegation that the employees were engaged as independent contractors is contained in the respondent's response to the appellants' Statements of Claim.

The Labour Court

[14] The main ground for opposition to the Condonation Application by UNISA was the appellant's delay in bringing the Application for Condonation. It was contended on behalf of UNISA that the appellant gave no explanation for this delay in their founding affidavit but only gave the explanation in reply. The explanation for the delay in bringing the Condonation Application was attributed to an administrative error and oversight, which cannot be attributed to the individual employees.

[15] The Labour Court had the following to say in its evaluation of the Condonation Application:

[15] *In my view, the excessive delay in filing the condonation application whilst aware of the need to do that is fatal to the applicants. The explanation for the delay is totally unsatisfactory, if it is for any reason to be regarded as anything closer to an explanation. In their founding papers the applicants do not provide an explanation as to why they did not heed the warning by the first respondent that they need to apply for condonation.*

[16] *The poor explanation, if there is any, is not supplemented by the prospects of success. The version that there were two distinct contracts of employment between the parties is unsustainable when the totality of the facts and the circumstances of the case are taken into account. There is no explanation as to why, if there were two separate contracts was payment for the bus driving services paid as an allowance.*

[17] *In light of the above, I am of the view that the applicants have failed to show that the interest of justice favours the granting of condonation. I see no reason in both law and fairness why costs should not follow the results.*

[18] *Having made the above finding, it is not necessary to deal with the issue of the delay in prosecuting the claim.* "[Emphasis provided]"

The Condonation Application was consequently dismissed with costs without any indication in the order that it only applies to the application in so far as it relates to UNISA.

The appeal

[16] The grounds of appeal upon which the judgment of the Labour Court is challenged are that the Labour Court erred:

- 15.1. in dismissing the Condonation Application for the late filing of the Statement of Claim against both the respondent and UNISA instead of restricting the determination of the application to UNISA only;
- 15.2. by failing to give consideration to the appellant's prospects of success against the respondent; and

15.3. in not finding that it was in the interest of justice to grant the Condonation Application against the respondent in favour of the appellant.

- [17] The strange feature of this appeal is that the appellant is appealing against the order of the Labour Court only in so far as it relates to the respondent before this Court even though the judgment and order is based on the same facts and circumstances that relate to both the respondent and UNISA. Mr Goosen who appeared on behalf of the appellant in the court *a quo* and in this Court, informed us that the appellant has since accepted that it does not have favourable prospects of success against UNISA as compared to the respondent and that, for that reason it only applied for leave to appeal against the respondent. It further confirmed that the appeal is consciously pursued against the respondent only.
- [18] Counsel for the appellant submitted that the judge in the court *a quo* had indicated during argument that he was not going to dispose of the appellant's Condonation Application in so far as it related to the respondent who did not oppose the application and, as a result, did not invite submissions from the respondent. This attitude, it was contended, resulted in the court *a quo* not considering the strong prospects of success against the respondent.
- [19] There is merit in the submission that the court *a quo* had decided to deal only with the Condonation Application only in so far as it related to UNISA. This is because at paragraphs [1] to [3] of the judgment, the court *a quo* recorded that it was dealing with an opposed application for condonation and that "*the opposition to the condonation is only by [UNISA]*", and that "*the case for the applicants is that they were unfairly dismissed as bus drivers for operational reasons by [UNISA]*". In addition, reference is made to the appellant's contentions against UNISA in the Statement of Claim and UNISA's defence in the response to the Statement of Claim. There is no reference to the appellant's contentions against the respondent and the respondent's defence to the Statement of Claim.
- [20] Furthermore, the grounds of appeal formed the basis of the application for leave to appeal. However, the court *a quo* did not take issue with these grounds in its

judgment granting leave to appeal. The court *a quo* acknowledged that the appellant was correct in stating that the respondent did not oppose the Condonation Application and that leave is “*sought on the ground that the respondent did not oppose the Condonation Application and that the Court did not consider prospects of success in relation to them*”. For these reasons, the court *a quo* was persuaded that there are reasonable prospects that another Court is likely to arrive at a different conclusion in as far as the application for condonation for the late filing of the Statement of Claim in relation to the respondent.

- [21] Mr Bekker, who appeared on behalf of UNISA in the court *a quo* appeared on behalf of the respondent in this Court. He submitted, *inter alia*, that the court *a quo* did consider the application in terms of Rule 11 in determining the Condonation Application and as such, its decision to dismiss the Condonation Application disposed of the case of the appellant against the respondent as well.
- [22] There is no merit in this submission. The Labour Court made it clear at paragraph [18] of its judgment quoted above, that it found it not necessary to deal with the Rule 11 application in view of its decision to dismiss the Condonation Application.
- [23] It is clear from the judgment of the court *a quo* that it found the delay of three days in serving and filing the Statement of Claim not to be excessive. However, the court *a quo* laid much emphasis in the fact that it took the appellant a period of 18 months (not 180 days as the court *a quo* said) to bring the Condonation Application. This delay was found to be “fatal” to the appellant’s application. The court *a quo* further found the explanation of an administrative error and oversight for this delay as totally unsatisfactory. Furthermore, the prospects of success, which can only be those against UNISA in light of the decision that the Condonation Application in relation to the respondent was not to be determined, were found to be weak.
- [24] It is trite that an applicant has a duty to bring an application for condonation without delay after he/she has become aware of the need to apply for

condonation.⁵ However, the distinction between the delay in filing a Statement of Claim and the delay in applying for condonation should be kept in mind when considering whether condonation should be granted.

[25] Although the appellant delayed in bringing the Condonation Application despite being alerted by UNISA of the need to bring the said application, it is common cause that the parties did not sit back and do nothing during the period of 18 months. All the necessary papers to move the litigation forward were filed. Pre-trial procedures that culminated in a Pre-Trial Minute being concluded were followed. It can therefore not be said that the respondent was prejudiced by the delay in bringing the Condonation Application on time. Neither of the parties depended on the Condonation Application for preparation and advancement of its case. The respondent could not have claimed that it suffered prejudice as a result of the delay in bringing the Condonation Application since no papers were filed to oppose the Condonation Application.

[26] In my judgment, the court *a quo* was required to consider and evaluate the prospects of success of the appellant's case against the respondent and the prejudice to be suffered by the parties should condonation be granted or denied in addition to the factors it considered in the application against UNISA. The omission to do so is an oversight on the part of the court *a quo*. It would not be in the interest of justice to refer this matter to the court *a quo* to consider the merits of the appellant's application. It would serve the purpose of the labour relations of speedy finalisation of labour disputes to dispose of the condonation application at this stage. All the facts necessary for the determination of the Condonation Application are on record and this Court is in as good position as the Labour Court to determine the application without any further delay.

[27] The appellant has shown that there are reasonable prospects of success against the respondent. They have attached documents to demonstrate that the

⁵ See *Allround Tooling (PTY) LTD v NUMSA* [1998] 8 BLLR 847 (LAC) at para 8; *NEHAWU v Nyembezi* [1999] 5 BLLR 463 (LAC) at para 5; *Librapac CC v Fedcrow and Others* (1999) 20 ILJ 1510 (LAC); [1999] 6 BLLR 540 (LAC) at 543.

individual employees entered into contracts of employment with the respondent who in turn remunerated them for their services. Furthermore, they are supported by UNISA which contends that the individual employees were indeed employed by the respondent. In return, the respondent has not filed papers to controvert the averments made by the appellant in the Condonation Application. One is however mindful of the respondent's defence raised in the response to the Statement of Claim which is to the effect that the individual employees were only engaged as independent contractors. Should such a defence be unsuccessful, the appellant and its members stand a chance of succeeding with their claim.

[28] In my view, a case has been made for condonation for the late filing of the Statement of Claim. It will also be in the interests of justice that condonation be granted in the circumstances.

[29] As pointed out the respondent did not oppose the condonation application in the Labour Court. However, a cost order was made in its favour. There is no justification for such an order being made. Despite all these factors, the respondent elected to oppose the appeal on the basis that the appellant could not contend that its application for condonation was not considered by the Labour Court because by granting the Rule 11 application, the appellant's claim was dismissed against both the respondent and UNISA. I have already found that there is no merit in this submission. Other than this contention, the respondent could not make any submission to dispute the fact that the Labour Court had decided not to consider the Condonation Application against the respondent. For that reason, the respondent is not entitled to any costs on appeal. The appellant is seeking an indulgence from the court and it would be in accordance with the requirements of the law and fairness that there be no order as to costs despite its success.

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

- a) The appeal succeeds and the order of the Labour Court in so far as it relates to the respondent is set aside.

- b) The appellant is granted condonation for the late filing of the Statement of Claim.
- c) Each party is to pay its costs.

LP Tlaletsi DJP

Coppin JA and Savage AJA concur in the judgment of Tlaletsi DJP.

APPEARANCE:

FOR THE APPELLANT:

Mr C Goosen

Instructed by Strydom Attorneys

FOR THE RESPONDENT:

Mr W Bekker

Instructed by Kuene Ramapala Botha INC