



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: CA7/2016

In the matter between:

COMPUTER STORAGE SERVICES AFRICA (PTY) LTD

Appellant

and

COMMISSION FOR CONCILIATION MEDIATION

AND ARBITRATION

First Respondent

JOHN M SIAVHE

Second Respondent

MOHAU NTAOPANE

Third Respondent

VERONA BOWIE

Fourth Respondent

Heard: 28 November 2017

Delivered: 30 November 2017

Summary:

Employee referred unfair suspension dispute to the CCMA for determination. Arbitration award granted in default in the absence of the employer. Suspension found to be unfair and employee ordered to return to work. Application for rescission of default judgment refused. Award and rescission ruling taken on review. Review application out of time. Condonation for the late filing of the review of rescission ruling refused and review application

**dismissed with costs. On appeal the decision of the Labour Court upheld.
Appeal dismissed with costs.**

Coram: Musi JA, Coppin JA and Savage AJA

JUDGMENT

SAVAGE AJA

Introduction

- [1] This is an appeal against the judgment of the Labour Court (Van Niekerk J), with the leave of that Court, in which the appellant's application to condone the late filing of its review application was dismissed with costs, including the reasonable accommodation and travel costs of the fourth respondent's attorney from Johannesburg to Cape Town on 16 September 2015.
- [2] The fourth respondent, Ms Verona Bowie, was employed in Johannesburg by the appellant, Computer Storage Services Africa (Pty) Ltd. She referred an unfair suspension dispute to the first respondent, the Commission for Conciliation Mediation and Arbitration (CCMA). The appellant failed to attend the ensuing arbitration hearing and the arbitration proceeded in default in its absence. On 31 March 2014, the second respondent (the first commissioner) issued a default arbitration award in which it was found that the employee had been unfairly suspended without pay. The appellant was ordered to pay the employee outstanding remuneration for the months of January, February and March 2014, with Ms Bowie reinstated for the month of April 2014.
- [3] The appellant applied for the rescission of the default arbitration award, which application was refused by the third respondent (the second commissioner) on 13 June 2014. The second commissioner found that the appellant had not explained why it had not received the notice of set down; that its claim that the employee was a consultant and that no employment relationship existed between the parties was without merit given the provisions of s200A of the Labour Relations Act 66 of 1995 (the LRA); and that Ms Bowie would be

prejudiced if rescission were to be granted given that she had been without salary since 23 January 2014.

Judgment of the Labour Court

- [4] On review to the Labour Court, the appellant sought the setting aside of both the rescission ruling and default arbitration award. The application to review the default arbitration award was some 14 weeks late. However, the appellant only sought condonation for the 20-day delay in filing its application to review the rescission ruling.
- [5] Mr Corne Pretorius, an official of an employers' organisation representing the appellant, deposed to an affidavit in support of the appellant's condonation application, with no confirmatory affidavit filed by the Chief Executive Officer (CEO) of the appellant. Mr Pretorius explained the delay in launching the review application on the basis that, following receipt of the rescission ruling, attempts were made to obtain proof from the CCMA that the notice of set down had been received by the appellant, but that, "*despite numerous telephonic requests during the month of July and August 2014*", the CCMA was unable to provide proof of registered postage. After Mr Pretorius became aware that the six-week period within which to file a review application had lapsed, the appellant's attorneys were instructed to file the application which was by then 20 days late, when calculated from the date of the rescission ruling. Mr Pretorius continued that the period of delay was not severe in that the appellant's representative "*had to be sure that there was proof of service*"; the "*prospects of success in the review application to have the rescission ruling reviewed...are very good indeed*" since Ms Bowie was never an employee and was not suspended; the matter is of extreme importance to the appellant; and that the appellant would be severely prejudiced if condonation were not granted.
- [6] In its judgment, the Labour Court found that, although the official appeared to have assumed it to be sufficient to seek condonation only in respect of the rescission application –

'...this cannot be so, since the merits of review sought appear to canvass both the rescission ruling and the default arbitration award. To the extent that the applicant has failed to apply for condonation for the late filing of the review application in relation to the default arbitration award issued by the second respondent on 31 March 2014, this court has no jurisdiction to entertain a review against that award.'

- [7] Furthermore, the application for condonation was supported only by the affidavit of Mr Pretorius, in which it was denied that the notice of set down had been received, but with no confirmatory affidavit filed by the appellant's CEO. The Court stated that:

'One might have expected, given the [first commissioner's] assertions regarding service and the reference in the record to a successful fax transmission, that the [employer] deal with these, or at least provide some response or explanation beyond the unsubstantiated assertion that the notice was not received by the CEO. But there is no reference to any of the methods of service referred to by the commissioner, either in the form of the successfully transmitted fax referred to in the transcript or the posting of the notice by fast mail to an address verified as that of the applicant. In the circumstances, it was incumbent on the employer to place before the [second commissioner] an adequate and sufficient explanation for its assertion that it had not received the notice...'

- [8] The consultancy agreement on which the appellant relied was rejected as a sham, with the Court stating that there was little doubt that, *"despite the label and the content of the contract"*, an employment relationship existed between the parties; and Ms Bowie was an employee of the appellant. The application for condonation was refused.

- [9] As to costs, the Labour Court found that the employer's election to institute proceedings in Cape Town, with the knowledge that the employee would be prejudiced in her opposition to the application, was *"indicative of an attitude on the part of the [employer] that pervades this matter"* and that there was no reason to deny the employee her costs, including the travel and

accommodation costs of her attorney in attending the hearing of the review application.

The appeal

[10] This appeal was first set down for hearing in Cape Town on 11 May 2017. Prior to the hearing, the employee indicated that she was unable to afford the costs of litigating the matter in Cape Town and the appeal was postponed *sine die* with submissions sought from the parties as to why the review application had been pursued by the appellant in Cape Town. The matter was thereafter set down for hearing before this Court in Johannesburg.

[11] It was contended for the appellant that the Labour Court erred in finding that an application for condonation for the late filing of the review of the default award had not been made, and in dismissing condonation for the late filing of the review application in respect of the rescission application. Ms Bowie opposed the appeal on the basis that the Labour Court had correctly found that there was no application to condone the late filing of the review application made by the employer and that the Court accordingly lacked jurisdiction to consider that application. As to the refusal to grant condonation in respect of the late filing of the review of the rescission ruling, it was submitted that, with poor prospects of success and an inadequate explanation for the delay, condonation was correctly refused and the matter dismissed with costs.

Evaluation

[12] It is trite that the Court holds a discretion as to whether to grant condonation. The exercise of such discretion requires that consideration be given to, *inter alia*, the extent of the delay; the reasons for the delay; the prospects of success; the prejudice that the parties will suffer if condonation is granted or

refused; and whether it is in the interests of justice to grant condonation as sought.¹

- [13] The appellant explained the 20-day delay in filing the application to review the rescission ruling on its unsuccessful attempts to obtain proof from the CCMA that the notice of set down had been received by the appellant. However, since the appellant's CEO denied that the notice of set down had been received, the Labour Court correctly found that this required some explanation from the CEO. No confirmatory affidavit from the CEO was placed before the Labour Court in which the appellant's fax and mail receipt systems may have been explained, the searches it had undertaken to determine whether notice was received detailed and in which it was confirmed that the notice had not been received. Instead, Mr Pretorius stated that the period of delay was not severe, when the appellant's representative "*had to be sure that there was proof of service*".
- [14] Condonation is not to be granted simply on the asking. A party seeking that condonation be granted puts up an inadequate and poorly motivated affidavit in support of its application at its own peril. The explanation provided by the appellant that it took more than six weeks for it to seek proof from the CCMA that the notice of set down had not been served is inadequate. There is no reason as to why more expeditious steps could not have been taken to obtain the information required and the Labour Court can hardly be faulted for finding that a more cogent case was required to be put up by the appellant to explain properly, and in appropriate detail, the reason for the delay in filing the review application.
- [15] The claim by Mr Pretorius that the "*prospects of success in the review application to have the rescission ruling reviewed...are very good indeed*", since Ms Bowie was never an employee and was not suspended from duty, was properly considered by the Labour Court and rejected. The material before it bore out its finding that –

¹ *South African Post Office Ltd v Commission for Conciliation Mediation and Arbitration and Others* [2012] 1 BLLR 30 (LAC); (2011) 32 ILJ 2442 (LAC); *NEHAWU obo Mafokeng and Others v Charlotte Theron Children's Home* [2004] 10 (BLLR) 979 (LAC).

'...there can be little doubt that despite the label and the content of the contract in which the applicant relies, the reality in the present instance is one of employment. The [appellant] does not address the merits of the [employee's] referral, i.e. that she was summarily suspended without pay after expressing her dissatisfaction at the fact that a colleague had received a better offer from the [appellant].'

[16] Furthermore, the Labour Court properly had regard to the fact that, were condonation to be granted, it would be entitled to interfere with the second commissioner's ruling only if the decision arrived at was unreasonable to the extent that no reasonable decision-maker could have come to the same decision on the available material. The Court cannot be faulted for finding that, despite the fact that the delay in filing the application to review the rescission ruling was not inordinate, it was not persuaded that the appellant held any prospects of success in the review application. The appellant's claim that the matter was of extreme importance to it was not substantiated. There was also no indication on what basis the appellant would suffer the severe prejudice it complained of if condonation were not granted. For all of these reasons, it follows that the appellant failed to make out a proper case to justify the grant of condonation in the matter and that in dismissing the application for condonation, the Labour Court cannot be faulted.

[17] Since no application served before the Labour Court seeking condonation to be granted for the 14-week delay in filing the application to review the default arbitration award made by the first commissioner, the Labour Court correctly found that it lacked jurisdiction to determine that review application.

[18] Having regard to considerations of law and fairness, there is no reason why costs should not follow the result.

Order

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

1. The appeal is dismissed with costs.

Savage AJA

Musi JA and Coppin JA agree.

APPEARANCES:

FOR THE APPELLANT:

C de Kock

Instructed by Carelse & Khan Attorneys

FOR THE FOURTH RESPONDENT:

R Saint

Instructed by Saint Attorneys