



REPUBLIC OF SOUTH AFRICA

Not Reportable

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

CASE NO: D298/01

In the matter between:

S PILLAY & K PILLAY

Applicants

and

DURBAN METRORAIL

Respondent

Heard: **30 AUGUST 2011**

Delivered: 30 AUGUST 2011

JUDGMENT

REDDY AJ

Introduction

[1] This is an *ex tempore* judgment. The applicant is S Pillay. This is an application on two fronts. The first is an application for a rescission of an order issued by this Court on 26 November 2010 when the trial was set down for hearing and the applicant did not appear. The referral was accordingly dismissed. That

application is coupled with an application for condonation.

Background facts

[2] The applicant was a temporary employee who was placed with the respondent by a temporary employment service in 1999. She occupied the post of Administrative Official.

[3] She was subsequently dismissed for misconduct. After referring an unfair dismissal dispute to the CCMA, she was awarded reinstatement.

[4] Shortly after the reinstatement award was handed down, the respondent advertised the post of Administrative Official. This was a permanent post. The applicant applied for the post and wrote the applicable test that candidates for the post had to write.

[5] She was not shortlisted or interviewed. She was not appointed to the post.

[6] The applicant alleges that the other candidates who did not have requisite qualifications or the experience that she had were appointed to the post. In addition, the applicant alleges that the respondent acted with nepotism when appointing the candidates that it did. The applicant alleges that she was excluded from appointment because the respondent, despite the existence of the arbitration award in her favour, believes that the applicant is guilty of the misconduct for which she was dismissed.

[7] The applicant referred an unfair discrimination dispute to the CCMA, which resulted in the matter being referred to this Court.

[8] The applicant's referral to this Court is one based on discrimination in terms of section 6 and 9 of the Employment Equity Act 55 of 1998.

Condonation application

The delay

[9] The rescission application is 73 days late.

Explanation for the delay

[10] The discrimination referral was set down for hearing on 26 November 2010. The applicant did not attend Court on that day and the matter was dismissed.

[11] I do not intend repeating the detail of the many grounds for the explanation for the delay, save to record that the explanation by the applicant covers various grounds including being represented by various legal representatives, not having finances to fund litigation, waiting for Legalwise to assist her, Legalwise withdrawing its cover for her legal fees, the Christmas break that intervened after the dismissal by this Court of the referral and that she is a lay person and was unaware of the time periods for the filing of the rescission application.

[12] The applicant only became aware of the matter having been dismissed well after 26th November 2010 and at the time that she became aware there was the Christmas break from the middle of December to the middle of January which had impeded any action by the applicant or her respective attorneys.

[13] The applicant being a lay person was not aware of the legal time limit of 15 days from the date of 26th November, to apply for rescission. She was at this time no longer represented by an attorney. Although the applicant was employed at this time her husband was not and she could not afford to instruct attorneys immediately. She faced various difficulties in travelling to Court and to her erstwhile attorneys. The applicant was also not allowed time off work to attend to this matter.

[14] The respondent submitted that the delay is substantial, it is more than three times the number of days that are required for a rescission application to be brought and that many areas or many periods in the entire trajectory of things have not been explained. For this reason the respondent submitted that it was not necessary for the Court to look at the applicant's prospects of success in the main matter.

[15] Whilst there are time periods which are not fully explained, I do not accept that the delay is so substantial so as to disallow me to consider the applicant's prospects of success or other relevant principles when deciding the condonation application. This Court is bound by the principle of fairness when deciding matters which, having regard to the obvious hardships the applicant faced in litigating this

matter, requires that all the principles must be considered by me before deciding the application for condonation.

Prospects of success

[16] Insofar as prospects of success are concerned, the applicant alleges that she was discriminated against in terms of section 6 of the Employment Equity Act on arbitrary grounds and by way of illustration lists a few examples of these. The first ground was that she had scored higher than the incumbent in the test but the applicant was not short-listed and that there is no substantive explanation by the respondent for not allowing the applicant to proceed to the second stage of being short-listed and being interviewed.

[17] The opposition to this ground is two fold. It was made in reply and secondly the respondent alleges that the applicant failed the test. In the replying papers, the applicant alleges that she scored 69% in her test and the incumbent scored 60%. This issue is disputed and the respondent, as correctly submitted by Mr Shangase, did not have an opportunity to reply thereto. Even if I were not to consider this ground, this would be a factual dispute before this Court and evidence should be led to determine, one, how the scoring applied, two, whether the scoring was applied correctly and, three, whether the applicant actually scored higher than the incumbent.

[18] The second ground is based allegedly on a belief by the respondent that the applicant was somehow involved in a robbery that took place at the respondent's premises and for which she was dismissed. Her dismissal was challenged and she was reinstated. The applicant's allegation in this regard is that the respondent harboured some ill feelings towards her for having an award against it and rather than review the award, the respondent has prevented her being appointed to the post. It is submitted by the applicant's attorney that this too is an arbitrary ground. To my mind this is something that, if the applicant proves was a real bar to her being appointed to the post, would constitute grounds for arbitrary conduct. Such evidence must be tested through cross-examination by witnesses of both the applicant and the respondent.

[19] The next ground is based on nepotism. My view is that there is not enough

made out in the papers that the incumbent was in fact related to those staff who were doing the hiring, however the applicant is entitled to lead relevant evidence on this issue to establish her case. The applicant need not prove her case on the papers in the condonation application. The trial court will be in the best position to determine if the applicant has discharged the onus on this issue.

[20] In defence of the appointment of the incumbent, the respondent has stated that there was a shortage of white females at that time and it therefore appointed the incumbent. This issue, as well, to my mind requires information and details as to the demographics of the employees at the time of the advert and whether in fact the incumbent fell within a group of employees where there was a shortage of white females. The respondent would be entitled to prove that this was in fact the case when justifying the appointment of the incumbent.

[21] The next ground is that one of the requirements for the post was the possession of a matric certificate. It is alleged by the applicant that other candidates who did not have a matric certificate were shortlisted, interviewed and placed in positions. The respondent alleges that this is not a material factor as all people who applied for the post were given an opportunity to write the test irrespective of whether they had matric certificates or not.

[22] A further response by the respondent to this issue is that it is not recorded in the applicant's statement of case. Even if this ground is not considered by this Court in this application, the applicant may amend her statement of case to record this ground. I will however not place any reliance on this ground in deciding this matter.

[23] I am of the view that those issues raised by the applicant and the respondent's response thereto require evidence to be led for this Court to arrive at a proper finding whether the applicant was discriminated against and whether such discrimination was unfair. Some grounds raised by the applicant have sound prospects of success whilst others are not so sound, but these are issues which cannot be determined on papers. They require documentary proof and verbal evidence to be led.

[24] I accept that the matter is important to both parties. I also accept that there is a public interest in having this type of matter heard in that the respondent is a

parastatal and it has perhaps a greater responsibility to comply with non-discriminatory practices in our democratic society than private entities.

[25] Insofar as prejudice is concerned, the main opposition to the condonation in respect of prejudice is that there are many witnesses who no longer work for the respondent and it will be difficult for it to prove its case. It has not been submitted that in respect of those employees who no longer work for the respondent, it does not have a record of their addresses or that they are incapable of being traced. Witnesses can be traced, can be searched for and found and they certainly can be subpoenaed. The applicant submitted that she will bring as witnesses those employees who like the applicant, initially contested their non-appointment. They were subsequently appointed. The respondent's responsibility in getting a whole host of witnesses is reduced by the applicant's bringing some of those witnesses herself.

[26] Having considered all those principles cited in *Melane vs Santam Insurance Company Limited* 1962 (4) SA 531 AD, I am satisfied that the facts and the law support the granting of condonation.

Rescission application

[27] In respect of the rescission application, the applicant must show sufficient cause for the default. There are two grounds that must be satisfied before a party is said to have satisfied sufficient cause: there must be a reasonable and acceptable explanation for the default on 26 November 2010 and that on the merits the applicant has a *bona fide* cause of action which carries some prospects of success.

Reasonable and acceptable explanation for the default

[28] The explanation by the applicant is on the basis that it falls wholly within the erstwhile attorneys' lap in that the attorneys, who represented the applicant at that time, did not inform the applicant of the fact that the matter had been set down for 26 November 2010 and neither had that firm informed the applicant that the firm was withdrawing as her attorneys of record for lack of funds. It is common cause that Legalwise was a conduit for legal services and the applicant's contract with Legalwise had expired. It seems from the papers that the applicant's erstwhile attorneys, Jayshree Moodley Attorneys, sent by registered post a copy of the notice

of set down. The applicant claims never to have received that notice. One would expect attorneys, who know the importance of set downs, especially in light of withdrawing as attorneys of record, to have made every effort in letting the client know as soon as possible, after being aware that the matter is set down, that, one, it is set down, and, two, they were no longer going to represent the client. To my mind, *prima facie* there is a huge degree of responsibility on the erstwhile attorneys to have done something more than just send a letter in the absence of any verbal communication with the applicant to let her know specifically that her matter was set down. This is especially so in light of the fact that she would not be represented on that day. I agree with the applicant's submissions that she is not wholly responsible for not being in court on 26 November 2010 and that a large portion of the blame for her not being there must lie with her erstwhile attorneys.

Prospects of success

[29] I am satisfied that the applicant has a *bona fide* cause of action.

[30] I have dealt with the applicant's prospects of success in the condonation application. For these reasons I am inclined to grant the rescission application. The interests of justice require that the evidence be tested so that the matter is properly aired. This matter is approximately 10 years old. The respondent, if it can properly justify the applicant's non-appointment, will not be prejudiced by the hearing of the matter.

[31] Having considered all the factors that are applicable, and being guided by the interests of justice, this matter requires that the condonation application and the rescission application be granted. In the circumstances, I make the following Order:

- 1 The application for condonation for the late filing of the application for rescission is granted.
- 2 The Order granted on 26 November 2010 dismissing the referral is rescinded;
- 3 There is no order in respect of costs.

Reddy AJ

APPEARANCES

FOR THE APPLICANT:

Mr Mkwibiso of Shepstone & Wylie

FOR THE RESPONDENT:

Mr Shangase of A P Shangase & Associates