



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case No. JS169/2012

In the matter between:

SOUTH AFRICAN REVENUE SERVICES

Applicant

and

PORTIA KAWULILE NDHLOVU

Respondent

In re:

PORTIA KAWULILE NDHLOVU

Applicant

and

SOUTH AFRICAN REVENUE SERVICES

Respondent

Delivered: 07 February 2014

JUDGMENT ON LEAVE TO APPEAL

VISAGIE AJ

- [1] This is an application for leave to appeal against a judgment delivered by this Court on 15 August 2013. The application for leave to appeal was filed with this Court on 5 September 2013. Although a notice of intention to oppose was filed on 10

September 2013 by the Respondent, no opposing submissions were filed. The Applicant's written submissions were filed on 16 September 2013.

- [2] The Applicant's first ground is the contention that the Court failed to take into account the Respondent's unexplained delay in filing her statement of claim. In support of this contention, the Applicant argued that apart from averring that the Respondent's Union advised her against proceeding with the claim and that she then approached a private attorney (Larry Dave Attorneys), no explanation for a period of approximately four months was provided by the Respondent.
- [3] In my view, there is no merit to the aforementioned contention of the Applicant. When the CCMA certified the Respondent's dispute as unresolved on 21 October 2011, the Respondent explained that she was called to a disciplinary hearing on 7 November 2011. The recommendation of the chairperson was for her to be given a final written warning and the chairperson recommended corrective steps. She explained that given the nature of the disciplinary outcome, she decided against proceeding with the unfair discrimination dispute in the hope that the recommendation would have resolved the issues. It was common cause that after the parties received the chairperson's recommendation, the Applicant was informed by the Respondent's Union that the Respondent would accept the written warning and that the Respondent was not appealing the recommendation.
- [4] It was only when the alleged abusive conduct of the management of the Respondent became unbearable in November 2011 that the Respondent sought advice first from the CCMA and then from her Union as to how to take the matter further. So it is entirely incorrect to state that the only explanation provided was the Respondent's approaches to the two Unions and Larry Dave Attorneys.
- [5] Faced with the above explanation, the Court found the Respondent's explanation plausible. The Court was satisfied that the Respondent provided an explanation for the whole period of the delay. I do not think that *Moila*¹ is authority for the contention that an application for condonation must in detail explain each day of

¹ *Moila v Shai N.O. and Others* 2007 (28) ILJ 1208 LAC

the period of delay in order for such an applicant to satisfy the requirement that an acceptable explanation be provided in order for condonation to be granted.

- [6] The next ground of appeal is the contention that this Court erred by not drawing an adverse inference from the fact that the Respondent did not deal with the prospects of success fully. In support of this contention, the Applicant argued that the Respondent failed to state the alleged grounds of discrimination and that the Applicant brought this to the Respondent's attention by filing an exception. Notwithstanding this exception, according to the Applicant, the Respondent failed to remedy the alleged shortcomings in her statement of claim. The Applicant further argued that the Respondent only made bold allegations in her statement of claim and that such averments were insufficient to establish unfairness. The Applicant cited various authorities in support of this contention. In further support, the Applicant argued that based on the authority of *NUM and Others Western Holdings Gold Mining*,² in the absence of a reasonable explanation for the delay the prospects of success need not even to be examined and condonation should have been refused.
- [7] As the Court has already stated in the judgment and repeated above, the Court found the explanation by the Respondent as plausible. Any authority cited by the Applicant containing the well-established principle that in the absence of a reasonable explanation the prospects of success need not be considered is not applicable. What is more, based on the authority of *Gaoshubelwe*³, the Court found that the Respondent needed only to show the likelihood or chance of success in the main case when dealing with her prospects of success. The Court was satisfied that the Respondent showed the likelihood or chance of success in her main claim.
- [8] A further ground relied upon by the Applicant is the contention that the Court erred by relying on the fact that the Respondent was represented by a trade union and that this provided some justification for her lateness. In support, the Applicant cited the well-established authority of *Saloojee and Another NNO v Minister of Development*.⁴ This ground, in my view, is similarly misplaced. The Court did not

² 1994 (15) ILJ 610 (LAC)

³ (2009) 30 ILJ 347 (LC) at para 27

⁴ 1965 (2) SA 135A.

understand the Respondent's explanation for the delay to have been that the delay was caused due to the negligence of any one of the Unions. Her explanation was that she was assisted and advised by her union in dealing with her dispute from the time that she referred it to the CCMA up until the time that she filed her statement of claim with the Court. The reference to the two unions and to Larry Dave Attorneys was simply to show to the Court the attempts that the Respondent made in order to pursue her claim and try and deal with the dispute. It was the finding of the Court that the Respondent cannot be faulted for trying to seek advice on issues which she, as a lay person, would have little knowledge of. It was never the Court's view that the delay was caused by the negligence of the Respondent's representatives. For these reasons, this ground has no merit.

- [9] The Applicant also contends that the Court failed to address the issue of prejudice in the judgment, or at all. In exercising its discretion to grant condonation, the Court considered all the facts put before it. The Court weighed the Respondent's clear intentions and attempts to have her dispute heard by the CCMA and then dealt with by the Court with the Applicant's contention that there was no merit to the Respondent's dispute and that her statement of claim was arguably inadequate. Against this backdrop, the Court found the Respondent's explanation for the delay a reasonable explanation and, although the Court may not have been entirely convinced of her prospects of success, having determined that it was fair it did not escape the Court that the Applicant had a second chance of raising the alleged inadequacy, if any, in the statement of case when the main matter was to be heard. For these reasons, it was this Court's view, even though not pertinently expressed in the judgment, that the prejudice to the Respondent for not granting condonation outweighed the prejudice that the Applicant may be faced with by stepping into the main case. In the case of *NUM v Western Holdings Gold Mining*,⁵ the Labour Court had the following to say about the approach to be adopted in considering applications for condonation.

‘The approach to be adopted in considering the applications well-established. The Court has a discretion to be exercised judicially upon a consideration of all the facts and in essence it is a matter of fairness to both sides. Among the facts usually

⁵ 1994 (15) ILJ 610 (LAC) at 613B-E.

relevant are the degree of lateness, the explanation therefor, the prospects of success and the importance of the case. These facts are inter-related. They are not individually decisive. What is needed is an objective conspectus of all the facts. A slight delay and a good explanation may help to compensate for prospects of success which are not strong. The importance of the issue and strong prospects of success may attempt to compensate for a long delay ... an unsatisfactory and unacceptable explanation for delay remains so, whatever the prospects of success on the merits.'

[10] As *NUM* and authorities on which it relies clearly indicate, the factors that a court considers in granting condonation are inter-related. As such, a consideration of the reasonableness of an explanation for the delay by its very nature has an element of fairness to it.

[11] The last ground of appeal is the Applicant's contention that this Court erred by awarding costs against the Respondent. In support of this contention, the Applicant argued that where a litigant seeks condonation it is essentially seeking the Court to grant an indulgence. As a result, the Court may order the successful applicant to pay the costs of the opponent. The Applicant's further argument was that the opposition was imminently reasonable and because the Applicant failed to make out a proper case in her founding affidavit, the Court should have ordered the Respondent to pay the Applicant's costs.

[12] In the case of *Call Guard Security Services (Pty) Ltd v Transport and General Workers Union and Others*,⁶ this Court had the following to say,

'It seems to me that, when this Court is asked to make an order of costs, the enquiry should be: having regard to all the relevant factors in this matter would it accord with the requirements of law and fairness to make an order of costs and, if it would, what costs order should be made? If the answer is that it would not accord with the requirements of law and fairness to make a costs order, then this Court should not make any costs order.'

[13] Further on in the judgment, the Court adopted the approach of the Appellate Division (as it then was) on the issue of costs in the case of *NUM v East Rand*

⁶ (1997) 18 ILJ 380 (LC) at 389G to 390C.

*Gold and Uranium Co Ltd.*⁷ While listing a number of considerations to be taken into account, the Appellate Division also stated that *"the general rule of law that in the absence of special circumstances costs follow the event is a relevant consideration. However, it will yield in consideration of fairness required."*⁸ As indicated in the judgment, both parties were represented by Counsel to argue their cases and asked for costs in the event of success. There were no special circumstances for the Court not to allow the general rule for costs to follow the event to be applicable. Moreover, as explained in the judgment, the Court was of the view that there was little merit in opposing the condonation application of the Respondent. In these circumstances there was no consideration of fairness that could detract from the general rule of law relating to costs.

[14] As the authorities clearly indicate, the granting of condonation is a discretion exercised judicially by this Court. This Court found that the Respondent provided a reasonable explanation for the delay and had fair prospects of success. In the result, the discretion in fairness of the Respondent was granted. For these reasons there are no prospects that another Court could come to a different conclusion on appeal.

[15] For these reasons, I make the following order.

[16] Leave to appeal is refused.

Visagie AJ

Acting Judge of the Labour Court of South Africa

⁷ 1992 (1) SA 700 (A).

⁸ See paragraph 1242E.