



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Of interest to other judges

Case no: JR 1567/10

In the application for leave to appeal between:

OFFICE OF THE PRESIDENCY

Applicant

and

PSA obo A H MBIZA

First Respondent

GPSSBC

Second Respondent

MARTIN SAMBO NO

Third Respondent

Delivered: 20 March 2014

RULING ON CONDONATION AND

APPLICATION FOR LEAVE TO APPEAL

STEENKAMP J:

Introduction

- [1] The applicant seeks leave to appeal to the Labour Appeal Court against the whole of my judgment and order handed down on 27 November 2013. The application is some 25 court days late. The applicant seeks condonation for the late filing of the application for leave to appeal.

The application for condonation was only delivered on 29 January 2014, two months after the judgment was handed down.

Condonation

- [2] I shall deal with the application for condonation at the hand of the well-known principles set out in *Melane v Santam Insurance Co Ltd*.¹ This Court is also guided by recent judgments of the Constitutional Court. In *Grootboom v National Prosecuting Authority*² Bosielo AJ pointed out that the State Attorney has a duty to assist the courts to maintain their “independence, impartiality, dignity, accessibility and effectiveness”.³ He reminded practitioners and litigants that the rules and courts’ directions serve a necessary purpose. And the primary duty of the office of the State Attorney is to serve the interests of the government by initiating or defending proceedings against the state. Bosielo AJ concluded:

“One gets the impression that we have reached a stage where litigants and lawyers disregard the Rules and directions issued by the Court with monotonous regularity. In many instances very flimsy explanations are proffered. In others there is no explanation at all. The prejudice to the Court is self-evident. A message must be sent to litigants that the Rules and the Court’s directions cannot be disregarded with impunity.”

Extent of the delay

- [3] I handed down judgment on 27 November 2013. The parties were notified that it would be handed down in open court on that day. The state attorney obtained a copy of the judgment and sent it to the Office of the President on the same day. Rule 30(2) prescribes that an application for leave to appeal

¹ 1962 (4) SA 531 (A) at 532C-D.

² [2014] 1 BLLR 1 (CC) paras 20] – [35].

³ Section 165(4) of the Constitution.

must be delivered within 15 days of the date of judgment. Those *dies* expired on 19 December 2013. And the Practice Manual that came into force on 2 April 2013 further provides:⁴

‘Within 10 days of the filing of the application for leave to appeal, the party seeking leave must file its submissions in terms of Rule 30(3A) and the party opposing the leave must file its submissions five days thereafter. An application for leave to appeal will be decided by the judge in Chambers on the basis of the submissions filed in terms of Rule 30 (3A), unless the judge directs that the application be heard in open court.’

- [4] The applicant only filed its application for leave to appeal on 16 January 2014 – almost a month late -- and the application for condonation on 29 January 2014. And Mr *Mokhari* only filed his submissions at Court on 13 February 2013, that is 20 days⁵ after the applicant had delivered the application for leave to appeal. His instructing attorneys did not serve it on the PSA’s attorneys of record, Messrs Martins Weir-Smith. He did not seek condonation. I will nevertheless consider his submissions.
- [5] The applicant or the state attorney did not serve the application for leave to appeal, the application for condonation or Mr *Mokhari*’s submissions on the PSA’s attorneys, Martins Weir-Smith, when they filed those documents at court. It was therefore not “delivered” as defined in the Rules. By 27 February 2014 -- the *dies* for delivering opposing submissions having expired, calculated from the date of the late filing of Mr *Mokhari*’s submissions – the registrar of this Court enquired from Messrs Martins Weir-Smith whether they had delivered their submissions, as the Court was anxious to deal with the application. It is only then that the existence of an application for leave to appeal came to their attention.

⁴ Clause 15.2.

⁵ In the rules and in the practice manual, “day” is defined as “a day other than a Saturday, Sunday or public holiday”, and when any particular number of days is prescribed for the doing of any act, the number of days must be calculated by excluding the first day and including the last day. It differs in this regard to the LRA, where “day” is a calendar day.

- [6] Unfortunately Messrs Weir-Smith did not act within the prescribed times period either. But, unlike the applicant and its attorneys and counsel, Mr *Weir-Smith* has applied for condonation for the late filing of his submissions.
- [7] It became apparent that the state attorney had used the wrong fax number in attempting to serve the application for leave to appeal on the PSA's attorneys. Mr Weir-Smith tried to phone the state attorney in vain a number of times on 27 February 2014. After he had advised this Court's associate, Ms Nakale, of his problems, the state attorney's Ms Maponya eventually phoned him on 3 March 2014. He gave her his correct fax number. She faxed the application to him on that day, but only sent him the applicant's submissions by email on 6 March 2014. Mr *Weir-Smith* delivered his submissions on 18 March 2014, that is three court days late. The delay is not excessive, especially when compared to the late filing of the applicant's submissions – more than 20 days late – that I have considered, even though the applicant had not applied for condonation for the late filing of the submissions, but only of the application for leave to appeal itself. And Mr *Weir-Smith* has provided the Court with cogent reasons for his late filing, whereas the applicant has not. Condonation for the late filing of the first respondent's submissions is granted.
- [8] The delay in delivering the application for leave to appeal, on the other hand, is significant. It is almost double the period of 15 days provided for in the rules. Given that significant delay, the Court has to examine the reasons therefor.

Reasons for the delay

- [9] Mr *Mokhari* blithely states in his submissions that “the delay in filing the notice of application for leave to appeal was occasioned by the fact that the judgment came towards the end of the year and the instructions from the principals was [*sic*] only obtained in January to the effect that instructions should be given to the legal representatives to file leave to appeal.”

- [10] It is not clear who those unnamed “principals” are. In his affidavit in support of the application for condonation, Mr Duduzile Mbongwa, the Deputy Director-General: Strategy & Operations, says that he received a copy of the judgment on 27 November 2013. He goes on to say:

‘After perusal of the judgment, I sought to obtain instructions from my principals as to whether the judgment should be implemented or appealed against.’

- [11] That was on 27 November 2013. Extraordinarily, Mr Mbongwa then jumps ahead to December and says:

‘I could not receive a firm decision from my principals to appeal against the judgment and order of Steenkamp J in December 2013 due to the fact that the festive seasons [sic] had already started and it was difficult to obtain instructions from my principals. I only received instructions from my principals on the 13th of January 2014 upon my return from the festive seasons [sic] that the judgment and orders should be taken on appeal.’

- [12] Still Mr Mbongwa does not say who these unnamed “principals” are. There are no confirmatory affidavits attached. What is even less clear, is how the “festive seasons” already commenced in November 2013. Perhaps that is why Mr Mbongwa refers to festive seasons in the plural – one festive season could not last that long.

- [13] In any event, Mr Mbongwa quite erroneously states as a fact that “the delay is also not excessive given the fact that the interruption of the festive seasons is a matter that is to be taken into account in the computation of dates”. That is simply not so. There are no *dies non* in this Court. Firstly, the judgment was handed down on 27 November. That is hardly “the end of the year”. The court only went into recess on 15 December 2013; and in any event, there are no *dies non* in the Labour Court. There is simply no explanation why “the instructions from the principals” – whoever they may be – were only obtained in January 2014, and why the application was only filed – without ensuring that it had been properly served on the PSA’s attorneys -- on 16 January. The applicant was represented by the State Attorney and by senior counsel

throughout. They are well aware of the rules of this Court. Their failure to adhere to the rules, without any proper explanation, is simply inexcusable. It amounts to no reason at all. And this Court heeds the sentiments expressed by the Constitutional Court in *Grootboom*.

- [14] Given the excessive delay and the poor reasons therefor, it is not strictly necessary to consider the prospects of success.⁶ I shall nevertheless take that factor into consideration.

Prospects of success

- [15] What the court has to take into account in the context of this condonation application, are the applicant's prospects of success in the application for leave to appeal. Is there, in other words, a real prospect that another court may come to a different conclusion on the merits of the review judgment?
- [16] In my judgement I found that part of the award of the arbitrator was reviewable. There was simply no evidence to sustain the arbitrator's finding that the employer had discharged the onus of showing that there was a fair reason for dismissal. That stated reason was alleged incompatibility between the employee and Ms Mbete. Yet there was no evidence of such incompatibility before the arbitrator, nor was the employee given any opportunity to establish a rapport with Ms Mbete, should it have been found absent. That part of the award was reviewed and set aside. It was substituted with a finding that the dismissal was not for a fair reason and the Office of the Presidency was ordered to pay the employee compensation equal to three months' remuneration.
- [17] The applicant submits that I erred in reviewing and setting aside the arbitration award insofar as the arbitrator found that the dismissal of Mbiza was substantively fair; and that I also erred in awarding compensation. Mr *Mokhari* argued that Mbiza was not entitled to any compensation due to the fact that when his contract was terminated he was paid the balance of his contract and therefore he suffered no loss. In so doing, Mr *Mokhari* loses sight of the

⁶ *NUM v Council for Mineral Technology* [1999] 3 BLLR 209 (LAC) 211 H.

distinction between compensation and damages. That distinction is dealt with in paragraphs [26] – [34] of the judgment. It is a matter of trite law. It was recently confirmed by the Constitutional Court in *FAWU v Ngcobo & another*.⁷ There is no reasonable prospect that another court will come to a different finding.

- [18] The applicant submits that I also erred in finding that the dismissal was substantively unfair because a dismissal of an employee on a fixed term contract “can never be substantively unfair if that employee was placed in the position he would have been in had the termination not occurred earlier”. He cites no authority for that proposition. The question was whether the employee had been dismissed for a fair reason. The stated reason for the dismissal was incompatibility. The applicant laid no basis for a finding that the relationship between the employee and Ms Mbete was indeed incompatible. There was simply no evidentiary basis for such a finding. Hence, the employer failed to prove that there was a fair reason for dismissal. There is no prospect that another court will come to a different conclusion on the evidence that served before the arbitrator.
- [19] In conclusion, the applicant’s prospects of success in the application for leave to appeal are poor.

Prejudice

- [20] The applicant argues that there is no prejudice on any of the respondents in the application for leave to appeal. On the contrary, there is substantial prejudice. The employee is entitled to compensation. The delay occasioned by the applicant has meant that he has not been paid. He should have been paid before Christmas. Instead, his “festive season” was anything but.

Conclusion

- [21] The applicant has failed to make out a case for condonation. With regard to costs, I take into account that the PSA and the employee have had to incur further costs in defending this application. However, they did not oppose the

⁷ (2013) 34 *ILJ* 1383 (SCA); [2013] 7 *BLLR* 648 (SCA); 2013 (5) SA 378 (SCA) para [6].

application for condonation. I further take into account that the PSA's submissions in the application for leave to appeal were also delivered late, albeit by only three days. In law and fairness, I do not deem a costs order to be appropriate.

Order

The application for condonation for the late filing of the application for leave to appeal is dismissed.

Steenkamp J

Appearances

For the applicant: W R Mokhari SC

Instructed by: The State Attorney, Pretoria.

For the first respondent: Ian Weir-Smith of Martins Weir-Smith Inc, Sandton.