



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case No JR 3347/2010

In the matter between:

WILSON MABUDUSHA

Applicant

and

THE COMMISSION FOR CONCILIATION,

First Respondent

MEDIATION AND ARBITRATION

ARBITRATOR – L NOWOSENITZ NO

Second Respondent

LAND BANK

Third Respondent

Decided(In Chambers): 11 June 2014

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

SEEDAT AJ

- [1] This is an application for leave to appeal against my judgment of 10 January 2014 in terms of which I dismissed the application for condonation for the late filing of the application to review an award issued by the second respondent.¹

Grounds of appeal

- [2] Firstly, the applicant argues that the court had erred in finding that the applicant's attorneys were mistaken in their belief that the period applicable to reviews in the High Court was also applicable in the Labour Court whereas the applicant's attorneys were mistaken that the *dies non* that obtains in the High Court are also applicable in the Labour Court.
- [3] Secondly, the applicant asserts that the court had erred in finding that the applicant had no prospects of success in the review application.
- [4] Thirdly, the court was incorrect in finding that the applicant's attorneys only became aware of the statutory time period for bringing a review application when advised by the third respondent's attorneys some two years later.

The judgment

- [5] The court found that it was inconceivable that a firm of attorneys which had assisted the applicant in referring the dispute to the Commission for Conciliation and Mediation (CCMA), represented him in the arbitration and had received the award from the CCMA, was not aware of the requirement of six weeks stipulated in s 145(1)(a) of the LRA for the launching of a review application. This showed negligence on the part of the attorneys, a fact admitted by Mr Mndezi, counsel for the applicant.
- [6] Despite the fact that the applicant had not given a satisfactory explanation for the late filing of his statement of claim and which, by itself, would entitle the court to refuse the application for condonation,² the court considered the prospects of success and relying on judicial authority concluded that the conditions did not exist for the reinstatement of the applicant.

¹ The application for leave to appeal was decided in chambers in terms of rule 30(3A) and clause 15 of the Consolidated Practice Directive of 2013.

² *SA Post Office Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2011) 32 ILJ 2442 (LAC) at para 22

- [7] In whichever way the applicant's attorneys became aware of the statutory period for the filing of a review application is not important.

The legal principles

- [8] The Constitutional Court in *Mohlomi v Minister of Defence*³ said:

'Rules that limit the time during which litigation may be launched are common in our legal system as well as many others. Inordinate delays in litigating damage the interests of justice...such rules prevent procrastination and those harmful consequences of it. They thus serve a purpose to which no exception in principle can cogently be taken.'

- [9] Bosielo AJ sitting in the Constitutional Court in *Grootboom v National Prosecuting Authority & another*⁴ remarked:

'I need to remind practitioners and litigants that the rules and courts' directions serve as a necessary purpose. Their primary aim is to ensure that the business of our courts is run effectively and efficiently. Invariably this will lead to the orderly management of our courts' rolls, which in turn will bring about the expeditious disposal of cases in the most cost effective manner.'⁵

The learned justice said that '[n]on-compliance [with rules of court or directions] has bedevilled our courts at various levels for a long time'⁶ and that it 'is axiomatic that condoning a party's non-compliance with the rules of court or directions is an indulgence. The court seised with the matter has a discretion whether to grant condonation'⁷ on the 'facts of that particular case'.⁸ He continued:

'It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause. This requires a party to give a full explanation for

³ 1997 (1) SA 124 (CC) at para 11

⁴ (2014) 35 ILJ 121 (CC); see *eThekweni Municipality v Ingonyama Trust* 2013 (5) BCLR 497 (CC)

⁵ At para 32

⁶ At para 21

⁷ At para 20

⁸ At para 35

the non-compliance with the rules or the court's directions. Of great significance, the explanation must be reasonable enough to excuse the default.⁹

[10] The granting of condonation is the exercise of a discretion by a court.¹⁰ The decision in this regard is not appealable simply because another court could reasonably differ. As such it is not open to an appeal unless the court committed a misdirection in the exercise of its discretion.¹¹

[11] In *NUMSA & others v Fibre Flair CC t/a Kango Canopies*¹² the Labour Appeal Court set out the principles that a court will have to consider in deciding whether to interfere with a discretion. The applicant will have to show:

‘...that the court a quo acted capriciously, or upon a wrong principle, or in a biased manner, or for insubstantial reasons, or committed a misdirection or an irregularity, or failed to exercise its discretion, or exercised its discretion improperly or unfairly.’¹³

[12] The court continued that the fact that the Labour Appeal Court might have ‘reached a somewhat different conclusion from the court a quo, would not in itself justify a departure’ from the ‘general rule against interference’ in regard to the exercise of the court’s discretion. This was because policy considerations, especially with the need for expeditious resolution of labour disputes, discouraged the Labour Appeal Court from interfering with decisions which entail the exercise of a discretion.

[13] Willis JA in *Coates Brothers Ltd v Shanker & others*¹⁴ asserted that a simple misdirection is insufficient and recalled the dicta of the appeal court in *S v Dhlumayo & others* 1948 (2) SA 677 (A) at 702 that the misdirection ‘must be of such a nature, degree or seriousness that it shows that the Court did not exercise its discretion at all or exercised it improperly or unreasonably’. The learned judge went on to say:

⁹ At para 23

¹⁰ *Grootboom v National Prosecuting Authority & another* (2014) 35 ILJ 121 (CC) at para 20; *A Hardrodt (SA) (Pty) Ltd v Behardien & others* (2002) 23 ILJ 1229 (LAC) at para 5

¹¹ *Masuku v Score Supermarket (Pty) Ltd* (2013) 34 ILJ 147 (LC) at para 10

¹² (2000) 21 ILJ 1079 (LAC)

¹³ See *Coates Brothers Ltd v Shanker & others* (2003) 24 ILJ 2284 (LAC) at [15]; *Masuku v Score Supermarket (Pty) Ltd* (2013) 34 ILJ 147 (LC) at para 10

¹⁴ (2003) 24 ILJ 2284 (LAC) at para 6

‘...I accept that [the court] may have erred in its findings as to the prospects of success and the weight given thereto. Let it be assumed...that these errors were made by the court a quo. They would not, however, constitute misdirections of such a kind that they would warrant interference with the discretion exercised by the court a quo.’

[14] In *A Hardrodt (SA) (Pty) Ltd v Behardien & others*¹⁵ the Labour Appeal Court concluded that the court a quo ‘should not have condoned the late filing of the review on the basis of the totally inadequate explanation’.

[15] Steenkamp J in *Masuku v Score Supermarket (Pty) Ltd*¹⁶ wrote that

‘an appeal court will not exercise its own discretion regarding [the exercise of a discretion] on appeal afresh, unless it is first satisfied that the court a quo committed a misdirection in the nature described, so as to warrant, in effect, the setting aside of that decision.’

Evaluation

[16] The onus to satisfy the court that condonation should be granted is on the applicant.¹⁷

[17] The applicant has not based his application on any of the grounds listed by the Labour Appeal Court in *NUMSA & others v Fibre Flair CC t/a Kango Canopies*¹⁸. Indeed, the applicant does not say that I had exercised my discretion improperly or unreasonably or that I had misdirected myself.

[17] I am satisfied that I considered all the relevant factors in exercising a judicial discretion not to grant condonation. The distinction between *dies* and *dies non* cannot assist the applicant because his attorneys should have been familiar with the rules. I took into account the admitted gross negligence and incompetence of the applicant’s attorneys which alone should have been sufficient to refuse condonation. But I went ahead and considered the applicant’s prospects of success which I found to be lacking.

¹⁵ (2002) 23 ILJ 1229 (LAC) at para 21

¹⁶ (2013) 34 ILJ 147 (LC) at [12]

¹⁷ *A Hardrodt (SA) (Pty) Ltd v Behardien & others* (2002) 23 ILJ 1229 (LAC) at para 6

¹⁸ (2000) 21 ILJ 1079 (LAC)

[18] Accordingly, there is no reasonable prospect of the Labour Appeal Court concluding that the court a quo had exercised its discretion improperly or unreasonably.

[19] For these reasons, the application is refused.

Order

1. The application for leave to appeal the judgment of 6 January 2014 is refused.
2. There is no order as to costs.

SEEDAT AJ

Acting Judge of the Labour Court of South Africa