



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not Reportable

Case no: P337/12

In the matter between:

SOUTH AFRICAN TRANSPORT AND ALLIED

WORKERS UNION (SATAWU)

Applicant

and

ALGOA BUS COMPANY (PTY) LTD

First Respondent

TRANSPORT ACTION RETAIL AND

GENERAL WORKERS UNION (THOR)

Second Respondent

TRANSPORT AND ALLIED WORKERS

UNION OF SOUTH AFRICA (TAWUSA)

Third Respondent

Heard: 17 November 2015

Delivered: 20 April 2016

Summary: Failure to provide reasonable explanation for inordinate delay in bringing an application may lead to the refusal of a condonation application.

JUDGMENT

LALLIE, J

Introduction

- [1] Two applications served before court. One is an application for leave to appeal which was brought by the applicant. The second was brought by the third respondent. It is an application for the rescission of an order of this court dated 31 October 2014. As both applications were brought outside the prescribed time limits, applications for condonation of the lateness were also filed. The applications are opposed by the applicant.

Background

- [2] In September and October 2011, members of the applicant, second and third respondents who are employees of the applicant embarked on unprotected strikes. Part of the first respondent's reaction to the unprotected strikes was to bring an application in terms of section 68 (1) (b) of the Labour Relations Act 66 of 1995 ('the LRA') for compensation for loss attributable to the unprotected strike. The application was unopposed and the following order was granted in favour of the first respondent in the absence of the applicant, the second respondent, the third respondent and their members who were cited as the fourth respondent in the application:

- '1 The First, Second and Third respondents are jointly and severally indebted to the Applicant in the amount of R10 million plus interest thereon calculated *a tempore morae*, or such other amount as the above Honourable Court may determine.
- 2 Those of the Further Respondents, against whose names ticks appear in Column "A" of annexure "T" to the Founding Affidavit, are jointly and severally indebted to the Applicant for a share of R350 000.00 of the amount specified in paragraph 1 above, plus interest thereon,

calculated *a tempore morae*, or such other amount as the above Honourable Court may determine.

- 3 Those of the Further Respondents against whose names ticks appear in Column "B" of Annexure "T" to the Founding Affidavit are jointly and severally liable and indebted to the Applicant for a share of R10 million of the amount specified in paragraph 2 above, plus interest thereon, calculated *a tempore morae*, or such other amount as the above Honourable Court may determine.
- 4 The First, Second, Third, Fourth and Further Respondents pay the Applicant the amounts determined under paragraphs 1 and/or 2 and/or 3 above within 14 days of the date of this order, the one paying, the others to be absolved.
- 5 Should the First, Second, and Third Respondents not pay the amount determined within 14 days of the date of this order, the Applicant may deduct from the further respondents' salaries over a period of six months an amount proportional to their individual share of the amount determined, on the balance thereof, subject to the limitations imposed by Section 34(d) of the Basic Conditions of Employment Act, or recover the amounts owing by other alternate measures.
- 6 Costs of this application to be paid by First, Second, Third and Fourth respondents jointly and severally.'

Condonation of the late filing of the application for leave to appeal

- [3] The order that the applicant seeks leave to appeal against was granted on 31 October 2014. In terms of Rule 30(2), the applicant should have filed its application for leave to appeal within 15 days of the date of the order. The applicant, however, filed the application on 20 March 2015. It is, therefore, 83 days late. The explanation proffered by the applicant for the delay is mainly that the attorney it had instructed to file the application failed to execute its instructions. The first respondent proved the untruthfulness of the explanation by presenting correspondence from the attorney to an official of the applicant in which the attorney sought instructions as time for filing the application was running out. The applicant submitted that it has good prospects of success on

appeal as the case pleaded by the first respondent, in the application in terms of the LRA 68 (1)(b), necessitated the hearing of oral evidence. It should have been determined through action proceedings and not by application. The spreadsheet that the first respondent relied on was insufficient to justify the granting of the order in the absence of oral evidence and the contracts which formed the basis of part of the first respondent's case. The first respondent contended that it complied with section 68 of the LRA which prescribe that the relief that it sought should be obtained through application proceedings.

- [4] The applicant further submitted that although the delay may prejudice the first respondent who is entitled to have the matter brought to finality as expeditiously as possible, it is in the interests of justice that the condonation application be granted as justice is better than expediency. It argued that the first respondent will suffer no prejudice should this application be granted when its refusal will open it to the prejudice of having a debt of R10 million which threatens its very existence. The first respondent submitted that the applicant has itself to blame for not preventing its members from participating in the unprotected strike which led to the filing of the section 68 application and for not opposing the application.

- [5] The first respondent submitted that the extent of the delay and the applicant's failure to provide reasonable explanation justify the dismissal of the application. It further submitted that the applicant has no prospects of success on appeal as the order that it seeks is not final and, therefore, not appealable.

- [6] The test for condonation is expressed as follows in *Van Wyk v Unitas Hospital and Another*:¹

‘This court has held that the standard for considering an application for condonation is the interests of justice. Whether it is in the interests of justice to grant condonation depends on the facts and circumstances of each case. Factors that are relevant to this enquiry include but are not limited to the nature of the relief sought, the extent and the cause of the delay, the effect of the delay on the administration of justice and other litigants, the

¹ 2008 (2) SA 472 (CC) at para 20.

reasonableness of the explanation for the delay, the importance of the issue to be raised in the intended appeal and the prospect of success.’

- [7] The extent of the delay is excessive. Its explanation is unreasonable as it is not factually correct. In *Van Wyk (supra)* it was held that granting condonation of an inordinate delay and in the absence of a reasonable explanation would undermine the principle of finality and cannot be in the interests of justice.² Another factor which weighed against the applicant is that the order which it intends appealing against is not final. The principle is elucidated as follows in *Pitelli v Everton Gardens Projects CC*:³

‘An order is not final for the purposes of an appeal merely because it takes effect, unless it is set aside. It is final when the proceedings of the court of first instance are complete and that court is not capable of revisiting the order. That leads one ineluctably to the conclusion that an order that is taken in the absence of a party ordinarily not appealable (perhaps there might be cases in which it is appealable, but for the moment I cannot think of one). It is not appealable because such an order is capable of being rescinded by the court that granted it, and it is thus not final in its effect.’

- [8] The applicant has no prospects of success in the principal claim as it has not yet applied for the rescission of the order that it seeks leave to appeal against. The order is not final and therefore not appealable. For these reasons the application for condonation cannot succeed. As condonation has been refused the application for leave to appeal is not properly before court.

Application for rescission

- [9] The third respondent is one of the trade unions and their members against whom the first respondent obtained the order dated 31 October 2014 (‘the order’). The order has already been cited in full in this judgment. The third respondent brought this application seeking an order rescinding and setting aside the order as against itself and those of its members who were directed to compensate the first respondent (‘the individual judgment debtors’) and

² *Ibid* at para 31.

³ 2010 (5) SA 171 (SCA) at para 27.

concomitant relief. The application was filed more than two months after the order was granted and the respondent applied for condonation.

Condonation application

- [10] The third respondent submitted that the order handed down on 31 October 2014, came to its attention on or about 25 November 2014, through its Port Elizabeth correspondents. In terms of Rule 16A (2)(b), it should have filed its rescission application by 17 December 2014. It was filed on 17 March 2015. The application is, on the third respondent's version, out of time by 65 days. The third respondent added that in so far as its rescission application is based on common law, it should have been brought within reasonable time. In its view, it is not late as it has been brought within reasonable time. It submitted that should it be found that it delayed in bringing the application, the delay is not inordinate.
- [11] The reasons advanced by the third respondent for the delay in launching this application are, mainly, that the default judgment was brought to the attention of its main office in Johannesburg in November 2014, when a journalist sought comments of one of its officials. It gave instructions to its attorneys to obtain a copy of the judgment and the court file. The respondent briefed counsel, it, however, had insufficient funds to allow counsel to travel to Port Elizabeth to consult with witnesses. An attempt was made to draft the papers without counsel having to travel to Port Elizabeth. In January 2015, when the third respondent had sufficient funds, its counsel travelled to Port Elizabeth for the necessary consultation. Further delay was caused by the unavailability of witnesses and the difficulty in obtaining relevant documents.
- [12] The first respondent argued that the 65 day delay which the third respondent acknowledged is excessive although its true extent is even more. Whether the third respondent was required to have brought its application within 15 days of becoming aware of the judgment or within reasonable time, 65 days is excessive in the circumstances of this matter. I accept the first respondent's argument that the explanation proffered by the third respondent that the delay was due to logistical and financial constraints is unreasonable. The third

respondent had an obligation to explain the full extent of the delay. It did not. It omitted essential dates and left portions of the delay unaccounted for. The third respondent's difficulty to provide reasonable explanation for the delay is consistent with the first respondent's version that the third respondent filed the application on 17 March 2015 having been jolted into action by receiving the writ of execution on 13 March 2015. The absence of reasonable explanation for inordinate delay constitutes sufficient grounds for the refusal of a condonation application.

- [13] Any prejudice that the third respondent and the individual judgment debtors stand to suffer as a result of the refusal of the condonation application is the direct result of TAWUSA, as a trade union, to act on behalf of its members. It is, therefore, self-created and may not be relied upon. The amount of the judgment debt on its own does not make the matter of significance. With regard to prospects of success, I found the following *dictum* apposite:

'There are overwhelming precedents in this Court, the Supreme Court of Appeal and the Constitutional Court for the proposition that where there is a flagrant or gross failure to comply with the rules of court condonation may be refused without considering prospects of success.'⁴

- [14] The inordinate delay in bringing the rescission application is a direct result of the third respondent's flagrant failure to comply with Rule 16A. In the absence of reasonable explanation for the delay and the importance of the matter, condonation may not be granted. As condonation has been refused the rescission application is not properly before court.

- [15] In the premises, the following order is made:

15.1 The applicant's application for condonation of the late filing of the application for leave to appeal is dismissed.

⁴ *Collett v CCMA and Others* [2014] 6 BLLR 523 (LAC) at para 38.

15.2 The third respondent's application for condonation of the late filing of the rescission application is dismissed.

A handwritten signature in black ink, consisting of stylized, overlapping loops, positioned above a horizontal line.

Lallie J

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate Mafokeng

Instructed by Masondo Attorneys

For the First Respondent: Advocate Grogan

Instructed by Joubert Galpin Searle

For the Third Respondent: Advocate Wilke

Instructed by Lennon Moleele & Partners