



IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

Reportable

Case no: PR 28/13

In the matter between

UMSO CONSTRUCTION (PTY) LTD

Applicant

and

WELLINGTON LEBEPE

First Respondent

**COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION**

Second Respondent

COMMISSIONER VUYANI NOSINDWA

Third Respondent

Heard: 04 May 2017

Delivered: 29 November 2017

JUDGMENT

TLHOTLHALEMAJE, J:

Introduction:

- [1] This is an application brought by the applicant (UMSO) to rescind the order of this Court granted by Lallie J on 14 May 2014. The order sought to be rescinded was granted following the first respondent (Willington Lebepe) having approached this court with an application to review and set aside a condonation ruling issued under case number ECEL1060/13 by the third respondent

(Commissioner). The application for rescission was only filed on 22 September 2016 together with what purports to be an application for condonation for its late filing. Lebepe opposed both applications.

Background:

[2] The protracted history of this matter is as follows;

2.1 Lebepe was dismissed from UMSO's employ on the basis of operational requirements during November 2012, and his services were officially terminated on 01 January 2013.

2.2 On or about 2 April 2013, Lebepe referred an unfair dismissal dispute to the second respondent (CCMA). Lebepe's referral was filed about 61 days outside of the time periods prescribed by the Labour Relations Act¹, necessitating an application condonation.

2.3 The Commissioner considered the application for condonation and issued his ruling on 29 April 2013, in terms of which condonation was refused. Lebepe thereafter approached this Court in terms of section 145(2) of the LRA for an order reviewing and setting aside the condonation ruling issued by Commissioner.

2.4 That application was not opposed, and Lallie J had on 14 May 2014 and in the absence of the applicant, issued an order in terms of which the condonation ruling was reviewed and set aside, and the matter was remitted back to the CCMA for its fresh consideration of the application for condonation.

2.5 The application for condonation was reconsidered on 23 July 2014 by the CCMA and granted. A certificate of outcome was also issued. Lebepe referred the dispute in respect of his alleged unfair retrenchment to this Court by way of a statement of claim under case number PS 29/14.

¹ Act 66 of 1995

2.6 UMSO did not file a statement of response, and a default order was issued by Ah Shene AJ on 25 March 2015 in favour of Lebepe, who was granted compensation in the amount of R183 807.00.

2.7 An urgent application was brought before the court by UMSO to stay the warrant of execution in respect of the default order granted by Ah Shene AJ, pending the finalisation of a rescission application. Whitcher J on 15 April 2015 issued a *rule nisi* in that regard, which order was confirmed by La Grange J on 5 May 2015. The order was to lapse automatically on 10 June 2015 if the rescission application pending before the CCMA had not been decided by that date.

2.8 An application to rescind Ah Shene AJ's order was heard and granted by Van Niekerk J on 8 June 2015. The writ of execution was also set aside. UMSO was also granted leave to defend Lebepe's claim, and to file a statement of defence within 14 days of the date of that order.

2.9 The parties concluded and signed pre-trial minutes on 18 November 2015. Amongst the issues raised in the pre-trial minutes was UMSO's intention to raise an unspecified *point in limine*.

2.10 The point *in limine* was heard and upheld by Lallie J on 13 September 2016, resulting in the proceedings under case number PS 29/14 being stayed pending the finalisation of the current application.

The rescission application, the need for condonation and evaluation:

[3] UMSO seeks to rescind the default order granted by Lallie J on 14 May 2014 in terms of which the condonation ruling issued on 29 April 2013 was reviewed, set aside and the matter remitted back to the CCMA for reconsideration.

[4] The rescission application was filed and served on or about 30 September 2016. In its notice of motion, UMSO sought condonation for the late filing of the rescission to the extent that '*it may be the case*'. This contention is made in circumstances where the rescission application was filed some two years and three months out of time. In terms of the provisions of Rule 16A (2) (b) of the

Rules of this Court, applications for rescission ought to be brought at least within 15 days from the date a party acquires knowledge of an order or judgment granted in its absence.

- [5] UMSO holds the view that an application for condonation of the late filing of the rescission application is not necessary on the grounds that it was granted leave to bring the application by virtue of Lallie J's order of 12 September 2016. The order reads as follows;

"Having heard Mr Sehunane, Counsel for the Applicant and Ms. Ellis, Counsel for the Respondent and having read the papers filed of record:

IT IS ORDERED THAT:

1. *The first point in limine is upheld.*
2. *These proceedings are stayed pending the finalisation of the application for rescission of the order of this court dated 14 May 2014"*

- [6] Of course from a plain reading of the above order, UMSO's argument is contrived, self-serving and nonsensical. Nowhere in the above order is it stated that UMSO is granted leave to bring an application for rescission of the 14 May 2014 default order. If any such order was sought and granted, this would have been clear from Lallie J's order. Paragraph 2 of the above order can only be understood to mean that there is a pending application for rescission. As at 13 September 2016, there was no such pending application, it being common cause that the application was only filed and served on 30 September 2016.

- [7] The rescission application is some two years and three months out of time in view of the provisions of Rule 16A (2) (b) of the Rules of this Court. If the court were to be generous to UMSO and gave it the benefit of the doubt, the delay, according to Lebepe, would be 18 months on its own concession that it only became aware of the review application proceedings on 8 April 2015. Whichever date is picked, the delay remains excessive in the extreme.

- [8] UMSO reluctantly seeks condonation for the late filing of the rescission application. The condonation application is nonetheless not filed separately and it is apparent that it is one those *'in any event'* applications, where very little

effort was put into it. Condonation is sought on the basis that UMSO first became aware of Lebepe's review application after the default order under case number PS29-14 was issued by Ah Shene AJ in April 2015. It further contended that it has always refuted Lebepe's consistent assertions that a review application was brought, and that this issue was further raised in the Statement of Defence under PS 29-14 dated 26 June 2015. The high-water mark of UMSO's argument is that Lebepe was always aware that it sought to bring an application to rescind Lallie J's order of April 2014, since it had never conceded that it was served with the review papers.

- [9] Significant with the developments after that default order was issued by Ah Shene AJ is that UMSO had in April 2015, brought an urgent application before the court to stay the warrant of execution issued after that default order, pending the finalisation of a rescission application. Whitcher J on 15 April 2015 issued a *rule nisi* in that regard, which order was confirmed by La Grange J on 5 May 2015. The order was to lapse automatically on 10 June 2015 if the rescission application pending before the CCMA had not been decided by that date.
- [10] It is apparent from La Grange J's order that it was granted on condition that the rescission application *before the CCMA* was decided within a particular date. As to what had happened to that application before the CCMA is unknown, unless any reference to the rescission application before the CCMA as stated in the order should read '*before this Court*'.
- [11] Be that as it may, an application to rescind Ah Shene AJ's order was nonetheless heard and granted by Van Niekerk J on 8 June 2015. The writ of execution was also set aside. UMSO was also granted leave to defend Lebepe's claim, and to file a statement of defence within 14 days of the date of that order. The parties concluded and signed pre-trial minutes on 18 November 2015. Ordinarily, one would have thought that at least the merits of the dismissal dispute were finally to be dealt. UMSO however had other ideas as evident from the launching of this application.

- [12] In the light of the above, it is apparent that UMSO must have been aware of the review application leading to a default order in terms of which the condonation was reviewed and set aside. UMSO must also have been aware of a second ruling, and a certificate of outcome as a result of the statement of case that led to AH Shene AJ's default order under case number PS29-14. Flowing from the parties' pre-trial minutes, other than indicating its intention to raise a point *in limine* and by implication, an intention to pursue the rescission application in respect of Lallie J's order of 14 May 2014, UMSO had done nothing in that regard.
- [13] It is therefore disingenuous for UMSO to contend that it did not have knowledge of the facts pertaining to review proceedings until 12 September 2016. Even if it did not have detailed knowledge of those facts, at the very least, as at April 2015 when AH Shene AJ's default order was issued, it should have been clear to UMSO that the condonation must have been granted by the CCMA and a certificate of outcome issued. It is doubted that Ah Shene AJ would have issued the default order unless she was satisfied that the Court had the requisite jurisdiction to do so, in the sense that the dispute before her had been conciliated, or a certificate of outcome had been issued.
- [14] UMSO further contended that it was only on 12 September 2016 that it became aware of the documents relating to the review proceedings until 12 September 2016, hence its belated rescission application. Again, this does not take its case any further in the light of what had been stated above. UMSO did not need review papers prior to launching this rescission application. All it needed to be aware of at the time, which was the case, was Lallie J's order of 14 May 2015. If UMSO had any intention to challenge that order, as soon as at least it had launched the urgent application to stay the execution of the writ, it would have made every effort to establish from the CCMA and from the office of the Registrar of this Court, as to how the matter ended up before Ah Shene AJ and led to that default order. Again, UMSO did nothing.

[15] The principles applicable to applications for condonation are trite as set out in *Melane v Santam Insurance Co. Ltd*². A further consideration is whether it is in the interest of justice to grant or refuse an application for condonation.³ In this case, the explanation for the excessive delay is poor in the extreme, and hardly qualifies as an explanation. It is further trite that where the delay is extreme, and the applicant's purported explanation amounts to no explanation at all, there would be no need to even look at other considerations applicable to such applications⁴. This approach was confirmed by the Constitutional Court in *Grootboom v National Prosecuting Authority and Another*⁵ where Zondo J held that:

²1962 (4) SA 531 (A) at 532B-E, where it was stated that;

"In deciding whether sufficient cause has been shown, the basic principle is that 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 relevant are the degree of lateness, the explanation therefor, the prospects of success and the importance of the case. Ordinarily these facts are interrelated, they are not individually decisive, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate prospects which are not strong. Or the importance of the issue and strong prospects may tend to compensate for a long delay. And the Respondent's interests in finality must not be overlooked"

³ *Brummer v Gorfil Brothers Investments (Pty) Ltd* [2000] (2) SA 837 (CC) it was held:

This Court has held that an application for leave to appeal will be granted if it is in the interests of justice to do so and that the existence of prospects of success, though an important consideration in deciding whether to grant leave to appeal, is not the only factor in the determination of the interests of justice. It is appropriate that an application for condonation be considered on the same basis and that such an application should be granted if that is in the interests of justice and refused if it is not. The interests of justice must be determined by reference to all relevant factors including the nature of the relief sought, the extent and cause of the delay, the nature and cause of any other defect in respect of which condonation is sought, the effect on the administration of justice, prejudice and the reasonableness of the applicant's explanation for the delay or defect.

⁴ *Moila v Shai N.O. and Others* (2007) 28 ILJ 1028 (LAC) at para 34, where it was held that;

"I do not have the slightest hesitation in concluding that this is a case where the period of delay is excessive and the appellant's purported explanation for the delay is no explanation at all. I accept that the case is very important to the appellant. However, the weight to be attached to this factor is too limited to count for anything where the period of delay is as excessive as is the case in this matter and the explanation advanced is no explanation at all. If ever there was a case in which one can conclude that good cause has not been shown for condonation without even considering the prospects of success, then this is it. Where, in an application for condonation, the delay is excessive and no explanation has been given for that delay or an "explanation" has been given but such "explanation" amounts to no explanation at all, I do not think that it is necessary to consider the prospects of success."

⁵ [2013] ZACC 37; 2014 (2) SA 68 (CC); 2014 (1) BCLR 65 (CC); [2014] 1 BLLR 1 (CC); (2014) 35 ILJ 121 (CC)

“Although the existence of the prospects of success in favour of the party seeking condonation is not decisive, it is an important factor in favour of granting condonation.

The interests of justice must be determined with reference to all relevant factors. However, some of the factors may justifiably be left out of consideration in certain circumstances. For example, where the delay is unacceptably excessive and there is no explanation for the delay, there may be no need to consider the prospects of success. If the period of delay is short and there is an unsatisfactory explanation but there are reasonable prospects of success, condonation should be granted. However, despite the presence of reasonable prospects of success, condonation may be refused where the delay is excessive, the explanation is non-existent and granting condonation would prejudice the other party. As a general proposition the various factors are not individually decisive but should all be taken into account to arrive at a conclusion as to what is in the interests of justice.” [Footnotes omitted]

[16] As mentioned above, the court order sought to be rescinded was issued 14 May 2014. Since then, and after the condonation application was remitted back, the CCMA has issued a second ruling in terms of which condonation was granted. The CCMA has similarly issued a certificate of outcome, which as things stands, remains valid. Lebepe has since filed a statement of claim to which UMSO had responded. The parties have also completed, signed and filed pre-trial minutes. This case since the second condonation ruling was issued by the CCMA, has been before the Court on no less than six occasions (inclusive of these proceedings), and there is no end in sight. The rescission application is clearly ill-conceived, and there is merit in the submissions made on behalf of Lebepe that UMSO is bent on frustrating the ultimate finalisation of his claim. In the light of all these considerations, it follows that the interests of justice dictate that the application for condonation for the late filing of the rescission application ought to be dismissed, as well as the rescission application itself.

[17] I have further had regard to the requirements of law and fairness and I am satisfied that to the extent that this application was clearly ill-considered and

unnecessary in view of the history of this matter as outlined in this judgment, there is no reason why Lebepe should be burdened with its costs.

[18] In the premises, the following order is made:

1. The application for condonation for the late filing of the rescission application is dismissed;
2. The application for the rescission of the order granted by Lallie J on 14 May 2014 is dismissed;
3. The Registrar of the Court is directed to set the matter under PS29/14 down for trial, for three days.
4. The applicant (Umso Construction (PTY) Limited) is ordered to pay the costs of this application.

E Tlhotlhemaje

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant:

Adv. L Ellis

Instructed by:

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For the First Respondent:

M.R Sehunane of Sehunane
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LABOUR COURT