



THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case no: JA 71/23

In the matter between:

ASPEN HOLDINGS PTY LTD

First Appellant

STEPHAN SAAD

Second Appellant

MOTEBANG PHELANE

First Respondent

ALEXANDER FORBES GROUP HOLDINGS LTD

Second Respondent

Heard: 14 November 2024

Delivered: 23 January 2025.

Coram: Molahlehi AJP, Musi AJA and Mooki AJA

JUDGMENT

MOLAHLEHI, AJP

Introduction

[1] This is an appeal against the Labour Court's judgement and order granting condonation for the first respondent's (employee) late filing of his statement of the case.

[2] In the statement of the case, the employee alleges that his dismissal by the appellant was automatically unfair, as contemplated in section 187 (1) of the Labour Relations Act¹ (LRA). Before his dismissal, he was employed as a group operations quality auditor. Leave to appeal was granted to this Court on petition.

Background

[3] The employee was dismissed in December 2020 for misconduct related to his failure to attend his disciplinary hearing. The dismissal was referred to the CCMA as an automatically unfair discrimination dispute based on culture and religion. It is apparent that before his dismissal, the employee had launched a grievance about the treatment he received from the appellant in 2017, which is related to the allegations of victimisation, discrimination and harassment by his line manager. The alleged incidents relating to how he was harassed and unfairly treated are set out in his founding affidavit, and these include, among others, the allegation that he was denied training opportunities and development exposure. The other complaint is that the appellant failed to investigate and assist the employee with his ill health challenges. According to him, his poor health condition was triggered by the need for him to attend the cultural and traditional spiritual processes of "*Intwaso*".² He needed to leave work to participate in these cultural and traditional rituals.

[4] The employee received the certificate of non-resolution of the alleged unfair dismissal dispute from the CCMA on 6 January 2021. He filed the statement of case with the Labour Court on 18 May 2021.

¹ Act 66 of 1995, as amended. Section 187 makes provision for the various grounds upon which a dismissal may be classified as automatically unfair in regard to alleged unfair discrimination, including discrimination on the basis of religion, conscience, belief, and culture.

² In describing what constitutes "*Intwaso*," the employee states in a footnote in his statement of case that "*Intwaso*" is a seriously debilitating illness with severe physical symptoms, unusual dreams or walking visions indicating that a person is being called to undergo initiation as a spiritual healer. The sufferer accepts the call and undergoes training to emerge as a healer. If they do not, the illness is unlikely to be cured. They may even die.

[5] The appellant did not file a statement of opposition but took exception to the statement of case based on the complaint that the referral was filed outside the prescribed timeframe set out in the LRA. In other words, the statement of case was not properly before the Labour Court. The employee did not oppose the exception but responded by applying for condonation.

Condonation application

[6] In his founding affidavit before the Labour Court, the employee states that the late filing of the statement of case was due to the erroneous advice he received from his Counsel. According to him, Counsel advised him that the statement of case had to be filed with the Labour Court within 90 days from the date the certificate of non-resolution was issued. He states further that he became aware that the advice was incorrect when the appellant raised the point *in limine* concerning the late filing of the statement of case.

[7] It is common cause that the employee was 41 days late in filing his statement of case as required by the LRA. He contended that this period was not excessive. It is also not in dispute that the employee did not file his condonation application soon after he became aware that he was late with his statement of case.

[8] The employee contended before the Labour Court that:

- i. He had a reasonable prospect of success in the main case because his dismissal involved an alleged automatically unfair dismissal based on the grounds of cultural and religious belief;
- ii. It would be in the public interest that his claim should proceed to trial despite the non-compliance with the timeframes set out in the LRA; and
- iii. The appellant would not suffer prejudice if condonation was to be granted by the Labour Court.

In the Labour Court

[9] The Labour Court found, based on the provisions of section 191 (11)(a) of the LRA, that the employee was 41 days late in filing his statement of case. It further

found that the period of 41 delays was not too excessive and “*there was no mala fide shown by the applicant or his legal representative*” concerning the delay. It also found that the employee’s explanation was poor but “*cannot be an absolute bar from granting condonation*”.

[10] The other reason for granting condonation was that the Labour Court found that the appellant had good prospects of success in the main case because his claim is “*that he endured consistent harassment, discrimination and victimisation after he attended to the cultural ceremonies and his calling to ‘ukuthwasa’*”.³

[11] In concluding that the employee had good prospects of success, the Labour Court considered that the appellant failed to file the statement of defence but instead raised a point *in limine* regarding the delay in filing the statement of the case. In this regard, the Court held that:

“In the absence of the statement of defence the applicant has shown that prima facie, he has prospects of success. Besides, there is a dispute of fact, which needs to be ventilated in a trial. As such, there is no merit in the respondent’s submission relating to the prospects of success. In my view, the applicant has made out a case for why condonation application should be granted.”

Before this Court

[12] The appellant contended that the employee failed to provide an acceptable and reasonable explanation for his delay or demonstrate circumstances permitting him to escape the consequence of his representative’s negligence. It was further submitted that the prospects of success were irrelevant without a reasonable and acceptable explanation.

[13] It was contended on behalf of the employee that the judgement of the Labour Court was correct and that in instituting these proceedings, the appellant was seeking to avoid adjudication of the dispute in the light of the constitutional violation.

The principles governing condonation

³ “Ukuthwasa” is defined as meaning “come out” or “be reborn” and signifies the transformative nature of an individual experience where both men and women are ‘called’ to become traditional healers.

[14] In terms of section 191 (11)(a) of the LRA, a referral of a dispute of the nature of this matter must be referred to the Labour Court for adjudication within 90 days after the CCMA has certified that the dispute remains unresolved. The Labour Court may, however, condone non-observance of that timeframe on good cause shown. The onus of showing the existence of good cause in a condonation application rests with the applicant, and this essentially entails satisfying the two well-established requirements, namely: (a) providing a satisfactory explanation for the delay and (b) showing the prospect of success in the main case. In other words, regarding the onus, the applicant bears the burden of showing good cause.⁴ A mere allegation of good cause will not be sufficient to assist the Court in exercising its discretion whether to grant condonation or not. In other words, as stated in *Standard General Insurance Co Ltd v Eversafe (Pty) Ltd and Others*⁵, the applicant must “at least, furnish an explanation of his default sufficiently full to enable the court to understand how it really came about and to assess his conduct and motives. ... Where there has been a long delay, the court should require the party in default to satisfy the court that the relief sought should be granted”.

[15] As indicated above, the applicant must also show that prospects of success exist in the main claim. The applicant has to satisfy the requirements of good cause by making out the case in the founding affidavit supporting the condonation application.

[16] It is trite that in considering an application for condonation, the Labour Court exercises a discretion described as “wide discretion” or “discretion loosely so-called”. The discretion has to be exercised judicially premised on all the relevant factors. Thus, as a general principle, the Labour Appeal Court (LAC) would not be entitled to interfere with the exercise of discretion by the Labour Court solely on the basis that it does not agree with the decision reached by the Labour Court. It is, however, entitled to interfere with the decision where it has been shown that the Labour Court failed to exercise its discretion judicially.⁶

⁴ *Nature's Choice Products (Pty) Ltd v Food and Allied Workers Union and Others* [2014] ZALAC 12; [2014] 5 BLLR 434 (LAC) at para 19.

⁵ 2000 (3) SA 87 (W) at para 12.

⁶ *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* [1999] ZACC 17; 2000 (2) SA 1 (CC) at para 11.

[17] As indicated above, the Labour Court exercised its discretionary power to grant condonation for the late filing of the employee's statement of case. Accordingly, the test to apply on appeal by this Court is whether the Labour Court, in exercising such powers, acted capriciously, upon wrong principles, in a biased manner, for insubstantial reasons, or committed a misdirection, or an irregularity or exercised its discretion improperly or unfairly.⁷

[18] The approach to adopt in determining whether good cause has been demonstrated to justify the granting of condonation entails consideration of all the relevant factors, amongst those being the degree of the delay, the explanation or the cause of the delay, the prospect of success and the importance of the case, prejudice to the other party or parties and the impact on the administration of justice.⁸ It has repeatedly been stated that these factors must not be considered in isolation. The overriding consideration in an application for condonation is the interests of justice, as stated by the Constitutional Court in *Grootboom v National Prosecuting Authority and Another*⁹ (*Grootboom*).

[19] In order to excuse the applicant's delay, the Court has to be convinced that the explanation is reasonable and acceptable. In this regard, the applicant must provide an explanation covering all the aspects related to the delay, including the period of any delay after becoming aware of the need to apply for condonation.¹⁰ In *Van Wyk v Unitas Hospital and Another*¹¹, the Constitutional Court held that:

"An applicant for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of delay. And, what is more, the explanation given must be reasonable."

[20] The other well-established principle governing an application for condonation is that condonation may be refused without a reasonable and acceptable explanation for the delay, irrespective of good prospects of success. This was confirmed in *Colett*

⁷ See: *Coates Brothers Ltd v Shanker and Others* [2003] ZALAC 12; (2003) 24 ILJ 2284 (LAC) at para 5.

⁸ *Van Wyk v United Hospitals and Another* [2007] ZACC 24; 2008 (4) BCLR 442 (CC) (*Van Wyk*).

⁹ [2013] ZACC 37; 2014 (2) SA 68 (*Grootboom*).

¹⁰ See *Librapac CC v FEDCRAW and Others* (JA49/98) [1999] ZALAC 6 (11 March 1999). See also: *SA Broadcasting Corporation Ltd v Commission for Conciliation and Arbitration and Others* [2009] ZALAC 13; (2010) 31 ILJ 592 (LAC).

¹¹ *Van Wyk supra* at para 22.

*v Commission for Conciliation, Mediation and Arbitration and others*¹², where the LAC held that:

“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 the prospects of success. In *NUM v Council for Mineral Technology* it was pointed out that in considering whether good cause has been shown the well-known approach adopted in *Melane v Santam Insurance Co Ltd* 1962(4) SA 531(A) at 532(C-D) should be followed but –

‘(t)here is a further principle which is applied and that is that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without good prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused.’

[21] I agree with the appellant that the Labour Court, in exercising its discretion of condoning the employee's late referral of the dispute, did so upon wrong principles, for insubstantial reasons and committed a misdirection. The judgement's reading makes it apparent that the Labour Court considered one aspect of the delay – the 41 days from the date the CCMA issued the certificate of non-resolution of the dispute. While the explanation was poor, it was concluded that the employee had made a case for condonation because he had prospects of success in the main case.

[22] It is not in dispute that the CCMA issued the certificate of non-resolution of the dispute referred to it in terms of section 187 (1) of the LRA on 6 January 2021, and the employee filed his statement of case on 18 May 2021. The explanation for the 41-day delay is set out by the employee in his affidavit in support of the condonation application as follows:

“19. It is on the basis of the aforesaid, I submit, therefore, that a period of 41 days is not excessively late. The reasons for my being late are that I entirely relied on the advice of my counsel from Pro bono legal services.

¹² [2014] ZALAC 1; (2014) 35 ILJ 1948 (LAC) at para 38.

20. My then counsel indicated that we have 90 court days to file the statement of case, it was only when the first respondent raised a point in limine about condonation that we revisited the rules to realise that we have committed a grave oversight.”

[23] The facts before the Labour Court show the employee needed to explain two delay periods. The first is the 41 days from issuing the certificate of non-resolution of the dispute to when the appellant raised the exception. The second period is from the date the employee became aware of the need to file the condonation application (being the date of the exception) to the date the condonation was filed – the 36-day delay.

[24] The reading of the judgment reveals that the Labour Court, in exercising its discretion to condone the employee's late filing of the statement of case, considered only the explanation for the first period of the delay and ignored that there was no explanation for the second period. Based on the principles set out earlier in this judgment, the failure to explain the further delay after the applicant became aware of the need to apply for condonation is fatal. The failure by the Labour Court to take this into account renders the decision to grant condonation for the late filing of the employee's statement of case improper. This Court is accordingly justified in interfering with the judgment and the order of the Labour Court, and thus, this appeal stands to succeed on this ground alone.

[25] In addition to the above, the appeal would still stand to succeed as the Labour Court misdirected itself in dealing with the employee's liability concerning the alleged lack of diligence by his legal representatives. The test is not whether the legal representative acted *mala fides* or intentionally in delaying prosecution of the dispute, thereby not ensuring that the dispute was timeously referred to the CCMA. The test is whether the legal representative's failure to correctly advise the employee on the time frame for filing the statement of case was negligent. The incident of the Counsel's failure to check and confirm the legal time frame for filing the statement of case reveals negligence or incompetence. In the circumstances of this case and following the authorities referred to below, the Labour Court ought not to have excused the employee from his representatives' negligence.

[26] In *A Hardrodt (SA) (Pty) Ltd v Behardien and Others*,¹³ this Court held that:

“The catalogue of events reveals negligence, incompetence and gross dilatoriness by the appellant's legal representatives. It is difficult to see how that constitutes a good cause for condonation with convincing reasons as laid down in *the Queenstown Fuel Distributors CC* case.”

[27] In *Superb Meat Supplies CC v Maritz*,¹⁴ this Court held as follows:

“It has never been the law that invariably a litigant will be excused if the blame lies with the attorney. To hold otherwise might have a disastrous effect upon the observance of the rules of this court and set a dangerous precedent. It would invite or encourage laxity on the part of practitioners.”

[28] It is also important to note that the employee did not make out a case that he ought to be exonerated from the negligence of his Counsel. In his affidavit supporting the condonation application, he does not identify the *pro bono* Counsel who gave him the incorrect advice. Furthermore, there is no confirmatory affidavit supporting this allegation from his attorneys of record or any other person.

[29] Turning to the issue of prospects of success, which is the core issue upon which the Labour Court based its decision in granting condonation, I do not believe that the employee made out a case in that regard. In this case, considering the principle discussed earlier, I believe the Labour Court erred in considering the prospects of success when the employee failed to provide a reasonable and acceptable explanation for the delay. In *NUMSA and another v Hillside Aluminium*,¹⁵ the Labour Court held that an unsatisfactory explanation for any delay would generally be fatal to an application, irrespective of the applicant's prospects of success. This was stated in the following terms by the Constitutional Court in *Grootboom*:¹⁶

“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

¹³ (2002) 23 ILJ 1229 (LAC) at para 4.

¹⁴ (2004) 25 ILJ 96 (LAC) at para 16.

¹⁵ [2005] ZALC 25; [2005] 6 BLLR 601 (LC) at para 6.

¹⁶ *Grootboom supra* at para 36.

unacceptably excessive and there is no explanation for the delay, there may be no need to consider the prospects of success.”¹⁷

[30] In my view, the condonation application ought to have failed even if prospects of success were to be considered. In his application for condonation, the employee makes a bold statement that his claim relates to an “*automatically unfair labour practice for reasons of discrimination based on cultural and religious believes (sic)*”. He further states that:

“a. It is not only on the basis of such intrusion of a constitutional right that I have prospects of success, but also on the basis of public interest. In a constitutional democracy like ours, it is not only fair that matters relating to cultural and religious believes (sic) are attended by courts for purposes of affirming our cultural diversities, but also to affirm constitutional supremacy.”

[31] On a reading of the judgment, it is clear that the court *a quo* erroneously based its assessment of the prospects of success on the contents of the employee’s stated case, which was neither pleaded by the employee in his affidavit in support of his condonation application nor was it attached thereto. It is important to note that the Labour Court considered the statement of case without the statement of response from the appellant in the circumstances where the appellant was not in default of filing the same.

Conclusion

[32] The refusal to condone the late filing of the statement of case will result in the employee being denied the opportunity to pursue his dismissal dispute before the Labour Court. It, however, is evident that the employee has not pursued this matter diligently and tendered no reasonable explanation as to the delay and, more importantly, why he did not file the condonation application, for the entire period, as soon as he became aware of the need to apply for condonation. On this basis, the appeal stands to succeed.

Order

1. The appeal is upheld.

¹⁷ *Ibid* at para 51.

2. The order of the Labour Court is set aside and substituted with the following order:

- “1. Condonation for the late filing of the employee’s statement of case is refused, with no order as to costs.

3. There is no order as to costs.

Molahlehi AJP

Musi AJA and Mooki AJA concur.

APPEARANCES:

For the Appellants: Adv L. Ellis., instructed by Kirchmann's Incorporated

For the Respondents: Adv M.R. Maphutha, instructed by Thyne Jacobs
Attorneys