



REPUBLIC OF SOUTH AFRICA

THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JA 72/2010

KERRADAM PROPERTIES (PTY) LTD

t/a CABANGA CONFERENCE CENTRE

Appellant

and

SONICA MATTHEE

Respondent

Heard: 29 May 2012

Decided: 22 June 2012

Summary: Practice and procedure- Appeals- Rules 5(17)- appeal lapsed. Application for condonation and reinstatement of appeal- several non-compliances with the Rules by the appellant- reckless disregard of the Rules- not in the interests of justice to grant condonation- doing so would send a wrong message to the public- Application dismissed with costs.

JUDGMENT

TLALETSI JA

Introduction

- [1] The appellant was granted leave to appeal against the judgment of the Labour Court (per Bhoola J) on 26 October 2010. In terms of Rule 5(8),¹ the appellant was obliged to deliver the record of the proceedings in the Labour Court within 60 days of the date of the order granting leave.
- [2] Rule 5(17) provides that if the appellant fails to lodge the record within the prescribed period, the appellant will be deemed to have withdrawn the appeal unless the appellant has within that period applied and obtained consent to an extension of time from the respondent or its representative. In the event that the consent to extension of time is refused, the appellant may apply to the Judge President in chambers for extension of time after service of the appellant's Notice of Motion accompanied by an affidavit in support of that request on the respondent.
- [3] In this case the appellant only served the record of the proceedings in the Labour Court on 8 March 2011 which was out of time by 23 days. The legal effect of the appellants failure to file the record within the prescribed period is that the appeal has lapsed and as such there is no appeal before this court. See *Goldfields Trust (Pty) Ltd and Another v Stander and Others*.²
- [4] On 07 May 2012, the appellant filed an application in terms whereof he is seeking an order that the appeal be reinstated; that the late prosecution of the appeal be condoned and that the appellant pay the costs of the application. In order for the appellant to succeed with his application, it has to show that there has been procedural compliance with the provisions of Rule 5(17) and further show good cause. In considering the application, the court would take into account the extent of the delay, the explanation therefor, prejudice to the parties and where necessary whether the appellant has good prospects of success on the merits of the appeal. The final factor to be considered is whether it is in the interest of justice to grant the condonation sought.

¹ Rules Regulating the Conduct of the Proceedings of the Labour Appeal Court.

² [2002] BLLR 797 (LAC) at para 6 - 8.

- [5] This Court had an opportunity to consider the approach to be adopted in applications of this nature in *SA Post Office Ltd v CCMA and Others*.³:

‘The degree of delay and the reason therefore complement each other. While the degree of delay is a mere arithmetical calculation, it is significant in relation to the expeditiousness with which the matter was required to be resolved. Hence, in matters where importance is placed upon the speedy and expeditious resolution of a dispute, even a short delay may not be excusable unless an explanation is provided that sets out the reasons for the delay which the court finds acceptable. With the factor of delay, go the prospects of success. Where it is evident that the party seeking condonation has no prospects of succeeding in its principal claim or opposition, no purpose is served in granting condonation and the court must in such circumstance refuse to grant condonation irrespective of the degree or explanation provided. Where the prospects of success are reasonably good or even fair then, depending on the delay and the explanation, consideration must be given to the prejudice that the parties may suffer before the discretion can be exercised on whether to grant the indulgence sought. The factor of prejudice plays a role only when the delay is substantial.’

The Court held further that there would be instances where a dispute evinces such miscarriage of justice that it cries out for interference by the court.⁴ Similarly, there will be cases where it would not be in the interest of justice to grant condonation despite there being reasonable prospects of success.

- [6] In the founding affidavit in support of this application, appellant has made bare statements that: it has a reasonable and *bona fide* explanation for the late service and filing of the record; that it has reasonable prospects of success on appeal; the delay in having filed the record is not inordinate and that the appellant will be prejudiced if the appeal is not reinstated. The appellant then attached copies of letters it exchanged with the transcribers without explaining in detail what transpired. It left it to this Court to discern from the contents of the letters what transpired. I found this approach to be improper to seek an

³ (2011) 32 ILJ 2442 (LAC) at para 18.

⁴ *Nehawu obo Mofokeng and others v Charlotte Theron Children's Home* (2004) 25 ILJ 2195; [2004] 10 BLLR 979 (LAC) at para 26 - 27.

indulgence from the court for Condonation as it is not there for taking. It is for the applicant to make out a case for such an order.

- [7] On 19 November 2010, the appellant's attorney wrote to I Africa Transcriptions (Pty) Limited ("the transcribers") and requested a quotation with regard to the preparation of the appeal record. On 22 November 2010, the transcribers replied by advising that they have made arrangements to obtain the relevant court file to enable them to provide a quotation. On 01 December 2010, the transcribers wrote to the appellant's attorneys, and advised, *inter alia*, that the costs of preparation of the record is R8 800-00 and that they request a deposit of R5 900-00 before they could proceed with the preparation of the record.
- [8] About nine days later, on 09 December 2010, the appellant's attorneys reported to the transcribers that they have deposited the requested amount of R5 900-00 and requested that the record be prepared. There is no indication as to what happened from 09 December 2010 until the transcribers responded on 10 February 2011 by sending a Tax Invoice requesting the balance due and advising that the record was ready for collection. It would appear that the appellant's attorneys sat back for almost two months and waited for the transcribers. The record was ultimately served and filed on 08 March 2011.
- [9] There is no explanation from the appellant as to what transpired from 10 February 2011 for the record to be only lodged on 08 March 2011. It does not allege that the respondent was requested to consent to extension of time for the record to be lodged out of time. What complicates the appellant's case further is that there is no explanation why the application for reinstatement of the appeal was only made on 07 May 2012 which is a period of more than sixteen (16) months from the expiry of 60 days.
- [10] It is evident from the record that there had been several non-compliances with the Rules of this Court by the appellant. The correspondence referred to above show that the appellant was not going to be able to lodge the record within the prescribed time. It was required of the appellant to approach the

respondent for consent to extension of time. It failed to do so. No explanation for that is provided. The second option available to comply with the Rule, was to apply to the Judge President in chambers on notice to the respondent, for extension of time. The appellant failed to do so and there is also no explanation provided for its failure to do so.

- [11] At the time when the record was filed, the appellant knew or his attorney ought to have known that the appeal had already lapsed. Instead, this state of affairs was ignored and the record was nevertheless filed. The filing of the record could not have had the effect of wishing away the deeming provision which was triggered in to operation by non compliance.
- [12] The record of the proceedings was available from 10 February 2011 and the outstanding balance of the amount of R2925-42 was paid on 11 February 2011. It appears nothing was done from 11 February 2011 other than to send a memorandum to the attorney's messenger on 22 February 2011 with instructions to file the record. Eleven days went by without any action being taken. From 22 February it took another 15 days to lodge the record. There is no explanation as to what transpired during that period.
- [13] The appellant filed its Heads of Argument for the appeal that had already lapsed on 13 April 2011. In these Heads of Argument, it chose to ignore the fact that the appeal had lapsed and said nothing about this fact. It was only the respondent who raised the matter as a point *in limine* in her Heads of Argument filed on 13 April 2011. The point *in limine* raised was to the effect that the appeal had lapsed and that there was no application for condonation or extension of time filed by the appellant. The order sought by the respondent was that this Court should not entertain the matter.
- [14] Even if one was to assume that the appellant or its attorney knew nothing about the rules of this Court, which would be unfortunate, the respondent's attorneys notified them by means of a point *in limine* that the appeal had lapsed. It took the appellant almost a year to file the application for condonation and reinstatement of the appeal. It was incumbent on to lodge

this application immediately it was made aware of the non compliance with the rules. See *Lumka and Associates v Maqubela*.⁵

[15] There is still to date no explanation why this application was only launched a year later. I find this conduct to be a reckless disregard of the Rules of this Court. I Furthermore there is nothing exceptional in this case that warrant granting condonation in the interests of justice. The issue on appeal is against the finding of the Labour Court that the dismissal of the respondent by the appellant was substantively fair but procedurally unfair and its order of compensation equivalent to twelve months remuneration plus costs in favour of the respondents. The prospects of success on the merits, if any, are by far outweighed by the reckless conduct on the part of the appellant. Granting condonation for non compliances in the circumstances of this case would send a wrong message to the public. The application for condonation and reinstatement of the appeal falls to be dismissed with costs.

[16] In the result, the following order is made:

“ The application for condonation and reinstatement of the appeal is dismissed with costs”.

TLALETSI JA

Judge of the Labour Appeal Court

⁵ (2004) 25 ILJ 2326 (LAC) at paras 34-38

Waglay AJP and Davis JA concur in the judgment of Tlaletsi JA

Appearances:

For the appellant : Adv L. Hollander

Instructed by : Anthony Hinds Attorneys

For the respondent : Adv. C Bruwer

Instructed by : Vogel Malan Attorneys