IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

Case no: CA 7/21

In the matter between:

ALBANY BAKERIES-TIGERBRANDS

FIELD SALES (PTY) LTD **Appellant**

and

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION **First Respondent**

URSULA BULBRING N.O. **Second Respondent**

FOOD AND ALLIED WORKERS' UNION and Raeez Swartz **Third Respondent**

Heard: **30 August 2022**

Delivered: **29 September 2022**

Coram: Sutherland, Coppin JJA et Kathree-Setiloane AJA

JUDGMENT

COPPIN JA

[1] This is an appeal against orders of the Labour Court (per Rabkin-Naicker J) in terms of which it: 1) condoned the late bringing of a review application by the third respondent (referred to respectively herein as "FAWU" and "Swartz"); and 2) reviewed and set aside a ruling of the second respondent (arbitrator), acting under the auspices of the first respondent (CCMA), in terms of which it held that the unfair dismissal dispute involving the appellant, FAWU and Swartz had become settled and that the CCMA, accordingly, had no jurisdiction in the matter. The Labour Court granted the appellant leave to appeal to this Court.

[2] None of the respondents filed heads of argument or otherwise participated in the appeal in this Court.

[3] The appellant contends essentially that the lateness of the review should not have been condoned because the delay was not explained at all or adequately, and that the Labour Court also erred in reviewing and setting aside the ruling on its merits on grounds that were not relied upon by FAWU and/or Swartz as a ground in their review application.

Background facts

[4] Swartz commenced employment with the appellant as a handyman at its Maitland bakery in Cape Town on 15 January 2005 and in 2013, he became a fitter.

[5] On 25 January 2017, after Swartz was dismissed by the appellant for gross insubordination toward the factory manager, FAWU, on behalf of Swartz, referred an unfair dismissal dispute to the CCMA for resolution. The referral was opposed by the appellant.

[6] On 12 June 2017, the arbitration in respect of the dismissal commenced before a particular commissioner of the CCMA but had to be adjourned for continuation on 28 August 2017.

[7] It is common cause that in the interim, and more particularly, on 18 July 2017 the Human Resources Manager of the appellant, Ms Dlamini, was contacted by a representative of Consol Glass (Wildeman) who sought an employment reference in respect of Swartz.

[8] Before providing the reference, Ms Dlamini contacted an official of FAWU, Mr Mbana, in connection with Consol Glass' request and it was agreed between Ms Dlamini and Mr Mbana that the appellant would give a positive reference in respect of Swartz and that, in turn, the union would withdraw the referral upon receipt of evidence that such a reference had been given. This agreement was confirmed by Mr Mbana in writing in an email on or about 18 July 2017.

[9] In an email of the same date, in which Ms Dlamini confirmed the agreement, she also advised that the required positive reference in respect of Swartz had been given to Consol Glass. She stated in particular the following:

> 'Based on the attached agreement kindly be advised that we have given a positive reference for Mr Swartz.
>
> The company requested the below information and our response is in red:
>
> 1. Relationship with team: Great supporter, always ensured alignment with team and played active role in providing sense of direction.
> 2. He told company was dismissed for insubordination, what happened?: There was an incident on site to that regard but matter was resolved but Mr Swartz chose to exit the business.
> 3. Working habit: Can work independently, takes initiative and is efficient.
> 4. Limitation: None
> 5. Strengths: Great technical skills/abilities.
>
> We spoke to [Wildeman] who can attest to such reference. We await the withdrawal letter of dispute.'

[10] Despite the aforesaid assurance, FAWU did not withdraw the referral. The appellant's written query in this regard of 18 August 2017 to FAWU seems to have been unanswered. The matter could not proceed in the CCMA on 28 August 2017 because the allocated commissioner was ill and this resulted in a further rescheduling. A preliminary issue regarding the agreement could not be raised at the time.

[11] Subsequently and particularly on 27 September 2017, the preliminary issue was raised before a new commissioner, namely the second respondent. It was essentially to the effect that the unfair dismissal dispute had been settled and that the CCMA accordingly had no jurisdiction to entertain the matter. At the hearing, the union and Swartz were represented by Mr Mbana, and the appellant was represented by its Human Resources Manager, Ms Dlamini.

[12] The second respondent made the ruling on the basis of submissions made on behalf of the employer and employee by the said representatives. No evidence was led, nor was an agreed statement of facts filed. The point of contestation, essentially, was whether the agreement stood, as Mr Mbana, on behalf of FAWU and Swartz, contended the following: that no proof had been furnished that a positive reference had indeed been given by the appellant to Consol Glass in respect of Swartz; that Swartz was not part of the discussion between Mr Mbana and Ms Dlamini; and that Swartz had merely said that there would be no need to pursue the referral further if he secured a job with Consol Glass, but he never got that job; that the matter could not have been withdrawn without a formal agreement having been concluded under the auspices of the CCMA; and that the union was disputing whether a positive reference had indeed been given by Ms Dlamini to Consol Glass in respect of Swartz.

[13] The second respondent accepted the contentions made on behalf of the appellant by Ms Dlamini to the effect that the appellant did indeed give a positive reference and that it was not in its interest to give a negative reference as that would not have resulted in the withdrawal of the dismissal referral. The second respondent accordingly concluded that the matter had

been withdrawn as per the alleged settlement agreement concluded between Mr Mbana and Ms Dlamini.

[14] The second appellant particularly stated the following in her ruling: "*My finding is that the agreement was concluded; the union, being the representative on record, was authorised to conclude the agreement (and the company entitled to rely on his authority), it was confirmed in writing; the company met its obligation in terms of the agreement by providing a positive reference to Consol Glass.*" She further found that the fact that Swartz's rights were not reserved in the event of him being appointed could not undo the fact of the agreement and further that the settlement agreement "*ousts the CCMA's jurisdiction and prevents the arbitration from continuing further.*"

[15] In March 2018, FAWU, on behalf of Swartz, brought an application in the Labour Court in terms of section 158(1)(b) of the Labour Relations Act[1] (LRA) to review and set aside the second respondent's ruling and directing the CCMA to "*reinstate the primary dispute*" between the parties. The union also sought such further/alternative relief as the Court might deem appropriate.

[16] Since the review application was late, FAWU also dealt with the issue of condonation in its founding papers. In the final paragraph, in addition to seeking condonation, it also sought an order that the ruling be set aside and replaced with an order that the preliminary dispute (i.e. relating to the alleged settlement agreement) be remitted back to the CCMA to be dealt with afresh.

[17] The appellant filed a notice opposing the application, and on 28 March 2018, it filed an answering affidavit while it was represented by its erstwhile attorneys, and deposed to by Ms Nokuthula Thethwa, a Human Resource generalist employed by it.

[18] Notwithstanding the filing of such answering affidavit, FAWU, nevertheless, thereafter gave written notice (seemingly served on the appellant on 21 November 2018) in terms of Rule 7A (8A) of the Rules of the Labour Court that it stood by its notice of motion and would not be supplementing it, and

[1] Act 66 of 1995, as amended.

further invited any person who wanted to file a "replying affidavit" opposing the review application to do so within 10 days of receipt of the notice.

[19] In a notice dated 29 November 2018, the appellant was informed that it was substituting its existing attorneys with new attorneys, namely, its present attorneys of record, Norton Rose Fulbright SA Incorporated. And on 3 December 2018, went on to file a second answering affidavit deposed to by its Human Resources business partner, Glynn Isaacs, in which it yet again answered to the averments in the union's review application. In the second answering affidavit, it also raised further preliminary issues, contending, basically, that the record in the review application had been filed approximately five months late, and that in terms of clause 11.2.3 of the Practice Manual the review was deemed to have been withdrawn.

[20] On 23 January 2019, the appellant, through its new attorneys of record, gave written notice that it was withdrawing the answering affidavit deposed to by Ms Nokuthula Thethwa. The record further shows that on 20 June 2019, the Labour Court (per Rabkin-Naicker J) made an agreement between the parties an order of court in terms of which they agreed as follows: 1) That the appellant consented to the late filing of the record in terms of Rule 7A; 2) That FAWU consented to the filing of the appellant's second answering affidavit dated 30 November 2018; and 3) That FAWU was granted leave to reply to both of the appellant's answering affidavits within 14 days of the agreement. The costs of that aspect were reserved.

[21] It appears from the record that FAWU filed a replying affidavit, deposed to by Mr Mbana, dealing with both of the appellant's answering affidavits. In the replying affidavit he, *inter alia*, objected to the appellant's second answering affidavit and dealt with the reasons for filing the record late. He ascribed its failure to comply with Rules 7A(6) and (8) to a "mutual understanding" between it and the appellant's former attorneys that what had been filed was sufficient because the second respondent's ruling captured all the information that was necessary for the determination of the review.

[22] The Labour Court proceeded from the premise that there were two applications before it, namely, an opposed condonation application for the late filing of the review and an opposed application to review the ruling of the second respondent.

[23] In respect of the condonation application, the Labour Court held that the review application was filed about four months late and even though that was not a "short delay" or "insignificant" it was "not excessive" and that it was "*not a case where no explanation whatsoever is given for the delay*". The Labour Court was also prepared to grant condonation and entertain the merits of the review in light of the agreement between the parties which had been made an order of court and concerning the late filing of the record and the filing of the appellant's second answering affidavit.

[24] In respect of the merits of the review, the Labour Court held that since the terms of the alleged settlement agreement between the parties were in issue between them, the arbitrator was obliged to hear evidence in that regard and a failure to do so constituted a gross irregularity. Having found that there was no evidence before it to enable it to determine whether the jurisdictional ruling was correct, the Labour Court concluded that the preliminary issue had to be remitted to the CCMA for a fresh hearing.

[25] On 31 March 2021, the Labour Court accordingly made an order in the following terms: 1) condoning the late filing of the review; 2) reviewing and setting aside the ruling made by the second respondent; and 3) remitting the jurisdictional point to the CCMA for a hearing before a Commissioner other than the second respondent.

[26] The appellant successfully applied to the Labour Court for leave to appeal to this Court against the whole of its order. The grounds it relied upon are stated in its notice of appeal. As stated earlier, none of the respondents, including Swartz, participated in the appeal in this Court.

<u>The condonation</u>

[27] The appellant's counsel argued, essentially, with reference to case authority, that FAWU and Swartz were required to "*advance a compelling explanation for their default, dealing with all periods of the delay*"; that they had failed in that regard and that the Labour Court's conclusion, that the explanation tendered for the late filing of the review application was acceptable, was not in line with precedent, and that the Labour Court had failed to consider the prejudice which the appellant suffered as a result of the lateness, in particular, that it would be required to revisit a dismissal that took place as long ago as June 2017.

[28] Thus, the issue essentially is about the exercise of the Labour Court's discretion in respect of the condonation. It is a trite principle that in such matters, an appeal court will only interfere if it finds that the lower court has not exercised its discretion properly or judicially, in that it has either done so capriciously, or upon a wrong principle, or has not brought its unbiased judgement to bear on the issue to be decided, or has not acted for substantial reasons. The appellant bears the onus to show this.[2]

[29] It is also a trite principle that the applicant for condonation must give a full explanation for the delay and, in addition, must cover the full period of the delay and that explanation given must be reasonable[3].

[30] It is also established that unless the explanation for the delay meets those requirements, the prospects of success in themselves are immaterial[4].

[31] In the founding affidavit of the review application, Mr Mbana, on behalf of FAWU and Swartz (i.e. the third and fourth respondent in this Court), avers that the condonation was sought in terms of section 158(1)(f) of the LRA, and he purported to show good cause for the lateness. He proceeds to make averments under two headings. Under the first "lateness" he merely states

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[2] See: *inter alia*, *Chetty v Baker McKenzie* (2022) 43 ILJ 1599 (LAC) (*Chetty*) at paras 6 and 7 and the cases cited there.
[3] See *inter alia*, *Van Wyk v Unitas Hospital and another (Open Democratic Advice Centre as amicus curiae)* 2008 (2) SA 472 at para 22; *eThekwini Municipality v Ingonyama Trust* 2013 (5) BCLR 497 (CC) at para 28; *Chetty supra* at para 10.
[4] *Chetty ibid* at paras 6 - 10 and the cases cited there.

that the dispute was only filed 22 days late, and under the second, he purports to give the reasons for the late filing.

[32] In respect of the reasons, Mr Mbana states the following:

> '19. The matter was handled by a Sipho Mhlalo, an official in the legal department. He suffered severe depression and serious post-traumatic stress due to his partner committing suicide and also taking the life of the baby with her.
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> 20. As a result of the above he was admitted and treated in a psychiatric institution for a few days and had to be treated and monitored for some time by the psychiatrist until the doctor prescribed that he relocate back to the Free State, his hometown, to be nearer his family.
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> 21. This therefore caused the backlog in dealing with cases to the Labour Court in time, with particular reference to those cases that were given to him to attend. We therefore believe that this eventuality in the case of "Swartz" should not prejudice him to have his matter heard.'

[33] However, in the replying affidavit in the review application, Mr Mbana, states:

> '51. ...The referrals and applications to the Labour Court by FAWU of CCMA and Bargaining Council rulings have always been calculated to be required by the court to be done within ninety (90) days. This is a serious oversight that FAWU has been doing and at no stage did we experience a problem from both the court and from the litigation opponents we dealt with in the past.
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> 52. In terms of the third respondent the delay in the review application is excessive because it was supposed to be done in six weeks in terms of s 158(1)(g), but it was done in four months. The application by FAWU is in terms of s 158(1)B and FAWU unintentionally had a view that this application like all other Labour Court applications is required to be within ninety (90) days.
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> 53. The above oversight should not be construed as being disrespectful of the processes or deliberate contemptuous conduct to the court procedures but was a bona fide error that the union concedes that it

should not have happened had they had proper regard of the nature of the dispute in terms of the LRA.'

[34] Mr Mbana further goes on to quote a passage from a Labour Court decision and submits in that regard that the important legal principles involved in condonation should not be overlooked in adjudicating the matter. He further mentions that the appellant had at no stage argued that it had been prejudiced in any way.

[35] That constituted the sum total of the explanation(s) proffered by FAWU and Swartz for the lateness. No confirmatory affidavits were filed confirming those facts insofar as they were not within Mr Mbana's personal knowledge.

[36] While the Labour Court rightly found that the matter was not filed merely 22 days late, but, in fact, was filed four months late, it did not attach any significance to the gross understatement of the lateness by Mr Mbana. On his version, he was only covering the 22 days, while the remainder of the actual period of the lateness was not covered at all. Moreover, simply stating that Mr Mhlalo's incapacity caused a backlog, was not adequate. Further detail was required to properly and reasonably explain the lateness.

[37] It is also trite that a party must make a case for the relief it is seeking in its founding papers and not in the reply. In this instance, there were essentially two different, contradictory, explanations furnished for the delay. The first, contained in the founding affidavit, was that the delay was due to a backlog, and the second, proffered in the replying affidavit, was that it was due to a habitual, negligent oversight by FAWU. The latter explanation was clearly disingenuous.

[38] It is obvious that the explanation(s) furnished by FAWU and Swartz for the late filing of the review was wholly inadequate. It does not meet the fullness and cogency requirements that warranted a consideration of the prospects of success. They not only initially, grossly negligently, and misleadingly understated the extent of the lateness of the filing of the review, but essentially relied on inadmissible hearsay evidence as their explanation for the delay.

[39] The fact that the parties had agreed to the late filing of the record and a second answering affidavit, had nothing to do with the lateness of the review. The reason furnished in the replying affidavit for the delay, although rightly rejected by the Labour Court, essentially undermines the credibility of the initial reason given for that delay. Thus, there is merit in the appellant's argument, basically, that in the circumstances no (reasonable) explanation for the delay was given.

[40] In concluding otherwise, the Labour court erred and had exercised its discretion wrongly, justifying the interference by this Court. In the absence of a proper explanation, as was the case here, the prospects of success, whatever they might have been, were immaterial. Since the requested condonation ought not to have been granted, it follows that the Labour Court's entertainment of the merits of the review in those circumstances was consequentially irregular.

[41] In the circumstances, it is not necessary to traverse the arguments of the appellant regarding the merits of the review application.

[42] In the result, the following is ordered:

Order

1. The appeal is upheld;
2. The entire order of the Labour Court is set aside and is substituted with the following order:

   "1. Condonation for the late filing of the review application is refused".
3. There are no cost orders.

P Coppin

Sutherland JA and Kathree-Setiloane AJA concur in the judgment of Coppin JA.

APPEARANCES:

FOR THE APPELLANT: T Gandidze

Instructed by Norton Rose Fulbright Inc.

NO APPEARANCE FOR THE RESPONDENTS