IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Case No: JA 70/22

In the matter between:

ASPEN PHARMACARE Appellant

and

LUFUNO KENNEDY MAKHARI Respondent

Heard: **7 November 2023**

Delivered: **This judgment was handed down electronically by circulation to the parties' legal representatives by email and publication on the Labour Court's website. The date for hand-down is deemed to be on 7 October 2024.**

Coram: **Molahlehi DJP, Savage AJA *et* Malindi AJA**

JUDGMENT

MALINDI AJA

Introduction

[1] The issue in this appeal is whether the Labour Court was competent to consider the respondent's application for condonation for the late filing of the statement of claim in view of a purported non-compliance with rule 7(3) of the Rules of Conduct of proceedings in the Labour Court (Old Rules).

[2] Ancillary to that is whether the Labour Court erred in granting the condonation application when taking into account that it had miscalculated the degree of lateness. The contention is further that the Labour Court erred in concluding that the respondent had made out a case for condonation. The appeal is opposed by the respondent.

[3] The appellant further seeks condonation of the late filing of the notice of appeal. The appellant has proffered an explanation for the delay which is not excessive, there is a reasonable prospect of success of the appeal, and the respondent would not suffer substantial prejudice should condonation be granted. Thus, the interests of justice dictate that the late filing of the notice of appeal be condoned.

Background

[4] On 3 November 2020, the respondent referred an unfair discrimination dispute to the Commission for Conciliation Mediation and Arbitration. The dispute could not be conciliated within 30 days from the date in which the dispute was referred. On that account, on 3 December 2020 the respondent applied for the dispute to be arbitrated, and the matter was enrolled for a hearing for 10 March 2021. On 6 April 2021, the appellant raised a preliminary point to the effect that the respondent earned above the threshold stipulated in terms of section 6(3) of the Basic Conditions of Employment Act[1] and that as a result, the CCMA lacked the jurisdiction to arbitrate the dispute.

[5] On 6 May 2021, the CCMA issued a ruling upholding the appellant's point and confirming that the CCMA lacked the jurisdiction to arbitrate the dispute and that it

[1] Basic Conditions of Employment Act 75 of 1997, as amended.

ought to be referred to the Labour Court for adjudication. On 10 May 2021, the respondent filed his statement of claim in the Labour Court. The matter was enrolled for 3 September 2021, wherein the Labour Court (per Tlhotlhalemaje J) directed the respondent to deliver a proper application for condonation for the late filing of the claim within 14 days from the date of that order. The respondent purportedly did so and on 4 March 2022, the matter was enrolled for the hearing of the condonation application.

[6] In those proceedings, the appellant raised a preliminary point to the effect that the condonation was not in compliance with the Old Rules since the document filed in support of the application did not constitute an affidavit. In an *ex tempore* judgment, the Labour Court (per Mkwibiso AJ) did not address the point that the notice of application for condonation was not accompanied by an affidavit and proceeded to consider the merits of the application for condonation. In the end, the Labour Court condoned the late filing of the claim and moreover issued directives in respect of further conduct of the trial proceedings.

Legal framework

[7] The provisions of section 10(2) of the Employment Equity Act[2] (EEA) stipulate that a party must refer a dispute in terms of the EEA to the CCMA within six months from the date in which the conduct or omission which purportedly constituted unfair discrimination occurred. In terms of subsection (6)(*a*), if the dispute remains unresolved, the aggrieved party must refer the matter to the Labour Court for adjudication.

[8] Moreover, in terms of subsection (7) the relevant provisions of Parts C and D of Chapter VII of the Labour Relations Act[3] (LRA) apply in respect of disputes contemplated in Chapter I of the EEA. In *National Education Health & Allied Workers*

[2] Employment Equity Act 55 of 1998, as amended.
[3] Act 66 of 1995, as amended.

Union on behalf of Mofokeng & others v Charlotte Theron Children's Home[4], the Labour Appeal Court held as follows:

> Reading s 10(6) and 10(7) of the Equity Act together, it would appear that the Equity Act must be read together with the applicable provisions of the Act. By reference to the words 'with the changes required by the context' in s 10(7) the 90-day time period as provided for in s 136(1) of the Act, which itself appears in part C of chapter VII to the Act, becomes applicable to the dispute. In other words, although the present dispute involves adjudication after an unresolved conciliation and s 136(1) refers expressly to arbitration, the savings provision in s 10(7) of the Equity Act then becomes operative; hence the 90-day requirement is of equal application in the new context to the adjudication as envisaged in s 10(6) of the Equity Act.

[9] It follows that within the context of section 10 and 11 of the EEA read together with section136(1)(*b*) of the LRA, a dispute in terms of section 6(1) of the EEA must be referred to the Labour Court within 90 days from the date of the issuance of a certificate of non-resolution of the dispute or within 90 days from the expiry of the 30 days subsequent to the referral of the dispute. The LRA does not define the word 'day' and recourse must be had to the Interpretation Act 33 of 1957, as amended.[5] In *South African Transport and Allied Workers' Union and another v Tokiso Dispute Settlement and others*[6] the LAC held as follows:

> The calculation of this period is done not in accordance with section 4 of the Interpretation Act 33 of 1957 by excluding the first and including the last day unless the last day is a Sunday or public holiday which is then excluded, but in terms of the civil method. See *LC Steyn Die Uitleg van Wette Juta* 1981 (5ed) at 174–175. In terms of this method, the first day is excluded so that the period runs from the next day. Therefore the review application had to be filed before 17 November. As the application was filed on 17 November 2005, it was not filed timeously. It was one day late. Strictly speaking an application for condonation was required. Where an application is filed but a day or two

[4] *National Education Health & Allied Workers Union on behalf of Mofokeng & others v Charlotte Theron Children's Home* (2004) 25 ILJ 2195 (LAC) at para 19.
[5] Interpretation Act 33 of 1957, as amended.
[6] *South African Transport and Allied Workers' Union and another v Tokiso Dispute Settlement and others* [2015] 8 BLLR 818 (LAC) at para 17.

out of time then in the absence of prejudice an application from the bar may have sufficed. Even this was not done.

[10] The timeframes in terms of section 136(1)(*b*) of the LRA must be computed in terms of section 4 of the Interpretation Act. These provisions stipulate that when any number of days are prescribed for any conduct or any other purpose, this shall exclude the first day and includes the last day unless the last day falls on a Sunday or any public holiday. This denotes a computation of the period using calendar days. Nevertheless, the provisions of section 136(1)(*b*) further stipulate that the [Labour Court] may condone the non-compliance with the timeframe upon good cause having been demonstrated.

[11] Rule 7 of the Old Rules regulates the filing of an application in the Labour Court. In terms of subrule (3), an application must be supported by an affidavit setting out, *inter alia,* the statement of the material facts and legal issues arising from those material facts. In spite of the foregoing provisions, subrule (7), enjoins the Labour Court with the discretion to deal with an application in any manner it deems fit. The LAC in *SRK Consulting (South Africa) (Pty) Ltd v Suliman and others*[7] and within the context of rule 31 of the CCMA Rules held that:

> "The court *a quo* held that the failure to append a "Notice of Motion" to the founding affidavit in an application brought in terms of Rule 31(1) does not render the application defective; that a commissioner has a discretion in terms of Rule 31(10) to deal with such applications in a manner he or she deems fit and that includes allowing the defect to be cured; what mattered were the averments in the founding affidavit as required by Rule 31(4). The court *a quo* was unable to find fault with the manner in which the commissioner dealt with the condonation application and, accordingly, dismissed the appellant's review application and directed the CCMA to set down the dismissal dispute for arbitration on an expedited basis.
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> The appellant, in essence, contends on appeal for a strict literal and formalistic interpretation and application of Rules 31(2) and (3).

[7] *SRK Consulting (South Africa) (Pty) Ltd v Suliman and others* [2019] JOL 44427 (LAC).

> The approach contended for by the appellant is wholly inappropriate and elevates form above substance. Expedition and the interests of justice and fairness allow substance to trump form in certain instances.
> Rule 31(10) effectively allows for expedition without the strictures of formality, provided that there is fairness. This is consistent with the objectives of the LRA and decisions of this Court and the Constitutional Court that the CCMA and its commissioners ought to resolve disputes fairly and expeditiously and not allow proceedings to be bogged down or retarded for want of formality where there is substance. Undue formalism in the application of the CCMA Rules could be destructive of the CCMA's mandate with regard to the resolution of disputes
> The objectives of the CCMA rules are most certainly, consistent with one of the objectives of the LRA, to ensure the inexpensive, expeditious and fair resolution of disputes referred to that body, but the rules are not ends in themselves. A purposive interpretation of those rules, as opposed to the strict formalistic construction and application proffered by the appellant, promotes those objectives. As with court rules, the CCMA rules exist for the CCMA and its commissioners, and they do not exist for those rules."[8] [Own emphasis]

Discussion:

[12] The Labour Court in deciding whether to grant condonation exercises a discretion premised on all the relevant factors. The Constitutional Court in *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*[9] held that an appeal court is not entitled to interfere with a decision of a lower court in the exercise of its discretion on the sole basis that it disagrees with the conclusions reached by the lower court. The yardstick is rather whether the lower court did not exercise its discretion judicially or that it had been influenced by the wrong principles or a misdirection on the facts or it had arrived at a conclusion which could not have been reasonably arrived at by a court properly directing itself to all the material facts and principles. In *McGregor v Public Health and Social*

[8] *Ibid* at paras 13 – 17.
[9] *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.

Development Sectoral Bargaining Council and Others[10] the Constitutional Court reemphasised the circumstances in which an appeal court may interfere with a decision reached by a lower court in the exercise of its discretion and held that:

> "…The Court said that the decision to award compensation (in terms of section 193(1)(*c*)) is a matter of judicial discretion which means that an appeal court's power to interfere in such an award is not circumscribed: "in such a case an appeal court is at large to come to its own decision on the merits". However—
> "in regard to the determination of the amount of compensation [in terms of section 194(1)] the Labour Court or arbitrator exercises a true or narrow discretion . . . [which means that] this Court's power to interfere is circumscribed and can only be exercised on the limited grounds. In the absence of one of those grounds this Court has no power to interfere with the amount of compensation.
> Those limited grounds include where the tribunal or court:
> "(a) did not exercise a judicial discretion; or
> (b) exercised its discretion capriciously; or
> (c) exercised its discretion upon a wrong principle; or
> (d) has not brought its unbiased judgment to bear on the question; or
> (e) has not acted for substantial reasons; or
> (f) has misconducted itself on the facts; or
> (g) reached a decision in which the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles."

[13] The gravamen of the appellant's complaint is that the Labour Court disposed of the application for condonation despite the non-compliance with rule 7(3) of the Old Rules. It contended that an application for condonation must be supported by evidence either on affidavit or under oath and that in this matter, the respondent had filed a document which did not constitute or contain evidence.

[14] It is correct that the document filed by the respondent in the Labour Court did not comply with the requirements of rule 7 of the Old Rules insofar as it does not comply with the formal requirements of an affidavit. However, the documents contain

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[10] *McGregor v Public Health and Social Development Sectoral Bargaining Council and Others* [2021] ZACC 14; (2021) 42 ILJ 1643 (CC) at para 27.

material allegations and the legal issues arising from the material allegations. It is further apparent that the appellant filed an answering affidavit in the Labour Court wherein it did not dispute the reasons advanced for the lateness but merely denied that the reason proffered was satisfactory and reasonable. It further dealt with the averments in respect of the prospect of success and further dealt with the defectiveness of the condonation.

[15] The Labour Court does not deal with the issue of the defect in its *ex tempore* judgment. However, the LAC has a discretion to consider the issue on appeal, provided that the issue was adequately addressed in the pleadings before the Labour Court and the consideration thereof would not lead to unfairness to the affected party.[11] In the present matter, the issue of the irregularity was addressed in detail in the answering affidavit and canvassed in the hearing before the Labour Court. Furthermore, the appellant did not allege prejudice of any kind.

[16] It must be accepted that, *albeit* the application was irregular, the explanation for the delay was to a large extent common cause. It was undisputed that on 3 December 2020 the dispute was referred to arbitration and that the CCMA enrolled the matter for arbitration for 10 May 2021. Furthermore, that the appellant had raised a jurisdictional point on or about 6 April 2021, and the CCMA issued its ruling on 6 May 2021. This is significant since in *Plascon-Evans Paints (TVL) Ltd. v Van Riebeck Paints (Pty) Ltd.*[12] It was held that where there are disputed facts, the order should only be granted in motion proceedings if the facts stated by the respondent together with the admitted facts in the applicant's affidavit justify such an order. In the present matter, it cannot be said that the Labour Court was not favoured with material facts in the face of the appellant's answering affidavit. It must be restated that the appellant did not materially dispute the respondent's reasons for the delay and the explanation therefor. Thus, it is incorrect to say that the Labour Court was not favoured with evidence, particularly since the answering affidavit made specific reference to the pertinent portions of the defective document and does not debunk those material allegations.

[11] *Barkhuizen v Napier* 2007 (5) SA 323 (CC) at para 39.
[12] *Plascon-Evans Paints (TVL) Ltd. v Van Riebeck Paints (Pty) Ltd.* 1984 (3) SA 623 (A).

[17] It follows that in accordance with the *ratio* in *SRK Consulting (South Africa) (Pty) Ltd v Suliman and others*,[13] the Labour Court would have been entitled, for reasons of expedition, fairness and the interest of justice, to exercise its discretion on whether to cure the defects in the respondent's application. It is further significant that the appellant did not aver in its answering affidavit how the defect had caused it prejudice. The appellant merely contended in the heads of argument that there are certain situations in which a court may dispense with the formal requirements but did not proffer any reasons why this present matter was not such a circumstance wherein the Labour Court could have dispensed with the formalities. It would seem that this issue is intertwined with the issue of prejudice and as mentioned above, the appellant did not address it in the answering affidavit.

[18] Therefore, it would have not served any practical purpose for the Labour Court to dismiss the respondent's application solely on technicalities in circumstances where the material facts were fully before the Court *albeit* defective in form. It is clear as stated in *SRK Consulting (South Africa) (Pty) Ltd v Suliman and others*[14] that such an approach would have amounted to elevating form over substance where the LRA contemplates a simple and expeditious resolution of labour disputes. The Labour Court considered the fact that the respondent was unrepresented. This clearly constituted a factor which is relevant to the requirements of justice and fairness in considering whether to condone the non-compliance with rule 7(3) and to dispose of the application in a manner that was appropriate for the Labour Court in accordance with subrule (7) of the Old Rules.

[19] This preference for substance over form was further fortified by the LAC's decision in *South African Transport and Allied Workers' Union and another v Tokiso Dispute Settlement and others*[15] where it was stated that in certain circumstances, an application for condonation may even be made from the bar. Thus, there is no bar against the consideration of an application which does not comply with the Rules, on condition that such condonation seeks to promote the spirit and objectives of fairness and expeditious resolution of labour disputes in accordance with the

[13] *Supra.*
[14] *Supra*.
[15] *Supra.*

prescripts of the LRA. As such, even if the Labour Court did not expressly condone the non-compliance with rule 7(3) of the Old Rules, it can be inferred from the objective facts that the Labour Court sought to condone the non-compliance with the rule on account of fairness and expedition.

[20] In respect of the computation of degree of lateness, the appellant is correct in contending that the Labour Court erred in relying on Rule 1 of the Old Rules. As stated in *South African Transport and Allied Workers' Union and another v Tokiso Dispute Settlement and others*, the delay had to be computed in terms of section 4 of the Interpretation Act. Nevertheless, the delay of two months was excessive *albeit* not excessive to the extreme. It required a full and satisfactory explanation.

[21] In the process of exercising its discretion, the Labour Court had to consider whether the explanation proffered for the delay was reasonable and satisfactory. This was since a full, detailed and accurate account of the causes of the delay and their effects was required in order to enable the court to understand clearly the reasons and to assess the responsibility.[16] Thus, the respondent before the Labour Court had to demonstrate a detailed, full and accurate explanation for the delay in order to demonstratively establish good cause for the delay. It has been previously accepted that in certain circumstances, the erroneous referral of a matter to arbitration may constitute a reasonable and satisfactory explanation for a delay in instituting a claim.[17] In *Melane v Santam Insurance Co. Ltd*[18] the Court held 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

[16] *Mulaudzi v Old Mutual Life Assurance CO (South Africa) Ltd and Others* 2017 (6) SA 90 (SCA) at para 26.
[17] *South African Transport and Allied Workers' Union obo Members v South African Airways (Pty) Ltd and others* [2015] 2 BLLR 137 (LAC) at para 16
[18] *Melane v Santam Insurance Co. Ltd* 1962 (4) SA 531 (A) at 532B – E.

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"

[22] The Labour Court *albeit* concluded that the degree of lateness was insignificant, it considered the delay, and the reasons proffered and concluded that the reasons were reasonable and satisfactory. The Labour Court during its exchange with the representatives of the appellant was at pains to point out that it is a norm for employees to rely on the advice of CCMA officials when making an election on the correct avenue and that it was not unreasonable for the respondent to have also done so. Furthermore, that it had taken the respondent some four days after the issuance of the ruling to refer a claim to the Labour Court. Thus, it is clear that the explanation that the delay was significantly caused by the erroneous referral of the dispute to arbitration is reasonable and the Labour Court cannot be faulted for coming to that conclusion.

[23] As mentioned in *Melane v Santam Insurance Co. Ltd* a slight delay and a good explanation may compensate for the other factors relevant for consideration. It seems from the above that the consideration of good cause therefore entails an objective conspectus of the facts wherein a slight delay and a good explanation may compensate for the prospects of success which are weak, and the importance of the issue and strong prospects may compensate for a long delay.

[24] In the present matter, the Labour Court's miscalculation of the degree of lateness does not detract from the fact that the respondent proffered a reasonable and satisfactory explanation for the delay and further had on *prima facie* basis laid sufficient basis for his claim. Moreover, the Labour Court stated that there are allegations of unfair discrimination made in the statement of claim which the trial court must grapple with and that the interests of justice dictated that the merits of the dispute ought to be ventilated at trial. This clearly evinces the fact that the Labour Court considered the importance of the issue and the reasonable prospects of success which manifestly ought to have compensated for the slightly long delay.

[25] On the whole, the Labour Court considered the degree of lateness; the explanation proffered; the prospects of success and the importance of the issues and in the result it cannot be said that the discretion was exercised based on wrong principles or that there was a material misdirection on the facts. Thus, the decision cannot be interfered with even if the LAC would have treated the facts differently.

Order:

[26] In the premise, the following order is made:

1. The late filing of the notice of appeal is condoned.
2. The appeal is dismissed with no order as to costs.

G. Malindi AJA
Acting Judge of the Labour Appeal Court South Africa
Molahlehi DJP and Savage AJA concur.

APPEARANCE:

For the appellant: A. Redding SC, instructed by Kirchmann's Attorneys.
For the respondent: In person