THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JS202/21

In the matter between:

GOLD PLAT RECOVERY (PTY) LTD **Applicant**

and

AMCU OBO H MALULEKE & 4 OTHERS **Respondent**

Decided: In Chambers

Delivered: 18 December 2024

LEAVE TO APPEAL: JUDGMENT

NKUTHA-NKONTWANA, J

Introduction

[1] The applicant (Goldplat) is the respondent in the main application and the respondent (AMCU) is the applicant. In this application, Goldplat seeks leave to appeal against the judgment and order handed down by this Court on 8 September 2021. This application was delivered on 20 August 2024 and the application for condonation was delivered on 9 October 2024. The parties filed their written submissions in the condonation application on 19 November 2024 and 9 December 2024, respectively.

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[2] In the impugned judgment, this Court granted AMCU condonation for the late delivery of its statement of claim. The action proceeded to trial and served before Daniels J. On 29 July 2024, Daniels J delivered a judgment in favour of AMCU and ordered the reinstatement of the respondent employees with backpay. This application, it would seem, was triggered by that finding. The delay is obviously 720 days.

Grounds of appeal

[3] Goldplat's main ground of appeal is that there are new facts that emerged during the trial that cast doubt on the integrity of the evidence that was presented by AMCU during the proceedings before this Court. This pertains to Mr Simbala's evidence during the trial on 15 May 2024, who testified that the respondent employees were aware that their dismissal was automatically unfair and as such, had to be referred to the Labour Court as opposed to the CCMA. Yet, the respondent employees previously contended that they were not aware that their dispute pertained to automatically unfair dismissal hence it was referred to the CCMA for arbitration. To fortify this contention, Goldplat referred to paragraph 8.16 of the Daniels J judgment.

> 'AMCU referred a dispute concerning the fairness of the individual applicants' dismissal to the Commission for Conciliation, Mediation and Arbitration (the "CCMA"). AMCU advised the individual applicants that they should not inform the CCMA that the true reason for the dismissal related to their membership of AMCU, and their recruitment for the union because this would result in the dispute being referred to this Court and many years would lapse before their dispute was heard. When conciliation failed, the dispute was referred to the CCMA for arbitration.'

[4] In essence, Goldplat contends that it could not have been expected to bring this application within 15 days of the handing down of the impugned judgment because the facts underpinning the application only came to its attention on 15 May 2024. As such, had this Court been aware of the respondent's misrepresentation, it would not have granted condonation for the late delivery of the statement of claim.

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[5] AMCU opposes both condonation and leave to appeal applications. Firstly, it takes issue with the fact that Goldplat failed to apply for condonation at its earliest convenience. Even after it was alerted to this obvious omission in AMCU's written submissions filed on 6 September 2024, the condonation application was only delivered on 9 October 2024. There is no explanation proffered for the delay in delivering the condonation application.

[6] AMCU further contends that Goldplat should have launched the leave to appeal within 15 days from 15 May 2024, when Simbala testified. Yet Goldplat deliberately did not apply for leave to appeal but elected to roll the dice and proceed with the trial. However, it changed its tact when Daniels J delivered his judgment against it. That being the case, Goldplat acquiesced to the impugned judgment and that any right of appeal was unequivocally abandoned, so it is further contended.

[7] The principles applicable to an application for condonation are trite. What an applicant is called to explain is not only the delay in the timeous prosecution of the leave to appeal but also the delay in seeking condonation as condonation must be sought without delay.[1] The interest of justice is the yardstick for an application for condonation and would be determined based on the facts and circumstances of each case.[2] The relevant factors to this enquiry include the nature of the relief sought, the extent and cause of the delay, the reasonableness of the explanation of the delay, the effect of the delay on the administration of justice and other litigants, and the prospects of success.[3] The applicant must give a full explanation for the delay.[4]

Analysis

[8] This matter has a long and unfortunate history. The respondent employees were dismissed on 31 August 2016, which is eight years ago. To date, this

[1] See: *Mulaudzi v Old Mutual Life Assurance Co (South Africa) Ltd and Others* [2017] ZASCA 88; 2017 (6) SA 90 (SCA) at para 26.
[2] *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others* [2000] ZACC 3; 2000 (2) SA 837 (CC) at para 3.
[3] See: *Grootboom v National Prosecuting Authority and Another* [2013] ZACC 37; (2014) 35 ILJ 121 (CC) *(Grootboom)* at paras 22 – 23. See also: *Steenkamp and Others v Edcon Ltd* [2019] ZACC 17; (2019) 40 ILJ 1731 (CC) *(Steenkamp*) at paras 36 – 37.
[4] Id.

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litigation is marked by tactical impugns which are contrary to one of the primary objectives of the Labour Relations Act[5] (LRA) being the expeditious resolution of disputes. Goldplat's machination commenced when it unsuccessfully challenged the jurisdiction of the CCMA. Nonetheless, it rolled the dice by proceeding with the arbitration and prevailed. AMCU challenged the arbitration award on the basis that the CCMA lacked jurisdiction to entertain the dispute as it pertained to automatically unfair dismissal. In a strange move, Goldplat opposed the review application when the jurisdictional point was initially raised by it. AMCU's review application was successful.

[9] The same scenario is repeated in this application. Goldplat, rolled the dice once more, hoping to prevail before Daniels J. There is no merit in its contention that it delayed seeking leave to appeal as soon as the new facts emerged because it was avoiding litigating in a piecemeal manner. A condonation ruling has a bearing on the jurisdiction of the Court to hear a matter. Thus, if a party fails to challenge the exercise of discretion to grant condonation and proceed to oppose the litigation on the merits, then it must be concluded that it has acquiescence to the order. That is what happened in the present instance. Goldplat's last roll of the dice dismally failed. This subterfuge, in any event, cannot be countenanced as it would turn litigation into a lottery.

[10] While I accept that a subsequently overturned legal strategy may constitute a reasonable explanation for the delay, in this instance, the interest justice yardstick for granting of condonation has not been met.[6] Goldplat did not bother to explain the tardiness in delivering the condonation application. Too, the explanation proffered for the late delivery of this application is manifestly inadequate. This means that condonation can be refused irrespective of the prospects of success. Yet, I have considered the prospects of success in the present instance and they are non-existent. Moreover, the effect of the delay on the administration of justice and the interests of AMCU and the respondent employees is self-evident. Eight years after their dismissal, their future still hangs in the balance.

[5] Act 66 of 1995, as amended.
[6] *Steenkamp supra* fn 3 at para 75.

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Conclusions

[11] Resultantly, the application for condonation of the late delivery of the application for leave to appeal stands to be dismissed. I am, however not inclined to award costs against Goldplat having considered the principles of law and fairness.

[12] In the circumstances, the following order is made:

Order

1. The application for condonation for the late filing of the application for leave appeal is dismissed.
2. There is no order as to costs.

P Nkutha-Nkontwana
Judge of the Labour Court of South Africa

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