

SOUTH AFRICA / JUDGMENT

Smith v Aon South Africa (Pty) Ltd (JS 1159/10) [2013] ZALCJHB 199 (22 July 2013)

[2013] ZALCJHB 199

COURT

Labour Court Johannesburg

BEFORE

Van Niekerk

CASE / FILE NUMBER

JS 1159/10

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REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

case no: JS 1159/10

In the matter between:

CAREL SMITHApplicant

and

AON SOUTH AFRICA (PTY) LTDRespondent

Date of ruling: 22 July 2013 (in Chambers)

RULING: APPLICATION FOR LEAVE TO APPEAL

VAN NIEKERK J

- [1] This is an application for leave to appeal against the judgment of this Court, delivered on 18 July 2012. The application for leave to appeal was filed on 18 March 2013. The applicant has filed a separate, substantive application to condone his failure to file the application for leave to appeal timeously. That application has been opposed, and an answering and replying affidavit have been filed. The replying affidavit was signed in April 2013. For reasons that are not apparent from the file, an indexed and paginated set of papers was filed only on 16 July 2013. On 19 July 2013, the applicant filed an amended notice of motion in

terms of which both condonation and leave to appeal were sought. I have elected to deal with the application in Chambers, as provided for in the Practice Directive.

- [2] In his application for condonation, the applicant acknowledges that any application for leave to appeal ought to have been filed by 1 August 2013. He concedes that the period of delay is significant, which by any measure it clearly is, being some seven and a half months in excess of the prescribed period of 15 days.
- [3] The affidavit filed in support of the application for condonation primarily addresses the explanation for delay. In essence, the applicant contends that he had always harboured the intention to appeal the judgment but that he was not aware of the applicable time limits, and that he was in any event precluded from filing an application on account of a lack of means. There is a suggestion in the papers that the applicant became aware at the end of February 2013 that one of the respondent's employees previously subordinate to him had been appointed to the position that he previously held. To what extent this is relied on as an explanation for the delay is not entirely clear; the applicant appears to suggest that this is new evidence of what he contends was his sham retrenchment.
- [4] The legal principles to be applied are well-established. It is incumbent on the applicant to provide a reasonable explanation for any significant delay in filing the application. If a reasonable explanation is furnished, the court must consider the applicant's prospects of success in the main application. In the absence of a reasonable explanation for the delay, the applicant's prospects of success are less relevant, if they are relevant at all. (See *NUM v Council for Mineral Technology* [1999] 3 BLLR 209 (LAC), where the Labour Appeal Court held that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial.)
- [5] I do not intend to engage in or resolve the factual dispute on the papers, especially that concerning the applicant's financial position. The applicant's case is largely made out in his replying affidavit, after a challenge in the answering affidavit to the integrity of his version. In my view, the reasonableness of the applicant's explanation for the delay in filing the application for leave to appeal turns on an assessment of the applicant's contention that he was unaware of the time limits relevant to the application until he sought legal advice in February 2013, and the reasonableness of his explanation that he was not in a financial position to pursue his rights in the period immediately following the delivery of the

judgment.

Much of what is contained in the papers before me is not directly relevant to this enquiry.

- [6] The applicant is not an unskilled worker. On the contrary, he is a financially literate and highly qualified executive with a great deal of experience in the commercial world, in which time limits and constraints are part and parcel of doing business. I find it difficult to accept that a person with the applicant's expertise and experience might reasonably assume (as the applicant contends that he did) that he was unaware of any time limit relevant to the

exercise of a right to appeal, and in effect, that he was entitled to file an application at his convenience. Accepting for the moment the applicant's version that he was unhappy with the outcome of the trial, a reasonable person in the applicant's position would no doubt have, without delay, enquired from his legal advisers as to any available avenues of recourse, and the time limits that might apply. The applicant does

not say that he was aware of the applicable time limit but had no means to instruct an attorney or counsel on the prospects of success of any appeal – he denies knowledge of the existence of any time limit. To ascertain the existence of a time limit is not an endeavour that would have frustrated by any lack of means - an enquiry as to time limits for an appeal would ordinarily have flowed from the applicant's disaffection with the outcome of the proceedings that he had initiated, and involved no more than a question to the applicant's attorney or counsel. Even if he were to incur legal costs in the process, these would have been minimal. Even if the applicant at that point had been impoverished to the extent that he could not afford to seek advice on the prosecution of a possible appeal from an attorney (which I do not accept), there was nothing to preclude him from making his own enquiries by reference to the Labour Relations Act and the Rules of this Court, both of which are readily available and drafted in plain language. Further, the services of the Court's pro bono clinic were at his disposal, as was the prospect of approaching the legal aid board. In short, there was also nothing to prevent the applicant from lodging an application for leave to appeal without legal assistance, something done in this Court by lay people on a regular basis. Instead, the applicant elected for more than seven months to do nothing to challenge the ruling against him except, on his version, to harbour a sense of unhappiness with the outcome.

[7] The chronology of events sketched in the papers suggests that it was only after a demand to make payment of the respondent's taxed costs and his appreciation (also in February 2013) that one of the respondent's employees previously subordinate to him had been appointed to what he alleges was his post, that the applicant sought legal advice. This was some seven months after he had become aware of the judgment. A reasonable person in the position of the applicant, dissatisfied with the terms of a judgment dismissing his or her claim, would have taken active steps long before then at least to make enquiries as to any right of recourse. Nor, for the reasons recorded above, would a reasonable person in the position of the applicant have been precluded by any lack of means from establishing the existence of any applicable time limits.

[8] I am not persuaded that the applicant's contentions relating to his limited financial means and his ignorance of the applicable time limits lay the basis for a reasonable explanation for the significant delay in filing the application for leave to appeal. On the contrary, on the applicant's own version, his expectation is that the statutory purpose of expeditious dispute resolution be held hostage to his emotional state and the state of his bank balance. In these circumstances, the applicant having failed to provide a reasonable explanation for a significant delay in filing the application for leave to appeal, it is not necessary for me to consider the applicant's prospects of success in that application. For these reasons, the

application for condonation stands to be dismissed. It follows that the application for leave to appeal must fail. There is no reason why costs should not follow the result.

I make the following order:

Condonation for the late filing of the application for leave to appeal is refused, with costs.

André van Niekerk

Judge of the Labour Court

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