REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JS 293/12

In the matter between:

NATIONAL UNION OF METALWORKERS

OF SOUTH AFRICA **First Applicant**

THABISILE SIBISI **Second Applicant**

and

KK ENGINEERING (PTY) LTD t/a KK SHELVING **Respondent**

Heard: 19 June 2013

Delivered: 21 June 2013

Summary: Condonation-late filing of statement of case. Failure to provide reasonable explanation. Making broad statement about prospects of success-not establishing a case for prospects of success.

JUDGMENT

MOLAHLEHI J

[1] There are three condonation applications in this matter. The first application concerns the late filing of the statement of case, the second is that of the late filing of the answering affidavit and the last concerns the late filing of the replying affidavit. And on the day of the hearing a further condonation for the late filing of the heads of arguments was made from the bar.

[2] The outcome of the first application disposes off the main matter and thus renders the other applications irrelevant.

[3] The statement of claim which is filed late concerns an alleged automatically unfair dismissal of the Second Applicant. The dispute was referred to MIEBC for conciliation and upon failure, a certificate of non resolution was issued by the conciliating panellist on 19 April 2011. The statement of claim was filed on 10 April 2012.

[4] The basis for the claim that the dismissal was automatically unfair is set out in the Applicant's founding affidavit in the following terms:

> '44.1 The Second Applicant was prevented from working overtime, and earning much needed extra money, by the Respondents management on the sole basis that she was HIV positive;
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> 44.2 The management adopted this stance despite the fact that the Second Applicant's own doctor had given his approval to her working overtime;

44.3 When this was reported to the senior manager he paid lip service to the issue by glibly confirming that the manager's actions were wrong but then instead of reprimanding or sanctioning the manager he essentially supported him by demanding from the Second Applicant that she produce a doctors certificate that stated that she could work overtime;

44.4 The management refused to consider the Second Applicant's grievance and refused to sanction the manager for firstly discriminating against her and then later, after he heard she had reported him, victimizing her by making faces at her and instead instituted disciplinary proceedings against her for bringing police onto the premises when she had absolutely no control over this.

44.5 The dismissal of the Second Applicant was inconsistent in that fellow employees who also went on strike under the same circumstances were not dismissed and were only issued with a final written warning"

The reasons for the delay

[5] There are about five periods of the delays which the applicants deal with in their application. The first period of delay has to do with the direction that came from the certificate of non resolution, which indicated that the matter is arbitrable. The Applicant says that the understanding that both parties had was that the dispute required arbitration for its resolution. The delay was accordingly caused by having to request the matter to be scheduled for arbitration hearing.

[6] The second period of the delay occurred when the matter served before the arbitrating panellist who ruled that the dispute had to do with discrimination and therefore the bargaining council did not have jurisdiction to entertain it. The arbitrating panellist directed that the matter needed to be referred to court for adjudication. The arbitrating panellist made his ruling concerning the jurisdiction of the Bargaining Council on 7 September 2011.

[7] The delay that followed after the ruling was made is attributed the ignorance and the failure to understand the ruling by the arbitrator. This resulted in Mr Sishwili having to consult other colleagues and office bearers about the merits of the ruling and what step to take next. The other reason for the delay according to the Applicant on the part of Mr Mdlalose to whom Mr Sishwili had handed the matter to as the Regional Legal Officer of the First Applicant. Mr Mdlalose is accused of having failed to respond to messages of seeking a meeting with him by Mr Sishwili. Mr Mdlalose is also accused of having failed to process cases which needed to be referred to the Labour court including that of the Second Applicant.

[8] The reading of the Applicant's founding affidavit suggests that Mr Mdlalose was charged and dismissed for his failure not only to draw pleadings in a number of labour matters involving dismissal of employees including the Second Applicant.

[9] The other period of the delay is attributed to the December /January closure of the First Applicant. The deponent to the founding affidavit says that on his return from the December/ January holiday and that was on the 22 January 2012, he in addition to the 87 files had to work on, he had to travel the regions

to conduct trials in the Labour Court. It was according to him for this reason that he was not able to immediately attend to this matter.

[10] The other delay was occasioned by the deponent to the founding affidavit being "perplexed about what cause of action to follow regarding this matter" because the ruling of the arbitrator. The next period of the delay occurred from the end of February 2012 when the attorney of record was instructed to deal with the matter.

[11] The attorney was in the same way as was Mr Montshioa faced with the difficulty of not knowing what to do with the ruling of the arbitrator on jurisdiction. It took time for the attorney to decide whether to review or have the matter referred to the Labour Court.

[12] At paragraph 40 of the founding affidavit Mr Montshioa makes another interesting statement as to another factor that contributed to the delay. He says:

> "39. I am advised that Cartwright (the attorney of record) was also initially uncertain whether the Commissioners ruling should be reviewed or whether the matter should be referred to the Labour Court in the form of action proceedings.
>
> 40. In this case the intolerability of the Second Applicants situation was predicated on the discrimination she had received at the hand of a certain manager and thus discrimination she had received at the hand of a certain manager and thus discrimination was embedded in the very centre of the constructive dismissal argument and did not form a separate part to it. Cartwright's argument was that if the inextricable

linked to the constructive dismissal argument then it should first and foremost be treared as a constructive dismissal dispute and that therefore the Bargaining Council and not the labour Court would have jurisdiction to hear the matter.

41. Cartwright after much legal research and seeking of advise of colleagues in the bar and the side bar decided that he would have to refer it to the Labour Court in the form of action proceeding as the general consensus amongst his peers was that whether discrimination was part of the constructive dismissal argument or not would still feature separately when the Labour Court, having decided that the termination of the Second Applicants conduct did constitute a constructive dismissal, would then in reaching the final decision whether the dismissal was fair would have to establish objectively, as opposed to objectively and subjectively in determining whether the Second Applicant was dismissed, whether the Respondent did discriminate against the Second Applicant on the basis of the HIV status."

Legal Principles

[13] The approach to be adopted when dealing with an application for condonation is set out in the often cited case of *Melanie v Santam Insurance Co Ltd*[1], in the following terms:

"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

[1] 1962 (4) 531 (A) at 532 C-F

> therefore, the prospects of success and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for what would be piecemeal approach incompatible with a true discretion... What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help the issue and strong prospects of success may tend to compensate for a long delay. And Respondent's interests in finality must not be overlooked."

[14] The authorities are also in agreement that condonation should be refused where there is no reasonable or acceptable explanation. Condonation should also be refused where there are prospects of success.

[15] When dealing with condonation concerning dismissal of an individual, the Court in *Queenstown Fuel Distributors CC v Labuschagne NO and Others*[2] held that:

> "It follows, however, from what I have said above, that condonation in the case of disputes over individual dismissals will not readily be granted. The excuse for non- compliance would have to be compelling"

Evalution

[16] There can be no argument that the delay in this matter is excessive and the explanation is unreasonable and totally unsatisfactory.

[17] As concerning the extent of the delay it is apparent that the matter was referred to Court 267 days out of time, if the delay was to be calculated from the time the arbitrator made the ruling that the matter should be referred to the Labour Court, the referral is 216 days late. The referral as indicated is

[2] 2000 (1) BLLR 45 LAC at para 24 on page 53

excessively late irrespective of the period from which point the time of the delay is calculated from.

[18] It has been disputed that Mr Sishwili represented members of the First Applicant at conciliation and arbitration proceedings. This being the case, it makes no sense to say that the cause of the delay was due to the fact that Mr Sishwili did not have had full understanding of the time limits provided for in the LRA.

[19] It also does not make sense to blame the delay on the alleged failure by the arbitrator to explain to Mr Sishwili the jurisdictional ruling. In my view, the ruling is self explanatory. The ruling issued by the arbitrator reads as follows:

> 'This pertains to a constructive dismissal that was referred to arbitration. From the facts of the matte; the Applicant alleges that she was discriminated against because of her status (medical issue) and was compelled to resign. Since this matter pertains to discrimination based on a medical condition, the MEIBC does not have jurisdiction and this matter should therefore be referred to the Labour Court. Both parties have agreed that the Labour Court will be the appropriate forum.'(my emphasis)

[20] It is important to note that the ruling was not based only on the opinion of the arbitrator but also on the fact that the parties agreed that the appropriate forum to deal with the dispute was the Labour Court. It is therefore not clear why there was a need to consult with the office bearers on the merits of the ruling which the parties had agreed to. It is also important to note in this regard that there is no evidence that Mr Sishwili was not aware that the matter needed to be referred to the Labour Court within 90 days.

[21] It is important to note that to a very large extent the cause of the delay can be attributed to the negligence to both the union officials and the attorney of record. This however is not a case where the Second Applicant can be exonerated from such negligence. There is no evidence that the Second Applicant ever enquired about what was happening to his claim in a period at least of 216 days. In *Nampak Corrugated Wadeville v Khoza*[3], the Court held that:

> "An application for condonation of the late filing of heads of arguments was refused because there was no "acceptable explanation" for the delay that was caused by an attorney."

[22] In *Waverly Blankets Ltd v Ndima and Others*[4], the court held that:

> 'Although the employees were not to blame for this state of affairs, it has frequently been emphasised by our Courts- including this Court- that an attorney's neglect of his client's affairs may be so in excusable that condonation may, despite the blamelessness of his client, be refuse. In my view, this is precisely such a case."

[23] In my view, the Applicant's application stands to fail on the basis of the failure to provide a satisfactory and reasonable explanation. The application stands to fail also for the reason that the Applicants have failed to make a case on prospects of success. The Applicant has made a broad and unsubstantiated statement about prospects of success.

[3] 1999 (2) BLLR 108 (LAC) para 8 on page 110
[4] 1999 (11) BLLR 1143 (LAC) para 10 on page 1146

[24] The duty to show prospects of success rests with the applicants. Whilst the test to apply in determining the merits in the main case, the applicant still has the duty to place evidence before the court to show the existence of the prospects of success. In the present case, as indicated, the applicant relies in the general and broad statements that there are prospects of success. The second applicant has not placed evidence before the court regarding the facts and the circumstances surrounding her resignation. Accordingly I found that the applicants have failed to make out a case that they have prospects of succeeding in the main case if condonation was granted. On the assumption that the parties still have a relationship, I do not consider appropriate to allow costs to follow the results.

Order

[25] In the premises, the Applicant's condonation application is dismissed with no order as to costs.

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Molahlehi J

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr David Cartwright of DC Attorneys

For the Respondents: Adv Cosyn instructed by Klopper and Jonker Inc