Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case no: JS 1002/09

In the matter between:

MEWUSA obo MAHATOLA, ELIJAH **Applicant**

& 15 OTHERS

and

F&J ELECTRICAL **Respondent**

Heard: 22 April 2016

Delivered: 26 April 2016

Summary: (Condonation – late referral following jurisdictional ruling – failure to file condonation application fourteen months after being aware of the need to – no explanation provided – prospects on substantive fairness in any event not reasonable)

JUDGMENT

LAGRANGE J

[1] This is an application for condonation for the late referral of a dispute concerning the alleged unfair retrenchment of the applicants. The matter has an extraordinarily long history which culminated in a judgement of the constitutional court handed down on 17 February 2015.[1] The narrative of

[1] F & J Electrical CC v Mewusa & Others

events is comprehensively summarised in that judgement and I do not intend to repeat it here.

[2] There are only a few additional details that need to be mentioned. Firstly, the constitutional court's judgement squarely addressed the contention raised by the union that it had not been necessary to apply for condonation for the late referral of the dispute to the Labour Court because the dispute was not late. The Court pointed out that this was based on a misconception that if there was a jurisdictional ruling such as in this case, where the arbitrator ruled that the dismissal dispute could not be arbitrated but should be referred to the Labour Court because it concerned the retrenchment of more than two employees, the employees had 90 days from the ruling to refer their dispute to Court. The Court confirmed that the date on which the 90 day period starts to run is the date on which the initial conciliation period expires. This was not merely an incidental point in the judgement but was one of the reasons why the Court set aside the default judgement of the Labour Court namely, because no condonation had been granted for the union's late referral of the dispute.

[3] Secondly, on 17 February 2015, the respondent filed its answering statement in which it expressly raised the point that the Labour Court had no jurisdiction to determine the dismissal dispute in the absence of condonation being sought and granted for the late referral of the dispute. Thirdly, when the parties concluded a pre-trial minutes on 28 August 2015, the respondent again signalled its intention to raise the absence of condonation as a jurisdictional question. Lastly, no steps were taken by the union to seek condonation and it was only when the preliminary issue came up at the commencement of the trial proceedings that it sought leave to file a condonation application. Despite grave reservations, the trial was postponed and the applicants were given leave to file their application. When this leave was granted the applicants were also expressly advised that in the condonation application they should deal with all relevant issues including their previous failure to file a condonation application.

[4] The general principles governing condonation applications are well-known and were originally set out in the judgement in *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) where it was stated at 532C-F:

> '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, for that will be a piecemeal approach incompatible with a true discretion, 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 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 for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay.'

[5] It is also a well-established principle that a party should bring an application for condonation at the earliest opportunity. The failure to do so simply compounds the extent of the delay.

Degree of lateness

[6] In this instance, the applicants referred the matter to the Labour Court on 7 October 2009. The 90 day period within which they ought to have referred the dispute expired on 2 June 2009. Accordingly, the referral was four months late. The condonation application for the referral was only filed when the applicants could no longer avoid the implications of the respondents *in limine* objection. Ordinarily, it should have been filed together with the referral. The four month's delay in the filing of the referral is nearly double the normal period allowed for referring disputes and is obviously excessive. The delay of over five years in filing the condonation application itself is clearly excessively long. It is therefore necessary to consider the explanation for both delays.

Explanation for lateness

[7] It is apparent that the explanation for the delay in the referral of the statement of claim itself was based, as the constitutional court found on a misconception of when the 90 day period for referrals to the court starts to run. I am willing to accept that it was a *bona fide* mistake at that stage to believe that the 90 day period ran from the date of the jurisdictional ruling on 13 July 2009 and at that stage that the applicants believed that they had referred the matter in time. I accept that it was *bona fide* and that in fact it was only in August 2014 that the Labour Appeal Court clarified the time periods in cases where jurisdictional ruling are made.[2]

[8] It is therefore understandable in my view that the applicants believed they were correct in not applying for condonation at least until the Constitutional Court handed down its judgement in February 2015. At that point, they could have been in no doubt that they were wrong and that this court has no jurisdiction to hear their claim if they do not successfully obtain condonation for the late referral. The union did nothing however.

[9] Even when it received the answering statement of the employer and when the pre-trial minute was concluded in which the condonation issue was expressly flagged as an outstanding question this did not prompt the union to take any steps. No explanation is provided in the founding affidavit for the failure to have any regard to the Constitutional Court judgement or the fact that the *in limine* objection was pertinently brought to the union's attention. As things stand, there is no adequate explanation for the further delay in filing the condonation application in the 14 months which had lapsed since the Constitutional Court judgement. It was only when the respondent argued its *in limine* point at the start of proceedings, that the union sought the court's indulgence to file the condonation application.

[10] When the condonation application was heard on Friday the same week I afforded Mr Phala, who had appeared for the applicants in the Constitutional Court, yet another opportunity at the hearing of the condonation application to explain the union's failure to take any steps to launch the condonation application before the trial proceedings

[2] See SATAWU obo Members v South African Airways (Pty) Ltd and Others 2 BLLR 137 (LAC)

commenced on Tuesday this week. The only explanation he could offer in his oral submissions was that the applicants remained of the view that there was no reason for their dismissal. Plainly, that could not explain the failure to apply for condonation in respect of the unfair retrenchment case before the court.

[11] The authorities concerning the late filing of a condonation application are clear. In ***Librapac CC v FEDCRAW & others*** [3] *and* ***SA Broadcasting Corporation Ltd v Commission for Conciliation, Mediation & Arbitration & others***[4] the LAC reaffirmed that an application for condonation must be brought as soon as it becomes apparent that there had been a delay. In this case even if the applicants were initially of the genuine view that they were not late, they could not have been in the slightest doubt once the Constitutional Court judgement had been handed down. The need to file the condonation application was simply reinforced by the answering statement and the pre-trial minute.

[12] In the circumstances, there is no evidence before the court to explain the applicants' failure to act. The subsequent delay in bringing the condonation application merely compounds the lateness of the delay in referring the matter, even if that initial delay might have been excusable. The point is that until the condonation application has been filed and decided the referral cannot be entertained and the delay in bringing the condonation application exacerbates the original delay.

[13] It is also well established that without a reasonable and acceptable explanation for delay, a court may, in the exercise of its discretion, refuse condonation irrespective of the prospects of success. Thus the LAC confirmed in ***Colett v Commission for Conciliation, Mediation & Arbitration & others*** [5] that:

> "[38] There are overwhelming precedents in this court, the Supreme Court of Appeal and the Constitutional Court for the proposition I that where there is a flagrant or gross failure to comply with the rules of court

[3] **(1999) 20 *ILJ* 1510 (LAC)** at 1513, par [13]

[4] **(2010) 31 ILJ 592 (LAC)** at 597, par [21]

[5] **(2014) 35 *ILJ* 1948 (LAC)**

> condonation may be refused without considering the prospects of success. In *NUM v Council for Mineral Technology* it was pointed out that in considering whether good cause has been shown the well-known approach." [6]

Prospects of success

[14] For the reasons stated above, I do not believe this is a case where the prospects of success warrant consideration, but even if I am wrong for the sake of completeness, I will address the question whether the applicants have established reasonable prospects of success that are sufficient to outweigh the failure to explain the subsequent delay in bringing a condonation application.

[15] In their application for condonation, the applicants simply make a bald statement that they were retrenched without consultation and make no other reference to the substantive merits of their retrenchment claim. The first point that needs to be made is that it is common cause that the retrenchment concerned a sufficient number of employees to fall under section 189 A of the Labour Relations Act, 66 of 1995 (the LRA). In terms of section 189A (13) read with sections 189A (17) to (19) if employees do not challenge the procedural fairness of their retrenchment by way of an application under s 189A (13) they can only challenge the substantive fairness of their dismissal in a subsequent trial. Accordingly, the applicants would be prevented from challenging the procedural unfairness of their retrenchment if condonation was granted and would be confined only to issues relating to substantive fairness.

[16] In so far as I may even consider the issue of substantive fairness even though it was not set out in the applicants' founding affidavit in the condonation application as it should have been[7], the applicants essentially raise two issues. Firstly, they contend that there was no general need to

[6] At 1955-6

[7] See for example ***Mould v Roopa NO & others* (2002) 23 *ILJ* 2076 (LC)** at 2084, para [34] and ***Seatlolo & others v Entertainment Logistics Service (A Division of Gallo Africa Ltd)* (2011) 32 *ILJ* 2206 (LC)** at 2218, par [24].

retrench and secondly they believe certain other employees should have been selected for retrenchment. The respondent likewise did not address the substantive merits in the answering affidavit in much detail, which it was not obliged to deal with in the absence of them being raised by the applicants in their founding affidavit.

[17] Be that as it may, even if I considered the pleadings and pre-trial minute, the respondent identifies the general reason for the retrenchments arising from the cancellation of its contract with City Power. Mr Phala submitted that this must be weighed against the fact, which is something he asserted from the bar, that the respondent still had contracts with Eskom and the City of Tshwane and that it allegedly advertised positions some eight months after the retrenchments took place. I do not think that in the absence of the applicants having set out more detailed averments on affidavit addressing these issues that I can say that the respondent does not have a reasonable prospect of establishing a general need to retrench.

[18] In relation to the selection of individuals for retrenchment, the respondent contends that it followed the principle of LIFO subject to retention of special skills and denies that the four individuals identified by the applicants in the pre-trial minute ought to have been retrenched instead of them. Even if it is true that four other individuals ought to have been selected before any of the applicants, at best that could only conceivably have assisted four of the sixteen individual applicants and would not have helped the remainder. On the pleadings and the pre-trial minute it is not entirely clear if the respondent denies that the four individuals identified were employed after the applicants as they allege or that it maintains that the four individuals were not retrenched because they were retained on the basis of their skills, or both. However, I cannot say that the respondent does not seem to have reasonable prospects of establishing the fairness of the selection of retrenchees, and conversely the applicants have not established a reasonable prospect that it will be found that most of them should have been retained using the selection criteria applied by the respondent.

[19] Thus, even on a generous interpretation of the material before the court and ignoring the principle that the applicants should have set out in greater detail in their founding affidavit in support of the condonation application the reasons why they had reasonable prospects of success in their claim that their dismissal was substantively unfair, I do not believe they are able to establish this.

Prejudice

[20] I appreciate that if the applicants were ultimately successful if the matter was allowed to proceed they are being prejudiced by the proceedings been curtailed, whereas the respondent faces the prospect of defending a dismissal seven years after the event. It is an inherent risk of failing to obtain condonation for the late referral of disputes that applicants will not have their dispute ventilated before an independent forum. That is always an important consideration. However, while the LRA provides remedies for unfair dismissal those remedies must be invoked timeously. Once a party is late it should make every effort to ensure that the lateness is not prolonged. It cannot be expected that respondents must patiently wait for an indefinite period until applicants take all the necessary steps to finalise their referrals. As much as the applicants are prejudiced by forfeiting the independent adjudication of their dispute, respondents are prejudiced by the lack of timeous finality. In this instance, I do not believe the prejudice suffered by the applicants can outweigh all the other considerations discussed above in deciding if condonation should be granted.

<u>Conclusion and costs</u>

[21] Based on the analysis above, I am not satisfied that the applicants' late referral of their statement of claim should be condoned.

[22] Allowing the applicants a last opportunity to file a condonation application necessitated the postponement of the trial proceedings and in the absence of any explanation whatsoever why the application was not brought timeously, I see no reason why the applicants should not pay the respondents costs of the postponement. In relation to the condonation application itself, the complete failure of the applicants to attend to the

need to cure the defect in their referral despite a period of 14 months elapsing between the Constitutional Court judgement and the trial date and without attempting to explain their failure to bring the application earlier warrants an adverse cost award as well.

Order

[23] The application for condonation of the applicants' late referral of the dismissal dispute to the Labour Court is dismissed.

[24] The applicants must pay the respondent's costs of opposing the condonation application and wasted costs of the postponement of the trial on 19 April 2016.

Lagrange J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANTS: M Phala of MEWUSA

RESPONDENT: S Collet instructed by Clifford Levin Attorneys