IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

CASE NO: JS 191/06

In the matter between:

W MARABA & OTHERS **1st to 54th Applicants**

and

PJL MULTITRANS (PTY) LTD t/a MULTI-WASTE **Respondent**

JUDGMENT

LAGRANGE,J

Introduction

1. This is an application to condone the late filing of a statement of case.

2. At the hearing of the matter the respondent raised an *in limine* issue about the locus standi of the first applicant to represent the rest of the individual applicants. By the time the matter was heard 52 individual applicants in addition to the first applicant, Mr Maraba had signed affidavits confirming the contents of his founding affidavit in support of the condonation application and affirming their status as co-applicants in the matter.

3. The respondent objected to Mr Maraba representing the other applicants in arguing the condonation application. Present in court were 24 other applicants, who confirmed before the court that they had no objection to him speaking on their behalf. The grounds for condonation were set out in Mr Maraba's application and the other applicants had all made common cause with what was stated there. In the circumstances, court proceedings would have been unduly delayed by inviting every applicant present in court to individually argue the condonation application on their own behalf.

4. When this prospect was put to the respondent's representative, Mr Gerber, he agreed that in the circumstances, the respondent would not object to Mr Maraba speaking on behalf of the rest of the applicants in this application, notwithstanding the respondent's right to rely on section 161(c) of the Labour Relations Act 66 of 1995. That provision sets out who may represent parties in the Labour Court. In the case of employees only legal representatives or a member, office-bearer or official of that employees' trade union may appear in court on their behalf, if they do not appear in person. Mr Maraba as spokesperson then proceeded to argue the applicants' case for condonation for the late referral of their statement of claim.

The Factual Background

5. The applicants whose number is a matter of dispute but who amount to at least 53, were dismissed on or about 24 November 2004 for operational reasons. They dispute the substantive and procedural fairness of their dismissal.

6. They referred their dismissal dispute to South African Local Government Bargaining Council ('the SALGBC') timeously and the matter was unsuccessfully conciliated on 28 January 2005. They were assisted in making the referral for conciliation by a consultant. For reasons which are not apparent, the bargaining council only set the matter down for arbitration on 25 November 2005. Approximately 42 individual applicants attended the hearing according the copy of the attendance register which appears in the bundle pertaining to the Rule 11 application launched by the respondent which is discussed below. The arbitrator ruled that the bargaining council did not have jurisdiction to hear the matter. They were further assisted at the arbitration of the matter by another individual whose status is unknown, but whom they say they lost contact with immediately after the arbitration. It is not clear when

the ruling was handed down but in December 2005 they were trying to refer the matter to the Labour Court but could not get someone to assist them at that stage.

7. During February 2006 they obtained assistance from an employee of the union, SACCAWU and approached the Wits Law Clinic for assistance where they were told they would be placed on a waiting list. Seemingly, they were unable to get anyone to draft the statement of case for them, and finally submitted a statement of case on 15 March 2006. At this stage the applicants appeared to be using a SACCAWU address for the service of correspondence and court process, but SACCAWU was not a party to the matter. Annexed to the statement of case was a list of 62 names of persons retrenched, of which approximately 30 had signatures next to them.

8. The respondent filed a statement of response on 3 April 2006 and took exception to the applicant's statement of claim on the basis that it did not comply in one or more unspecified respects with Rule 6 and that the applicant's representative had not proven his mandate to act on behalf of all the applicants. The respondent also filed an application for condonation for the late filing of its statement of response.

9. In August 2007 the applicants sought to hold a pre-trial conference with the respondent, but it is not clear what happened at that stage. No record of such a meeting appears in the papers. At the end of January 2008, the respondent appointed its current attorneys to act for it. Not long thereafter, in mid-February 2008, the respondent launched an application in terms of Rule 11(1) of the rules of this court seeking an order that the court does not have jurisdiction to hear the matter or, alternatively, that the applicants' statement of claim and condonation application be struck out. The basis for the application was that the deponent to the founding documents in the referral did not prove he has any mandate to act on behalf of the all the individual applicants. The court's jurisdiction to consider the referral and the condonation application for the late referral was attacked on the same basis.

10. On 31 July 2008, the matter came before the honourable judge Molahlehi , J. He made an order requiring the applicants to file an amended statement of claim in compliance with the rules and an application for condonation for the late referral of the dispute addressing the whole period of time from the service of the certificate of outcome to the date of filing the

amended statement of claim. In these proceedings, the applicants were represented by an attorney.

11. On 29 September 2009, the applicants' erstwhile attorney filed an amended statement of claim. In the application, 59 applicants were now cited as being a party to the dispute instead of the previous 55 whose names had not previously been clearly specified. An amended application for condonation was also included, the supporting affidavit to which had been completed in mid-August 2009. Approximately 49 applicants signed confirmatory affidavits inter alia confirming their status as applicants. A further supplementary affidavit was filed by the first applicant dated 25 September 2009 explaining that it had not been possible to obtain all the confirmatory affidavits of the applicants on 16 August 2009, which is the date a meeting was convened to report back to all of them.The applicants were still represented by attorneys, Rammutla-at-law Inc. at this point.

12. It must be mentioned that, in the course of addressing the court, Mr Maraba sought to add additional factual details in support of the application, and it was explained that the matter had to be decided on the facts as pleaded in the affidavits.

The Merits of the Application

The period of the delay

13. The period of the delay between the issue of the certificate of outcome and the filing of the amended statement of claim is considerable, assuming the certificate of outcome was issued on or about 28 January 2005 and the filing of the amended statement of claim on 29 September 2009.

14. On the face of such a delay in the absence of a cogent explanation for the delay the applicants' late referral would stand to be dismissed even if the merits were reasonable. Assuming that the applicant's received the ruling from the commissioner by the beginning of December 2009, the referral of the statement of claim took place about three and a half months' later. In my view given that it only became apparent to the applicants when they got the ruling that they could not proceed in the bargaining council and given that events took place at the year end, I don't think this delay is excessive.

The reasons for the delay

15. In analysing the delay, the period until the belated arbitration of the matter by the bargaining council cannot be attributed to the applicants. They were a group of individuals, who were not properly represented at the time. They were muddling along with the partial assistance of a unionist but not in the capacity of a representative of a union that had made the applicants' cause its own. The respondent replied promptly, raising two *in limine* objections to the applicant's claim. The first objection raised was that the referral "…did not comply with one or more of the provisions of Rule 6(1)(a) to (f) of the Labour Court rules. It must be said that stated in this form, the nature of the objection would not have been immediately obvious to lay persons like the applicants, and the respondent should have spelled out this objection in more detail. When dealing with opponents who obviously lack basic legal skills the practice of obscure pleadings is to be deprecated. Objections should be clearly spelled out so a lay person can understand the nature of the objection being taken. The real problem, as it later turned out, was that the applicants' statement of case had been cast in the form of a notice of motion with a supporting affidavit. The second objection was that the only signatory to the affidavit was the first applicant Mr Maraba and accordingly, there was no evidence of him being mandated or authorised to bring the application on behalf of the other individual applicants.

16. Following the service of the respondent's answering statement, there is then an unexplained delay where the case is not advanced by the applicants for a period of some sixteen and a half months, or nearly a year and a half. The request to hold a pre-trial conference could and should have been made within 10 court days of receiving the respondents answering statement. At the very least it could have been requested by the end of April 2006. If the main applicant driving the litigation was having difficulty contacting other applicants in order to consult with them prior to holding a pre-trial he could have phoned the respondent's attorneys and advised them of the steps he was taking. I appreciate the difficulties faced by an individual trying to co-ordinate a number of dismissed workers who are no longer in one location. In my view, reasonable allowance must be made for this, but even individuals facing such obstacles must pursue the prosecution of their case with reasonable diligence.

17. No specific explanation is offered for the sixteen month delay, so I must assume it is covered by the general statement at the beginning of the applicants' condonation application. This explanation was that the individuals were still unemployed and could not finance litigation using an attorney, especially 'at the beginning'. It is apparent that at a later stage the applicants must have gathered sufficient funds to appoint an attorney because one was appointed to deal with the Rule 11 application in 2008. Another general explanation offered is that it was difficult co-ordinating matters amongst all the applicants who lived in different provinces. To gather them all together to consult was accordingly difficult. I appreciate that this was a real difficulty confronting the applicants. However, by the end of September 2008, after the applicants had been ordered to amend their statement of claim, they managed to consult and file the amended statement with an amended condonation application accompanied by a significant number of supporting affidavits. This two month delay in filing the amended statement and condonation application after the judgment handed down by Molahlehi J on 31 July 2008 I would be willing to excuse in the light of the difficulties mentioned.

18. However, a delay of sixteen and a half months without any communication to the employer about whether the applicants were still proceeding, and without any adequate explanation why it was such an extended delay cannot, in my view, be condoned. It is excessive by any standard, even if I make allowance for the logistical difficulties faced by the applicants. In view of the extensive delay the employer would reasonably have been entitled to assume that the matter was not being pursued. Indeed, on the evidence, it seems that if the employer had not filed its Rule 11 application, the matter might never have seen the light of day again. No reason was advance which explained why the applicants could act within two months in 2008, but could not act for more than 16 months between April 2006 and August 2007. There is also no explanation why they appeared to do nothing further to drive the pre-trial process forward after August 2007. The applicants could have asked the court to order the convening of a pre-trial but nothing of this nature was done. A simply enquiry at the court Registrar's office about the next step would have directed them to the next step if they were unsure what to do. However, the next party to take a step was the respondent, which launched the Rule 11 application in an apparent effort to bring finality to the matter.

19. It would seem it was only in mid-2008, nearly four years after their dismissal, and two and a half years after their original referral, that the applicants found the energy to revive the dormant litigation in earnest. Even this appears to have been stimulated by the Rule 11 application rather than their own initiatives.

The merits of the case

20. The applicants claim unfair retrenchment, but at the hearing of the matter, the main point emphasised by Mr Maraba was that they had been dismissed about six days earlier than they were advised.

21. On the pleadings the parties have pleaded mutually exclusive versions. Given this, it might be argued that the applicants have some prospect of success. However, that prospect is not obviously a good one. However, in my view, it is insufficient to outweigh the lengthy and unexplained delays mentioned above.

Prejudice

22. The prejudice to the applicants of not having their case heard is obviously significant. But there is a limit to how long the court can expect a respondent party to wait for applicants who want to pursue their rights. While allowance can be made for the very real obstacles the applicants faced in pursuing their claim, the extent of the indulgence they seek cannot be entertained. If they intended to pursue the matter they should have made more consistent efforts to do so to minimise the unavoidable delays, rather than proceeding in the 'start-stop' manner they did. It is difficult to attach so much weight to the prejudice they suffered when their own efforts to remedy it were made in such a faltering and erratic manner, rather than being pursued with the necessary energy and diligence. I accept Mr Maraba did manage after some time to pull the applicants together, but these efforts were far too late. In this instance the prejudice facing the employer of dealing with a case concerning dismissals occurring nearly six years ago, outweighs the prejudice to the applicants in my view.

23. Accordingly, I find that the applicants have not made out a sufficiently strong case for condonation of their late referral of their amended statement of case.

Order

24. The applicants application for condonation is accordingly dismissed

25. No order is made as to costs.

ROBERT LAGRANGE

JUDGE OF THE LABOUR COURT

Date of hearing : 19 August 2010

Date of judgment: 19 August 2010

Appearances:

For the applicants: Mr W Maraba (First Applicant)

For the respondent: Mr Gerber, instructed by Philip Coetzer Inc