**THE LABOUR COURT OF SOUTH AFRICA**
**(HELD AT JOHANNESBURG)**

**CASE NO. JS 230/08**

In the matter between:

**SOLIDARITY obo STRYDOM & ANOTHER** **Applicant**

and

**ALBERT LUTHULI MUNICIPALITY COUNCIL** **Respondent**

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**JUDGMENT**

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**VAN NIEKERK J**

**Introduction**

[1] These proceedings involve two applications for condonation and three special pleas. The first application is made by the respondent for condonation of the late filing of its statement in response to the applicant's statement of claim. The second application for condonation is an application by the applicant made in terms of the Institution of Legal Proceedings Against Certain Organs of State Act, 40 of 2002 ('the Act'). In addition, the respondent has filed three special pleas (excluding a point to the effect that the applicant had failed timeously to file a notice in terms of the Act) to the statement of claim filed by the applicant. These have been enrolled for hearing simultaneously with the applications for condonation.

**The application for condonation: statutory notice**

[2] Section 3 (1) of the Act provides that no legal proceedings for the recovery of any debt may be instituted against an organ of state unless the creditor has given notice of the intention to institute the proceedings in question. The respondent is an organ of state (see s 239 of the Constitution). Section 3 (2) (a) requires that a notice must be served within six months from the date on which the debt became due. "Debt" is defined in s 1 of the Act to include any debt arising from any cause of action which arises from delictual, contractual or other liability.

[3] The applicant's claim is brought under s 77 of the Basic Conditions of Employment Act ('BCEA'), as a contractual claim for the payment of severance pay, a long service bonus and a pro-rated performance bonus on behalf of two of the applicant's members ('the individual applicants), both of whom were previously employed by the respondent. The applicant was therefore required to give the statutory notice required by s 3 (1) of the Act.

[4] The individual applicants were engaged on fixed term contracts. The first, Lindeque, was engaged on 1 February 2002 for a period of five years. The second, Strydom, was engaged on 1 January 2002 for a period of four years. These contracts terminated on 31 January 2007 and 31 December 2006 respectively. The applicant contends that its members are entitled to payment of the amounts referred to above consequent on the termination of their employment. Applying the provisions of s 3 (2) (a) of the Act, the debts became due on 1 February 2007 and 1 January 2007 respectively. In the event that the individual applicants were aware that the debt was owed to them on the dates that their contracts terminated (which they deny), then the required notice had to be given to the respondent on or before 1 July 2007 and 1 June 2007 respectively. The individual applicants state that they became aware of their claim against the respondent in or about late December 2007. In any event, notice of the intention to institute

action for the payment of monies owed as a consequence of the termination of the applicant's members' employment was given on 1 October 2008.

[5] Section 3 (4) (b) of the Act defines a Court's power to grant condonation for a failure to comply with s 3 (2) (a). The Court must be satisfied that:

(i) the debt has not been extinguished by prescription;
(ii) good cause exists for the failure by the creditor to serve the statutory notice timeously; and
(iii) the organ of state was not unreasonably prejudiced by the failure.

[6] In *Madinda V Minster of Safety and Security* 2008 (4) SA 312 (SCA), the Supreme Court of Appeal elucidated at some length the implications of s 3 of the Act, and in particular, the interpretation that ought properly to be accorded s 3 (4). The Court affirmed that the phrase 'if [the Court] is satisfied' in s 3 (4) (b) requires an approach in terms of which the overall impression made on a Court which brings a fair mind to the facts set up by the parties is determinative. The first requirement is that the applicant rely on an extant cause of action (this is not in dispute in the present proceedings); the second is that the Court consider all the factors which bear on the fairness of granting the relief as between the parties and as affecting the proper administration of justice. These may include prospects of success in the proposed action, the reasons for the delay, the sufficiency of the explanation offered, the *bona fides* of the applicant, and any contribution by other persons to the delay and the applicant's responsibility therefor (at paragraphs [9] and [10] of the judgment). The requirement of 'good cause' comprehends the merits of a case – at least in the sense that strong merits may mitigate fault, while no merits may render mitigation pointless (at para [12]). The requirement of an absence of unreasonable prejudice emphasises the need to give due weight to

both the individual's right of access to justice and the protection of state interest in receiving timeous notice (at para 15]). The structure of s 3 (4) is such that all three requirements have been met. Once they have, the discretion to condone operates according to the established principles (at para [16]).

[7] This approach is not entirely congruous with the approach to be adopted in matters in which condonation is sought for a departure from, for example, the Rules of Court. That test, referred to most often in the form that it was so eloquently expressed in *Melane v Santam Insurance Company Limited* 1962 (4) SA 531 (A), shares some of the elements of what is understood to comprise 'good case', but in other respects, it differs considerably. In terms of s 3 of the Act, the Court is called upon to consider and to balance the two main elements at play – the individual's right to have the merits of the case adjudicated, and the right of the state not to be unreasonably prejudiced by a delay in the giving of notice that complies with s 3 (2) (a), or even the failure to give any notice at all.

[8] In the present matter, considering first the requirement of good cause, the individual applicants aver that they only became aware of the amounts owed to them in December 2007, when one of their previous colleagues, Killian, informed them that he was engaged in negotiations with the respondent regarding his severance pay and long service bonus. There is no reason to dispute this, nor is there any reason to dispute the proposition that on this basis, for the purposes of s 3 (3) (a), the individual applicants acquired knowledge of the facts giving rise to the debt in or about late December 2007. The resultant effect is that the applicants' notice to the respondent was approximately three months outside of the statutory six-month period.

[9] Killian requested them to keep any claim that they might have had in abeyance, pending the outcome of his negotiations. (Killian had been diagnosed with a brain tumour, and in view of his limited life

expectancy, wished to secure a payment that could be utilized to the advantage of his family). In any event, Killian was paid at the end of December 2007. The individual applicants approached Solidarity on 6 March 2008. On 14 March 2008, the union wrote a letter to the respondent, claiming severance packages, long service bonuses and pro-rated performance bonuses. The respondent did not reply to the letter. On 3 April 2008, Solidarity addressed a further letter to the respondent, proposing a meeting. The respondent did not reply to that letter. On 29 May 2008, Solidarity filed a statement of claim. On 3 July 2008, the respondent filed its answering statement, in which it raised the point *in limine* that the applicant had failed to comply with s 3 of the Act. The Solidarity official dealing with the matter had taken the view that the Act did not apply to a claim under the BCEA – his view (albeit mistaken) was informed by his engagement in disputes under the LRA, to which the Act does not apply (see *Mohlaka v Minister of Finance & others* [2009] 4 BLLR 348 (LC)). As I have indicated above, the notice was filed in October 2008, after the applicants had taken advice from counsel on the application of the Act to a dispute such as that referred to the Court for determination.

[10] The applicants' prospects of success weigh heavily in favour of granting condonation. In terms of their contracts of employment, it was agreed that on expiry of the fixed terms for which they had been appointed, they would be deemed to have been retrenched due to redundancy. On the face of it, it would seem therefore that whatever regulatory provisions afforded the same benefit or payment to retrenched employees, the individual applicants would be entitled to them. As the SCA said in *Madinda*:

> *"The relevant circumstances must be assessed in a balanced fashion. The fact that the Applicant is strong in certain aspects and weak in others will be borne in mind in the evaluation of whether the standard of good cause has been achieved"* (at 317H).

[11] The ‘reasonable prejudice’ component of the approach to be applied was explained by the SCA in the following terms:

> “*The third leg of section 3(4)(b) required the appellant to satisfy the Court that the Respondent had not been unreasonably prejudiced by the failure to serve the notice timeously. This must inevitably depend on the most probable inference to be drawn from the facts to be regarded as proved in the context of the motion proceedings launched by an applicant. The approach to the existence of “unreasonable” prejudice [not simply any level of prejudice, and aspect which the judgment of the Court a quo blurs] requires a common sense analysis of the facts, bearing in mind that whether the grounds of prejudice exist often lies peculiarly within the knowledge of the respondent. Although the onus is on an applicant to bring the application within the terms of the statute, a Court should be slow to assume prejudice for which the respondent itself does to lay a basis*” (at 320 H-I).

[12] The respondent has failed to set out any basis for the prejudice it claims to have suffered. The answering affidavit filed by the respondent’s municipal manager baldly and blandly states that “The Respondent will suffer severe prejudice if condonation is granted”. No further facts or grounds are proffered to assist the Court in what is ultimately a need to have regard to the individual’s right of access to justice and the protection of the interests of the state in receiving timeous notice of intended legal proceedings. In the present circumstances, I fail to appreciate what prejudice the respondent has suffered by the applicants’ failure to give the required notice. The notice was given only after the referral of the applicants’ claim to this Court, and after the respondent had filed its response to the claim. By then, the respondent had had the opportunity of investigating the claims made by the individual respondents, and of taking full instructions on its response. It had also filed a response to the

applicants' claim that is comprehensive to the point of raising no less than four special pleas. The respondent was no worse off in regard to the conduct of this litigation only because the notice was filed in October 2008 – frankly, by then, the filing of the notice served no purpose at all. In these circumstances, to deny the applicants the right to pursue their claim only because the statutory notice was not filed would be an injustice. In any event, Solidarity addressed letters to the respondent on 14 March 2008, setting out the nature of the demands made by the individual applicants and inviting the respondent to engage in a discussion on them. Assuming for present purposes that one of the purposes of notice in terms of s 3 of the Act is to enable an organ of state to be made aware of pending litigation, to decide how to respond to it, to secure any relevant evidence and the like, the respondent was clearly aware by mid-March 2007 that the applicant's considered that they had a claim to severance pay, long service bonus and pro-rated performance bonus. Section 3 (2) (b) requires that a notice set out only the facts giving rise to the debt, and those particulars of the debt that are within the knowledge of the creditor. This is generally the information that was conveyed to the respondent, and to which it did not afford Solidarity the Courtesy of a response. The respondent has accordingly failed to demonstrate any unreasonable prejudice suffered consequent on the applicants' failure to issue a s 3 (1) notice.

[13] The Court is now in a position to assess the combined weight to be attributed to the elements contained in s 3 (4) (b). There was little, if any, unreasonable prejudice to the respondent occasioned by the applicants' failure to file the notice. The respondent was made aware of the nature of the individual applicants' claim some three months after they acquired knowledge of it, and chose to ignore the offer to engage in a discussion on it. This was discourteous, unwarranted and unreasonable. The applicants' reliance on good cause must be assessed in this context. Their explanation for the failure to file a notice timeously amounts to one of ignorance. There is obviously a limit to

which an explanation of this nature will be considered acceptable, but it should be recalled that the applicants were not assisted by legal representatives until after the statement of claim was filed, and that the union official dealing with the matter was accustomed to dealing with claims under the LRA, where s 3 does not apply. There was never any disinterest on the part of the applicants, who persuaded their claim diligently but for the failure to file a s 3 notice. In these circumstances, I am satisfied that the applicants have shown good cause for that failure.

[14] For these reasons, the applicants' failure to file a notice in terms of s 3 of the Act should be condoned.

**Special pleas**

[15] The respondent has raised three special pleas. The first is that the dispute between the parties ought to have been referred to arbitration. In support of this contention, the respondent relies on a clause in the relevant contracts of employment that read as follows:

> "*20.1 For the purposes of this clause, dispute includes without prejudice to the generality of that term, any dispute arising out of or in connection with this agreement and/or the interpretation thereof and/or the implementation and/or termination thereof and/or transactions contemplated thereby;*
>
> 20.2.1 *Save as specifically provided to the contrary in this agreement, should a dispute arise any party shall be entitled to require, by written notice to the other, that the dispute is submitted to arbitration in terms of this clause….*"

[16] The respondent submits that in terms of this clause, the individual applicants have bound themselves to arbitration under the Arbitration Act as the applicable dispute resolution mechanism, and that in the

absence of any compelling reason for refusing to hold them to the contract, the proceedings ought to be stayed. I disagree. The plain meaning of clause 20 of the individual applicants' contracts of employment is not that the parties are obliged to refer a dispute to arbitration, but rather that either party to the agreement is entitled to require, on written notice, that a dispute be referred to arbitration in terms of the clause. It is common cause that neither party to this dispute invoked the provisions of clause 20. In the absence of any written notice requiring the dispute to be referred to arbitration, the applicant was entitled to refer its claim to this Court for adjudication, and this Court has jurisdiction to entertain that claim.

[17] The third and fourth special pleas are to the effect that a severance pay dispute may be brought only in terms of s 41 of the BCEA, and that only the CCMA or a relevant bargaining council have jurisdiction to determine the dispute. Secondly, the respondent submits that disputes about an entitlement to a long service bonus and a performance bonus amount to disputes concerning alleged unfair labour practices, a matter over which only the CCMA or a relevant bargaining council has jurisdiction.

[18] Section 41 of the BCEA was introduced into the Act in 2002. As such, a right to severance pay constitutes a basic condition of any contract of employment, and can be enforced on that basis. Section 41 establishes a right to severance pay only when an employee is dismissed by reason of an employer's operational requirements. To the extent that this Court has held that it is entitled to adjudicate disputes about severance pay, these must be read subject to that caveat. But the fact that an employee becomes entitled to severance pay under the BCEA on termination of employment for reasons related to the employer's operational requirements does not preclude parties from entering into contracts of employment that provide for the payment of severance pay in other circumstances. In the present instance, the

applicant relies on clause 3.5 of the individual applicants' contracts of employment. The clause provides:

> "*The parties hereby agree that upon expiry of this agreement in terms of clause 3.2 or termination thereof by the EMPLOYER in terms of clause 15, the EMPLOYEE shall be deemed to have been retrenched due to redundancy for purposes of the rules of the EMPLOYEE's retirement, gratuity or pension fund and the EMPLOYEE shall have the right to the full benefits of the said fund rules applicable to a retrenched employee*."

[19] Further, clause 23 of the contract provides that the contracts are subject to the LRA, the BCEA and various other statutes and their successors. In particular, the applicants rely on the term of a Regulation Gazette and of a collective agreement to sustain their claim to the payment of severance pay. In short, the claim for severance pay is not posited on the application of s 41 of the BCEA – the applicants seek to enforce a contractual and not a statutory right. In these circumstances, I fail to appreciate how the necessary precondition of a dismissal for reasons related to an employer's operational requirements that applies to a claim to statutory severance pay has any relevance or application.

[20] Similarly, the rights to long service and performance bonuses are not framed as unfair labour practice disputes – they are clearly brought as contractual claims. Whether they may also found an unfair labour practice claim under s 186 (2) of the LRA is neither here nor there. While it is conceivable that there might be a degree of overlap in the protections that the definition of unfair labour practice might extend and the protections that the terms of an employment contract afford, there is no statutory bar to an employee electing to pursue a contractual claim to the exclusion of any statutory remedy that may be available. (In general, see *Makhanya v University of Zululand* [2009] 8 BLLR 721 (SCA and *Mogothle v Premier of the North West Province* [2009] 4

BLLR 331 (LC)). In coming to this conclusion I obviously express no view on the merits of the contractual claims that have been filed – these will have to be determined in due course. I find only that this Court has jurisdiction to entertain the claims that have been referred for adjudication.

[21] In so far as the application to condone the late filing of the respondent's response to the statement of claim is concerned, the response was filed 18 days late in circumstances where I did not understand the applicants to seriously contest that condonation should not be granted. There is no reason why the late filing of the response should not be condoned.

[22] In summary: the Court is satisfied, having regard to the criteria established by s 3 (4) (b) of the Act that condonation for the failure to file the requisite notice should be granted. Further, the respondent's failure timeously to file its statement in response to the applicant's statement of claim is condoned. There is no merit in any of the special pleas filed by the respondent. Finally, having regard to my findings and to the provisions of s 162 of the LRA, there should be no order as to costs.

I accordingly make the following order:

1. The application for condonation of the late filing of the respondent's statement of response is condoned.

2 The applicants' failure to serve a notice in terms of s 3 of the Institution of Legal Proceedings Against Certain Organs of State act, 40 of 2002, is condoned.

3. The respondent's special pleas are dismissed.

4. The parties are directed to conduct a pre-trial conference in accordance with the Rules of this Court.

5. There is no order as to costs.

**ANDRE VAN NIEKERK**

**JUDGE OF THE LABOUR COURT**

Date of hearing: 22 September 2009
Date of judgment: 14 January 2010

Appearances:

For the applicant: Adv W P Bekker
Instructed by: Serfontein Viljoen & Swart Attorneys

For the respondent: Adv A Mosam
Instructed by: Macbeth Ncongwana Attorneys