

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JA53/2019

In the matter between:

NATIONAL EDUCATION HEALTH AND

ALLIED WORKERS UNION (NEHAWU)

BONGA GEORGE DLADLA

CATHERINE MOLEFE

HLENGIWE BUTHELEZI

SONGEZE JIYS

GLADYS MAMATSHELE

MATLHODI MASIPA

LESIBA JIMMY MOGALE

JOSEPH DIPUO

CADWELL MAKHALE

LUCKY MPOFU

LESETJA THOMAS LEDIGA

DUDU VERONICA MBULI

DORAH MALEBYE

AUDREY KITIRENG NOGE

KEDIMETSE ANNA ABRAHAMS

and

METROFILE (PTY) LTD

INFOVAULT (PTY) LTD

DISCOVERY (PTY) LTD

First Appellant

Second Appellant

Third Appellant

Fourth Appellant

Fifth Appellant

Sixth Appellant

Seventh Appellant

Eighth Appellant

Ninth Appellant

Tenth Appellant

Eleventh Appellant

Twelfth Appellant

Thirteenth Appellant

Fourteenth Appellant

Fifteenth Appellant

Sixteenth Appellant

First Respondent

Second Respondent

Third Respondent

ZAHEER CASSIM N.O.

Fourth Respondent

Heard: 19 November 2020

Delivered: 29 March 2021

Summary: *Practice and procedure—Condonation—Labour Court proceedings—Where prospects of success not addressed condonation refused.*

Practice and procedure—Condonation—Labour Court proceedings—Labour Appeal Court will only interfere where Labour Court not exercising discretion to grant condonation judicially.

Practice and procedure—Motion proceedings—Affidavits constitute pleadings and evidence---Applicant stands or falls by its papers--- Failure to incorporate statement of claim into founding affidavit fatal to the determination of prospects of success.

Coram: Phatshoane ADJP, Coppin JA, Kathree-Setiloane AJA.

JUDGMENT

PHATSHOANE ADJP

[1] This is an appeal, with leave of this court, against the whole of the judgment and order of the Labour Court (*per* Nieuwoudt AJ) dated 08 March 2019 dismissing the application for condonation of the late filing of the first to the sixteenth appellants' statement of claim and their dismissal claim with no order as to costs.

[2] The second to the sixteenth individual appellants were retrenched on 04 July 2017. There is a dispute of fact on the question whether they were dismissed by Metrofile (Pty) Ltd, the first respondent, or Infovault (Pty) Ltd, the second respondent. It suffices, at this point, to state that the appellants referred their dismissal dispute to the Commission for Conciliation Mediation and Arbitration ("the CCMA") in terms of s 191 of the Labour Relations Act, 66 of 1995 ("the LRA") for conciliation.

- [3] Following an unsuccessful attempt at conciliation of the dispute on 01 August 2017 the dismissal claim ought to have been referred to the Labour Court for adjudication in terms of s 191(11)(a) of the Labour Relations Act, 66 of 1995 (“the LRA”). However, on or about 20 September 2017, the appellants referred their dispute to the CCMA for arbitration.
- [4] On 20 November 2017, at arbitration, a commissioner of the CCMA ruled that the CCMA lacked jurisdiction and that the dispute be referred to the Labour Court for adjudication. The appellants failed to lodge their dispute with the Labour Court within the prescribed timeframe. Ms Pumla Nkosi (“Ms Nkosi”), a candidate attorney in the employ of Mdhluli Pearce and Mdzikwa, the attorneys of record for National Education Health and Allied Workers Union (NEHAWU), the first appellant, and the individual appellants, explained the delay as follows. NEHAWU’s offices were closed for the 2017 December holiday season and reopened on 10 January 2018. Some of the individual appellants went to their respective hometowns throughout South Africa and, therefore, she could not consult with them or obtain instructions. Mr Lindokuhle Mzimela, NEHAWU’s regional organiser, managed to consult with the individual appellants later in January 2018 and gave instructions to the legal representatives on 23 January 2018. On 29 January 2018 counsel was briefed to consider the individual appellants’ dispute; to provide legal advice on the process to follow; and to lodge a dispute with the Labour Court. Counsel requested certain undisclosed information and only consulted with NEHAWU and Ms Nkosi on 28 February 2018. Ms Nkosi had a further consultation with counsel sometime in March 2018 following her endeavour to locate some of the individual appellants who had moved out of the Gauteng Province.
- [5] The appellants referred their retrenchment dispute to the Labour Court on 11 April 2018, approximately 163 days outside the time allowed, through motion proceedings as opposed to delivering a statement of claim. On or about 09 May 2018, Metrofile and Infovault served on the appellants a notice of an irregular step in the proceedings. They contended that rule 6 of the Rules for the conduct of proceedings in the Labour Court provided that the referral of an unfair dismissal dispute, based on operational requirements, in terms of s

191(5)(b) of the LRA, had to be instituted through a statement of claim and not by way of motion proceedings. The appellants were urged to remove the cause of complaint within a period of 10 days.

- [6] Following an exchange of correspondence between the parties the appellants reconsidered their position and withdrew their application on 24 May 2018. They served and filed their statement of claim on 29 May 2018, almost 211 days outside the time allowed, together with the application for condonation. The period of delay is approximately six months calculated from the date the certificate of outcome of conciliation was issued to the date the statement of claim was filed.

The judgment of the Labour Court

- [7] The Labour Court found that the period within which the referral of the dispute ought to have been made to it, 01 August 2017 to 20 November 2017, was not essential in assessing the delay because NEHAWU had incorrectly referred the dispute to arbitration. The court was also of the view that the inactivity over the Christmas season ought not to be subjected to heightened scrutiny as people do take vacation. The court noted that by 10 January 2018, when NEHAWU reopened its offices for business, it must have been clear to it that its statement of claim was out of time and required urgent attention. A period of three months lapsed before the ill-conceived application in terms of Rule 7 was lodged with the Labour Court. The court found that the explanation for this delay was woefully inadequate.
- [8] The Labour Court noted that the appellants had failed to address their prospect of success in their founding papers. On the basis of the trite principle, that in motion proceedings a party stands or falls by its papers, the Labour Court declined an invitation to consider the statement of claim for purposes of assessing the appellants' prospects of success because the statement was not incorporated by reference into the condonation affidavit. The court concluded that the appellants had not shown any prospects of success and that the prejudice that they stood to suffer did not outweigh other factors. As already

alluded to, the court refused to condone the late filing of the appellants' statement of claim and dismissed the claim.

The grounds of appeal

[9] The appellants attack the judgment of the Labour Court on five primary grounds, namely, that it erred in finding: that the explanation for delay for the period commencing 10 January 2018 to 11 April 2018 was woefully inadequate; that there was inactivity on the part of the appellants during the period in question; that the appellants had no prospects of success; and that it was not pertinent to have regard to the statement of claim. The appellants further argued that insofar as the parties had exchanged pleadings, this signified that there were triable issues that the Labour Court completely disregarded.

The discussion

[10] To grant condonation is an exercise of judicial discretion that is only fettered by being judicially explained.¹ The test is whether the court whose decision is challenged on appeal has exercised its discretion judicially. The exercise of the discretion will not be judicial if it is based on incorrect facts or wrong principles of law² or where the court of first instance acted capriciously, or in a biased manner, or committed a misdirection or an irregularity, or exercised its discretion improperly or unfairly.³ If none of these grounds is established, it cannot be said that the exercise of discretion was not judicial. In those circumstances the claim for interference on appeal must fail.

[11] Where time-limits are set, whether statutory or in terms of the rules of court, a court has an inherent discretion to grant condonation where the interests of justice demand it and where the reasons for non-compliance with the time-limits have been explained to the satisfaction of the court.⁴ The following dictum by the Constitutional Court in *Steenkamp & others v Edcon Ltd*⁵ is instructive:

¹ *Steenkamp & others v Edcon Ltd* (2019) 40 ILJ 1731 (CC) at 1741 para 31; *Moodley v Department of National Treasury & others* (2017) 38 ILJ 1098 (LAC) at 1109 para 47-48.

² *Notyawa v Makana Municipality & others* (2020) 41 ILJ 1069 (CC) at para 41

³ *Coates Brothers Ltd v Shanker & others* (2003) 24 ILJ 2284 (LAC) at 2288 para 5.

⁴ *Steenkamp & others v Edcon Ltd* (2019) 40 ILJ 1731 (CC) at 1740 para 26.

⁵ (2019) 40 ILJ 1731 (CC) at 1744 para 41.

[41] In giving effect to this primary object, the LRA imposes strict time-limits within which various applications and referrals must be launched. Non-adherence to these time-limits may be condoned. Both the Labour and the Labour Appeal Courts have incorporated the general principles for condonation referred to above. But they have also infused factors and considerations specific to labour law: **Condonation in the case of disputes over individual dismissals will not readily be granted.** The explanation for non-compliance would have to be compelling, the case for attacking a defect in the proceedings would have to be cogent and the defect would have to be of a kind which would result in a miscarriage of justice if it were allowed to stand. Whether the delay was a result of a deliberate, wilful decision not to comply with a lawful and binding award in terms of the LRA is also an important factor to consider. **Where the explanation for the delay is the internal processes and procedures of trade unions, the Labour Court has taken a stricter view.** (Emphasis added)

- [12] The well-established principles applicable to the consideration of condonation were restated by this court in *Department of Agriculture , Forestry & Fisheries v Baron & others*⁶ as follows:

[41] It is trite that in condonation applications, good or sufficient cause must be shown by the party seeking condonation for a delay. This not only involves giving a full explanation for the delay, but also showing that it has reasonable prospects of success. Generally, a slight delay and good explanation for the delay could compensate for weak prospects of success, and good prospects could make up for a long delay..'

- [13] In terms of s 191(11)(a)(b) of the LRA read with s 191(5)(b)(ii) the referral of a dispute to the Labour Court for adjudication, concerning a dismissal based on the employer's operational requirements, must be made within 90 days after the council or (as the case may be) the commissioner has certified that the dispute remains unresolved. The Labour Court may condone non-observance of that timeframe on good cause shown. The 90-day period clock commenced ticking for the appellants to file their statement of case from the

⁶ (2019) 40 ILJ 2290 (LAC) at 2304 para 41.

date the CCMA certified their dispute unresolved on 01 August 2017. The period expired on 30 October 2017.

[14] The Labour Court, as it were, condoned the delay between 01 August to 20 November 2017 because, as alluded to, the dispute had been referred to arbitration. However, the court could not discern the lodging of the arbitration proceedings by NEHAWU when it should have been acutely aware that where more than one employee had been dismissed due to operational reasons, their dispute had to be adjudicated by the Labour Court. Apart from this, the certificate of outcome of conciliation indicated that the dispute be referred to the Labour Court. This court warned in *Edcon Ltd v Steenkamp & others*⁷ that the explanation in support of condonation, relying on a failed legal strategy to justify the delay, is not acceptable.

[15] There is a complete lack of detail in the explanation of the delay between 29 January 2018, when counsel was briefed, up until the incorrect application was filed on 11 April 2018. The appellants do not explain why it took a month for counsel to finally consult with them on 28 February 2018 when he had already been briefed on 29 January 2018. The founding affidavit does not cast any light on the reasons Ms Nkosi had to consult with counsel again on the unspecified date in March 2018, after her attempt to locate some of the individual appellants. There is a dearth of information on who these appellants were; whether she was able to make contact with them and if she did so, when?

[16] The pursuit to resolve the labour dispute, the filing of which was already inordinately late (by more than five months), was again frustrated by the appellants when they lodged the defective application as opposed to filing a statement of claim in terms of rule 6 of the Rules for the conduct of proceedings in the Labour Court which applies to referrals including those concerning a dismissal for operational requirements.⁸ A further month of legal skirmishes through correspondence ensued until it dawned on the appellants to withdraw

⁷ (2018) 39 ILJ 531 (LAC) at 544 para 45.

⁸ See Rules for the Conduct of Proceedings in the Labour Court, Published under GN 1665 in GG 17495 of 14 October 1996.

the fatally defective application. The Labour Court carefully analysed the appellants' explanation for the delay. Its finding that the explanation for the delay was deplorably inadequate cannot be faulted.

[17] The appellants did not address their prospects of success at a hearing in due course in their founding papers save to state: "*The applicants have good prospects of success procedurally and substantively.*" Metrofile refuted this. In its answering affidavit it averred that the contents of the special pleas contained in its [Metrofile's] statement of response were incorporated into its answering affidavit as if specifically traversed.⁹ There are three special pleas in the statement of response. The first is to the effect that Metrofile was not the appellants' employer, and therefore the jurisdiction of the Labour Court was ousted. The second is that, prior to referring their dispute to the Labour Court, the appellants failed to properly refer their dispute to the CCMA or at all. In its third special plea, Metrofile states that it concluded a settlement agreement with the sixteenth applicant, thus the Labour Court did not have jurisdiction to adjudicate her dispute.

[18] In what had become an established pattern of inadequate attendance to their dispute, the appellants did not file a replying affidavit to address any of the issues set out in Metrofile's answering affidavit. Hence, the three special pleas that Metrofile specifically incorporated by reference into its answering affidavit remained unanswered. Instead, the appellants resorted to some legal stratagem in order to circumvent the fact that their founding papers did not disclose their prospects of success. They contended that their statement of claim ought to be incorporated by reference to their founding affidavit because Metrofile's answering affidavit incorporated its special pleas. They furthermore criticised the Labour Court for its failure to determine the identity of the employer because, in their view, this was dispositive of their case against Metrofile. In any event, it was not necessary for the appellants to show their prospects of success where the identity of their employer had been brought into question, so the argument ran.

⁹ Ad para 42 of the Answering affidavit.

- [19] The appellants rely on *Shell SA Energy (Pty) Ltd v National Bargaining Council for the Chemical Industry & others* (“*Shell SA*”)¹⁰ and *SATAWU and Others v Country Meat Market CC* (“*SATAWU*”)¹¹ as support for their argument that the Labour Court ought to have dealt with the preliminary question regarding the identity of the employer.
- [20] In *Shell SA* the employer challenged the jurisdiction of the Bargaining Council at conciliation on the basis that there was no employer-employee relationship between *Shell SA* and a certain Ali, the employee. The conciliator allowed, *inter alia*, argument and the submission of documents on the identity of the employer but refused *Shell SA*’s application to lead oral evidence on the issue. In the end, the conciliator ruled that Ali was an employee of *Shell SA*. On this aspect, the Labour Court, on review of the conciliator’s ruling, found that the conciliator correctly determined the existence of an employer-employee relationship without recourse to oral evidence. On appeal, one of the questions for determination was whether the Labour Court erred in upholding the conciliator’s refusal to allow the presentation of oral evidence to establish the existence of an employment relationship. The LAC held that the preliminary point which was raised at conciliation proceedings, disputing the existence of an employer-employee relationship, necessitated a decision on the issue before the dispute was conciliated.
- [21] *Shell SA* did not concern an application for condonation where an applicant is required to address his/her prospects of success in its founding papers. The circumstances and the manner in which the preliminary point on the employer-employee relationship was taken and dealt with in *Shell SA* is quite distinguishable from the present. It is illogical that the court would determine a special plea on the identity of the employer without first disposing of the condonation aspect.
- [22] *SATAWU* concerned an opposed application for condonation for the late filing of the respondent’s response to the statement of claim. It does not advance the

¹⁰ (2013) 34 ILJ 1490 (LAC).

¹¹ (JS 71/12) [2014] ZALCJHB 27 (18 February 2014).

appellants' case for their failure to address the prospects of success. At para 19 of *SATAWU and Others* the court held:

'[19]...The Respondent's averments in respect of its prospects of success are not contained in Leach's founding affidavit. **He had however referred the court to the Respondent's response (to prevent unnecessary duplication).** The difficulty with relying on a response as in this case is that what is contained therein, is not in the form of an affidavit, and ultimately the question arises as to how much weight should be attached to those allegations made in that response in determining whether a party has any prospects of success. **It was only in his replying affidavit that Leach attempted to shed some light on these disputes of fact. In my view, special circumstances are applicable in this case for consideration of these averments in Leach's replying affidavit. This is due to the reason that the issue of prospects of success is crucial in the determination of this application, albeit not the main consideration.**" (Emphasis added)

[23] Furthermore, in *SATAWU*, the court had the benefit of a replying affidavit with some supporting documents. In this case, the appellants did not file a replying affidavit. It is trite that the applicant in motion proceedings must make out a proper case in the founding papers. In *Shakot Investments (Pty) Ltd v Town Council of the Borough of Stanger*,¹² the court held:

'In proceedings by way of motion the party seeking relief ought in his founding affidavit to disclose such facts as would, if true, justify the relief sought and which would, at the same time, sufficiently inform the other party of the case he was required to meet.'

[24] Truth be told, the appellants and their legal representatives bungled their case. Their argument went off on a tangent and did not meaningfully, or at all, address their prospects of success. No cogent criticism can be sustained in the Labour Court's determination that the special pleas, including one concerning the identity of the employer, were destined for separate adjudication. The appellants' belated attempt to call in the aid of their statement of claim, to show their reasonable prospects of success, is contrived. They failed to incorporate

¹² 1976 (2) SA 701 (D) at 704F-G.

their statement of case into their founding papers. The Labour Court correctly invoked the time- honoured convention that an applicant must, 'stand or fall' by his/her founding affidavit and resisted the temptation to consider the pleadings in the referral proceedings. Its finding that the appellants did not demonstrate their prospects of success remains unassailable.

[25] The appellants argued both in the Labour Court and in this Court that they stood to suffer prejudice if the late referral is not condoned. It was submitted in their founding affidavit: *"The employees have throughout the years contributed monthly towards their subscription with the view that should a dispute of this nature arise they would receive assistance."* Ms Nkosi furthermore averred that: *"their (the appellants') hope lies with their union and should the application not be a success, they would have been failed dismally by the justice system."* What is clear from the foregoing analysis is that NEHAWU had contributed significantly to the egregious delay. The Labour Court had regard to the question of prejudice and was of the view that it does not outweigh other factors. The finding is beyond reproach as any prejudice the appellants stand to suffer is entirely of their own making.

[26] One of the primary objects of the LRA is to promote the effective resolution of labour disputes¹³ which, by their very nature, require speedy resolution.¹⁴ The granting condonation in the circumstances of this case would have defeated this essential purpose. The appellants failed to show that the Labour Court did not exercise its discretion judicially which would merit this court's interference. It follows that the appeal must fail.

[27] There remains another matter upon which some remarks are called for, that is, the manner in which the record of this appeal was presented to us. Metrofile submitted that only volume 1 of the record that served before the Labour Court is relevant to the appeal and that volume 2 and 3 are not because the Labour Court was not required to consider them in the adjudication of the condonation application.

¹³ Section 1 (d) (iv) of the Labour Relations Act, 66 of 1995.

¹⁴ *Commercial Workers Union of SA v Tao Ying Metal Industries & others* 2009 (2) SA 204 (CC); (2008) 29 ILJ 2461 (CC); [2009] 1 BLLR 1 (CC).

[28] Numerous documents which naturally ought not to form part of the record served before us. This ranges from the full record of the petition for leave to appeal (volume 2) and some of the pleadings in the action proceedings (volume 3). This slipshod manner of presenting the record is to be deprecated in the strongest possible terms. I am of the view that, in accordance with the requirements of law and fairness, NEHAWU, the first appellant, should bear the costs of this appeal. I make the following order.

Order:

1. The appeal is dismissed.
2. The National Education Health and Allied Workers Union (NEHAWU), the first appellant, is to pay the costs of the appeal.

MV Phatshoane ADJP

Coppin JA and Kathree-Setiloane AJA concur in the judgment of Phatshoane ADJP

APPEARANCES:

FOR THE APPELLANTS:

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Instructed by Mdhluli Pearce Mdzikwa and Associates Inc.

FOR THE FIRST RESPONDENT:

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