

IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

CASE NO: JS 540/05

In the matter between

**NATIONAL EDUCATION, HEALTH &
ALLIED WORKERS UNION**

1st Applicant

REBECCA MOLOTSI & 64 OTHERS

2nd to 65th Applicants

and

**VANDEBIJLPARK SOCIETY FOR
THE AGED**

Respondent

JUDGMENT

LAGRANGE, J

- 1] This is an application for condonation of the late filing of a statement of claim. The individual applicants are 50 members of the First applicant, N E H A W U, a trade union,, who claimed they were unfairly retrenched in March 2004 by the respondent, a society running four old age homes ('the society').

The degree of lateness

- 2] the dispute was referred to the CCMA and on 28 January 2005 a certificate of non-resolution was issued. In terms of section... Of the Labour Relations Act 66 of 1995 (' the LRA'). The dispute ought to have been referred to the Labour court by 28 April 2005, that was only filed on 22 July 2005, making the referral 87 days late.

The explanation for the delay

- 3] The deponent to the founding affidavit is the legal coordinator of the first applicant. He explains the principal reason for the lateness of the referral as follows: "*I submit that the reason for the lateness in filing our Statement of case is primarily due to the fact that various bodies within NEHAWU had to give their approval before attorneys could be instructed to prepare papers on our behalf. The reason for the lateness was therefore more to do with the lengthy process that has to take place before approval is given than anything else.*" The deponent then went on to elaborate in more detail about the various internal steps which must be followed before a matter that can be referred to the union's attorneys.
- 4] On 23 February 2005, the regional organiser for the Sedibeng region who had received the certificate referred the matter to the Provincial Secretary of Gauteng province, requesting assistance. At this point, it should be mentioned that the same regional organiser attended the conciliation meeting at the CCMA on 28 January 2005, where the employer representative advised him that all but six of the 50 applicants had agreed to terminate their services by way of voluntary severance packages. The employer representative had proposed that it would be far more expeditious and cheaper to refer the matter to arbitration at the CCMA instead of referring the matter to the Labour court, but this proposal was rejected by the regional organiser.
- 5] It is apparent that the matter was unresolved on 28 January and the founding affidavit in the condonation application does not explain when the certificate of non-resolution was received by the regional organiser. This is an important omission in explaining the sequence of events in the referral of this matter. On the face of it, it seems it was only a month after the conciliation meeting that the matter was referred to the provincial office. According to the deponent, though this was not confirmed in any confirmatory affidavit, it took the provincial office approximately 5 days to make a decision, and on 3 March 2005 the matter was referred to the deponent at NEHAWU's head office. The deponent says he

is solely responsible for the approval of matters for litigation, though he must consult with other office bearers at head office and, in particular, the general secretary before he makes a final decision. In this case he provides no details of any of these consultations or whether they had any impact on the delay. He also complains of being 'generally swamped' with requests from all regions of the union. After making these general claims, he simply states that after he considered the submissions made, he gave authorisation for attorneys to be instructed. This was only done on Friday, 17 June 2005.

- 6] What is immediately apparent from this explanation is that a period of more than three months passed between the referral of the matter to head office and the instruction being issued to attorneys. There is no explanation why the deponent showed no appreciation for the fact that when he received the request from the regional office, he ought to have realised that they were approximately 8 weeks left before the time period for referral expired. Similarly, there is no explanation why, when the deadline for referral was near or had just passed, that the deponent took no steps to try and accelerate the matter. Even when the matter was referred to the union's attorneys, it took a further month simply to file the referral. The partial explanation for this, which again is not confirmed by the union's attorneys, is that it was necessary to hold further consultations with the individual members to confirm all the details and the exact number of members retrenched.
- 7] It is difficult to understand why the need for this detail only became apparent after the matter had been referred to attorneys when this information could have been gathered while all the internal steps within the union were taking place. To identify the members actually involved ought to have been a basic part of the union's preparation of the matter.
- 8] The deponent mentions that the union has over 230,000 members and 72 branches falling under the various provincial offices of the union. The thrust of the explanation is that a large multi-layer organisation cannot easily comply with the time limits in the LRA. However, if one looks at the detail of the explanation the real delay occurred at head office, and possibly at the initial stage before it was referred to the regional office. When the application was received there was more than enough time to make the referral timeously

and the explanation of what occurred during this time is not satisfactory. It is true that, strictly speaking, the delay the court is more concerned with is the period after 28 April 2005, but to appreciate whether there was a justification for being nearly three months late, one must also consider why the matter could not be referred within the initial three month period. The request for assistance from the region lay at the head office for nearly two months before the expiry of the 90 day period and for nearly two months after that before the matter was referred to attorneys. This delay is not properly explained.

- 9] The LRA has been in existence for more than fifteen years, and the time limits governing referrals have not changed in that time. It is reasonable to expect that trade unions ought to be well aware of the need to act timeously in the interests of its members and would adapt their internal procedures to accommodate those time limits, not vice versa. The scale of an organisation cannot serve as a justification for delays. On the contrary, it is reasonable to expect that larger organisations, be they trade unions or businesses ought to be able to see to it that they are organised to deal with disputes of this nature in a systematic matter to ensure that they do not fall foul of the time limits in the LRA. Where handling such disputes is a core function of the organisation, this should go without saying.

The merits of the claim

- 10] The applicant seeks to rely on the merits of the case as set out there as a basis for indicating the prospects of success, though not specifically confirming the contents thereof on oath. Nevertheless, much of the chronology appears to be common cause. In January 2004 the respondent identified the need to outsource services provided by staff because it could not cope with the increased cost of wages and benefits which the union had succeeded in negotiating previously and the anticipated demands it would have to meet in the future. The management of the old age home explained that the only income of the society was the levies paid by residents all of whom were pensioners and it was unable to increase levies to cater for costs of salaries and other operational expenditures. It was anticipated that approximately one third of the staff positions would be affected by the outsourcing of certain services. One of the measures proposed to limit the possible adverse consequences

of the measure, was that any contractor engaged would be asked to employ as many of the retrenched employees as possible as a condition of being awarded the contract.

11] At a meeting on 16 January with the union affirmed its wish to minimise job losses as much as possible and asked to be furnished with financial information. A follow up meeting at which the union was asked to present proposals was arranged for 24 January 2004. The respondent did not supply a full set of financial statements but supplied "Revenue Accounts" dating back to the 2000/2001 financial year through to projections for 2004/2005 financial year the accounts showed a R 106,226 deficit of income over expenditure for the 2002/03 year, a projected R 29,000 deficit for the current financial year and a further deficit of R 93,000 for the following year.. The union was not satisfied with this document and persisted with its demand for a full financial statement, which management said was privileged information and would only be made available to the management team. The union did not invoke any provisions of the LRA to compel disclosure of the document. The union also did not table any proposals at the second meeting.

12] A further meeting was held on 29 January 2004. The regional organiser was unable to attend this and the meeting proceeded without any employee representatives present, and therefore without any consultation taking place. The respondent admits that no union representatives attended the meeting, but was unaware that the regional organiser would not be coming. On phoning the union office the employer claims it was advised that the regional organiser was in fact attending the meeting in question. The union shop stewards also declined to attend a meeting. The respondent claims that the meeting in question did not take any decisions, but debated the issue of providing the financial statements to the applicants, given that these were not even available to all the residents of the old age home. It claims that no final decision to outsource was taken at the meeting but an opinion on it being the best option was expressed.

13] A further meeting was held on 5 February 2004 at which a different union official was present. The union claims that the respondent was not prepared to revisit or consult on any

of the decisions that the union claims it had made. The only agreement reached at this meeting was that the employer would make further information available which the union requested. This was a list of those employees who would be affected by the retrenchment, those whom the respondent proposed to retain, the details of the proposed voluntary severance package and payments due from the Provident fund. The minutes of the meeting, which were never disputed by the union at the time, reveal that discussions were held on an alternative of shorter working hours and a shorter working week and why the society could not adopt that measure. It is also recorded that the number of staff who were likely to be retained was discussed and retrenchment criteria were dealt with. At the end of the meeting it was agreed that the union would meet with employees on 12 February 2004 before the next meeting. The overall impression gained from the available evidence is that the parties were still engaged in consultation over the kind of issues they ought to be dealing with, and no stalemate had been reached.

- 14] The next meeting took place on 13 February 2004, by which state it seems the union had received the documentation it had requested. At this meeting, the society's rationale for the outsourcing was interrogated by the union and the society explained that a contractor would charge less for the services currently rendered by the staff whom they were considering retrenching. At the end of the meeting it was agreed the society would make enquiries with the possible contractors and obtain figures of potential re-employment numbers. It was also agreed that the society would re-consider supplying financial statements to the union and the union would revert to the society on the key posts which the society envisaged retaining for full-time employees. The next consultation meeting was scheduled for 4 March 2004. Apart from revisiting the question of shorter working hours, financial statements were handed to the union representative on the understanding that they would be kept confidential. The society reported that undertakings have been obtained from two contractors to the effect that all of those employees who might be retrenched would be absorbed by them. Discussion then moved on to voluntary severance packages and the society confirmed that even if employees accepted the voluntary severance package they would still qualify for re-employment by the contractors. The voluntary package entailed an additional month's salary for those accepting it, over and above the

statutory severance pay and other payments that would be due to anyone retrenched.

15] It appears that the meeting of on 4 March 2004 did not take place and a letter was sent by the union on 5 March indicating that the union rejected what it characterised as “a decision” taken by management to outsource work, and called on at to reverse all decisions taken because the process had taken place without the union's participation. The society responded to this letter agreeing to ‘an extension’ to 15 March 2004 after which a follow-up meeting would be arranged. It is not entirely clear what the extension refers to, but the only plausible explanation is that the society was allowing further time to the union before another meeting was scheduled. A further letter indicates that a follow up meeting was arranged for 25 March 2004, but according to the society no union representatives arrived for the scheduled meeting on that day and no request had been made to reschedule it. The applicant claims that workers were approached during March and forced to sign voluntary severance agreements, which the respondent denies.

16] On 30 March 2004 the union complained about the alleged threats and called upon the society to withdraw the letters and negotiate in good faith, failing which it would refer a dispute to the CCMA. The society responded to this the following day advising that eight consultation meetings had been held, and all but four of the affected employees had secured employment with various contractors. It further said it believed sufficient consultation had taken place and that it had decided to proceed with the retrenchments. The union alleges that consultation was still in progress in March yet the respondent was in the process of implementing its plans without telling the union. In response to the union’s claim that the consultations had yet to be finalised the society responded that the last meeting on 25 March 2004, which the union did not attend was expected to finalise discussions. It seems that the union had decided that for better or worse, it was unable to persuade the society to change course, and decided at a late stage to escalate issues. This stance is difficult to reconcile with the course the consultations had taken until March during which the parties moved progressively through the issues and had reached a point when the terms of retrenchment and the selection of retrenched had been discussed. Moreover, after the union did get the financial statements, no other concrete alternative

proposals were forthcoming from it thereafter.

17] Having regard to the course of discussions between the parties it appears that the society did engage with the union, did consider alternative proposals which the union proposed and did provide information requested without the union having to compel it to do so.

18] A complaint of the union is that even though all but six of the individual applicants accepted voluntary severance packages, those who did so were pressurised by the society to accept them. The society in turn claimed that none of those who accepted the voluntary severance packages have locus standi to challenge their termination as unfair dismissals because they accepted the packages and accordingly their terminations were by agreement. The society also contends that the referral of the dispute to the CCMA, which was also late, was originally only in respect of the six employees. Indeed, the founding affidavit of the applicants in the CCMA condonation application is ambiguous about whether the dispute concerns six employees or sixty-four.

19] What is apparent is that the proposal for a voluntary severance package was in fact made by the union at one of the consultation meetings on 23 January 2004. By the time the union met with workers on 12 February 2004, it was in a position to report on the list of names of those to be retrenched and those to be retained, the details of the voluntary severance package offered and the anticipated savings the society expected to make if the outsourcing was implemented. At the meeting of 13 February 2004 and 1 March 2004 it is clear that discussions focused primarily on the re-employment of staff in the outsourced functions by contractors and the terms on which this would be done including whether those employees who accepted voluntary severance packages would be eligible for re-employment by the contractors. The question of disclosure of the financial statements was settled in the meeting on 1 March 2004 when the society handed the documents to the union representative. No new proposals were forthcoming from the union on alternatives to retrenchment during these meetings, after these documents were received.

20] In the condonation application before the CCMA, the union describes its prospects of success in that application as being based on insufficient consultation before the services of employees were terminated and that no other alternatives were considered. No mention at all is made of anyone being coerced to accept voluntary severance packages, which might have been expected to have featured prominently if this had indeed been a real grievance.

21] An overview of the available evidence suggests that the fundamental needs of the society to cut costs was never seriously disputed, that the only alternative proposed by the union was considered and the society explained the reasons why shorter working hours would not be a viable alternative. Further, the society both consulted and adopted proactive measures to alleviate the impact of retrenchment and the union had ample opportunities to make representations on all matters affecting the retrenchment. In the circumstances, it seems unlikely that a court would find that the retrenchments were substantively or procedurally unfair. Accordingly, the applicant's prospects of success appear to be weak rather than reasonable.

Prejudice

22] The union submits that the society will not suffer no prejudice support if the matter proceeds, whereas the unprocedural and unilateral implementation of retrenchment which led to the dismissal of the individual applicants outweighs any prejudice that the society may have suffered. It is noticeable that the union makes no reference to the fact that the persons affected by the exercise are unemployed. The society reiterates the details of the retrenchment consultations and that they proceeded without objections from the union. It also points out that the condonation application had only been served in October 2005. Given the measures which were adopted to alleviate the impact of the retrenchment and the fact that the vast bulk of those affected did obtain alternative employment, and considering the prospects of success I did not believe that the prejudice to the individual applicants outweighs the prejudice to the society of having to now defend their actions at that stage.

23] I am mindful of the fact that although the condonation application ought to have been ripe

for a hearing 2006, for reasons which are not apparent, the matter lay dormant until 2010. Based on the contents of the court file, little seems to have happened since the parties were directed to file a pre-trial minute by 15 November 2006, by this court. It does not seem since then that any effort was made by the applicant to have the matter enrolled earlier. However, even if the matter had come before court in 2006 I do not believe that the balance of prejudice would have been materially different.

24] In argument before me, applicant's representative, Ms Maenetje, urged me to follow the approach of this court in the case of ***Gaoshubelwe & others v Pie Man's Pantry (Pty) Ltd (2009) 30 ILJ 347 (LC)***. However, I think the facts contemplated by my brother Molahlehi J in that case, are distinguishable from those before me. In *Gaoshubelwe* the individual applicants had effectively been abandoned by their union. A lack of funds also delayed their ability to take matters forward timeously. It appeared that the applicants who had been dismissed for allegedly participating in an unprotected strike and were still unemployed. Moreover, the court found their prospects of success were good. In this instance, no factual claims were made about the individual applicants having shown an ongoing interest in the matter, but being misled by the union about its progress. As mentioned above, the prospects of success are weak, and they were not unemployed after the retrenchment. Accordingly, I do not think the two case are on a par.

25] In view of the above consideration of the factors laid down in ***Melane v Santam Insurance Co. Ltd 1962 (4) SA 531 (A)***¹, I believe that this is not a case in which condonation is warranted.

26] On the matter of costs, there appears to be no ongoing relationship to consider and the merits of the application were weak. Consequently I believe this is an instance in which there is no reason not to award costs, considering also that the society is not a profit making organisation.

¹ At 532C-F

Order

27] The application for condonation of the late referral of the applicant's statement of case is dismissed.

28] No order is made as to costs.



ROBERT LAGRANGE

JUDGE OF THE LABOUR COURT

Date of Hearing: 20 August 2010

Date of Judgment: 17 February 2011

Appearances

For the Applicants: Ms Maenetje of Thaanyane Attorneys

For the Respondent: H J Van Rensburg of H J Van Rensburg Inc.