

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG**

Case no: JS 1971/10

Reportable

In the matter between:

**HORATIOUS SEATLOLO
INDIVIDUAL APPLICANTS
LISTED IN SCHEDULE 'A'**

First Applicant

Second to Further Applicants

And

**ENTERTAINMENT LOGISTICS SERVICE
(A DIVISION OF GALLO AFRICA LTD)**

Respondent

JUDGMENT

BHOOLA J:

Introduction

[1] This is an opposed application for condonation of the late referral of two disputes involving the dismissal of the applicants to this court.

Background

[2] The applicants are and have at all material times been members of the South

African Commercial, Catering and Allied Workers' Union (SACCAWU), which represented them in three disputes with the respondent as described below.

- (a) The first dispute: on 5 March 2008 the respondent dismissed 28 of the applicants for participation in an overtime ban on 23 and 24 February 2008 whilst they were on final written warnings. SACCAWU referred the dispute to the CCMA on 31 March 2008 and a certificate of outcome was issued on 21 April 2008. The 90-day period for referral of this dispute in terms of section 191 (11) (a) of the Labour Relations Act 66 of 1995 (the Act) expired on 21 July 2008.
- (b) The second dispute: during the period 5 to 27 March 2008, the respondent dismissed 53 of the applicants for having participated in an unprotected strike on 26 February 2008. SACCAWU referred this dispute to the CCMA on 28 April 2008 and a certificate of outcome was issued on 1 July 2008. The 90-day period for referral of this dispute in terms of the Act expired on 1 October 2008.
- (c) The third dispute: on 18 April 2008 the respondent dismissed Mazibu, a SACCAWU shop-steward for participation in the unprotected strike of 26 February. SACCAWU referred a dispute arising from her dismissal to the CCMA on 8 May 2008 and on 2 June 2008 the CCMA issued a certificate of outcome. This dispute was referred to this court in terms of the Act on 2 September 2008.

[3] On 14 October 2008 SACCAWU brought an application for joinder of the applicants in this matter (who are the applicants in the first and second disputes referred to above) with the matter involving Mazibu (the third dispute). At this stage, the referrals to this court of the first and second disputes were three months and two weeks out of time respectively. In its

answering affidavit in the joinder application the respondent alleged that the joinder procedure was incorrect and that SACCAWU should have referred the first and second disputes together with applications for condonation, and then thereafter sought to consolidate all three disputes. This warning was not heeded and SACCAWU persisted with the joinder application. The joinder application was dismissed with costs by Van Niekerk J on 31 August 2010 on the grounds *inter alia* that the joinder application was misconceived. The learned judge held further that condonation was a pre-requisite for joinder:

[12] To the extent that the applicant contends that an application for condonation is not required at this stage and that it ought appropriately to be dealt with after a ruling in this application, this contention overlooks the structure of the dispute resolution process. In effect, the applicant seeks to refer a dispute on behalf of the individual employees [i.e. the applicant's herein – court's note] outside of the prescribed time limit, and thus requires condonation. It is not sufficient, as the applicants submit that the individual employees have never denied any necessity for an application for condonation or that such an application will not be forthcoming. It is incumbent on a party to apply for condonation as soon as possible after becoming aware of the default.

- [4] On 19 October 2010, some six weeks after the dismissal of the joinder application, Vuza Biyana & Associates delivered this application together with a referral of the first and second disputes (“the statement of claim”). It is common cause that the statement of claim is two years and three months late in respect of the first dispute and two years and three weeks late in respect of the second dispute.
- [5] On 9 November 2010, E S Makinta attorneys, the current attorneys of record for the applicants delivered a “supplementary and replying affidavit” in the condonation application.

The legal test

[6] The onus is on the applicants to satisfy the court that condonation should be granted: *Meintjies v H D Combrinck (Edms) Bpk* 1961 (1) SA 262 (A) at 263H-264A; *Saloojee & another N.N.O v Minister of Community Development* 1965 (2) SA 135 (A) at 138E-F; and *Glazer v Glazer* NO 1963 (4) SA 694 (A) at 702H.

[7] The test for determining whether good cause exists for the delay in filing a statement of claim in terms of section 191(11) (b) is now well established. In *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) Holmes J.A at C-E set out the applicable principles as follows:

...the basic principle is that the court has a discretion, to be exercised judicially upon a consideration of all the facts, in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation thereof, the prospects of success and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach, incompatible with a true discretion, save of course that if there are no prospects of success there will be no point in granting condonation. What is needed is an objective conspectus of all the facts. Thus, a slight delay and a good explanation may help to compensate for the prospects of success which are not strong. On the importance of the issue and strong prospects of success may tend to compensate for a long delay. The Respondents interest in finality must not be overlooked...

[8] However it has been held that a *bona fide* defence and good prospects of success are not sufficient in the absence of a reasonable explanation for the default: *Chetty v Law Society Transvaal* 1985 (2) SA 756 (A) at 765. This principle has been interpreted as follows by the Labour Appeal Court in *NUM v Council for Mineral Technology* (1999) 3 BLLR 209 (LAC) at 211 G-H:

There is a further principle which is applied and that is that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without prospects of success, no matter

how good the explanation for the delay, an application for condonation should be refused.

- [9] This approach has been endorsed in a long line of LAC judgments. See in this regard *NUM v Western Holdings Gold Mine* (1994) 15 ILJ 610 (LAC at 613 E; *Zondi & Others v President of Industrial Court & Another* [1997] 8 BLLR 984 (LAC) at 989 E-F; *Mziya v Putco Ltd* [1999] 2 BLLR 103 (LAC) at 107 A-C; *NEHAWU v Nyembezi* [1999] 5 BLLR 463 (LAC) at 456 J-466 A; *Waverely Blankets Ltd v Ndimma & Others, Waverely Blankets v Sithukura & Others* (1999) 20 ILJ 2564 (LAC) at para 11; *Mgobhozi v Naidoo NO & Others* [2006] 3 BLLR 242 (LAC) at para 34 and *Moila v Shai NO & Others* [2007] 5 BLLR 432 (LAC) at para 34-36. However in *NEHAWU obo Mofokeng & Others v Charlotte Theron Children's Home* [2004] 10 BLLR 979 (LAC), the Labour Appeal Court noted that "a more flexible approach" had been adopted in two other judgments (*PPWAWU & others v AF Dreyer & Co (Pty) Ltd* [1997] 9 BLLR 1141 (LAC) at 1145 E and *Toyota Marketing v Schmeizer* [2002] 12 BLLR 1164 (LAC) at para 18).
- [10] It is trite that an application for condonation must be brought as soon as the party becomes aware of the default. This principle has been emphasized by the Supreme Court of Appeal on numerous occasions (see *Saloojee supra* at 138H; *Rennie v Kamby Farms (Pty) Ltd* 1989 (2) SA 124 (A) at 129G; and *Napier v Tsaperas* 1995 (2) SA 665 (A) at 671 B-D). This approach has been endorsed by the Labour Appeal Court which in fact advocates bringing the application for condonation on the same day it is discovered to be necessary. See in this regard *inter alia Allround Tooling (Pty) Ltd v NUMSA and others* [1998] 8 BLLR 847 (LAC) at 849 para 8; *NEHAWU v Nyembezi* [1999] 5 BLLR 463 (LAC) at 464 D-F; and *Librapac CC v Fedcraw and Others* [1999] 6 BLLR 540 (LAC) at 543.
- [11] In order to exercise its discretion whether or not to grant condonation, this court must be appraised of all the facts and circumstances relating to the delay. The applicant for condonation must therefore provide a satisfactory

explanation for each period of delay. See *NUMSA and another v Hillside Aluminium* [2005] 6 BLLR 601 (LC) where Murphy AJ held that an unsatisfactory explanation for any period of delay will normally be fatal to an application, irrespective of the applicant's prospects of success.

Evaluation of pleadings and submissions

- [12] The respondent submits that it is noteworthy that SACCAWU is not a party to this application notwithstanding having represented the applicants up to this point, including having prepared this application. I agree with the respondent that this appears to be an expedient strategy to avoid liability and to enable the applicants to rely on the delays to establish good cause without it having to provide any explanation. The essential submission by the applicants is that their union is to be blamed for the delays and that they should not be visited with punishment for its incorrect legal advice. The respondent submits that in circumstances where there is a manifest failure to provide a reasonable and acceptable explanation for the delay, the applicants cannot escape the consequences by simply blaming their union. In my view it is simply unacceptable that SACCAWU has elected not to be a party to these proceedings and has not even endeavoured to take this Court into its confidence to explain its conduct. Had it done so the outcome of this application might well have been different. Obviously these applicants have civil remedies at their disposal in respect of the manifest and negligent disregard of the union's duty towards them. Nonetheless, it is the merits of the application which must be considered and it is to this that I now turn.
- [13] The applicants submit that although the delay in referring the first and second disputes is lengthy, it is redeemed by the reasonable and satisfactory explanation provided. The explanation in essence is that their union representative labored under the wrong impression that since one of the three disputes which related to the events that led to their dismissals (i.e. the dismissal of Mazibu) had been timeously referred to the Labour Court, the

other disputes could simply be consolidated with it and need not be separately referred. Their counsel did not concede that this was a mistaken view of the law. Instead, Mr Boda asserted that it was “probably” mistaken but that the *bona fides* of the union officials were demonstrated by the fact that the joinder application was actually brought. After the joinder judgment, the attorneys representing the applicants at that point arranged an urgent consultation with them in order to refer the disputes to this court and apply for condonation. However, given the large number of applicants and their location all over the country, the earliest that a meeting could be secured with them was 16 October 2010. The applicants submit that this is an acceptable explanation for the delay, and that the disputes were referred and the condonation application made a month and a half after the joinder judgment, and which is not an unreasonable delay.

- [14] The applicants submit further that the balance of convenience favours the granting of condonation. They at all times demonstrated an intention to challenge their dismissals, which the respondent was well aware of, and the respondent will not be prejudiced by consolidation of the claims as it will have an opportunity to defend all three disputes on the merits.
- [15] In regard to the prospects of success, the applicants submit that it is common cause that there are *prima facie* prospects of success on the merits. They deny participation in any overtime ban and allege that certain of the applicants were not requested to work overtime and others advanced personal reasons for their inability to work overtime. Moreover, the alleged overtime ban lasted only about two hours, and they immediately complied with the ultimatum issued by the respondent to return to work. They deny that they embarked on an unprotected strike and submit that their dismissals were in the circumstances unfair.
- [16] Mr Boda submitted on behalf of the applicants that they seek to vindicate a constitutional right and relied on *Brummer v Gorfil Brother Investments (Pty)*

Ltd & others 2000 (5) BCLR 465 (CC) as authority for the proposition that the prospects of success are not decisive but are simply one factor to be taken into account. This is the approach adopted by the Labour Appeal Court in *NEHAWU obo Mofokeng & others v Charlotte Theron Children's Home* [2004] 10 BLLR 979 (LAC). The question, he submitted, was whether the long delay tips the scales of justice so much that they should not be permitted to proceed. In this regard two considerations are relevant. The first being the oversight on the part of the union – there is no definitive authority for the argument that the union's failure to refer the first and second disputes was an error, although it is conceded that it was probably an error. The facts are similar to *Motloi v SA Local Government Association* [2006] 3 BLLR 264 (LAC) in that the employees erroneously referred a dispute to arbitration instead of to the Labour Court. The Labour Appeal Court, in condoning a delay of four years, had regard to whether the route they adopted was unreasonable. In the present instance although the union was advised by the respondent that it had adopted the incorrect process and it remained adamant, there is no clear authority to support the proposition that its conduct was negligent or reckless. It is therefore in the interests of justice that condonation should be granted. The second consideration is the prejudice caused to the employer by having the merits aired after such a lengthy delay. In this regard Mr Boda submitted, relying on *Republican Press and CEPPAWU* 2007 11 BLLR 1001 (SCA), that the delay is only relevant to relief and can be taken into account by way of an appropriate order (for instance, not ordering back pay should the applicants succeed in obtaining reinstatement). The difficulty with this approach, as submitted by Mr Dodson, is that this submission is not accompanied by any formal waiver.

- [17] It is clear from the authorities cited above that an application for condonation must be brought as soon as a party becomes aware of the need for it. In the present matter, the applicants chose to ignore the advice of the respondent that they were obliged to refer the disputes and apply for condonation. In this regard I agree with Mr Dodson that they did so at their own peril and must face the consequences. Mr Dodson cited as authority in this regard *NUMSA & others v Duro Pressing (Pty) Ltd* [2002] 11 BLLR 1087 (LC) where Ntsebeza

AJ refused condonation in circumstances where the claim was 107 days late and the application for condonation was brought seven and a half months after the respondent had raised the delay and failure to apply for condonation as a point *in limine*. He further referred to the Labour Appeal Court decision in *SABC Ltd v CCMA & others* [2010] 3 BLLR 251 (LAC) where Waglay ADJP (as he then was) held that a delay of two and a half or three and a half months was substantial (in the context of the prescribed six weeks for instituting a review), and the explanation for the delay was vague and unsatisfactory where the appellant failed to explain its inactivity during the entire period. Moreover the appellant failed to seek condonation at the earliest opportunity, and took 39 days to apply for condonation.

- [18] Mr Dodson submitted that in circumstances where the applicants were at the material times represented by an experienced trade union which had access to attorneys and counsel, as well as shop-stewards who are required by section 14(4) of the Act to have knowledge of labour law, the considerations applicable to unsophisticated litigants are not relevant. It is also inexplicable that a group such as the applicants who have shown themselves to be quick to defend their interests suddenly become passive victims when they engage with their union about progress in their matters. They advance no explanation why, after being told by their union that as soon as the second dispute had been conciliated it would refer all three disputes to the Labour Court, they continue to wait even after the certificate of outcome in respect of the second dispute was issued. This is inexplicable in the context where there must have been considerable anticipation that their dispute would be referred to the Labour Court. In any event the facts were entirely different – involving an overtime ban on the one hand and an unprotected strike on the other – and they were aware of this. There is a complete lack of explanation as to why the applicants did nothing to pursue the matter and similarly why the union failed to provide any explanation why they did not honour the promise to refer the second dispute by 1 July 2008. Thereafter on 2 September 2008, some six or seven months after their dismissals, the applicants come to learn that SACCWU had only referred Mazibu's case to this Court, for reasons the

deponent to the founding affidavit says are unknown to the applicants. There is no explanation why the previous commitment to refer the second dispute was not honoured and indeed why this was not questioned by the applicants. SACCAWU assisted the applicants in drafting the application for condonation and was a party to the joinder application and it would appear to be disingenuous for them to deny any knowledge of why only Mazibu's dispute was referred. In any event Mazibu's referral was also late (albeit by one day, being filed on 2 September 2008) and reflects a pattern of disregard of the Rules of this court.

- [19] Thereafter, between 2 September and about 13 October 2008, a period of about one and a half months, things lay dormant. The deponent to the founding affidavit did not question the lack of progress; the affidavits in the joinder application were signed on or before 30 September but the application was only brought on 14 October, two weeks after being signed. There is no explanation for this delay nor is there any explanation why the 90-day period in respect of the second dispute (which expired on 30 September) was not complied with.
- [20] The delay of five months from 14 October 2008 to March 2009 is not explained. The applicants allege that they approached SACCAWU to enquire about progress and Motane (a para-legal) advised them that SACCAWU was waiting for the set-down of the joinder application and would revert to them after three months. They provide no explanation why they waited for about six months before approaching SACCAWU and why they then stopped making enquiries. Moreover, no reason is advanced reason why SACCAWU could not have sought to set down the joinder application in this period.
- [21] In September 2009, some six months later, the applicants learned that Motane has resigned and another official, Boboyi, is assigned to their matter. There is no explanation provided for why they did not endeavour to ascertain progress earlier, or why when they did not hear from Motane after the promised three months they failed to take steps to ascertain the status of their matters. SACCAWU furthermore elects not to explain why it persisted with the

joinder application, waiting two years till the matter is set down and then dismissed, despite the clear warning in the answering affidavit that they were pursuing the wrong cause of action. SACCAWU simply does not reply to the allegation that they were advised in about three places in the answering affidavit in the joinder application that the correct procedure was to refer the disputes and apply for condonation for the late referrals.

[22] In September 2009, Boboyi advised that SACCAWU has instructed Vuza Biyana and associates as their attorneys in the matter. There then follows a period of continued and unexplained delays from about 30 September 2009 until mid-February 2010 during which the applicants are advised by the attorneys that the joinder application is still pending (which advice they accept even though it had been pending for a year already); and when advice from Counsel is sought (and this take about four months); and heads are drafted in the obviously misconceived joinder application. SACCAWU is party to these delays but by virtue of its absence in the condonation application does not provide any, let alone a satisfactory explanation. Despite a Directive issued by the Judge President of this Court on 12 February 2010, heads of argument are only filed by SACCAWU on 12 May 2010 after a second Directive placing them on terms is issued on 4 May 2010. Again no explanation is forthcoming for this conduct, which by this stage borders on contempt for the Rules of this Court.

[23] After the joinder judgment on 31 August 2010 the applicants held a meeting at the SACCAWU offices a month and a half later (on 16 October 2010) at which they were addressed by Boboyi. The explanation provided for the delay in convening this urgent meeting is that there were difficulties in contacting all the applicants dispersed throughout the country. The respondent submits that this is in any event a nonsensical explanation in that a mass meeting is not required for SACCAWU (which at that stage was still the applicants' representative) to decide how to proceed given that it had a mandate to deal with the dispute and the deponent was available; and moreover, it was strange that the applicants had no means of communicating among

themselves. Boboyi advised that an application for condonation had to be drafted immediately and he proceeded to draft the founding affidavit in this application on the understanding that it would be settled by the attorney, Vuza Biyana. The application was brought six weeks later, which is in itself inexplicable given that it was already two years since they had been advised that a condonation application was necessary. In explaining this delay, the applicants rely on their lack of knowledge of the law and procedures of this Court, which is in itself disingenuous given that they were at all times represented by SACCAWU in bringing the condonation application, and that SACCAWU had instructed attorneys and counsel. They cannot therefore rely on their ignorance of the law. The persistence with the joinder application is in the end explained as Motane's fault but no attempt is made to explain why SACCAWU persisted with this after Motane's departure in April 2009.

[24] In the circumstances, the delay is egregious and the explanation for it would have to be compelling. Whether the prospects of success are considered to be irrelevant in the absence of a reasonable or acceptable explanation for the delay, or whether the prospects are relevant but are outweighed by the lack of a satisfactory explanation and the egregious delays, the consequences remain the same. If the prospects are taken into account, the correct enquiry is, as advanced by the respondent in its written heads, whether the applicants would succeed in the main action if the facts pleaded by them in their condonation application were established at trial (see *Mould v Roopa NO & Others* [2003] 1 BLLR 38 (LC) at para 34). On this approach, the applicants may have *prima facie* prospects of success. However, they fall well short of demonstrating that their prospects of success are so good as to compensate for such egregious and unexplained delays. On the respondent's version the first dispute relates to 28 applicants engaging in an unprotected overtime ban while on a final written warning while the 53 applicants dismissed in the second dispute engaged in an unprotected strike whilst on a final written warning, and dismissal was warranted in both instances.

[25] I am cognisant of Mr Boda's plea that the doors of justice should remain open to litigants who are laypersons and reliant solely on their union and who

genuinely believed they were in safe hands. However, there are at the same time limits beyond which the doors of justice cannot but be closed – in these circumstances where they themselves are to blame for not holding their union accountable and where the Act is premised on expedition and the employer is likely to be prejudiced by permitting the matter to proceed on the merits. The applicants are in any event not entirely bereft of a remedy in that civil proceedings in delict may still be available to them. I disagree with Mr Boda that it is not clear that the joinder application was obviously misconceived – in my view it is manifestly clear and must have been so to the union or at least its legal representatives. In any event even if it were not, they sought to pursue the remedy despite due warning which in my view is nothing short of reckless. In any event as Mr Dodson submitted, *Motloi* (supra) is not in point – the respondent had contributed to the delay and the applicant had clean hands. Here, on the contrary, all the applicants are equally blameworthy. Likewise *Gorvil* (supra) lastly is not a Labour Court matter and is impervious to the interests of expediency which is a core objective of the Act.

- [26] The applicants have failed to advance a compelling explanation for the egregious delays of more than two years. There are lengthy periods of delay and sheer inactivity that are unexplained involving the applicants themselves; there is no explanation from SACCAWU of the persistence with the flawed joinder application and consequent delay of two years; there is no explanation for the delays in bringing the condonation application. If SACCAWU was a party its failure to explain the second and third aspects would result in the application being dismissed. However it is not a party to this application. The respondent submits that the result should be no different in that the applicants have in all probability feigned a breakdown in the relationship with SACCAWU by ensuring that it is not a party. However they have not terminated their mandate to SACCAWU and are not in a situation where they cannot expect co-operation or where they are not privy to the facts and circumstances that gave rise to the application. Instead, SACCAWU in the form of its national legal unit co-ordinator Boboyi drafted the founding affidavit in this application; instructed attorneys to settle and file it and is still advising the applicants. In

these circumstances, the respondent submits, the applicants cannot benefit from the absence of a satisfactory explanation on the main issues and the application therefore stands to be dismissed. This is a prime example of where they cannot escape the negligence of their representatives. The respondent submits that the applicants are in an even more dire situation than that of a party who is relying on the negligence of his attorneys and where it was made to bear the consequences of his attorney's negligence (as in *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA)). Indeed a trade union is not an independent legal representative acting as an agent to the detriment of a client. It is a collective embodiment of its members and is akin to a *curator at litem* in civil proceedings – in other words, it is “the institutional embodiment of the several members involved in the dispute”: *Manyale & Others v Maizecor (Pty) Ltd & another* [2002] 10 BLLR 972 (LC) at para 13. The trade union is its members and thus the applicants cannot escape the consequences of their decision to be members of SACCAWU and act collectively under its auspices: See *inter alia Mhlongo & Others v FAWU & Another* [2007] 2 BLLR 141 (LC) at paras 21-22 .

- [27] It is trite that condonation should only be granted where the legal requirements have been met and is not a default option. It remains an indulgence granted by a court exercising its discretion whilst being cognisant of the criticism emanating from the Constitutional Court and the SCA and bearing in mind the primary objective of the expeditious resolution of disputes articulated in the Act. On the facts and law as set out above this is not an instance where condonation can be granted.

Order

- [28] In the premises, I make the following order:

The application for condonation is dismissed.

In the interests of law and fairness there is no order as to costs.

Bhoola J

Judge of the Labour Court of South Africa

Date of hearing: 19 April 2011

Date of judgment: 5 May 2011

Appearance:

For the Applicants: Adv F A Boda instructed by E S Makinta Attorneys

For the Third Respondent: Adv A Dodson instructed by Bowman Gilfillan