

**LABOUR COURT OF SOUTH AFRICA
(HELD AT BRAAMFONTEIN)**

Case: JS 881/09

In the matter between:

**TRANSPORT AND ALLIED WORKERS UNION
OF SOUTH AFRICA**

Applicant

obo GUSTAV MATJILA AND 26 OTHERS

and

NORTHWEST PARKS AND TOURISM BOARD

First Respondent

REASONS FOR JUDGMENT

LAGRANGE, J:

Introduction

^{1]} Judgment in this matter was handed down on 19 May 2011. My reasons for the judgment appear below. The judgment read as follows:

“Having considered the matter, the following order is made:

- i. The applicants’ late referral of their statement of case is condoned.
- ii. The applicants’ attorney of record is ordered to pay the costs of the respondent’s application to compel the filing of the applicants’ heads of argument.

iii.No order of costs is made in respect of the condonation application.

iv.The parties are directed to hold a pre-trial conference within 20 days of this order and to file a pre-trial minute by 30 June 2011.

v.In the event a pre-trial minute is not concluded by 30 June 2011, the registrar must set the matter down for a pre-trial hearing before a judge.”

2] This is an application for condonation of the late filing of a statement of case. The 27 individual applicants, whom I am advised by their current legal representative, Mr Modisakeng, are no longer represented by their union, were dismissed on 14 December 2008.

3] The applicants were dismissed for: allegedly participating knowingly in an illegal strike from 29 November to 1 December 2008; for failing to heed advice prior to the strike not to embark on it, and for not complying with an ultimatum on 29 November to return to work. A further reason for their dismissal was the alleged intimidation of non-striking employees.

The condonation application

The length of delay in filing the statement of claim

4] The union referred the matter to the CCMA and a certificate was issued on 18 February 2009 confirming that the dispute over the dismissals could not be

resolved. The matter has been referred to the CCMA for arbitration, but on 20 May 2009 a jurisdictional ruling was handed down to the effect that the CCMA had no jurisdiction over the matter. If the matter had been referred to the court after the certificate of the outcome had been issued instead of proceeding in error to arbitration by the CCMA, it should have reached court by 19 May 2009.

- 5] However the statement of case was only served on the company on 2 October 2009, some 137 days late. It must be said that there do not seem to have been any delays on the union's part in processing the dispute through the CCMA channels. However, even if it is accepted that the union, in good faith, first referred the dispute for arbitration at the CCMA, it was only some four months later that the referral was made to court. It is this delay which requires closer scrutiny and explanation.

Explanation for the delay

- 6] No proper explanation is provided for why the matter was referred to arbitration in the first place. In terms of sub-sections 191 (5)(b)(i) and (ii) Of the Labour Relations Act ("LRA"), a dismissal for participation in a protected and unprotected strike respectively is adjudicated by the labour court. Nevertheless, it cannot be said that the union took no steps to pursue the matter prior to the adverse jurisdictional ruling in the CCMA. Moreover, it appears to have taken steps timeously up to that point, albeit they were in the wrong direction.

7] The difficulties arise in relation to the further delay in referring the matter to court.

To understand the union's explanation, as it appears from the founding affidavits deposed to by a union official in November 2008, it is necessary to outline the history of litigation between the parties in the labour court which started when the employer obtained an interdict interdicting the applicants from participating in the continuation of an unprotected strike and from intimidating and otherwise interfering with persons connected with the Parks' business.

8] Events leading to the strike which commenced on 29 November 2008 began with a declaration of the dispute of the union about an alleged unilateral change to terms and conditions of employment between the individual applicants and the board. On 7 August 2008 a certificate of the outcome was issued by the CCMA. As this dispute could not be resolved, a strike commenced on 20 September 2008, but the dispute giving rise to the strike was eventually settled by the parties. A written settlement agreement was concluded on 25 September 2008.

9] On 27 November 2008 the union again informed the employer that it intended commencing strike action, two days later, on 29 November. Apart from any other difficulties with the strike notice the employer alleged that insufficient notice of the strike was given because it was entitled to 7 days notice of the strike in terms of section 64(1)(d) of the LRA. The strike notice was also silent as to what time the strike would start on 29 November and did not specify the demands put to the

applicant. Moreover, there was no other dispute referred to conciliation in the run-up to the strike other than the one which had already been settled.

^{10]} An interim interdict was issued on 1 December 2010 prohibiting the union and its members from participating in unprotected strike action. At the time the union did not oppose the application. When did so much later, by filing an opposing affidavit on 30 April 2009, it claimed that the strike had merely been suspended pending the applicant's compliance with the earlier settlement agreement. The union also alleges that individual applicants had returned to work on 2 December 2008 and on arrival at their workstations were told to come back to work the following day. On returning to work on 3 December 2008 they were issued with suspension letters and notices to attend enquiries. They further allege that the applicant had dealt with returning workers selectively by only subjecting some of the strikers to disciplinary enquiries and not others.

^{11]} The return day for confirming or discharging the interim order was 26 February 2009. The return day came and went without the interim order being contested and without the rule being formally discharged. By that stage the dismissal dispute arising from the strike had already been referred to the CCMA and by the time the return date fell due it had already been unsuccessfully conciliated. On 20 May 2009 a jurisdictional ruling was issued in the CCMA to the effect that it did not have authority to arbitrate the dispute. Prior to this ruling, the applicants' union had filed its belated opposing affidavit in the strike interdict proceedings.

12] The employer's response to the union's late attempt to revive the interdict proceedings was to serve a formal notice of withdrawal of the interdict application on 9 June 2009. Despite this formal notice of withdrawal, the matter was somehow set down for a hearing on 1 September 2009 when the court discharged the rule with costs. According to the employer's attorney's uncontested account, the applicants' erstwhile attorneys were in attendance at court on that day and must have failed to notify the court that the matter had been withdrawn.

13] Following the discharge of the interdict, the applicants finally filed a statement of claim with the court five weeks later on 7 October 2009. The reason given for the delay in filing the statement of claim is twofold: the union believed it was essential to establish the legality of the strike and therefore it was important to quash the interdict which it only did on 1 September 2009, and because of its limited financial resources it felt it should not proceed with the labour court referral until the legality of the strike had been resolved.

14] There are some difficulties with the explanation offered. The first is that the applicants did refer the dismissal dispute to the CCMA without bothering to determine whether or not the strike was protected. The implication of this is that they did not find it necessary to finalise the protected status of the strike before doing so, whereas they now rely on this issue to explain the delay in referring the

matter to court. Secondly, the determination of the legality of the strike would not have affected the labour court's jurisdiction to determine the fairness of the dismissals because it would have jurisdiction to determine the fairness of the dismissals, irrespective of the legal status of the strike, in terms of subsections 191(5)(b)(i) or (ii) of the LRA.

15] Nevertheless, I accept that a determination of the legality of the strike might have assisted the applicants in drafting the statement of case, thereby avoiding an unwieldy pleading in the alternative. However, the discharge of the interim order simply meant that the court was not willing to confirm the provisional order. It did not amount to a finding on the legal status of the strike. Consequently, merely discharging the rule could not have assisted the union greatly, except in the sense that the provisional unprotected status of the strike was never confirmed in the form of a final determination. Had the applicant's erstwhile attorneys not obtained the discharge of the rule, apparently improperly, the order would in any event have lapsed following the withdrawal once the provisional order had expired.¹

16] The union's former legal representatives' approach may be criticised in this

¹ See ***MV Snow Delta Serva Ship Ltd v Discount Tonnage Ltd* 2000(4) SA 746 (SCA)**. In the context of dealing with the effect of an appeal against the discharge of an interim order, the SCA held at 752, Para [6]: "...Where an interim order is not confirmed, irrespective of the wording used, the application is effectively dismissed and there is likewise nothing that can be suspended. An interim order has no independent existence but is conditional upon confirmation by the same Court (albeit not the same Judge) in the same proceedings after having heard the other side (*Chrome Circuit Audiotronics (Pty) Ltd v Recoton European Holdings Inc and Another* 2000 (2) SA 188 (W) at 190B - C). Any other conclusion gives rise to an unacceptable anomaly: If an applicant applies for an interim order with notice and the application is dismissed, he has no order pending the appeal; on the other hand, the applicant who applies without notice and obtains an *ex parte* order coupled with a rule *nisi* and whose application is eventually dismissed, has an order pending the appeal." (emphasis added)

regard as ill-informed and their action in allowing proceedings on 1 September 2009 to continue, despite knowing that the application had been withdrawn, was reprehensible.

17] However, even if the belated opposition of the union to the interdict had been misguided, it is difficult to believe that this course of action was deliberately contrived in order to try and justify a belated referral of the statement of case. The effort required to file the opposing affidavit in the interdict application could not have been any less than the effort it would have taken to file a statement of claim at that stage. In the circumstances, I am inclined to believe that it is not implausible that the applicant union or their legal representatives, or both, actually believed that it was necessary to obtain a final ruling on the interdict before referring the unfair dismissal dispute to the labour court. This is borne out by the pursuit of this relief, albeit apparently in an underhand manner, even when the matter had been withdrawn.

18] As mentioned above, I am aware that the referral to arbitration was made without this matter been determined, but I am also mindful of the fact that the applicants did not need to incur the cost of drafting pleadings before referring the matter to arbitration at the CCMA.

19] Consequently, I believe that the explanation though weak cannot be dismissed as simply implausible. Although the conduct of the applicants representatives in

obtaining the discharge of the rule of 1 September 2009 must be condemned by the court in the strongest terms, that does not detract from the fact that it appears the applicants genuinely, if misguidedly, believed they should obtain such relief before advancing further with the merits in the labour court. This goes to the question of whether there is a reasonable explanation for the delay.

Merits

20] I have set out to have some of the factors which the parties rely on to support their respective claims of the merits of the fairness of the dismissals. On the evidence before me it still appears that there are a number of factual and legal issues in contention. The contentious issues are not trivial. Firstly, there remains a question of the ultimate determination of the protected nature of the strike. In particular, the implications of the provision in the previous settlement agreement in which the union agreed to suspend the strike does raise the question whether or not the strike was genuinely a continuation of the previous one. Should it turn out that the strike was protected, that would change the character of the dispute and which factual issues would have to be canvassed. There is at least a prospect, which I cannot say is unreasonable, that the applicants might succeed in establishing the lawful character of the strike.

21] On the other hand, if the strike's unprotected status is confirmed there are at least two issues which might affect the fairness of the dismissals. Allegations

made in the opposing affidavits are that the interim order was only served on the applicants at 15:00 hours on 1 December 2008 and that they returned to work the following day but were not allowed to return to work. There is also the claim that only some of the strikers were subjected to disciplinary enquiries and were dismissed, yet others were permitted to return to work without suffering any disciplinary sanction. It is difficult to reconcile this with the employer's version that strikers refused to attend disciplinary enquiries.

22] Although workers were apparently warned before the strike started that it would be unprotected, it seems possible only one ultimatum was issued to them during the strike before dismissal proceedings were initiated, and that there might have been a collective return to work in an attempt to comply with the interdict. Moreover, the employees might yet succeed if differential disciplinary treatment was meted out to them and cannot be justified.

23] Unlike in the case of ***Melane v Santam Insurance Co Ltd 1962 (4) SA 531 (A)***, which dealt with condonation for the late filing of an appeal, the court does not have the benefit of a judgment on the fairness of the dismissals against which to evaluate the prospects of success. Consequently, I believe the applicants have demonstrated a sufficient basis for concluding that their prospects of success are not unreasonable.

Prejudice

24] I appreciate that dealing with the dispute after so long with a prospect of possible reinstatement is significant for the employer. However, even if the applicants are ultimately successful, a court considering any relief is entitled to have regards to delays in prosecuting the claim and must consider the factors set out in section 193(2) in determining what relief should be granted,² and I believe these provide adequate protection against such prejudice it faces in this respect. In so far as witnesses' memories' may be less reliable there is no reason to believe this would not affect both parties equally. Against the prejudice facing the employer there is the prejudice the applicants face in not ever having the fairness of their terminations adjudicated on by an independent forum.

Conclusion

25] In the circumstances, on an overall assessment of the various factors mentioned in *Melane's* case, I believe that condonation of the late filing of the applicants' statement of case should be granted in this instance.

Ancillary matters

26] The employer was compelled to bring an application to force the applicants to submit their heads of argument, after the applicants had not complied with the

² See for example *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2008) 29 ILJ 2507 (CC) at 2526,[43], and *National Union of Metalworkers of SA & others v Edelweiss Glass & Aluminium (Pty) Ltd* (2010) 31 ILJ 139 (LC) at 158-160, paras [80] – [89].

court's directive in this regard. I see no reason why the employer should bear the costs of that step.

27] This matter has taken long enough to get to this stage and in order to try and minimise further delays, some directions are issued as part of the order.



R LAGRANGE, J

JUDGE OF THE LABOUR COURT

Date of hearing: 13 May 2011

Date of judgment: 19 May 2011

**For the applicants: G S Modisakeng of Rocky Modisakeng Attorneys and
Administrators of Estates.**

For the respondent: Ruth Edmonds Attorneys