

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: J1376/09

In the matter between:

BMEAWU

First Applicant

JOHN PETRUS SITHOLE AND 16 OTHERS

Second to further Applicants

and

BOSUN BRICK (PTY) LTD t/a
SMART STONE PRETORIA

Respondent

JUDGMENT

FRANCIS J

Introduction

1. This is an application for condonation for the late filing of the applicants' statement of claim. The application was opposed by the respondent.

The background facts

2. The applicants were employed by the respondent. Their services were terminated by the respondent for its operational requirements on 1 July 2008. They were at the time of their dismissals, members of the National Construction, Building and Allied Workers Union (NACBAWU). On or about 15 July 2008 NACBAWU on behalf of the applicants referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (the CCMA). A conciliation meeting took place on 11 August 2008 and a certificate of outcome was issued on 11 August 2008.

3. On or about 30 August 2008 a second dispute relating to the same dismissal was referred to the CCMA by the National Union of Democratic employees of South Africa (NUDESA) on behalf of the applicants. A second conciliation meeting took place on 19 March 2009 and a second certificate was issued on the same day indicating that the dispute remained unresolved.
4. The Building, Motor, Engineering and Allied workers Union (BMEAWU) on behalf of the applicants served and filed a statement of claim on or about 7 July 2009. The respondent filed a statement of response on 20 July 2009 and raised a point *in limine*. The respondent contended that the applicants referral should have been served on or about 10 November 2008 from the first referral and was therefore eight months out of time. It was further contended that should the second certificate be taken into account, the 90-day period expired on 17 June 2009 and the referral was made twenty days late. It stated that a proper condonation application should be made.

The condonation application

5. The applicants filed the following application for condonation:

"I, the Undersigned,

Oupa Mtshweni

Do hereby make oath and say:

1.

I am adult male official of Building, Motor, Engineering and Allied Workers Union

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(“BMEAWU”).

2.

The facts contained herein falls within my personal knowledge unless the contrary is stated or appears from the context and are to the best of my knowledge both true and correct.

3.

DEGREE OF LATENESS

The Application is 20 days late. It is submitted that the period of delay is not excessive.

4.

EXPLANATION FOR THE DELAY

4.1

The Second Applicants in this matter were previously represented by the National Union of Democratic Employees of South Africa (“NUDESA”) at the conciliation stage.

4.2

The General Secretary of NUDESA, Johan Madisha had in late 2009 approached our office to inform us that NUDESA was de-registered and that they needed us to take over their existing membership, staff and pending cases at different tribunals. This process took some time before we would agree and efforts to audit and transfer membership, staff and cases made the process longer.

4.3

BMEAWU also had to consider which cases would need legal representation and

costs implications. Whilst we were able to find legal representation in other matters, were unable to get one in this matter due to high costs implications. We then had to prepare and file this matter and this took time as Consultations with NACBAWU had to be conducted I on order to appraise ourselves with the matter.

5.

PROSPECTS OF SUCCESS

The Second Applicants have good prospects because their dismissal is substantively and procedurally unfair. In this regard it is respectfully submitted that the paragraph 4 to 5 of the Statement of Case filed with this Honourable Court should be read as if specifically incorporated herein. The Respondent was not bona fide and treated the consultation process as a mere formality and made little or no attempt to seek consensus with the other consulting party.

6.

PREJUDICE TO THE PARTIES

I submit that the Second Applicants will suffer great prejudice if condonation is not granted as it will deny them the opportunity to have this matter scrutinized by the Honourable Court. The Second Applicants had already been prejudiced by the process of replacing representatives for reasons beyond their control.

In the circumstances, I pray that an order condoning the late referral of this application be granted.”

7. The condonation application was opposed by the respondent. The respondent in its answering affidavit pleaded that the applicants were dismissed on 1 July 2008 and that

a dispute regarding the fairness of such dismissal was referred to the CCMA by NACBAWU on their behalf on 15 July 2008. A certificate of outcome was issued by the CCMA on 11 August 2008. For unknown reasons a second dispute was referred by NUDESA to the CCMA on 30 August 2008. The second certificate of outcome was issued on 19 March 2009. The statement of claim was served on 7 July 2009. The *dies* started running from the date of first certificate which was eight months late.

Should it start running from second certificate it was twenty days late. It was pointed out that at the first conciliation the applicants were represented by NACBAWU and they had failed to state what steps it took subsequent to the conciliation. It was stated that the applicants were now being represented by the third trade union. It was further stated that the deponent in the condonation application was not involved in the consultations and could not dispute that the respondent had followed an exhaustive consultation process.

Analysis of the facts and arguments raised

8. The leading case dealing with condonation application is *Melane v Santam Insurance Co Ltd* 1962(4) AD where the following was said at page 532 paragraphs C to D:

“In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, 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 decision, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked. I would add that discursiveness should be discouraged in canvassing the prospects of success in the affidavits. I think that all the foregoing clearly emerge from decisions of this Court, and therefore I need not add to the evergrowing burden of annotations by citing the cases".

9. The applicants had to deal with the following facts in its application for condonation namely:
 - 9.1 The degree of lateness;
 - 9.2 The explanation for the lateness;
 - 9.3 Prospects of success; and
 - 9.4 The importance of the case.
10. The first issue that arises in this matter is how late the application is. It is common cause that the applicants were at the time of their dismissals members of NACBAWU. It appears from the documents filed by the respondent that it had embarked on a retrenchment exercise and invited NACBAWU to take part in the consultation

process. The applicants' services were terminated on 1 July 2008. NACBAWU on behalf of the applicants had on 15 July 2008 referred an unfair dismissal dispute to the CCMA. In the referral to the CCMA it was contended that the dispute arose on 1 July 2008. The dispute was summarised as a "dispute or alleged unfair dismissal (based on operational requirements) relating to an alleged discriminative selection criteria". It contained a list of its members as at 1 July 2008 which included all the applicants who are listed in the list contained in the statement of claim. The dispute was conciliated on 11 August 2008 and a statement of outcome was issued on the same day.

11. The applicants stated in the condonation application that the statement of claim was filed 20 days late. They have stated in paragraph 4.1 of the founding affidavit that they were previously represented by NUDESA at the conciliation stage. It is common cause that the second conciliation meeting took place on 19 March 2009. The applicants' contention that the statement of claim was filed 20 days late cannot be correct. The respondent had raised a point *in limine* in its statement of response. In its answering affidavit it referred to the two disputes referred for conciliation by both NACBAWU and NUDESA and the two certificates that were issued. The applicants should have dealt with the two certificates in its replying affidavit but chose not to file a replying affidavit.
12. None of the applicants who were members of NACBAWU at the time of their dismissals filed any affidavits stating that they had either resigned from NACBAWU

or that NACBAWU had no mandate when it referred the dispute to the CCMA for conciliation. It is also not stated when exactly they ceased to be members of NACBAWU and when they became members of NUDESA.

13. The statement of claim should have been filed on or before 12 November 2008. It was only filed on 7 July 2009 which is about eight months late. The period is excessive.
14. The second issue that needs to be determined is the explanation for the delay. It is common cause that a second referral was made to the CCMA on 30 August 2008 by NUDESA on behalf of the applicants. It contains a list of seventeen employees whose dispute had also be referred to the CCMA by NACBAWU. It is stated that the applicants were dismissed on 31 July 2008 and the dispute is described as a retrenchment. A certificate was issued dated 19 March 2009 stating that the dispute remained unresolved as at 19 March 2009.
15. As stated previously after the applicants had filed a statement of claim, the respondent filed a statement of response and raised a point *in limine* raising the issue of the two certificates of outcome. The applicants brought a condonation application and did not deal at all with the first referral but only with the second referral. This point was again raised in the answering affidavit and the applicants did not deem it necessary to deal with this in a replying affidavit. It did not file a replying affidavit. The applicants should have dealt with what was raised by the respondent in the statement of response

and also in the condonation application about the two certificates that were issued. The applicants for best reasons known only to them decided to ignore what was contained in the statement of response and the answering affidavit. They should have dealt with this in their condonation application. They should have provided an explanation why if NACBAWU had referred an unfair dismissal dispute to the CCMA on 15 July 2008 and a certificate was issued on 11 August 2008 they had referred the dispute late. They provided no reasons whatsoever why the matter was not referred to this Court before 10 November 2008. The only explanation that they gave was what is contained in paragraphs 4 of the founding affidavit. It is not stated that they had terminated NACBAWU's mandate and if so when it was. I would have expected that the applicants' new representatives would have approached NACBAWU and had made the necessary enquires about it. It is not stated when the applicants became members of NUDESA.

16. There is simply no explanation given why there were two referrals to the CCMA. The applicants did not deem it necessary to deal with this issue despite it being brought to its attention. All that it has done was to give the explanation tendered in paragraph 4 of the founding affidavit. There was clearly correspondence between NACBAWU and the respondent about the consultation process. They referred a dispute on their behalf. It is also not clear why NUDESA had referred a referral on behalf of the applicants. It is unclear when they become members of NUDESA. It is not the applicants case that NACBAWU lacked a mandate when it referred their dispute to the CCMA. It is also not clear when NUDESA ceased to be a registered

trade union.

17. The applicants have simply ignored the first referral and have in the circumstances given no explanation why the dispute was referred late. There is simply no explanation given for the eight-month delay.
18. On the prospects of success it is clear that the respondent had been consulting with NACBAWU. This much is clear from the correspondence attached to the respondent's papers. The respondent had pointed out in its opposition that the deponent one Oupa Mtshweni who described himself as a male official of BMEAWU was not present at nor involved in the consultation process and could not confirm same. The respondent stated that it followed an exhaustive consultation process before dismissing the individual applicants. The applicants did not file any confirmatory affidavit by any of the officials of NACBAWU who took part in the consultation process. They have failed to show that they have any prospects of success in this matter.
19. The application has failed to make out a proper case for condonation. The application stands to be dismissed.
20. I do not believe that this is a matter where costs should follow the result.
21. In the circumstances I make the following order:

21.1 The application is dismissed.

21.2 There is no order as to costs.

FRANCIS J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

FOR APPLICANTS : J TTIKANE - UNION OFFICIAL

FOR RESPONDENT : ATTORNEY D W MORGAN

DATE OF HEARING: 11 AUGUST 2011

DATE OF JUDGMENT : 23 AUGUST 2011