

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case no: JS 1971/10

Reportable

In the matter between:

HORATIOUS SEATLOLO

First Applicant

INDIVIDUAL APPLICANTS

LISTED IN SCHEDULE 'A'

Second to Further Applicants

and

ENTERTAINMENT LOGISTICS SERVICE

(A DIVISION OF GALLO AFRICA LTD)

Respondent

JUDGMENT

BHOOLA J:

Introduction

[1] The applicants seek leave to appeal against the whole of the judgment and order dated 5 May 2011 in which the court *a quo* dismissed their application for condonation of the late referral of their dispute with the respondent.

Grounds of appeal

[2] The court *a quo* erred in failing to consider all factors relevant to determining good cause and in finding that a *bona fide* defence and good prospects of success were not relevant. The court erred in finding that, in the absence of a reasonable and

acceptable explanation for the delay, the prospects of success were immaterial. In so doing the court adopted a more rigid approach to condonation contrary to the jurisprudence of the Labour Appeal Court and the Supreme Court of Appeals. Another court might reasonably find that, in determining the issue the court *a quo* ignored the good prospects of success, the balance of convenience and the importance of the matter.

[3] The court erred in finding that the applicants had failed to satisfactorily explain some of the periods of delay, and that this was fatal to their application, and in finding that the explanation for the delay was not reasonable, acceptable or satisfactory. At all times until the joinder application was dismissed the applicants relied on the advice of their union and legal representatives to the effect that their matters could be joined with that of Mazibu. Another court might reasonably come to the conclusion, having regard to all the relevant factors, that their conduct was acceptable. In *Motloi v SA Local Government Association* [2006] 3 BLLR 264 (LAC) the court condoned a delay of four years having had regard to all relevant factors instead of confining itself to one or two factors. Although the delay is lengthy it is redeemed by the reasonable and satisfactory explanation, the good prospects of success, the balance of convenience, the importance of the matter as well as the fact that any prejudice caused to the respondent can be addressed in the trial by way of an appropriate remedy.

The court erred in finding that SACCAWU had failed to give an explanation for the delays, and found against the applicants on this basis. Since SACCAWU was not a party to the proceedings, only the explanation or failure to explain the delays by the applicants should have been considered to have been relevant. The court erred in having regard to the possible civil remedies that the applicants might have against SACCAWU since it was not a party to the dispute. The dispute is one between the applicants and their employer and the court thus took irrelevant factors into account. Another court might come to the conclusion that since SACCAWU took reasonable steps to prosecute the applicants' case, including instructing legal representatives on their behalf, and relied on this advice, the court erred in considering a possible civil

claim against SACCAWU in determining whether or not to condone the late referral. Another court might find that a claim against SACCAWU is not a viable alternative and is not a factor that should have been considered.

[11] The court erred in finding that SACCAWU's view that it could consolidate the applicants' case with that of Mazibu was mistaken since the application for joinder had its merits and was not farfetched. Alternatively, even if it was a mistake such a mistake was understandable and reasonable and therefore constituted an acceptable explanation for the delay.

[12] The court erred in finding that, because the applicants failed to waive their right to compensation or reinstatement for the period, condonation would result in prejudice to the respondent. This is not so since the respondent would have an opportunity to present evidence to prove that it had a fair reason for dismissing the applicants, and will be able to raise the delays in the determination of an appropriate remedy. Another court might therefore find that any prejudice the respondent might suffer would not have been due to the decision to grant condonation, but by the failure to prove the fairness of the dismissals and that it should not be prejudiced by the delays.

[13] The court erred in not considering the prejudice the applicants will suffer if condonation is not granted, and the economic impact on their families.

[14] The court erred in finding that the applicants should not have accepted the advice of their union, attorneys and advocate as to the appropriateness of the joinder application, but should have heeded the advice of the respondent, their opponent, that they withdraw the joinder application. Another court might come to the conclusion that this finding is unfair to the applicants and that the court erred in this regard.

[15] The court erred in interpreting section 14(4) of the Labour Relations Act, 66 of 1995 (“the Act”) as stating that a trade union representative is an expert in law who cannot in any manner misinterpret the law, even though lawyers often misinterpret its provisions. The section only gives the union representative the right to perform certain duties in terms of the law but not knowledge of all labour laws. In any event a joinder issue is a civil procedure rather than a labour matter.

[16] The court erred in finding that the applicants were initially quick in defending themselves and later became passive. The delay was not caused by their failure to remain active. They had given instructions to competent people to handle their case, and had reason to believe it was properly handled. In any event, the evidence indicates that notwithstanding their queries their representatives continued to do what they considered to be appropriate. Therefore it cannot be said that their enquiries had much or any impact on the prosecution of their case. The court erred further in finding that the applicants did not take appropriate steps to ascertain progress with their matter, when the record clearly indicates the efforts they made in this regard.

[17] The court erred in finding that the applicants had not explained why they waited after the issuing of the second certificate of outcome. They had instructed a representative who had resigned from the union and it was not possible for them to explain his delay in dealing with their matter.

[18] The court erred in finding that the facts of the three disputes were entirely different, as they related to the same employer and the applicants as members of the same union. The evidence reveals that, in all probability the same witnesses would be required to testify in all the matters.

[19] The court erred in finding that there was no explanation why the union did not honour a promise to refer the second dispute, and why the applicants did not query this. The applicants explained in this regard that Motane was the person able to explain this but was not available to provide an explanation. They went to the union on several occasions and were given explanations they were unable to query. The court erred further in holding that the applicants had to explain the conduct of Motane and had not done so, when in fact they had done this.

[20] The court erred in finding that the applicants denied knowledge of the reason why the union only referred the dispute involving Mazibu. The applicants indicated that that they were told that their cases would be joined with that of Mazibu. The court erred further in considering the merits of Mazibu's matter, which was not known to it and not before it, to the prejudice of the applicants.

[21] The court ignored the evidence of the applicants, including that to the effect that after the judgment of 31 August 2008 the union started the process of calling all of them, who were scattered all over the country, to obtain their instructions, as they are legally entitled and obliged to do.

[22] The court misunderstood the submissions of the applicants regarding the joinder application, which included their belief that it would yield positive results and hence was the reason why they waited for it to be finalised before taking further steps. The court further erred in requiring the applicants to explain why SACCAWU had not arranged to set the joinder application down earlier, when the applicants did not have knowledge of this information.

[23] The court misunderstood the papers when it stated that the period from 14 October 2008 to March 2009 was unexplained.

[24] The court erred in dismissing the application based on SACCAWU's failure to explain why it insisted on proceeding with the joinder application. SACCAWU had taken legal advice which confirmed that the joinder application as being an appropriate step. The court erred further in blaming SACCAWU for the delays of September 2009 to February 2010 in circumstances where SACCAWU instructed attorneys who kept insisting that they were busy with the matter.

[25] The court erred in finding that SACCAWU should not have called the applicants to a meeting to obtain instructions. The court erred in finding that the applicants should have had a means of communicating amongst themselves despite the fact that they were all scattered around the country and were unemployed and had no means to finance calls to one another. In any event it was the union that was required to communicate with the applicants.

[26] The court erred in finding that the union should have taken the advice of the respondent and withdrawn the joinder application, and should have referred the dispute with a condonation application before seeking joinder, contrary to the advice of its legal representatives. The court erred further in finding that the applicants' explanation for pursuing the joinder application was that they did not have knowledge of the law and procedures of this court. They had been advised by the union and its representatives that joinder was the appropriate step. They were accordingly relying not on ignorance of the law but on legal advice.

[27] The court considered the delay only together with the explanation, and found it excessive and the explanation unreasonable, when it was required to consider all relevant factors including the balance of convenience and the prospects of success in order to determine if there was just cause for condonation.

[28] Having found that the applicants have *prima facie* good prospects of success the court erred in finding that the prospects were not as good as to compensate for

the lengthy and unexplained delays. The applicants had explained all delays logically and to the best of their ability in the circumstances.

[29] The court erred in finding that this case was appropriate for it to close the doors of justice to the applicants, when the facts revealed that the applicants were in a helpless situation and needed the mercy of the court. The court erred in finding that considerations of expediency outweighed those of justice when the applicants had suffered so much injustice.

[30] The court erred in finding that the applicants were themselves to blame for the delays.

[31] The court erred in finding that condonation would necessarily prejudice the respondent, despite the respondent submitting that it could prove that the dismissal of the applicants was fair, and the trial court would be able to address any prejudice caused by the delays should it find the dismissals to be substantively unfair.

[32] For these reasons it was submitted that another court might reasonably conclude that the court *a quo* erred in dismissing the condonation application.

Analysis

[33] Mr. Pretorius submitted on behalf of the respondent that the merits of the application must be considered against the background of the primary object of the Act, being the expeditious resolution of labour disputes. In this regard the court *a quo* endorsed the approach taken by the Labour Appeal Court, the Supreme Court of Appeal and the Constitutional Court that systemic and other delays are unacceptable.

[34] The question of whether a decision on condonation is a final decision and therefore subject to appeal is now settled: see *Motloi v SA Local Government Association* [2006] 3 BLLR 264 (LAC). However, the nature of the interference of an appeal court in the context of judicial discretion is limited. In making this submission Mr. Pretorius relied upon the authority of *NUMSA & Others v Fibre Flair cc t/a Kango Canopies* [2000] 6 BLLR 631 (LAC), which was approved in *SA Chemical Workers Union & Another v African Commerce Developing Co (Pty) Ltd t/a Buffalo Tapes* (2000) 21 ILJ 1735 (SCA). In consequence of this approach, Mr. Pretorius submitted, the appeal court will not exercise its own discretion regarding the grant or refusal of condonation on appeal afresh, unless it is first satisfied that the court *a quo* committed a misdirection of the nature described so as to warrant the setting aside of that decision. One such ground would be that the court *a quo* failed to act “for substantial reasons” (see *Buffalo Tapes* supra at [16]). Mr. Pretorius submitted that the applicants have neither alluded to nor met this test. Mr. Makinta submitted on the other hand, relying on *Motloi v SA Local Government Association* [2006] 3 BLLR 264 (LAC), that a court on appeal was in as good a position as the court *a quo* to decide whether good cause had been shown for the granting of condonation and may substitute its decision for that of the court *a quo*. However this begs the very question clarified by *Fibre Flair* supra, in which the test for interference was held to require the applicants to show that “the court *a quo* acted capriciously, or upon a wrong principle, or in a biased manner, or for unsubstantial reasons, or committed a misdirection or an irregularity, or failed to exercise its discretion, or exercised its discretion improperly or unfairly”.

[35] The applicants have failed to meet this test. In my view, there is no reasonable prospect of the Labour Appeal Court reaching a different conclusion on the granting of condonation, which is in essence the main ground of appeal. Even if the applicants are correct in their list of errors made by the court *a quo*, these would have to be shown to be misdirection of the kind that would warrant interference on appeal.

[36] Although it may be appropriate to dispose of the application on this ground, I nevertheless proceed to consider the merits although I do not intend to traverse each and every ground of appeal relied upon. Many of the grounds of appeal cited by the applicants incorrectly reflect the court *a quo*'s judgment (for instance the ground based on the assumed knowledge of the union officials), or are based on facts not before the court (for instance what advice was proffered by the advocate briefed on behalf of SACCAWU). The essence of the judgment is that the delay of more than two years in referring the two disputes was egregious; that the applicants failed to advance a compelling explanation for the various periods of delay by largely extricating their union from the scene, and that in these circumstances the prospects of success, would have to be overwhelming. It is moreover incorrect that the court *a quo* reformulated the legal test for condonation by failing to have regard to the prospects of success. It is apparent that these were considered and weighed against the lengthy and unexplained delays.

[37] This is moreover not the kind of circumstance where the applicants can simply escape the consequences of their union's conduct, or lack thereof, as a mere convenience – they are the union and its legal representatives. They cannot therefore avoid the consequences even if the union and its legal representatives had been entirely to blame for the delay. This approach has been endorsed by the Labour Appeal Court in *inter alia Allround Tooling (Pty) Ltd v NUMSA* [1998] 8 BLLR 847 (LAC) at para 10; *Glansbeek v JDG Trading (Pty) Ltd* [1998] 3 BLLR 223 (LAC) at para 11; *Nampak Corrugated Wadeville v Khoza* (1999) 20 ILJ 578 (LAC) at para 8; *Waverley Blankets Ltd v Ndimma & others Waverley Blankets v Sithukuza & others* (1999) 20 ILJ 2564 (LAC) at para 10 and *Sennet & Wessels (Pietersberg) BK v Prins* (1998) 19 ILJ 1134 (LAC) at para 18. The inescapable conclusion is that the applicants were party to the full facts not being placed before the court *a quo* in relation to the involvement of their union, and were unable to satisfactorily explain various substantial delays, least of all the delay in bringing the condonation application after the joinder application failed.

[38] On the authorities cited by the court *a quo* the prospects of success were

held to be irrelevant in the absence of an acceptable explanation for the delay. The applicants were on final written warnings for unprotected industrial action and had participated in an overtime ban. It is trite that the prospects of success would have to be overwhelming to assist the applicants in circumstances where their explanation is found to be so inadequate as to constitute a complete lack of an explanation. This approach is consistent with the authorities cited and it cannot be contended that the incorrect legal test was applied or that the issue of whether good cause has been shown was not properly determined, or that the decision was inconsistent with the jurisprudence of the Labour Appeal Court or the Supreme Court of Appeals.

[39] It is incorrect that the court *a quo* expected the applicants to follow the legal advice of their opponents, or failed to take into account that they pursued steps that were clearly legally untenable. What the court *a quo* found was that they had chosen the particular course of action, which was nothing short of reckless and had to bear the consequences thereof.

[40] The applicants have failed to show that there is a reasonable prospect that the Labour Appeal Court will reach a different conclusion to that of the court *a quo*. The respondent submitted that an adverse costs order would be justified in that the applicants have at every stage of the proceedings ignored the Rules of this court, and moreover insisted on a hearing when the appeal could have been disposed of in chambers as is envisaged in the Consolidated Practice Directive. I do not agree that costs would be in the interests of justice and fairness in this instance since it would appear that the applicants have already been sufficiently penalised by being left to their peril by their union.

Order

[41] In the premises, I make the following order:

The application for leave to appeal is dismissed. There is no order as to costs.

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Bhoola J

Judge of the Labour Court of South Africa

Date of hearing: 30 September 2011

Date of judgment: 21 October 2011

Appearance:

For the Applicants: Mr N Makinta, E S Makinta Attorneys.

For the Third Respondent: Adv P Pretorius SC instructed by Bowman Gilfillan.