



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case No: JS596/09

PHILLIP KATISI MNISI AND 32 OTHERS

Applicant

And

EXTRATA ALLOYS SOUTH AFRICA (PTY) LTD

– MOTOTOLO (LEBOWA)

Respondent

Date of hearing: 01 November 2011

Date of judgment: 17 November 2011

Summary: Condonation for the late filing of the statement of case. Explanation weak no need to consider prospects of success. No special circumstances justifying deviation from the established principles.

JUDGMENT

Molahlehi J

Introduction

- 1] This is an application for condonation for the late filing of the statement of case. The statement of case concerns the claim by the applicants that they were dismissed for participating in a strike which they say they never did.

Background Facts

- 2] The thirty three applicants in this matter were dismissed by the respondent on 27 October 2008. The applicants were dismissed for allegedly participating in an unprotected and illegal industrial action during October 2008. The applicants deny having embarked on the alleged industrial action and contend that on 24 October 2008, when they arrived at the workplace some of them could not find the drills that they work with. A delegation was then sent to management to find out what was the reason for the disappearance of their drills. They say that no proper explanation was given to them.
- 3] The applicants say that on 27 October 2008, when they arrived at work, they were refused permission to clock in for duty and were told that they were dismissed. The applicants lodged an internal appeal against their dismissal but were unsuccessful. The appeal having failed and the applicants being unhappy with their dismissal, referred an alleged unfair dismissal dispute to the CCMA for conciliation.
- 4] The conciliation having failed to resolve the dispute, the conciliating Commissioner issued a certificate of outcome which directed that the matter could be referred to arbitration. The matter was subsequently referred to arbitration and was enrolled for a hearing on 1 June 2009. At the arbitration hearing, the respondent raised a point in *limine* concerning the jurisdiction of the CCMA to arbitrate the matter as it contended that the dispute arose from a dismissal related to participation in an industrial action.
- 5] On 9 June 2009, the Commissioner issued the ruling that the CCMA did not have jurisdiction. The statement of case was thereafter filed with the Court.
- 6] In explaining the delay, the applicants started by indicating that they were not assisted by the union at the time they referred the dispute to the CCMA. They further say that they stated in their referral forms that they did not know the reason for their dismissal. They claim that they referred the dispute to arbitration; '[p]urely due to lack of knowledge and the fact that we considered ourselves not having participated in a strike.' They also blame the respondent for not correcting them at the conciliation meeting when they said that the

reason for their dismissal was unknown.

- 7] As concerning prospects of success, the applicants in their founding affidavit say the following; '[w]e were not participating in a strike. Therefore the respondent had no valid reason for our dismissal.'
- 8] In its answering affidavit, the respondent says that the applicants were amongst those who participated in the strike action on 13 and 14 March 2008.
- 9] The respondent further says that at the end of that strike an agreement was reached with the union representing the applicants that the employees would be issued with a final written warning for participating in an unprotected strike and the warning issued for a period of 9 months.
- 10] The agreement further provided that in case of any further unprotected strike action, the respondent would issue a first and final ultimatum. That agreement was concluded on 9 April 2008. However, before the expiry of the nine months period of the written warnings and specifically on 24 October 2008, the employees embarked on a strike action.
- 11] On 27 October 2008, when the applicants reported for duty they were issued with notices of dismissals for participating in an unprotected strike. In the notices, the applicants were informed of the following:
 - 3.25.1 that they had been issued with a final written warning for participating in unprotected industrial action during 2008;
 - 3.25.2 their employment would terminate with effect from 27 October 2008;
 - 3.25.3 should they have a compelling reason why the respondent should not finalise their termination they should provide such reasons to the respondent in writing by no later than 15h00 on Wednesday, 29 October 2008;
 - 3.25.4 if the applicants do not state it will lead to confirmation of their dismissal.'
- 12] On 30 October 2008, the union addressed a letter to the respondent requesting that the dismissed employees should be reinstated. According to

the respondent the union requested the reinstatement on the basis that the respondent never informed them of the strike action by the employees.

13] In response, the respondent indicated to the union that it had invited the employees to make submissions as to why they should not be dismissed for their conduct. The respondent further says that despite the extension for the period for making submissions, the employees failed to make any submission.

14] The respondent further says that instead of making submissions as to why they should not be dismissed the employees lodged an internal appeal which was based on the following grounds:

‘3.29.1 there had never been any ultimatum given; and

3.29.2 the finding that the applicants were on strike was not true as all the Rock Drill Operators and Rock Drill Assistants did their jobs on 24 October 2008.’

15] The respondent dismissed the appeal applications for the following reasons:

‘3.31.1 the applicants had been given a verbal ultimatum to return to work and to commence their work activities.

3.31.2 although the applicants eventually went underground more than five hours after the final ultimatum was given they did not commence their normal activities and therefore their submissions that they returned to work is rejected; and

3.31.3 the applicants had all received a final written warning for participating in an unprotected strike in April 2008 and that final written warning was still valid.’

The principles governing condonation

16] In considering whether to grant or refuse condonation the Court has a discretion to exercise. The Court will generally not grant condonation unless satisfied that the applicant has:

(a) shown that the degree of lateness or non-compliance with the prescribed time frame is not excessive;

(b) provided an explanation for every aspect of the period of the lateness

or the failure to comply with time frames;

(c) shown that he or she has prospects of succeeding or has bona fide defence when the matter is considered in the main case;

(d) shown the importance of the case;

(e) shown interest in the finality of the matter and the convenience of the court; and

(g) shown avoidance of unnecessary delay in the administration of justice.¹

17] It has repeatedly been stated that the above factors are not individually decisive but are interrelated and must be weighed against each other. And in weighing these factors for instance, a good explanation for the lateness may assist the applicant in compensating for weak prospects of success. Similarly, strong prospects of success may compensate the inadequate explanation and the long delay. The explanation and the prospects of success carry a considerable weight in assessing whether to grant or refuse condonation.²

18] The other general principle which the Courts have adopted is that without reasonable explanation for the delay, or prospects of success condonation should be refused. In *Melane v Santam Insurance Co Ltd*,³ the court held 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.

19] In *National Union of Mineworkers v Council for Mineral Technology*,⁴ the Court held that:

‘What is needed is an objective conspectus of all facts. A slight delay and a good

¹ See *Foster v Stewart Scott Inc* (1997) 18 ILJ 367 (LAC).

² See *Saraiva Construction (Pty) Ltd v Zululand Electrical and Engineering Wholesalers (Pty) Ltd* 1975 (1) SA 612 (D) and *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (AD) at 765 A–C.

³ 1962 (4) SA 531 (A) at 532 C–F.

⁴ [1999] 3 BLLR 209 (LAC) at para 10.

explanation may help to compensate for prospects of success which are not strong. The importance of the issue and strong prospects of success may tend to compensate for a long delay. 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.'

Evaluation

- 20] The case of the applicants is that the cause for the delay in filing their statement of case was due to the fact they did not know that the reason for their dismissal was because of the alleged participation in an unprotected industrial action. They contend that they referred their dispute to the CCMA because they did not know the reason for their dismissal.
- 21] The respondent in its answering affidavit has placed in dispute the allegation that the applicants did not know that they were dismissed for participating in an unprotected industrial action. The applicants have not filed a replying affidavit countering the averments of the respondent in its answering affidavit.
- 22] There are three key aspects in the explanation of the applicants as to why the statement of case is late which can be summarised as follows:
- a) The respondents' representative failed at the conciliation meeting to correct them about their understanding as to the reason for their dismissal namely that it was because of participating in an unprotected strike.
 - b) The respondent failed on receipt of the referral of the matter to arbitration to bring to their attention they chose a wrong forum in referring their dispute to arbitration.
 - c) Had they known the reasons of their dismissals after the conciliation they would have referred the matter to the Court and not the CCMA.

- 23] It is apparent that initially several disputes arising from the incident related to the dismissals were referred to the CCMA by the individual applicants. Those disputes were subsequently consolidated into one matter when they served before the Commissioner. One of the disputes which formed part of the consolidated cases before the CCMA was referred in the name of Tebogo Benjamin Hebula (spelling not clear from the referral form).
- 24] In the dispute referral form of Hebula the reason for dismissal is summarised as 'unfair dismissal for participating in an unprotected strike.' The same applies in the referral of Nkunyesu Mhlonga. In the referral made by the NUM obo Mabelane and others the dispute is summarised as 'unfair dismissal'. The features of the dispute is summarised as follows: 'Workers protest and went back to their normal duty and dismissed the following no ultimatum was issued.' In answering the question about the procedural fairness, they say; 'No ultimatum was issued to the workers and the union was not informed about the protest.' From the perusal of the record, there appears to be only two cases where reference is not made to the reason for dismissal being associated with strike action.
- 25] The applicants have not disputed the letter addressed to the CCMA's convening Commissioner and copied to the applicants via Mr Philip (Katsi) Mnisi. The letter, which is undated and seem to have been sent to the CCMA soon after the conciliation meeting, records as follows:
- 'This case was conciliated on 5 December 2008 in Sabie under Commissioner Adv J.C.B Schoeman. During the conciliation process the reason for the Dismissal (sic) were discussed, namely they were all dismissed for "**Participating in unprotected industrial action**". The applicants have now referred this matter for arbitration (see CJP1). This is an ill referral as the CCMA does not have jurisdiction to arbitrate this matter in terms of section 191(5) (b) (iii) of the Labour Relations Act 66 of 1995. This say that the case must be referred to the Labour Court.'
- 26] It would appear from correspondence in the file that the contact person was Mr Mnisi and his contact and post office number is PO Box 1429, which is also reflected in the CCMA correspondence.

27] It is common cause that the applicants lodged an internal appeal against their dismissal on 3 November 2008. Except for mentioning the outcome of the appeal in one sentence, the applicants say; 'No ultimatum was issued to workers and the union was not informed about the protest.'

28] The respondent in their answering affidavit deals with both the grounds for the appeal and the reasons for its outcome. The respondent's allegations have not been challenged and disputed by the applicants. It needs to be mentioned that even during argument this issue was not touched upon by the applicants' representative.

29] The respondent in their answering affidavit says that the grounds for the internal appeal as set out by the applicants were the following:

'3.29.1 there had never been any ultimatum given.

3.29.2 the finding that the applicants were on strike was not true as all the Rock drill operators and the Rock drill assistants did their jobs on 24 October 2008.'

30] The respondent further says that the applicants were each given the letter wherein the reasons for dismissing the appeal are set out as follows:

'3.31.1 The applicants had been given a verbal final ultimatum to return to work and to commence their work activities

3.31.2 Although the applicants eventually went underground more than five hours after the final ultimatum was given they did not commence their normal activities and therefore their submission that they returned to work is rejected.

3.31.3 The applicants had all received a final written warning for participating in an unprotected strike in April 2008 and that final written warning was still valid.'

31] The excuse for not knowing the appropriate forum to refer the dispute, in my view, is not sustainable once the Commissioner has issued a ruling indicating that the CCMA did not have jurisdiction. After the ruling the applicants further

delayed filing their statement of case by some 58 days. This delay which in my view is not insignificant is not explained by the applicants.

32] In my view the explanation is clearly unsatisfactory. The delay in this matter must be understood in the context that the certificate of outcome was issued on 5 December 2005 and the applicants filed their defective statement of case on 1 July 2009, which is some 139 days late.

33] It is apparent from the above discussion, regarding the background facts of this matter, that the credibility of the explanation for the delay given by the applicants is highly questionable. In other words whilst seeking an indulgence, they have failed to take the Court into their confidence by giving a version which in all probabilities is incorrect.

34] The other difficulty which the applicants have with their case relates to the period after the jurisdictional ruling was issued. The explanation that they did not know the reason for their dismissals fell away once the certificate of outcome was issued. The jurisdictional ruling made it very clear that the correct forum to consider their matter was the Labour Court. The jurisdictional ruling was issued on 1 June 2008 and statement of case was properly referred to the Court on 6 August 2009, some 54 days late.

35] The delay after the receipt of the jurisdictional ruling which clarified to the applicants the correct forum to which their disputes ought to be referred to is not explained. The authorities are very clear that in an application for condonation each period of the delay must be explained. The consequences of failure to provide an explanation for any of the period of delay is that the Court need not consider the issue of prospects of success in its assessment as to whether condonation for the late filing of the statement of case should be granted. Thus failure to explain any period of the delay disqualifies the applicants from receiving condonation.

36] In making the above finding I have also considered the issue of whether it would be in the interest of justice to grant condonation despite the inadequate or absence the explanation for the delay. There exist no special circumstances in this matter in terms of which I could say that the interest of justice dictate

that condonation be granted.⁵ I have also not been persuaded on the facts and the circumstances of this matter that despite that inadequate explanation the prospects of success should be considered. Accordingly, the applicants' application stands to fail. I do not however believe that costs should follow the results.

Order

37] In the premises the applicants' application for the late filing of their statement of case is dismissed with no order as to costs.

MOLAHLEHI J

Judge of the Labour Court of South Africa.

⁵ In *NEHAWU obo Mafokeng and Others v Charlotte Theron Children's Home* [2004] 10 BLLR 979 (LAC), the Court held that there are instances where in an exceptional case condonation may be granted despite the substantial delay and the inadequate explanation. See also *South African Post Office Ltd v Commission for Conciliation, Mediation and Arbitration and Others* [2011] ZALAC 16 (3 August 2011).

Appearances:

For the applicant: Mr C. Mogane of Mohlaba & Moshwana Inc.

For the respondent: Mr D. Masher of Bell Dewar Inc.