

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT DURBAN

Not Reportable

Case Nos: D289/09 & 294/09

In the matter between:

APOLLO TYRES SOUTH AFRICA (PTY) LTD (Durban) Applicant

and

NATIONAL UNION OF METALWORKERS OF
SOUTH AFRICA ("NUMSA") 1st Respondent

INDIVIDUAL RESPONDENTS as set out
in annexure "A" attached to
Statement of Claim 2nd to 11th Respondents

FURTHER INDIVIDUAL RESPONDENTS as set out
in annexure "B" attached to Statement of Claim 12th and Further
Respondents

Date of Hearing: 3 March 2011

Date of Judgment: 7 October 2011

JUDGMENT

Cele J

Introduction

[1] The respondents seek condonation for the late filing of their statements of response to the applicant's statements of claim. The respondents' statements of defence were filed eight months late. The appeal of the parties shall be

retained as they are in the pleadings. The first respondent will be referred to as the union while the second to further respondents will be referred to as the employees. Two claims were filed against the respondents emanating from the Ladysmith and the Durban plants of the applicant. The claims have been amalgamated into one action, hence the two case numbers cited above. This judgment deals with condonation applications for both matters. The applicant opposed the condonation applications.

Factual background

- [2] This condonation application has a genesis from the claim for compensation filed by the applicant against all respondents, in terms of section 68 (1) (b) of the Act.¹ The response in each claim was filed some eight months late.
- [3] The claims of the applicant are premised on strikes embarked upon by the Ladysmith based employees on 7 March 2009 till 24 March 2009 and by the Durban based employees on 16 to 17 March 2009. The claim for the Ladysmith branch is in the amount of R12 663 000,00 and that of the Durban branch is R1 256 000.00.
- [4] Parties have since filed a pre-trial minute upon the direction of this Court, in terms of which certain facts have been identified as common cause between them. For purposes of this application, Court will assume the correctness of those facts.

¹ The Labour Relation Act Number 66 of 1995.

- [5] In its operation, the applicant suffered a down turn in the volume required by the tyre market at large. This was due to sales in the new car sector being severely down on previous years and also as a result of the general replacement market not replacing worn tyres at the usual intervals. This impacted negatively on the required volume produced by the applicant's manufacturing plants.
- [6] The applicant was at the time operating 24 hours, 7 days per week at its Ladysmith plant. That excluded the shutdown or public holidays and the year-end plant closure. The shift pattern was a 4 days on 2 days off rotation pattern, operating 7 days per week. The Ladysmith employees were paid double time on Sunday when they were scheduled to work.
- [7] As from 9 September 2008, the applicant instituted a lay-off on Sundays, meaning it did not operate on Sundays at its Ladysmith plant. The employees were not happy with the change of shifts and in November 2008, they embarked in an unprotected strike. The applicant launched an urgent application to interdict the strike under case number D837/08 which was postponed *sine die* due to discussions held by the parties.
- [8] On 23 February 2009, the union served and filed a section 189A referral to the applicant and the Commission for Conciliation, Mediation and Arbitration, the CCMA, requesting the CCMA to appoint a facilitator. The referral had not been preceded by any notice issued by the applicant in term of section 189 (3) of the Act, seeking to proceed with retrenchments as a result of the lay-off and short

time. Nor was the referral made in terms of section 189A (3) of the Act. The respondents relied on the interpretation they place in clause 9 of the collective agreement between them and the applicant.

[9] On 27 January 2009, the Ladysmith employees embarked on a strike which led to the applicant setting the urgent application in case D837/08 down for hearing as a matter of urgency. The application was dismissed by Court on 28 January 2009 due to insufficient notice of the application given to the respondents. On the morning shift of 3 February 2009 ,employees returned to work, following a collective agreement reached by the parties. The union and the employees undertook never to participate in an unprotected strike and the respondents agreed to a dispute resolution procedure to be followed should an industrial action be contemplated.

[10] Three facilitation meetings were set down and held by the parties beginning on 4 February 2009 before Mr S M Govender. The employees' grievances and demands to be retrenched were among issues discussed. The applicant had unsuccessfully objected to the jurisdiction of the CCMA, contending that the facilitation was not held pursuant to a section 189 (3) notice. Then on 4 February 2009, the applicant issued a notice in terms of section 180 (3) of the Act in which it gave notice of a possible retrenchment, only in the event it was unable to implement a proposed shift pattern change.

[11] To ensure efficiencies and quality, a normal regularized shift pattern needed to be introduced to eliminate the situation where an employee might work, for an

example, on Monday, Tuesday, Wednesday, Saturday and be off duty on Thursday, Friday and Sunday.

[12] On 17 February 2009, a certificate of outcome was issued to the parties, indicating that the dispute between them remained unresolved and could be referred to this Court. On the same day the applicant issued a letter to the union, stating that the certificate of outcome did not give the respondents a right to strike and therefore that any industrial action based on that certificate would be unprotected and would be interdicted by the applicant. The letter stated also that the applicant had not terminated any employment contract of its employees.

[13] The applicant then issued a letter to the union dated 20 February 2009 in which it confirmed an agreement reached by the parties at a meeting of 17 February 2009, in terms of which the CCMA would be requested to provide Ms Hilda Grobler as a facilitator pursuant to the applicant's notice dated 4 February 2009, in terms of section 189 (3) of the Act. The applicant stated that in light of the facilitation, the demands of the employees as contained in their letter of 20 February 2009 headed "48 hours" would be appropriately dealt with at such facilitation. As to retrenchment, the position of the applicant was that changing the shift pattern would significantly mitigate retrenchment. The respondents disputed that contention.

[14] In a letter dated 4 March 2009, the applicant re-stated its view on the jurisdiction of the CCMA and it stated that it would apply to review and set aside

the certificate of outcome. On 5 March 2009, the union addressed correspondence to the applicant headed: "48 Hour Notice: Protected strike Action: Indefinite Lay-Off". The letter concluded in the following terms:

"...workers want to make use of the certificate which was issued by CCMA Commissioner S M Govender on 17 February 2009 to embark on protected primary strike action for Ladysmith and secondary strike action for Durban operations in terms of Section 66 of the LRA.

This then serves to inform you that our members will embark on a protected strike action in support of their demand to bring to an end to unfair lay-off imposed by the company".

[15] The applicant's legal representatives issued a letter dated 5 March 2009, calling upon the union to retract its 48 hour strike notice and on the following day, the applicant filed an application to review and set aside the certificate of outcome dated 17 February 2009.

[16] In the afternoon of 7 March 2009, the Ladysmith plant employees commenced with their strike. On 9 March 2009, the applicant's attorneys issued a letter to the union informing it that they had been instructed by the applicant to apply to this Court for an interdict against the unprotected strike. A rule *nisi* was indeed granted by this Court under case number D162/09 on 10 March 2009, returnable on 18 June 2009. Still on 10 March 2009, the applicant served what it thought was a rule *nisi*, to the union and the Ladysmith employees but, despite oral and written demands over the period of 10 to 12 March 2009, the employees did not return to work. Instead, on 12 March 2009, attorneys of the

union sent a letter to the applicant's attorney in which they pointed out that the order served on the respondents was marked "Draft Order." They asked for a copy of the order, while asking how employees were to tender their services since in terms of the Draft Order prayed the employees were: "interdicted and restrained from approaching or being within 500 metres of the access road in the immediate vicinity of the gate to the applicant's premises". A response was only received on 16 March 2009 from the attorneys of the applicant. The employees only returned to work on 24 March 2009, in terms of a special agreement reached by the parties on 21 March 2009.

[17] The employees in the Durban plant did not work normally on 27 February 2009 but on 2 March 2009 work normality was restored. On 12 March 2009, the applicant addressed correspondence to the union stating, *inter alia* that:

- Any planned industrial action at the Durban plant amounted to unprotected industrial action as the requirements of Section 64 of the Act had not been complied with;
- Since the so-called "primary" strike in Ladysmith had been declared unprotected by this Honourable Court, that there could be no question of such industrial action being protected at the Durban plant;
- If a new issue, grievance or demand was being raised, then industrial action would be unprotected until section 64 of the Act had been complied with.

[18] On 16 March 2009, and soon after 10h00, the employees at the Durban plant downed tools and embarked on a strike. Parties exchanged correspondence and the applicant indicated its intention to urgently interdict the strike, the notice of which was served on the union's attorneys on 18 March 2009. The employees resumed normal work on 18 March 2009.

[19] On 15 June 2009, the applicant served the statement of case in this matter to the union, but file same with the registrar on 17 June 2009, thus perfecting service. The respondents had 10 days within which to file a statement of response, if any and it should have been filed on or before 1 July 2009. The statement of defence was only filed on 17 March 2010. The delay is thus a period of eight months and one week.

The condonation application

[20] The principles governing the consideration of a condonation application are trite. In *Melane v Santam Insurance Company Limited*,² court held that:

"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 discretion, save of course that if there are no prospects of success there

² 1962 (4) SA531 (A).

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 to 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 Respondents interest in finality must not be overlooked. I would add that discursiveness should not be discouraged in canvassing the prospects of success in the Affidavit. I think that all the foregoing clearly emerges from decision of this Court, and therefore I need not add to the ever-growing burden of annotations by citing the cases.

- [21] The relevant considerations for this application are accordingly, the degree of lateness, the explanation thereof, the prospects of success, the importance of the case, the opposing party's interest to finality, and any prejudice and the degree thereof to the opposing party.³

The explanation for the delay

- [22] The explanation for the delay proffered by the Acting Head of the Legal Department of the union, Mr Mtileni was not seriously placed in dispute in any material effect and therefore stands to be accepted as correct, in which case it has then to be considered whether the explanation is reasonable and acceptable. The statement of case was served on the predecessor to Mr Mtileni, Mr Moshego based in the Johannesburg offices. The union was not

³ Wolgroeiers Afslaaers (Edms) Bpk v Municipaliteit van Kaapstad 1978 (1) SA 13 (A).

satisfied with his work performance and it suspended him in November 2009. In December 2009, Mr Mtileni was appointed to act in his place. It was on 19 February 2009 that he stumbled on the notice of set down for the matter D289/09, which was set down in the unopposed roll of this court. He instructed attorneys of the union to oppose the matter. Later he was informed by the attorneys that there were in fact two such matters, including D294/09. On 26 February 2009, the matter in D289/09 was removed from the unopposed roll and on 3 March 2009 the matter in D294/09 was also removed from the roll, with certain directives.

[23] After the March 2009 strike the employees, the Regional Organiser of the union and the applicant became engaged in a number of facilitation processes, including a section 189A facilitation process until December 2009. The purpose was to conclude agreements on shift patters, flexible working arrangements and other work arrangement issues that had caused the strike. The issue of the compensatory damages claim against the respondents was places on the agenda of those meetings and was discussed on numerous times by the parties, so as to avoid unnecessary litigation. The submission is that the respondents were not in willful default.

[24] The applicant denied that an agreement was made by the parties in respect of the compensatory damages claimed and it said that there was no reason for Mr Mashego and Ngubane to advise the attorneys to await the outcome of such discussions. The submission is further that the reasons for the delay are outweighed by the period of the delay as they are not justifiable.

*Prospects of success**Respondents' explanation:*

[25] It is mainly in this aspect that the condonation application is opposed by the applicant. The common cause facts leading up to the strikes form the main reason why the respondents considered the acts of the applicant to constitute an unlawful lockout. In particular the respondents contend that:

- The collective lay-offs resulted in severe financial loss for many Ladysmith employees and pay imbalances;
- The collective lay-offs were implemented without the consent of the employees, in the absence of proper consultation and without reasonable notice;
- The system was implemented to force the employees to agree to the new shift system proposed by the applicant;
- The Main Agreement of the Tyre Manufacturing Bargaining Council contained a which read:
 - "In the event of an employer extending any lay-off beyond a period of thirty (30) consecutive days, Numsa shall be entitled to require the employer to initiate the provisions of Section 189A of the Labour Relations Act."

[26] Although the applicant contended that the certificate of outcome and the strike notice were defective, the employees of both plants embarked on an industrial action because they believed their strike was protected in that:

- ❖ they had referred their dispute to the CCMA and the CCMA had, in effect, conciliated the dispute when it facilitated discussions between the parties regarding their demand and grievances. Their pre-strike procedures were therefore in compliance with section 64 of the Act;
- ❖ the commissioner who facilitated the discussions on the dispute gave them the impression that the process and certificate were valid when he dismissed the applicant's objections;
- ❖ the strike notice, which was issued on 5 March 2009, effectively gave the commencement date of the strike. The strike at the Ladysmith plant commenced soon after 48 hours had lapsed, namely in the afternoon on 7 March 2009;
- ❖ although the notice used the term "secondary strike" in respect of the Durban employees, they did not embark on a secondary strike. All employees had the same employer, namely the applicant. Employees were merely posted at different plants;

[27] Even if the industrial action is declared unprotected by this Court, there was substantial compliance by the respondents with section 64 of the Act. Further the applicant did not plead that the strikes were prohibited by section 65 of the Act and that the nature of the dispute referred to the CCMA was not a

strikeable or interest dispute. The strike was functional to collective bargaining. As a result of the strike, the applicant and the Ladysmith employees concluded a collective agreement which resolved all disputes which formed the basis of the industrial action.

[28] Although the applicant obtained an interdict against the Ladysmith strike, the application was not opposed, basically because of the extremely short time period involved in such an urgent application. By the return date, the dispute had been settled to the satisfaction of the parties. The union opposed only the costs order and was successful.

[29] The financial situation of the respondents was also a relevant issue for consideration. Over years, the union had suffered great loss due to various reasons including the fact that its membership had decreased due to massive industry wide retrenchments. Its members, the employees, were merely working class employees. Yet, after the strike the applicant increased production targets in Ladysmith, to the mutual benefit of both parties.

Applicant's reply:

[30] The applicant's submissions on the prospects of success, as contained in the answering affidavits amounted to a bare denial of the assertions made by the respondents. The applicant contended that the respondents made no attempt to comply with the provisions of section 64 of the Act and failed to refer the dispute to the CCMA or the Bargaining Council for the New Tyre Manufacturing Industry.

[31] The contention was that the union failed to give 48 hour notice in the proper form of the proposed strike but fraudulently purported to act in terms of a defective certificate of outcome after advised by the applicant's attorneys that the certificate did not authorise such action. The union also made no attempts to comply with the agreement reached between the applicant and the respondents on 3 February 2009. The industrial action by the employees was unlawful and unprotected.

[32] The submission was that the union intentionally encouraged the unprotected strike which the employees took part in for 17 days. As a result, all respondents were liable to the applicant for damages suffered by it.

[33] The applicant said it was entitled to compensation in the sum claimed due to losses it incurred as a result of the under recovery of fixed overhead costs, cost of waste product and IGP on lost sales of tyres. The union had resources to finance and compensate the applicant and the employees were in a position to satisfy the compensation award collectively, if made against them.

Prejudice

[34] The submission by the respondents was that no prejudice would be suffered by the applicant if condonation was granted. Any prejudice that the applicant might suffer was ameliorated by the Court order in term of which the

respondents agreed to pay the applicant's wasted costs occasioned by the matter being postponed to give the respondents an opportunity to file their statements of response. The respondents contended that they stood to suffer extreme prejudice in a claim involving more than R12m, should condonation be refused. The simple submission by the applicant was that the granting of condonation would be prejudicial to it, without indicating the basis for the submission.

- [35] While there are other considerations which might feature in a condonation application, they did not play any particular role in this matter.

Evaluation

- [36] The period of delay in this matter is fairly long when seen against the 10 days' period within which the statement of defence ought to have been filed. As already pointed in the *Melane* decision (supra), a slight delay and a good explanation may help to 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 opposing party's interest in finality must not be overlooked. While the explanation for the delay has its own shortcomings, it comes across as justifiable, in the circumstances of this matter. It then falls to be weighed against the other considerations.

- [37] The prospects of success of the defence raised by the respondents need to be seen against section 68 of the Act, on the basis of which the claim for

damages of the applicant is founded. To the extent relevant in this matter, section 68 (1) of the Act reads:

“ (1) in the case of any strike or lock-out, or any conduct in contemplation or in furtherance of a strike or lock-out, that does not comply with the provisions of this chapter, the Labour Court has exclusive jurisdiction –

(a) ...

(b) to order the payment of just and equitable compensation for any loss attributable to the strike or lock-out, or conduct, having regard to –

i. whether –

(aa) attempts were made to comply with the provisions of this Chapter and the extent of those attempts;

(bb) the strike or lock-out or conduct was premeditated;

(cc) the strike or lock-out or conduct was in response to unjustified conduct by another party to the dispute; and

(dd) there was compliance with an order granted in terms of paragraph (a);

ii. the interests of orderly collective bargaining;

iii. the duration of the strike or lock-out or conduct; and

iv. the financial position of the employer, trade union or employees respectively.”

[38] It is clear that, in terms of section 68, where an award of damages is to be made by Court, it must be a just and equitable compensation of any loss and therefore, not necessarily, the actual loss proved to have been incurred by the claimant. The discretion of this Court is accordingly wider than in ordinary civil claims of damages.

- [39] The factors which are to be taken into account in considering the award of damages as outlined in section 68 (1) (b) (i) of the Act are also of importance in this application. The respondents have pleaded various facts pertaining to these considerations. Even if one were to assume that the strike was unprotected and that the respondents did not have a *bona fide* belief in the protected status of their strike, it would not follow that they might not defend the claim. An award of damages against the respondents which is materially less than the amount claimed by the applicant could, arguably be seen to be some success on the part of the respondents.
- [40] The applicant's counsel referred Court to various decisions regarding the prospects of success. What tends to distinguish this matter from most of these decisions is that evidence is yet to be led in this matter, if the application is successful and therefore some of the discrepancies identified in those cases can very easily be cured by evidence of the witnesses called during the trial.
- [41] In my view, the respondents have shown that there are some prospects of success in their defence. When these are seen against a not so excellent explanation of the delay, I am satisfied that the prospects of success outweigh the explanation given. Further, justice does appear to justify the granting of condonation. While the strike created a situation that could very easily explode to beyond control, as one often sees these days, these parties were able to resolve the impasse and to restore peace in their work place. To that

extent no reference was made in these proceedings to any other unprotected strike that has subsequently taken place.

[42] Accordingly the following order will issue:

- 1) Condonation for the late filing of the statement of defence is granted.
- 2) No costs order is made.

Cele J.

Appearances:

- 1) For the Applicants: Mr A Rocher
Instructed by Farrell & Associates
- 2) For the Respondent: Ms B Whitcher
Instructed by Brett Purdon Attorneys.