



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JS 459/09

In the matter between:

SOUTH AFRICAN TRANSPORT AND

ALLIED WORKERS UNION

First Applicant

M.J MOLOI AND 7 OTHERS

Second Further Applicants

AND

K.B TSOTETSI LOGISTICS CC

First Respondent

Heard: 19 January 2012

Delivered: 14 February 2012

JUDGMENT

TLHOTLHALEMAJE AJ

Introduction

- [1] This is an opposed application for condonation for the late filing of a statement of claim brought by the Applicants. The dispute pertains to the termination of the Second to Further Applicants' services on account of operational

requirements.

Other preliminary issues

- [2] At the commencement of the proceedings, Mr. Mufamadi on behalf of the Respondent had submitted that the Applicants' application should be dismissed on the grounds that there was no proof that the deponent to the Applicants' founding affidavit, a Ms. Craven, was authorised to depose to the affidavit, and secondly that there was no proof that the Second to Further Applicants were members of the First Applicant.
- [3] These preliminary points were promptly dismissed due to the reason that in her affidavit, Craven had averred that she was employed by the First Respondent as its National Legal Officer based at its head office and was duly authorised to depose to the affidavit. I fail to appreciate what else would be required of a Union official in such circumstances to prove his or her status. It is not a requirement that deponents to affidavits, more specifically Union officials, must always prove authorisation or mandate every time that they file documents on behalf of the Union members. Unions generally act on behalf of their members in accordance with their constitutions, and all that it required is proof of their registration in accordance with section 95 (7) of the Labour Relations Act.¹
- [4] The second preliminary issue raised on behalf of the Respondent was even more ridiculous. Prior to the termination of the Second and Further Applicants' services, the Respondent and the First Applicant had exchanged correspondence in regard to the issue that led to this dispute. Copies of such correspondence are attached to the parties' founding and answering affidavits. Having engaged the First Applicant in regard to the impending retrenchments, it defies logic for the Respondent to suddenly contend that the Second to Further Applicants could not have been its members. That engagement by the Respondent with the First Applicant can only infer its recognition of the Second to Further Applicants' membership of the First Applicant.

¹ Act No 66 of 1995.

Background facts

- [5] As appears from annexures attached to the Applicant's founding affidavit in support of the application (Vide "NC3" and NC4"), a notice was issued to all employees by the Respondent on 02 October 2008 requesting them to attend a meeting scheduled on 04 October 2008 in regard to possible retrenchments. On 06 October 2008, the First Applicant's official, Chris Nkosi had sent correspondence to the Respondent and expressed his concerns about the possible retrenchments. On 11 October 2008, Nkosi had responded to correspondence from the Respondent advising that he was unavailable to attend a meeting scheduled for 13 October 2008. He had suggested 15 October 2008 as an alternative date. In its correspondence, the Respondent had then suggested a meeting for 16 October 2008. It is common cause that a meeting did not take place between Nkosi and the Respondent. On 20 October 2008, however, the Respondent had issued letters of termination to the Second to Further Applicants.
- [6] A dispute was referred to the National Bargaining Council for the Road Freight Industry on 24 November 2008. A certificate of non-resolution was issued on 19 January 2009 and the statement of claim was only filed with the Court on 05 June 2009 together with an application for condonation.

The Application

- [7] In explaining the delay in her founding affidavit, Ms. Norma Craven, who is the National Legal Officer of the First Applicant had averred that after the certificate of outcome was issued, she only consulted with the First Applicant's local organiser, Chris Nkosi and the Second to Further Applicants on 03 March 2009. During the consultation, she did not have the documentation pertaining to consultations between the Second to Further Applicants and the Respondent prior to the terminations. She had then asked the Nkosi to try and track down all the correspondence. She needed these documents in order to ascertain whether to proceed with the matter or not.
- [8] According to Craven, Nkosi managed to locate most of the correspondence but not the referral for conciliation which contained the names of the Second

to Further Applicants. Nkosi was then instructed to go to the Bargaining Council to locate the 7.11 forms. As Nkosi was the only organiser in the Springs local office responsible for attending to all conciliations and arbitration hearings of members in the area, he was also involved in the national strike that was taking place in the industry at the time. The 7.11 forms were only received by Craven on 11 May 2009 and she had immediately commenced drafting the Statement of Case following consultations with Nkosi. She contended that a delay of six weeks was not excessive.

- [9] In regards to the Applicants' prospects of success, Craven had averred that the Second to Further Applicants were dismissed without consultations; that the Respondent had by 02 October 2008 when it issued correspondence to the Second to Further Applicants, already decided who was likely to be affected by the retrenchments; that Nkosi had made attempts to consult with the Respondent in terms of s189 of the Labour relations Act; that the Respondent had refused to change the dates of meetings and proceeded to issue letters of termination on 21 November 2008; and further that the Respondent had retrenched the Second to Further Applicants even though it kept employees who were employed after them (i.e. that LIFO was not applied).
- [10] Regarding prejudice to the parties, Craven had merely contended that the delay was only six weeks and that there could be no prejudice to the granting of the application.
- [11] The Respondent's response via the answering affidavit of its Human resources manager, John MacDonald in regard to the reasons for the delay was that Nkosi had an understanding of the Court's rules; that it did not make sense for Nkosi to consult with Craven without the complete documents; that it is not stated as to when Nkosi was able to locate all the necessary documents required; that the alleged outstanding information required was not paramount to the extent that it could have prevented the Applicants from proceeding with their statement of claim; and that the statement could have been filed and a supplementary affidavit filed at a later stage. It was further averred that the delay was actually two months and excessive.

[12] In regards to prospects of success, MacDonald had averred that the Respondent was faced with operational requirements that warranted to contemplate the retrenchments; that the Respondent had identified or knew the department and the employees that were likely to be affected; that attempts were made to invite the First Applicant for consultations without success; that despite invitations and attempts to accommodate them on the dates suitable to everyone and telephonic agreements, no one from the First Applicant had “pitched up”. It was further contended that despite the absence of the First Applicant, consultations were held with the Second to Further Applicants and that the Applicants have not made out a case indicating prospects of success.

[13] Macdonald further averred that the Respondent would suffer financial prejudice as the explanation for the delay is not satisfactory and further since there is no *prima facie* case to answer to; and lastly that the Applicant could have prevented any prejudice by referring the dispute on time.

The legal framework

[14] Section 191 (11) (a) of the Labour Relations Act provides that any referral to the Labour Court as contemplated under subsection (5) (b) must be made within 90 days after a dispute has been certified as unresolved. Section 191 (11) (b) enjoins the Court to condone non-observance of the time frames on good cause shown. In considering whether good cause was shown, the Court will normally exercise its discretion after taking into account the factors identified in *Melane v Santam Insurance Co Ltd*.² These include the degree of lateness, the explanation thereof, the prospects of success on the merits of a claim and the importance of the case. The Court in that case went on and held that although these factors are interrelated, they are not individually decisive and must be weighed against each other. Thus if there are no prospects of success there would be no point in granting condonation. The court further 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

² 1962 (4) SA 531 (A).

condonation should be refused.

[15] In *Foster v Stewart Scott Inc*,³ and as further reiterated by Molahlehi J in *Mnisi and Others v Extrata Alloys South Africa (PTY) Ltd – Mototolo (Lebowa)*⁴ two further factors need to be looked at in considering such applications. Thus an applicant must have shown; (a) an interest in the finality of the matter and the convenience of the court; and (b) avoidance of unnecessary delay in the administration of justice.

[16] In *National Union of Mineworkers v Council for Mineral Technology*,⁵ the Court held that:

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

[17] In applying the above principles in *Moila v Shai NO and Others*,⁶ Zondo JP (As he then was) with McCall AJA and Kruger AJA concurring held at para [34] of the judgement that;

‘Where in an application for condonation, the delay is excessive and no explanation has been given for that delay or an “explanation” has been given but such explanation amounts to no explanation at all, I do not think it is necessary to consider the prospects of success.’

Evaluation

[18] In her arguments, Ms. Mitti on behalf of the Applicants had reiterated that the

3 (1997) 18 ILJ 367 (LAC)

4 (Case No: JS596/09),

5 [1999] 3 BLLR 209 (LAC) at para 10.

6 (2007) 28 ILJ 1028 (LAC)

delay, which was caused by arrangements and securing of relevant documents in order to finalise the drafting of the statement of case was minimal and could not be prejudicial to the Court or the Respondent. The essence of these submissions read together with Craven's averments is that the Court must indulge the Applicants, notwithstanding the First Applicant's clear tardiness in attending to this matter. This cannot be countenanced more specifically when regard is had to the following.

- [19] A delay of six weeks in filing a statement of claim is excessive if regard is had to the period granted to a party after a certificate of outcome has been issued. The Applicants' attempt at downplaying the extent of the delay is futile and is further indicative of its flippant approach in regard to this application. Firstly, there is no explanation from the Applicants in regard to what steps were taken in expediting the referral of this dispute between 19 January 2009, after the certificate of outcome was issued, and 03 March 2009 when Craven allegedly first consulted with the local organiser, and the Second to Further Applicants. Secondly, even if it is accepted that all the necessary documents were obtained on 11 May 2009, there is still no explanation as to the reason why the statement of case was only filed on 05 June 2009.
- [20] The explanation that there was still one outstanding letter on 03 March 2009 that prevented the finalisation of pleadings is not acceptable. As was correctly pointed out on behalf of the Respondent, nothing prevented the Applicants from filing their statement of claim on time and then amending or supplementing it thereafter. A further concern is that Craven does not appear to have taken this Court into her confidence. One of the alleged reasons the statement of case could not be filed on time was that Craven needed the Form 7.11 as it contained the list of the names of the Second to Further Applicants. If she had indeed consulted with Nkosi and the Second to Further Applicants on 03 March 2009, I fail to appreciate the reason she would still need the list of their names from the missing Form 7.11 when she could have simply got their names from them during her alleged consultations. The only inference to be drawn from these contradictions is that there was never a consultation between herself and the Second to Further Applicants as she

had alleged. The Court should take a dim view of parties who approach it for an indulgence and yet at the same time attempt to mislead it.

- [21] The delay, in my view, was purely as a result of inaction and tardiness on the part of the First Applicant, and it would make a mockery of the quest for administrative justice to indulge parties who make their own administrative problems the problem of this Court or that of the other party to the dispute. Of further concern are Craven's averments that she was waiting for the outstanding documents in order to decide whether to proceed with the matter or not. If she had indeed consulted with the Second to Further Applicants as she had alleged, surely she would have been in a position to assess the merits of their case and made an informed decision. The Form 7.11 would not have assisted her in any manner in the assessment of the merits of the case. This conduct is a classic case of an applicant having failed to show avoidance of unnecessary delay in the administration of justice.
- [22] To conclude in regard to the above considerations, there is no reasonable or acceptable reason proffered by the Applicants for the delay in filing their statement of claim. Furthermore, there is nothing from the Second to Further Applicants to indicate what steps they took in order to expedite the prosecution of their claim immediately after the certificate of outcome was issued. In the words of Zondo JP in *Moila (supra)*, the explanation as proffered by the Applicants is 'no explanation at all'.
- [23] Given the conclusions reached in regard to the extent of the delay and the lack of an explanation in that regard, this application would ordinarily be dismissed if one was to strictly follow the approach in *Moila (supra)*. However, for the sake of completeness, it would be proper to deal with the other considerations pertaining to such applications.
- [24] The Applicants' submissions or averments in regard to their prospects of success on the merits of their claim are equally lacking in substance. Despite the averments that the termination of the Second to Further Applicants' services was unfair, there was no supporting or confirmatory affidavit from anyone of them in this regard. This would have been more crucial in that

neither Nkosi, who had deposed to a confirmatory affidavit nor Craven had personal knowledge of how the terminations were effected. Thus their averments in that regard are not within their personal knowledge. Correspondence attached to the parties' respective affidavits indicates that attempts were made to involve the First Applicant in consultations prior to terminations. The Respondent's averments that Nkosi failed to attend such consultations as scheduled and agreed between the parties telephonically remains undisputed as neither the Applicants nor Nkosi in particular saw the need to file a reply.

[25] Having had regard to the submissions made on behalf of the Respondent that consultations were indeed held with the Second to Further Applicants prior to the notices of terminations being issued, and in the absence of any other contention from them in that regard, *prima facie*, it appears that the Respondent has no case of unfairness to answer to.

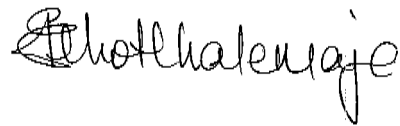
[26] The submissions made on behalf of the Applicants in regard to the issue of prejudice were equally thin in substance. The obvious prejudice to the Respondent, if condonation were to be granted, is that it would be forced to defend a matter more than three years after the dispute arose. It would be inconvenient to the Court to grant an indulgence in circumstances where a party has clearly shown no intention of timeously prosecuting its claim or any interest in the finality of its matter. Having had regard to the conclusions reached in regards to the excessive nature of the delay, the lack of a reasonable or acceptable explanation regarding the delay which amounts to no explanation at all, the lack of prospects of success on the merits and other considerations applicable to such applications, there is no reason in law or fairness that justifies that the application for condonation be favourably considered.

Costs:

[27] The Court has discretion on whether to award costs having had regard to the requirements of law and fairness. In exercising that discretion, the Court is also enjoined to consider factors under Section 162 (2) of the Labour Relations Act. One of those factors is the conduct of the parties in proceeding with or defending the matter before the Court as provided in Section 162 (2) (b) (i). In my view costs should follow the results in this case when regard is had to the Applicants' persistence with this application when it was clearly doomed to fail. Even more irksome is the Applicants' feeble attempts at misleading this Court in their averments in support of the application, which conduct bordered on contempt if not perjury.

Order:

- i. The Applicants' application for condonation for the late filing of their statement of case is dismissed with costs.



TLHOTLHALEMAJE AJ

ACTING JUDGE OF THE LABOUR COURT

Appearances:

For the Applicants: MM. Mitti of Mitti Attorneys

For the Respondent: Adv. R. Mufamadi

Instructed by: Nemavhulani Attorneys