



REPUBLIC OF SOUTH AFRICA

Reportable

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: JS 812/09

In the matter between:

PETER THELEDI

Applicant

and

SAFICON INDUSTRIAL EQUIPMENT (PTY) LTD

Respondent

Heard: 22 December 2011

Delivered: 10 July 2012

**Summary: -application for condonation for the late filing of statement of claim-
degree of lateness reasonable- condonation granted.**

JUDGMENT

JULY A.J

[1] This is an application for condonation for the late filing of the statement of claim by the applicant.

[2] The following facts are common cause-

2.1 that the applicant referred a dispute to the South African Local Government Bargaining Council ("the Bargaining Council"), as one of unfair dismissal on 30 October 2008;

2.2 that the dispute remained unresolved at conciliation on 26 November 2008, and that no certificate of outcome was issued;

2.3 that the applicant referred the dispute for arbitration to the Bargaining Council;

2.4 that the arbitration was set down on 14 January 2009;

2.5 that prior to the arbitration, the applicant withdrew the matter from the Bargaining Council; and

2.6 that on 17 August 2008, the applicant instituted proceedings before this Court.

[3] It is also common cause that the statement of claim by the applicant was filed late. In terms of Directive 3 of this Court, the condonation application must be determined first before the matter is set down for trial.

[4] In terms of section 191(5) of the Labour Relations Act ("LRA"),¹ after a dispute has been certified by the Commissioner as unresolved—

‘(a)

¹ 66 of 1995.

- b) the employee may refer the dispute to the Labour Court for adjudication if the employee has alleged that the reason for dismissal is –
 - (i) automatically unfair;
 - (ii) based on the employer's operational requirements;
 - (iii) the employee's participation in a strike that does not comply with the provisions of Chapter IV; or
 - (iv) because the employee refused to join, was refused membership of or was expelled from a trade union party to a closed shop agreement.'

[5] Section 191(11) of the LRA provides–

'(a) The referral, in terms of subsection (5)(b), of a dispute to the Labour Court for adjudication, must be made within 90 days after the council or (as the case may be) the commissioner has certified that the dispute remains unresolved.'

[6] It is submitted that the applicant withdrew the matter from the Bargaining Council. It is not clear when this was done. What is clear though is that it was before 14 January 2008 which was the date when the arbitration was scheduled to take place.

[7] The applicant did not refer the matter to this Court within the 90 days as prescribed in section 191 of the LRA. The 90 days from the date of the issuance of the certificate lapsed on 26 February 2009. Accordingly, the applicant referred the dispute to this Court five months and three weeks late.

[8] In terms of section 191(11)(b) of the LRA, this Court may condone, on good cause shown, "non-observance" of the timeframe.

[9] This Court has discretion to determine whether to condone the late referral of

the dispute. This discretion by the Court has to be exercised judicially. In exercising such discretion, there are factors that this Court must take into account. The factors are stated in the case of *Melane v Santam Insurance Co. Ltd*² as (a) degree of lateness, (b) the explanation therefor, (c) the prospects of success and (d) the importance of this case.

- [10] In the recent decision of the Constitutional Court in the matter of *MS v SC Centre for Child Law AS Amicus (Curiae)*³, the Court held-

‘The test for determining if condonation should be granted is whether it is in the interest of justice. Factors relevant to this inquiry including but are not limited to the extent and cause of the delay; the prejudice to other litigants, the reasonableness of the explanation for the delay, the significance of the issues to be decided ...and the prospects of success. None of these factors are decisive. The inquiry is one of weighing each against the others in order to determine where the interests of justice lie.’ [Footnote omitted]

- [11] With regard the degree of lateness, as already stated, the applicant was five months and three weeks late in referring this dispute to this Court. However, although, the explanation given by the applicant for this delay is not satisfactory, in my view, the five months and three weeks delay is not so long that the matter cannot be entertained by this Court. Also given the circumstances under which the applicant was dismissed, it is in the interests of justice that this late referral be condoned. I am aware of a plethora of cases decided by this Court that seek to suggest that a failure to give a satisfactory explanation should result in the refusal of the condonation. Some cases even state that it is the end of enquiry. That is not my understanding of the *Melane* decision. The *Melane* decision is very clear that the factors are interrelated. Although I am not satisfied with the explanation for the delay, it is however, in my view, not the end of the enquiry. Consistent with the principle that none of the factors are decisive the failure to give a satisfactory explanation for the delay must be weighed with other factors. In other words, the explanation factor is not a decisive factor.

² 1962(4) SA 531(A)

³ 2011 (2) SACR 88 para 15 also reported as *S v S* 2011 (7) BCLR 740 (CC).

[12] Having regard to the circumstances that led to the dismissal, I am inclined to grant condonation. Although I am not making any finding on the merits, in my view, the applicant has prospects of success.

[13] I have also considered that the respondent is not going to suffer any prejudice by this application being granted; instead the applicant will suffer more prejudice if his case is not heard by this Court.

[14] In light of the above, I make the following order –

14.1 Application for condonation brought by the applicant is granted;

14.2 Late filing of the Statement of Case instituted by the applicant dated 17 August 2009 is condoned; and

14.3 No order as to costs.

JULY AJ

Acting Judge of the Labour Court

APPEARANCES:

FOR THE APPLICANT: Mohlaba and Moshwana Inc Attorneys

FOR THE RESPONDENT: Schoeman and Associates Attorneys

