



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Case No: JS 1036/12

In the matter between –

NATIONAL UNION OF METAL WORKERS

OF SOUTH AFRICA

First Applicant

NICHOLAS KHULU AND OTHERS

Second to Further Applicants

And

SCAW WIRE AND STRAND, A DIVISION OF

SCAW METALS SA (PTY) LTD

Respondent

Heard: 15 May 2013

Delivered: 14 June 2013

Summary: Condonation application- weak explanation compensated by strong prospects of success. Need for unions and other organisation to align their internal administrative procedures with the LRA time lines.

JUDGMENT

MOLAHLEHI J

Introduction

- [1] This is an application for condonation for the late filing of the statement of case of the applicants in terms of which they claim that their dismissals for allegedly inciting and participating in unprotected strike action was unfair.

Background facts

- [2] The dispute in this matter has its origin in the grievance that the applicants had lodged with the respondent regarding alcohol testing. The dispute was sparked by an incident concerning the accusation that Mr Mavundla came to work under the influence of alcohol. He was then told to go back home for that reason but later to be called by Mr De Swart to return to work.
- [3] Both Mr Mavundla and Mr De Swart, were disciplined. The union requested to sit in in the disciplinary hearing as observers. This request was refused by the chairperson of the disciplinary hearing. After being told that they could not sit in the disciplinary hearing as observers, the shop stewards sat outside the premises where the disciplinary hearing was held. Whilst sitting there the shop stewards were approached by the employees who enquired as to what was happening. On being told about the decision of the chairperson of the disciplinary enquiry, the employees embarked on a protest action which according to the deponent to the founding affidavit lasted for three and half hours.
- [4] On 6 August 2010, the shop stewards were handed notices of suspension and a disciplinary hearing. The shop stewards who were suspended and disciplined were: Mr Mmashakana, Mr Khulu, and Mr Simelane. The charges

which were proffered against the applicants are summarised at paragraph 17 of the respondents answering affidavits as follows:

"Following the suspension, the shop stewards were charged with instigation and incitement; participations in an unprotected work stoppage, intimidation and threatening behaviour and gross misconduct violating the employment relationship.

- [5] The shop stewards were dismissed on 27 October 2010. Their appeal was also unsuccessful.
- [6] The charge against Mr Dlamini, the only shop steward who was not dismissed at the time the first industrial action took place was dismissed for what happened on 11 August 2010. The applicants say that Mr Dlamini, was dismissed after he informed the employees about the suspension of the shop stewards and in response the employees embarked on a work stoppage. The charges against him were similar to those which were proffered against his colleagues. He was found guilty and dismissed on 3 October 2011.
- [7] The shop stewards being unhappy about their dismissals referred separate alleged unfair dismissals disputes to the Metal and Engineering Bargaining Council (the Bargaining Council).
- [8] The applicants have tendered a number of reasons as to the delay in referring the matter to the Court within the prescribed 90 days period. The first, blame for the delay is placed on the certificate of outcome of the conciliation proceedings which directed that the different matters be referred to arbitration. It was at the arbitration hearing that the arbitrator directed that the matter should be referred to the Court or in one instance the parties agreed themselves that the matter be referred to the Court. The period of the delay

ranges from 675 and 693 days with that of the last dismissal being 377 days late.

- [9] The delay after it had become clear that the matter had to be referred to the Court has to do with the internal administration of the union in terms of which a meeting was held to discuss the matters. At that meeting which took place in September 2012, it was agreed that the secretariat of the union should be approached for approval to have the matter referred to attorneys.
- [10] The secretariat required a legal opinion from the attorneys of record which was furnished in October 2012. The opinion of the attorneys seem to have been that there was a case to be referred to the Court as on 7 November 2012, the applicant's attorneys of record filed the statement of case. The statement of case was however not accompanied by a condonation application as according to the applicants the attorney responsible for dealing with the matter had other urgent matters he had to attend to. The condonation application was finalised on 12 November 2012.
- [11] In opposing the application the respondent contends that the explanation proffered by the applicants is not satisfactory, particularly when regard is had to its excessive delay. The respondent contends that the explanation is made weak by the fact that the applicants are not specific about the periods of delays and further that they are vague in their explanation as to certain periods of the delay.

Evaluation

- [12] The authorities have over the years been in agreement as to the principles that should be applied when considering whether to grant or refuse a condonation application. In this regard the authorities have repeatedly stated

that in considering an application for condonation, the Court has a discretion which is to be judicially exercised. In exercising that discretion the Court has to take into account the totality of the facts and weigh all other factors together. The degree of the delay, the explanation thereof and the prospect of success in the main case are some of the factors which the court has to weigh in its consideration of the application.¹

[13] It was argued on behalf of the respondent that the explanation relating to the internal procedures of the union should be rejected on the authority of *NEHAWU and Others Vandebijlpark Society for the Aged*.² In that case R Lagrange J, refused condonation where the union sought to explain its delay on the basis of its internal administrative procedures. The condonation was refused on the basis that unions are expected to devise procedures to comply with the statutory deadlines. I agree and in fact this should apply to all organisations, institutions and public sector entities. I do not however read the judgment to be saying that an explanation based on internal administrative procedures of an organisation should automatically be rejected and be treated as no explanation or be regarded as poor explanation for that reason alone. An explanation based on internal administrative procedures has to be considered on the facts and the circumstances of each given case and be weighed with all other factors.

[14] In the present instance I agree with the respondent that certain aspects of the explanation given by the applicants are unsatisfactory. In this regard there are

¹ *Melanie v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532C-F, *Foster v Steward Scott Inc* (1997) 18 ILJ 367 (LAC) at 369, *National Union of Mine Workers and Others v Western Holdings Gold Mine* (1994) 15 ILJ 610 (LAC) at 613C-D, *Queenstown Fuel Distributors CC V CCMA and Others* (2000) 21 ILJ 1197 (LC) at 1198E-I.

² (2011) BLLR 690 (LC).

a number of gaps in the explanation of the second period of the delay. It is also evident that the delay was excessive.

[15] I do not however believe that the explanation proffered by the applicants is so poor that the need to consider prospect of success does not arise. In my view the weak explanation given by the applicants is compensated for by the prospect of success.

[16] The prospect of success are to be assessed in the context where it is alleged that the dismissal of the applicants was because they instigated, incited the employees to participate in an unprotected strike action and they also did the same.

[17] It is trite that participation in an unprotected strike action amounts to misconduct. However, the fact that employees participated in an unprotected strike action does not automatically lead to the conclusion that the dismissal is fair. The employer has a duty to show that the dismissal for participating in an unprotected industrial action was fair. Section 68 (5) of the LRA provides as follows:

'Participation in a strike that does not comply with the provisions of the Chapter, or conduct in contemplation or in furtherance of that strike, may constitute a fair reason for dismissal. In determining whether or not the dismissal is fair, the Code of Good Practice: Dismissal in Schedule 8 must be taken into account.'

[18] There is a dispute of facts in this matter regarding the allegation that the shop stewards incited the employees to embark on an unprotected strike action. It is common cause that the employees did embark on a strike action which according to the applicants lasted for a period not exceeding three and half

hours. The applicant denies having incited the employees to embark on the unprotected strike action. The employees are said to have embarked on the strike action upon being informed that the chairperson of the disciplinary hearing had refused the shop steward to sit in the hearing as observers. According to the applicants they intervened immediately the employees embarked on the strike action and persuaded them not to continue with their action. The applicants further say that they stopped the employees from damaging the respondent's property.

[19] The applicant complains that the respondent was unfair in dismissing them also because it applied discipline inconsistently. In this regard the applicants contend that although they were dismissed for the alleged participation in the strike, other employees who did the same were not dismissed but given warnings.

[20] In relation to Mr Dlamini, the applicants contend that he was dismissed for informing the employees about the suspension of his colleagues and this was done after management had granted permission for the meeting where he passed the information.

[21] In the answering affidavit the respondent answers to the case of the applicant in relation to the prospect of success in essentially two and half paragraphs.

The answer reads as follows:

'28.3 On 2 August 2010 and 11 August 2010 the Applicants and the members embarked on industrial action which was both unprotected and unlawful. The Applicants as they union and shop stewards had a duty to ensure that the members acted in accordance with the policies and procedures of the Respondent as well as the provisions of the Act during times of industrial action.

28.4 On the case in question, the Applicants incited that the members into embarking on unlawful and unprotected industrial action when they called their members out of work on 2 August 2010 and when Dlamini incited strike action following a meeting with members on 11 August 2010.

28.5 The former Employees used already tense situations to incite the members to act in an unlawful manner.'

[22] In my view, based on the above, the applicant have succeeded in showing that they have a very strong prospect of success and for that reason, I believe that, the application should succeed.

[23] In my view, allowing costs to follow the results, in the circumstances of this case would be unfair.

Order

[24] In the premises, the condonation for the late filing of the statement of case of the applicant's is granted with no order as to costs.

Molahlehi J

Judge of the Labour Court of South Africa

Appearances:

For the Applicants: Mr X Ngako of Ruth Edmonds Attorneys

For the Respondent: Advocate R Davey instructed by Bowman Gilfillan Inc.

LABOUR COURT