



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JS 142/ 11

In the matter between:

NATIONAL UNION OF METAL WORKERS

OF SOUTH AFRICA (“NUMSA”) OBO

STEVE MOJELA AND 57 OTHERS

Applicant

and

PARBAR (PTY) LTD

Respondent

Heard: 14 August 2013

Delivered: 08 January 2014

Summary: Application for the late filing of the statement of case. The test to apply. The interest of justice taking into account factors such as the period of the delay, the explanation, prospects of success, the importance of the matter and prejudice.

JUDGMENT

MOLAHLEHI J

Introduction

- [1] This is an application for condonation for the late filing of the statement of case by the applicants. In their statement of case the applicants avers that their dismissal was substantively unfair. The statement of case is 21 months late.
- [2] The dismissal of the applicants was as a result of the allegation that they participated in an unprotected strike action on 3 November 2010. Prior to the unprotected strike action the applicants participated in a protected national strike arising from a wage dispute.
- [3] The national wage dispute was resolved during September 2010, on the basis that the wages of the applicants would be increased and be backdated. On the return to work the shop-stewards were dismissed and as a result thereof the employees formed a committee to represent them in their dealings with management.
- [4] On 3 November 2010, the committee approached Mr Barbaglia to enquire as to when they could expect to receive their salary increase which had been agreed upon at the Bargaining Council. Mr Bargalia is alleged to have informed the employee that they should approach their union for their increase.
- [5] On receipt of the report about what Mr Barbaglia had said concerning the increase the employees embarked on a work stoppage. The employees were then approached by Mr Barbaglia and Mr Anderson who informed them that they will receive their salary as soon as the respondent received the Government Gazette confirming what the wage increase was. The employee requested a written confirmation of the undertaking but Mr Barbaglia and Mr Anderson refused to provide the same. In reaction the employees refused to resume work.

- [6] The statemate was resolved by the intervention of the SAPS and the union. It was agreed that the employees were to report for work the following day. According to the applicants on arrival at work the following day they found management at the gate and certain employees were allowed to go in and the others not.
- [7] The applicants were after several days of tendering their services summoned to a disciplinary hearing where they were found guilty and dismissed.

The reasons for the delay

- [8] According to the applicants the main reason for the delay was the incompetent manner in which the union official, Mr Mdlalose, handled their matter. Mr Mdlalose, who was assigned to deal with the applicants' matter was subsequently dismissed by the union for poor work performance in early 2012. Prior to his dismissal Mr Mdlalose kept informing the applicants whenever they enquired about progress on their matter, that it was receiving attention. It however, turned out after his dismissal that except for obtaining a case number from the Court, Mr Mdlalose had not done anything to progress the matter further.

Prospects of success

- [9] As concerning prospects of success, the case of the applicants is set out by the deponent to the founding affidavit in the following terms:
- 3.1 The applicants were not on an unprotected strike as they were not obliged to tender their services, the respondent having failed to comply with its obligations in terms of the Main Agreement;
 - 3.2 The matter was resolved by agreement which the respondent then failed to comply with;
 - 3.3 The respondent was selective in how it dismissed the individuals. I do not know the basis in which the respondent made its selection;

- 3.4 The respondent failed to hold a proper disciplinary enquiry;
- 3.5 The penalty of dismissal was too severe given the fact that:
 - 3.5.1 The respondent provoked the individuals by failing to pay them in terms of the Main Agreement;
 - 3.5.2 There was a good reason for the individual applicants ceasing to work;
 - 3.5.3 The failure to work was for an extremely short time;
 - 3.5.4 The applicants had agreed to work on the weekend to recover lost production;
 - 3.5.5 The respondent breached its agreement with the applicants;
 - 3.5.6 The respondent failed to take mitigating factors into account.
- 3.6 The disciplinary hearing was unfair given that the applicants were given no notice and no time to prepare'.

Legal principles

[10] The test to apply in determining whether to grant or refuse condonation application is the interest of justice.¹ In confirming this test as set out *Brummer v Gorfil Brothers Investment (Pty) Ltd*,² Zondo J in *Grootboom*,³ had the following to say:

'50 In this Court the test for determining whether condonation should be granted or refused is the interests of justice. If it is in the interests of justice that condonation be granted, it will be granted. If it is not in the interests of justice to do so, it will not be granted. . .

¹ See *Grootboom v National Prosecuting Authority* [2013] ZACC 37, where this test was recently confirmed by the Constitutional Court. In the main judgement the Constitutional Court, per Bosiello J, agreed with Zondo J, in his separate judgement regarding the approach to adopt when considering an application for condonation and held that the standard to apply is the interest of justice. The Court in the main judgement refused condonation for the late filing of the opposing appeal papers by the first respondent. In his judgement Zondo J found that condonation ought to have been granted.

² 2000 (2) SA 837 (CC).

³ See footnote 1 above

51. The interests of justice must be determined with reference to all relevant factors. However, some of the factors may justifiably be left out of consideration in certain circumstances. For example, where the delay is unacceptably excessive and there is no explanation for the delay, there may be no need to consider the prospects of success. If the period of delay is short and there is an unsatisfactory explanation but there are reasonable prospects of success, condonation should be granted. However, despite the presence of reasonable prospects of success, condonation may be refused where the delay is excessive, the explanation is non-existent and granting condonation would prejudice the other party. As a general proposition the various factors are not individually decisive but should all be taken into account to arrive at a conclusion as to what is in the interests of justice’.

[11] In determining the interest of justice the inquiry to conduct involves considering the following: (a) the degree of lateness or the extend of non-compliance with the prescribed time frame, (b) the explanation for the lateness or the failure to comply with time frames, (c) prospects of success or *bona fide* defence in the main case; (d) the importance of the case, (e) the respondent’s interest in the finality of the judgement, (f) the convenience of the court; and (g) avoidance of unnecessary delay in the administration of justice.⁴

[12] In conducting the enquiry into whether condonation application should be granted or be refused the following broad principles must be born in mind:

- a. the Court has a discretion which is to be exercised judicially after taking into account all the facts and the circumstances of the case before it.
- b. that the factors which are taken into account in conducting the enquiry in the interest of justice are not individually decisive but are interrelated and must be weighed against each other-the strong compensating for the weak.

⁴ See *Foster v Stewart Scott Inc* (1997) 18 ILJ 367 (LAC).

- c. the applicant has to give an explanation that shows how and why the default occurred.
- d. that the court could decline the granting of condonation if it appears that the default was wilful or was due to gross negligence on the part of the applicant.
- e. 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.⁵
- f. that the applicant should bring the application for condonation as soon as it becomes aware of the lateness of its case.⁶

⁵ See *Melane v Santam Insurance Co Ltd*, 1962 (4) SA 531 (A) at 532C-F. The prospects of success or *bona fide* defence on the other hand mean that all what needs to be determined is the likelihood or chance of success when the main case is heard. 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 at 765A-C. It is however not good enough for the applicant to make bald averment that there are prospects of success in his or her case. See *Rustenburg GearBox Centre v Geldmaak Motors* 2003 (5)SA 468 (T). In dealing with the approach to adopt when dealing with prospects of success and the explanation Zondo J in *Grootbom* had the following to say: '[51]. . . where the delay is unacceptably excessive and there is no explanation for the delay, there may be no need to consider the prospects of success. If the period of delay is short and there is an unsatisfactory explanation but there are reasonable prospects of success, condonation should be granted. However, despite the presence of reasonable prospects of success, condonation may be refused where the delay is excessive, the explanation is non-existent and granting condonation would prejudice the other party'.

⁶ This means that the applicant in a condonation application has a duty to explain also the delay in filing the condonation application if that is the case. Failure to provide an explanation for the delay in filing a condonation application could be fatal to the application. See *Allround Tooling (Pty) Ltd v NUMSA and Others* [1998] 8 BLLR 847 (LAC) at *para* 8 and *NEHAWU v Nyembezi* [1999] 5 BLLR 463 (LAC).

Evaluation

- [13] It is common cause that the delay in this matter is excessive. The certificate of outcome confirming that the parties have failed to resolve the dispute was issued on 13 December 2010 and the applicants filed their statement of case and the condonation application with the Labour Court on 11 December 2012. The individual applicants blame the union official who is alleged to have misled them into believing that their dispute had been referred to the Court when all what he did was to open a file, obtain a case number and thereafter did nothing further than that.
- [14] On discovering that the union official did not take any steps in prosecuting their case, the individual applicants approached the union's head office and brought to their attention what the union official did with their case. In support of the case that they never lost interest in their unfair dismissal claim the applicants attached annexure "J" which records the number of times they reported at both the regional and head office of the union to enquire about progress in their case. The annexure shows that the individual applicants made several inquiries during 2010, 2011 and 2012 about progress of their case at the various offices of the union including at the Bargaining Council. It would appear from the annexure that the last enquiry made at the union offices, both head office and the regional offices was on 21 November 2012 and thereafter they attended at what is referred to as MMCC and the CCMA. Annexure "K" indicates that three of the applicants who claim to have represented the others in engaging with the union about the case attended at the regional office to enquire about their case.
- [15] It would appear that towards the end of 2012, the individual applicants realised that their case was not receiving the attention they had expected from the union. In this respect they approached a firm of lawyers who on 26 November 2012 addressed a letter to the union informing it that they had been approached by the applicants for assistance and sought instructions from the union to proceed in representing them on its behalf. The union responded two days later on 28 November 2012 and advised the attorneys about its policy on briefing lawyers.

- [16] The respondent contended that the individual applicants did nothing for a period of eight months and that period is not explained. This point is raised in the context of annexure “J” to the founding affidavit. It was further contended on behalf of the respondent that the applicants have failed to provide an answer in this regard in their replying affidavit.
- [17] The union conceded that it did not act diligently in instituting the case on behalf of the individual applicants. It however, contends that there was nothing to trigger their attention to the failure to act diligently by the said official. In other words there was nothing that prompted an investigation into the delay in properly referring the dispute to the Court. It was for this reason that it was contended that the fact that this matter fell within the cracks should not be held against the union.
- [18] In considering whether or not to grant condonation, I have taken into account the contention of the respondent that for a period of eight months the individual applicants did not do anything in terms enquiring about progress in their matter from the union.
- [19] It is apparent that the individual applicants are lay litigants who had placed their hopes and trust that their case would be prosecuted properly and timeously on the union. There is indeed no record of attendance at the union or other entities by the individual applicants during 2 February 2012 and 21 September 2012 a period of about eight months. This should however, in my view be seen in the context where the individual applicants stated in their affidavit that they had repeatedly attended at the union offices to enquire about their case. I do not read the recording of attendance at the union offices to be saying that every attendance was recorded in that annexure. Account should also be taken of the fact that annexure “J” shows a further attendance at the union offices after 21 September 2012. It should also be noted that after repeatedly attending at the union offices to make inquiries about progress the individual applicants finally approached attorneys for help. In this context the individual applicants did everything that a reasonable litigant in their position could have done to pursue their claim. The totality and the objective facts as it appears from the affidavits do not in any manner suggest that the individual

applicants had lost interest in pursuing their unfair dismissal claim. The individual applicants may be criticised for not acting sooner in terms of instructing the attorneys as they did in September. However, objectively speaking it seems to me that it would be an injustice to label the applicants in the context of what has happened to their case as having failed to conduct themselves as diligent litigants.

[20] In relation to prejudice, I accept the contention of the applicants, that the respondent will suffer no prejudice in particular as concerning loss of memory by the potential witnesses if condonation was to be granted. Contrary to that contention it is apparent from the respondent's papers that there is clear recollection of what happened in as far as the details of the dispute is concerned.

[21] Turning to the prospects of success it was argued on behalf of the applicant that there were good prospects of succeeding if an indulgence was granted permitting matter to proceed to trial. The respondent on the hand contends that there are no prospects of the applicants succeeding because:

27.1.1 'the individual applicants partook in an unprotected strike ...

27.1.2 the allegation that the applicants could refuse to perform their duties as they were not paid their (sic) is both bad in law and false. This is specifically said as the increase only accrued to the identified applicants upon publication in the Government Gazette;

27.1.3 all striking employees who partook in the unprotected strike and remained on strike (despite various invites to return to work) were eventually dismissed irrespective as to whether they were members of the first applicant or, GIWUSA or no trade union;

27.1.4 a disciplinary enquiry was held by an independent lawyer upon two days' notice to the striking employees and

everyone had the right to state their case and examine witnesses;

27.1.5 the sanction of dismissal is appropriate given the number of ultimum and later requests to return to work. This view, I understand has recently been confirmed by the Constitutional Court . . .’

- [22] In the first instance consideration of prospects of success in a condonation application has to be done on the basis of determining whether there is *prima facie* chance that the applicant will succeed when the main matter was to be finally determined on the balance of probabilities. And secondly, in my view prospects of success in dismissal cases has to be assessed taking into account the party that bears the onus of proof in the main matter.
- [23] It is trite that in dismissal for misconduct cases, the employer bears the onus of showing that the dismissal was for a fair reason. In determining the fairness of a dismissal arising from charges of participating an unprotected strike action several factors have to be taken into account in determining the fairness or otherwise of such a dismissal which includes but not limited to the duration of the strike action and the fairness of the ultimatum.
- [24] In the present instance, the facts before this Court suggests very strongly that the applicants have a chance of succeeding if condonation was to be granted. In this case the applicants do not seem to dispute that the applicants were issued with the ultimatum to return to work. According to the applicants the strike action was only for one day as after the intervention of the SAPS and the union, it was agreed that the employees were to report for work the following day. The applicants further state that on arrival at work the following day they found their managers at the gate. Some employees were according to them allowed to enter the workplace whilst they were refused entry.
- [25] It is common cause that the employees as per the agreement reported for work the following day. It is also common cause that the respondent allowed some employees into the workplace whereas the same did not happen to the applicants. The respondent says it refused the applicants access because

they refused to give an undertaking that they would abandon their demand for the payment of the increase pending the production of the Government Gazette. According to the respondent those who gave the undertaking were permitted to enter the workplace and as stated earlier the applicants would not give the undertaking and were for that reason refused access.

Conclusion

[26] In considering the facts and the circumstances surrounding the delay in the filing of the statement of case of the applicants, I am persuaded that the interest of justice requires that an indulgence be granted in favour of condoning the late filing of the statement of case of the applicants.

[27] Turning to the issue of costs, the union in light of its unacceptable conduct in dealing with this matter correctly tendered costs on a punitive scale.

Order

[28] In the premises, the following order is made:

1. The applicants' late filing of the statement of case is condoned.
2. The parties are directed at holding a pre-trial conference within 30 days of date of this order.
3. The applicants are to pay the costs of this application on the attorney and own client scale.

Molahlehi J

Judge of the Labour Court, South Africa

Appearances:

For the Applicant: Ruth Edmonds of Ruth Edmonds Attorneys

For the Respondent: Adv AJ Nel

Instructed by: Lindeque Van Heerden Attorneys

LABOUR COURT