



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JS 71/12

In the matter between

SATAWU

First Applicant

MOKOENA M and 13 OTHERS

Second Further applicants

and

COUNTRY MEAT MARKET CC

Respondent

Heard: 12 June 2013

Delivered: 18 February 2014

Summary: Application for condonation: Despite a lack of a reasonable and acceptable explanation for the delay in filing an answer to a statement of claim, an application for condonation will be granted in circumstances where the true identity of the employer is in dispute.

JUDGMENT

TLHOTLHALEMAJE, AJ

Introduction:

- [1] This is an opposed application for condonation for the late service and filing of the Respondent's response to the Applicants' statement of claim. The Second to further Applicants' main claim was that their dismissals by the Respondent following upon a protected strike was automatically unfair as contemplated in section 187 (1) (a) of the Labour Relations Act (the LRA). For the purposes of convenience, the parties are referred to as they appear in the main application.

Other preliminary issues:

- [2] The Applicants' contention was that the Respondent's application for condonation was defective due to the reason that it was not accompanied by a notice of motion; did not comply with the Rules of this Court and further that the Respondent had not filed an application to amend and correct the defect. To the extent that the application was defective, it was the Applicants' contention that it should be dismissed. Having heard arguments and submissions, the preliminary issue was dismissed without an order of costs. My reasons for the order were read into the record and it would not be necessary to repeat same in this judgment.

Background to the application for condonation:

- [3] There is a dispute as to the identity of the real employer. The Respondent's contention is that the Second to further Applicants were in its employ as general workers until 01 June 2011. Following consultations, the Second to Further Applicants were transferred to a labour broker known as Thuba Flexible Staffing Solutions CC (Thuba) in terms of section 197 of the LRA.
- [4] A wage dispute was referred to the Commission for Conciliation Mediation and Arbitration (The "CCMA") by SATAWU on 20 June 2011. The Respondent and Thuba did not attend a conciliation meeting held on 20 July 2011 and the CCMA had issued a certificate of non-resolution. SATAWU had on 22 July 2011 notified the Respondent of its intention to embark on industrial action.

- [5] On 30 July 2011, members of the First Applicant had embarked on a strike. The strike was suspended following further consultations between the parties in order to resolve the dispute surrounding wage increases. When nothing came out of these discussions, the employees had continued with their strike action on 02 and 03 July 2011. On 04 July 2011 the employees abandoned the strike was abandoned and they had resumed their duties. According to the Applicants, those of them who had embarked on the strike action were verbally notified on 10 August 2011 of disciplinary proceedings against them, which took place on the same date. The Respondent's contention on the other hand was that the employees were issued with notices to attend the disciplinary enquiries on 08 August 2011 by a Mr. Bathe of FREO, an employers' organisation. These were scheduled to be held on 12 August 2011. Notwithstanding the dispute surrounding how and when these enquiries were held, it was common cause that the Second to Further Applicants were dismissed on 31 August 2011.
- [6] SATAWU had then referred an alleged unfair dismissal dispute to the CCMA on 04 October 2011. A certificate of outcome certifying that the dispute remained unresolved was issued on 28 October 2011. On 26 January 2012, the Applicants had initiated proceedings before this Court by filing a statement of claim. The Respondent had until 05 February 2012 to file a response in terms of Rule 6 (3) (c) of the Rules of this Court. On 03 May 2012, the Applicants had filed an application for a default judgment. The response to the statement of case was only filed on 24 July 2012, some 168 days out of the prescribed time limits. The response was accompanied by an application for condonation. The application for default judgment was set-down for 29 August 2012 and the matter was removed from the roll by agreement.

The application:

- [7] Rule 12 of this Court's Rules in terms of which this application was brought provide that;
- '(3) The court may, on good cause shown condone non-compliance with any period prescribed by these rules.'

The authoritative case dealing with applications for condonations, and more specifically what constitutes “good cause” or “sufficient cause” is *Melane v Santam Insurance Co Ltd*¹. In this regard, the then Appellate Division held as follows;

‘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 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 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 respondent’s interest in finality must not be overlooked.’

The degree of lateness:

- [8] The Respondent’s managing member, Adrian Leach had deposed to the founding affidavit in support of the application. He had averred that the Respondent’s response to the statement of claim was approximately four and a half months, and that the delay was not excessive in the light of the reasons proffered in that regard.
- [9] In his answering affidavit on behalf of the Applicants, Jack Mazibuko, the Provincial Secretary of the First Applicant had averred that the statement of claim was served on the Respondent on 26 January 2012, and one “Thuli” from its offices had confirmed receipt of the statement. An affidavit of service was attached to the answering affidavit. Mazibuko further pointed out that the response was filed some six months late, which delay was excessive.
- [10] It was common cause that the statement of claim was served on the Respondent on 26 January 2012. The Respondent had until 05 February 2012 to file a response in terms of Rule 6 (3) (c) of the Rules of this Court.

¹1962(4) AD at 532C-D

The response to the statement of case was only filed on 24 July 2012, some 168 days out of the prescribed time limits. It is therefore not correct as contended on behalf of the Respondent that the delay was only four and a half months.

- [11] The delay is close on six months, and it is indeed excessive. In this regard, Mr. Mabaso on behalf of the Applicants had submitted that on this ground alone, the application for condonation should be dismissed. I am however, not in agreement with the submission that the application should be dismissed on this ground alone in that the factors to be considered in determining “good cause” are interrelated, and can thus not be individually decisive. To adopt a piecemeal approach which the Court in *Melane* had cautioned against would be incompatible with the exercise of a true discretion.

The explanation for the delay:

- [12] Mr. Leach of the Respondent attributed the delay to the following reasons;

The statement of case was served on the Respondent's factory in Harrismith and not to its branch in Bethlehem where the Second to Further Applicants had rendered their services. The Applicants further did not serve the statement on Thuba Flexible Staffing Solutions CC. At a date he could not recall, an employee at the factory in Harrismith had advised him that “Labour Court papers” were faxed to them and he had requested that these be forwarded to him. Upon receiving the documents he had then scheduled a meeting with a Stephan van der Westhuizen, an organiser of Full Range Employer's Organisation (FREO) of which the Respondent was a member, in order to discuss and hand over the documents for the purpose of opposing the legal proceedings instituted by the Applicants. On 28 February 2012, he had received a telephone call from the Applicants' attorneys who enquired whether the Respondent intended to oppose their statement of claim. He had confirmed that this was to be done as FREO had already been given instructions in that regard. Van der Westhuizen had addressed correspondence to the Applicants' attorneys on 05 March 2012 advising that documents would be served on the parties. Leach avers that the Respondent

was at all material times under the impression that FREO would attend to the service and filing of the necessary opposing pleadings.

- [13] Leach was advised on 27 June 2012 when he met with Van der Westhuizen that FREO has lost an appeal in the Labour Appeal Court in March 2012 in respect of its deregistration as an employer organisation. At that meeting, Van der Westhuizen further told him that he had neglected to file the opposing pleadings as he undertook to do, and had totally forgotten about it after he learnt that FREO's appeal was unsuccessful. He had then instructed Van der Westhuizen to instruct attorneys in Johannesburg to attend to the matter. On 05 July 2012 Van der Westhuizen had then sent some documents to the Respondent's attorneys of record. The attorneys had consulted with Van der Westhuizen on 23 July 2012 who had flown from Durban for that purpose.
- [14] Mazibuko's response on behalf of the Applicants was that there was no confirmatory response from the alleged employee who advised Leach of the documents from the Applicants and further that Leach had conveniently failed to specify the dates that he first met with Van der Westhuizen. He contended that at the time that the Respondent was sent correspondence to enquire whether it intended to oppose the Applicants' statement of claim, the response was already 14 days late, and that as at 23 July 2012 when the response was filed, it had been 4 months and 18 days since the Applicants' attorneys had made enquiries. In this regard, it was submitted that the Respondent had failed to provide an explanation for not acting promptly from 28 February 2012 to 05 March 2012 when Van der Westhuizen addressed a letter to the Applicants' attorneys advising that documents would be served. Furthermore, it was submitted that the alleged deregistration of FREO had nothing to do with these proceedings, and the impression created was that once the Respondent had entrusted the matter to FREO, it had adopted a laid back approach and was only prompted to contact FREO after it had received a notice of set-down. To this end, it was submitted that the Respondent could not escape the consequence of a manifest failure to provide a reasonable and acceptable explanation for the delay by simply blaming FREO, more specifically in view of lengthy period of the delay and sheer inactivity which

remained unexplained. In the light of these factors, Mazibuko submitted that the Respondent's approach indicated a complete disregard of the rules of this Court, and did not act expeditiously in delivering its response.

[15] The explanation proffered by the Respondent for the excessive delay in filing a response is wholly inadequate. No explanation is given in respect of the period that the statement of case was filed and served on 26 January 2012 until 28 February 2012 when the Applicants' attorneys enquired whether a response was forthcoming. Leach failed to explain as to who was the employee who had allegedly informed him of the statement of case, and there is no confirmatory affidavit in this regard. Furthermore, there is no indication as to when Leach was informed, when he had received documentation in that regard, and when he had allegedly managed to schedule a meeting with van der Westhuizen. There is further no explanation in regard to the delay between the period 28 February 2012 after the Applicants' attorneys had sent correspondence and 05 March 2012 when Van der Westhuizen advised that the response would be filed. Leach in his affidavit further failed to account for the period 05 March and 27 June 2012, after Van der Westhuizen had sent correspondence to the Applicants' attorneys and when he again met with Van der Westhuizen only to be told that FREO was deregistered and that there was negligence on the part of van der Westhuizen.

[16] Other than a lack of explanation in respect of these prolonged periods, Leach also apportioned blame on Van der Westhuizen's negligence. It is not sufficient for a party in an application for condonation to simply blame his or her chosen representative. It is trite that there is a limit beyond which a litigant can escape the results of the negligence of its attorney². This principle has consistently been applied by this Court³ and other authorities referred therein). The principle is premised on the view that a litigant instructs that representative, be it an attorney, Union official or Employer Association official on the basis that the latter is familiar with applicable laws and more specifically with the Rules of this Court and the time periods applicable in filing

²(See *Saloojee and Another NNO v Minister of Community Development* ([1965] 1 All SA 521 (A)).

³(See *CWU obo Moses Mahambela v SABC and others* (P100/09)).

documents. Otherwise what would be the purpose of instructing that person or entity on matters of law?

- [17] In determining whether a litigant can escape the negligence of its chosen representative, the Court will have to look at what steps a litigant had taken since instructing the representative to take up a matter on its behalf. This implies that a litigant cannot simply fold its arms subsequent to instructing the representative. In *Uitenhage Transitional Local Council v South African Revenue Service* ⁴ the SCA held as follows:

'One would have hoped that the many admonitions concerning what is required of an applicant in a condonation application would be trite knowledge among practitioners who are entrusted with the preparation of appeals to this Court. Condonation is not to be had merely for the asking; a full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility. It must be obvious that, if the non-compliance is time-related then the date, duration and extent of any obstacle on which reliance is placed must be spelled out.'

This Court in *High Tech Transformers (Pty) Ltd v Lombard* ⁵ expressed similar sentiments as follows:

"Condonation is not merely for the asking as was duly pointed out by the court in NUMSA & another v Hillside Aluminium [2005] 6 BLLR 601 (LC): Additionally, there should be an acceptable explanation tendered in respect of each period of delay. Condonation is not there simply for the asking. Applications for condonation are not a mere formality. The onus rests on the applicant to satisfy the court of the existence of good cause and this requires a full, acceptable and ultimately reasonable explanation. One of the primary purposes of the Labour Relations Act is to ensure that disputes are resolved expeditiously, especially dismissal disputes. ... to do justice to the aims of the legislation, parties seeking condonation for non-compliance are obliged to set out full explanations for each and every delay throughout the process. An unsatisfactory and unacceptable explanation for any of the periods of delay will normally exclude the grant of condonation, no matter what the prospects of success on the merits".

⁴2004 (1) SA 292 (SCA) at para 6

⁵(2012) 33 ILJ 919 (LC) at para 25.

[18] From the above authorities, it is apparent that in circumstances where a party blames a representative for tardiness, the Court will determine whether a detailed account was given since the instructions were given, including dates of consultations, follow-up consultations and steps taken by a litigant in, ensuring that all the documents pertaining to the subject matter of litigation have been filed properly and timeously. Thus, it is expected of a litigant to be an active participant in his or her matter, to actively and vigorously follow up on the matter with the chosen representative, and not be content until satisfied that the instructions have been complied with to the latter. In this case, more specifically in respect of the period 05 March 2012 until 27 June 2012, Leach and by implication, the Respondent had not given an explanation to indicate what steps were taken to ensure that the matter as per its instructions were properly and timeously attended to. On Leach's own version, the Respondent was at all material times under the impression that FREO would attend to the matter. There is no foundation laid for the alleged impression, more specifically in the absence of an account of what steps the Respondent had taken to ensure that the matter was properly attended to. Curiously, there is no indication as to when FREO was deregistered, or when an application in that regard was made before this Court. Furthermore, it is not known as to when the deregistration was confirmed by the Labour Appeal Court. The lack of details in this regard clearly confirms that the Respondent had detached itself from its own litigation and taken an arm-chair approach. Had steps been taken to vigorously follow up on its instructions, it would have come to its attention that FREO no longer had *locus standi* to represent it. Furthermore, there was not even an attempt to explain a further delay between 27 June 2012 and 24 July 2012, when a response was ultimately filed. In a nutshell, the explanation proffered by the Respondent for the delay in filing its response qualifies as "no explanation at all".

Prospects of success:

[19] The Respondent was required to address the Court on all requirements for condonation in its founding papers. It is trite that a party is required to make out its case in its founding affidavit, especially if there are material disputes of

fact that a Court is required to determine. Thus a party cannot make out its case in its replying affidavit⁶. The Respondent's averments in respect of its prospects of success are not contained in Leach's founding affidavit. He had however referred the Court to the Respondent's response (to prevent unnecessary duplication). The difficulty with relying on a response as in this case is that what is contained therein, is not in the form of an affidavit, and ultimately the question arises as to how much weight should be attached to those allegations made in that response in determining whether a party has any prospects of success. It was only in his replying affidavit that Leach attempted to shed some light on these disputes of fact. In my view, special circumstances are applicable in this case for consideration of these averments in Leach's replying affidavit. This is due to the reason that the issue of prospects of success is crucial in the determination of this application, *albeit* not the main consideration.

- [20] The Respondent's main contention was that during May 2011, it had decided to transfer all its employees to Thuba, a labour broker, in terms of section 197 of the Act. These transfers came into effect on 01 June 2011. It was further contended that SATAWU did not at any stage initiate proceedings to have the transfers set aside. The Respondent had further contended that a certificate of outcome enabling the employees to embark on protected strike action was erroneously issued against the Respondent and not Thuba.
- [21] In the Respondent's view, the strike was in contravention of the provisions of section 64 of the Act as a dispute was not declared against the real employer. Following upon the strike action, the employees were then subjected to discipline by Thuba. Following the dismissal, SATAWU had referred an alleged unfair dismissal dispute on 11 October 2011. On the same date, it had also launched an application for a joinder at the CCMA, which application was not opposed as the Respondent was not the employer. Despite the application for a joinder, a certificate of outcome was still nevertheless issued against the Respondent and not Thuba. The Respondent's case is that at the time of the dismissal, the Second to Further Applicants were employed by

⁶ (See *Themba Joni and 82 Others v Servest (Pty) Ltd t/a FICA Quality Cleaning Services* (C833/05)).

Thuba, that they had cited an incorrect employer, and had also contravened the provisions of sections 64 and 134 of the LRA. In support of the contention that the Second to Further Applicants were employed by Thuba, copies of their payslips were annexed to Leach's replying affidavit. These are dated for the period 26 June to 27 July 2011, and reflect the name of Thuba Flexible Staff Solutions.

[22] Mazibuko's in his response denied that the Respondent had prospects of success. His contention was that the Respondent had fallen short of demonstrating that its prospects of success are so good as to compensate for the egregious and unexplained delays. As to who the real employer was, Mazibuko had averred that the Second to Further Applicants were at all material times employed by the Respondent and not Thuba. In support of his contention, he had attached examples of copies of payslips. The copies are however illegible. An original copy of the payslip in respect of one of the Applicants, JK Nhlapo was however filed as annexure "MM8" to Mazibuko's answering affidavit. It clearly shows the name of the employer/company as that of the Respondent as at 30 June 2011.

[23] The prospects of success or *bona fide* defence mean that all what needs to be determined is the likelihood or chance of success when the main case is heard.⁷ In this case, there are a variety of factual disputes that makes the Court's task of even making a *prima facie* finding on the prospects of success arduous. The first dispute of fact surrounds the identity of the employer. The copies of payslips of the employees submitted by both parties in respect of their contending versions are clearly not helpful and are at odds with each other. Secondly, it was common cause as per annexure "AL 11" to Leach's replying affidavit that SATAWU had at least on 11 October 2011 after referring the dispute to the CCMA, also launched an application to join Thuba. This application was properly before the CCMA, and there is no indication that a ruling was issued in that regard as a certificate of outcome in respect of the dismissal dispute was only issued against the Respondent. In the light of this application for a joinder, an inference should be drawn that SATAWU was at

⁷ (See *Chetty v Law Society* 1985 (2) SA at 765A-C.)

least aware that Thuba might have a substantial interest in the matter. The reasons Thuba was still not cited as a party for the purposes of this claim, or at most, why it was not joined are still unknown. Mr. Mazibuko in his arguments on behalf of the Applicants had submitted that the Respondent's application was not supported by an affidavit from Thuba to confirm that it was indeed the employer. In my view, such an affidavit would obviously have gone a long way in assisting in the identification of the real employer. However, the fact that no such affidavit was filed does not, in my view, put paid to the dispute to the extent that a determination can be made that the Respondent remains the employer. This conundrum could have been dealt with differently had SATAWU persisted with its initial joinder application as it was aware that Thuba had a substantial interest in the matter.

[24] In *Melane v Santam Insurance Co Ltd*,⁸ the Court had further 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.....'.

Based on the excessive delay and the lack of a reasonable and or acceptable explanation for that delay, ordinarily this application would have been dismissed. However, the importance of this case to both parties lie in the resolution of the identity of the true employer, coupled with a consideration of whether insofar as the cited respondent is concerned, in embarking on their strike action, the Applicants had properly complied with the provisions of section 64 and section 134 of the LRA. These issues in my view, can only be properly determined through oral evidence. In exercising discretion, I have taken account of interests of fairness in the sense that an adverse order may ultimately be obtained against an incorrect party if the parties are not afforded an opportunity to fully ventilate the issues in dispute, more particularly the identity of the true employer. This discretion is also in consideration of the convenience of this court in order to assist it in coming to a proper determination on these issues.

⁸ (*supra*)

[25] Considerations of the avoidance of unnecessary delays in the administration of justice compel this Court not only to grant this application but to also invoke the provisions of Rule 22 (2) (a) of the Rules of this Court, which provide that;

“ The Court may, of its own motion or on application and on notice to every other party, make an order joining any person as a party in the proceedings if the party to be joined has a substantial interest in the subject matter of the proceedings”

Reference in this Rule to “any person” in my view cannot have been meant to exclude entities. To this end, in the Court’s view, clearly Thuba has a substantial interest in the subject matter of these proceedings.

[26] In regards to the issue of costs, considerations of law and fairness preclude me from making an order in that regards.

Order:

- i. The application for condonation is granted.
- ii. Thuba Flexible Staff Solutions CC is to be joined as the Second Respondent in these proceedings.
- iii. The Applicants are directed to serve their original statement of claim on Thuba Flexible Staff Solutions CC within fourteen (days) of delivery of this judgment.
- iv. Thuba Flexible Solutions CC is directed to file its response with the Court within Fourteen days upon being served with a statement of claim by the Applicants
- v. There is no order as to costs

Tlhotlhamaje, AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicants:

Mr. S. Mabaso of Mabaso Attorneys

For the Respondent:

Mr. J Du Randt of Du Randt Du Toit Pelser
Attorneys

Labour Court