



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JS815/16

In the matter between

**THE ASSOCIATION FOR MINE WORKERS
AND CONTRUCTION UNION ("AMCU")**

First Applicant

**THE AMCU MEMBERS AS PER ANNEXURE
"A1"**

Second To Further Applicants

and

**OIL SEPARATION SERVICES NORTHERN
PROVINCE CC**

Respondent

Heard: 25 November 2016

Delivered: 11 January 2017

JUDGMENT

TLHOTLHALEMAJE, J:

Introduction:

- [1] The First Applicant, Association of Mineworkers and Construction Union (AMCU) seeks condonation for the late filing of a statement of claim on behalf of its members ('The dismissed employees'). The Statement of Claim was initially filed without an application for condonation.

Subsequent to the Respondent raising a point *in limine* in its Statement of Response, a substantial application for condonation was thereafter filed. In the main action, AMCU challenged the fairness of the retrenchment of its members. The application for condonation is opposed by the Respondent.

Background:

- [2] The Respondent is in the business of recyclable waste collection, waste treatment, bulk oil recovery and scrap metal. It had several contracts with various entities in terms of which it rendered various services. One of its contracts was with Mogoalakwena Platinum Mine ('The Mine'). The retrenchments took place on 30 October 2015, after notices of termination were issued on 9 October 2015. The retrenchments occurred against the following background;

2.1 On or about July 2015 Mr Johan Lombard, the Respondent's CEO and sole member, met and advised the employees that the company was contemplating retrenchments of some of them due to its poor financial status. The position the company found itself in was because of the Mine having terminated a portion of the Respondent's contract with it, resulting in the latter no longer being required to conduct sludge operations;

2.2 54 of the 85 jobs were identified as those that may be affected by the retrenchment exercise. The retrenchment process was then referred to the Commission for Conciliation Mediation and Arbitration ("CCMA") for facilitation in terms of section 189A of the Labour Relations Act. Despite four facilitation meetings, the parties could not agree on a variety of issues. This then prompted the Respondent to issue dismissal notices as mentioned above.

2.3 There is a dispute as to the number of employees retrenched. The Applicants contend that 54 were retrenched, whilst the Respondent contended that 35 were retrenched. AMCU however for the

purposes of this application and the main claim represents 29 of the dismissed employees.

- [3] AMCU thereafter referred an unfair dismissal dispute to the CCMA. The matter was conciliated on 25 November 2015, resulting in a certificate of outcome being issued on that date. The dispute ought to have been referred for adjudication by no later than 26 February 2016 in terms of the requirements of section 191 (11) (a) of the LRA. The statement of claim was only filed and served on 3 October 2016.

The legal framework and evaluation:

- [4] The Court's discretion when considering applications for condonation derive from the provisions of section 191 (11) (b) of the LRA read with Rule 12 of the Rules of the Conduct of Proceedings. Thus, on good cause shown, the Court may condone the non-observance of the time frames.
- [5] The court in *Melane v Santam Insurance Co. Ltd*¹ identified the factors to be considered in applications for condonation 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, 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 to compensate prospects which are not strong. Or the importance of the issue and strong prospects may tend to compensate for a long delay. And the Respondent's interests in finality must not be overlooked'

- [6] Further principles applicable to applications for condonation are that an application should be filed without delay as soon as a party to litigation becomes aware of the need to file such an application². To enable this court to

¹1962 (4) SA 531 (A) at 532B-E

² See *Meintjies v HD Combrinck* (Edms) Bpk 1961 (1) SA 262 (A) at 263 H-264B.

properly exercise its discretion, a party seeking condonation must set out all the facts and circumstances relating to the delay, and most importantly, must provide a satisfactory explanation and account for each period of the delay. Any period of delay that is unaccounted for, will result in an indulgence being refused³.

The period of the delay and explanation:

[7] The statement of claim was filed on 03 October 2016, some seven months outside of the 90-day period contemplated in section 191 (11) (a) of the LRA. Notwithstanding the need for condonation at that stage, such an application was filed and served on 17 October 2016, some two weeks later. It cannot be debatable that the delay is indeed excessive in the extreme.

[8] The AMCU's Head Legal Advisor, (Mr Philippus Daniel Marais) deposed to the affidavit in support of the application for condonation. He had attributed the delay to the following factors;

8.1 Throughout the facilitation and conciliation processes, a Mr Lesiba Mabilu, the then AMCU Regional Organiser had represented the Applicants and therefore had the knowledge of the facts of the matter;

8.2 Mabilu resigned from the employ of AMCU in January 2016. As Regional Organiser, he had the sole responsibility of referring the dismissal disputes to this Court after the certificate of outcome was issued by the CCMA. Mabilu did not however refer the matter to this Court as expected of him, and had upon his resignation, refused to participate in a formal handing over of matters to his replacement;

8.3 Prior to Mabilu's resignation, and subsequent to the conciliation proceedings, one of the dismissed employees, Mr Elias Thole had contacted with Mabilu to establish the status of their matter, and was assured that it was being dealt by the AMCU's legal department. Thole

³ See NUMSA and another v Hillside Aluminium [2005] 6 BLLR 601 (LC)

and the other dismissed employees accordingly had no reason not to accept Mabilu's assurances;

8.4 In June 2016, the Respondent had initiated and finalised a further retrenchment exercise. At that stage, the dismissed employees were concerned about how their matter was being dealt with. They had not received any update from Mabilu on their matter, and had directly approached the CCMA to establish its status. They then were informed by the officials of the CCMA that the latter did not have the jurisdiction to adjudicate the matter and as a result, it had been referred to the Labour Court. (A document, Access Control, dated 21 July 2016 was attached to the founding papers to demonstrate that indeed Thole had approached the CCMA on that date)

8.5 Thole and the other dismissed employees then approached the Labour Court on 02 August 2016 with the intention of establishing whether their matter had indeed been referred. They were then advised that no such dispute had been referred. Thole then contacted Mabilu who again assured him that the matter was referred to the AMCU's legal department. Mabilu further advised Thole that he had since resigned from AMCU, and that all further enquiries in respect of their matter should be directed to AMCU;

8.6 Thole thereafter directed communication to AMCU's Limpopo Regional office, inquiring about the status of the matter. The Regional Secretary within the Regional Office indicated that a diligent search had been conducted and that the file in respect of the matter could not be traced;

8.7 Thole went back again to Mabilu who advised him that the file was at the union's Witbank office. Again, a search was conducted at the Witbank office and the file could be located. To date, no such file could be located, necessitating the need to reconstruct the file from Mabilu's emails and work computer;

8.8 Ms Tsharelo Maphoto, a paralegal at the Applicant's Witbank office had then scheduled a meeting with Marais to draft the statement of

claim for 29 August 2016. That meeting was however cancelled as a result of an urgent matter, in respect of a strike action that the Head of Legal Department had to attend to. This Court heard the dispute in respect of that urgent matter under case number J190/16 on 30 August 2016;

8.9 The first opportunity that Marais could have to hold a meeting with the Applicants was in the middle of September 2016, and it had become apparent at that stage that the matter had not been referred to either AMCU's Legal Department or to this Court as Malibu had assured. A meeting was thereafter scheduled with the Applicants' attorneys of record for 30 September 2016, resulting in the statement of claim being filed on 03 October 2016.

[9] In the Respondent's answering affidavit deposed to by its Human Resources Manager, Megan Lombard, it was contended that the delay was excessive and incapable of being condoned by this Court in the light of dilatoriness on the part of AMCU and its members. Further contentions made on behalf of the Respondent were as follows;

9.1 AMCU was on its own version, negligent and dilatory in the handling of the matter, and the Second to Further Applicant were entitled to make a claim against AMCU;

9.2 The matter was not referred timeously to this Court as the Applicants were aware that they had no prospects of success in the main action;

9.3 Mr Mabilu was not the only official employed by the First Applicant as a Regional Organiser, and in fact, the Respondent, did not deal with him. There were other shop stewards within the employ of the Respondent who had intimate and working knowledge of the facts of the matter;

9.4 If AMCU and its Legal Department had been diligent, they would have known that the matter had not been referred to this Court, and there was nothing that prevented it, its officials, organisers or shop stewards within

the Respondent to have referred the matter timeously, at the very least after the end of February 2016;

- [10] It is apparent that the Applicants sought to blame Mabilu for the delay in filing and serving the statement of claim. The issue however is whether this is a reasonable and acceptable explanation. The obvious answer is in the negative. The starting point is that to the extent that a Union and its officials are mandated to act on behalf of its members, especially in regards to all matters pertaining to employees' rights in the LRA, there is in my view, no reason to distinguish them from the ordinary attorney/client relationship.
- [11] It is trite that litigants cannot be absolved from the tardiness of their own chosen representatives. The principles in this regard have long been set out by Steyn CJ in *Saloojee & another v Minister of Community Development* in the following terms;

"In Regal v African Superslate (Pty) Ltd 1962 (3) SA 18 (AD) ... this court came to the conclusion that the delay was due entirely to neglect of the applicant's attorney, and held that the attorney's neglect should not, in the circumstances of the case, debar the applicant, who was himself in no way to blame, from relief. I should point out, however, that it has not at any time been held that condonation will not in any circumstances be withheld if the blame lies with the attorney. There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the rules of this court. Considerations ad misericordiam should not be allowed to become an invitation to laxity. In fact this court has lately been burdened with an undue and increasing number of applications for condonation in which the failure to comply with the rules of this court was due to neglect on the part of the attorney. The attorney, after all, is the representative the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a rule of court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are.... A litigant, moreover, who knows, as the applicants did, that the prescribed period has elapsed and that an application for condonation is necessary, is not entitled to hand over the matter to his attorney and then wash his hands of it. If, as here, the stage is reached where it must become obvious also to a layman that there is a protracted delay, he

*cannot sit passively by, without so much as directing any reminder or enquiry to his attorney... and expect to be exonerated of all blame; and if, as here, the explanation offered to this court is patently insufficient, he cannot be heard to claim that the insufficiency should be overlooked merely because he has left the matter entirely in the hands of his attorney. If he relies upon the ineptitude or remissness of his attorney, he should at least explain that none of it is to be imputed to himself. That has not been done in this case. In these circumstances I would find it difficult to justify condonation unless there are strong prospects of success."*⁴

- [12] In the light of the above principles, it is not sufficient for the Applicants simply to lay the blame for the delay in filing their statement of claim solely on Mabilu. It was correctly pointed out on behalf of the Respondent that in the light of the extent of the delay, the explanation proffered was equally inadequate and not reasonable.
- [13] The second round of retrenchments took place in February 2016, and were finalised in May 2016. There was therefore no explanation for the delay in respect of the months after Mabilu had resigned between January 2016 and June 2016. Thus, between November 2015 after the conciliation process and June 2016 when the next round of retrenchments took place, nothing had been done by either AMCU or the dismissed employees themselves other than the odd occasion that Thole had contacted Mabilu, to ensure that the statement of case was timeously filed. Even if Mabilu had informed Thole at least on no less than three occasions that the matter had been referred to the AMCU's legal department, still, there is nothing to demonstrate that Thole and others had made any attempts at verifying that indeed their case was referred to the legal department, and that it was being attended to as assured by Mabilu. Furthermore, it is more than probable that Thole and others knew after February 2016 that Mabilu had resigned from AMCU. For them to persist in enquiring from him as to the status of their matter rather than directly contacting the Union is inexplicable.

⁴ 1965 (2) SA 135 (A) 141B-H. See also *Silplat (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and Others* [2011] 8 BLLR 798 (LC) at paragraphs 54 to 58

- [14] As it has already been stated, a party seeking indulgence from the court must give an account for each period of the delay, and in this case, the Applicants were found wanting on all accounts, inclusive of the period between November 2015, and June 2016. Furthermore, upon Thole verifying with the CCMA that indeed the latter did not have jurisdiction to determine their dispute, very little information is proffered in regards to what was done between July 2016 after Thole visited the CCMA and October 2016 when the statement of case was ultimately filed. Worst still, there is no explanation as to the reason it took the Applicants a further two weeks to file this application, when it was clearly apparent at that stage that such an application was necessary.

Prospects of success:

- [15] It was submitted on behalf of the Applicants by Ms Greyling-Coetzee that although on the face of it, a delay of Seven (7) months was excessive, but that the prospect of success in this matter were very strong, and thus accordingly compensated for that extensive delay. In *NUM v Council for Mineral Technology*⁵, it was 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 condonation should be refused”

- [16] Similarly, in *Moila v Shai N.O. and Others*⁶, the court (per Zondo JP as he then was) had commented on the period of delay in that matter by stating that;

“I do not have the slightest hesitation in concluding that this is a case where the period of delay is excessive and the appellant's purported explanation for the delay is no explanation at all. I accept that the case is very important to the appellant. However, the weight to be attached to this factor is too limited to count for anything where the period of delay is as excessive as is the case in this matter and the explanation advanced is no explanation at all. If ever there was a case in which one can conclude that good cause has not been shown for condonation without even

⁵ 1999 3 BLLR 209 (LAC) at p211 paragraph G-H

⁶ (2007) 28 ILJ 1028 (LAC) at para 34

considering the prospects of success, then this is it. 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 that it is necessary to consider the prospects of success.’

- [17] In this case, in the light of the conclusions reached that the Applicants’ attempt to lay the blame squarely on Malibu cannot be accepted as an excuse, and further in the light of their failure to account for each period of the delay, which is excessive in the extreme, it follows that the explanation, if any, does not amount to an explanation at all, and it thus little purpose would be served by considering the Applicants’ prospects of success in the matter.
- [18] For the sake of completeness however, and to the extent that in considering applications of this nature the interests of justice should be taken into account⁷, the basis of the Applicants’ claim should be examined. Primary amongst the complaints raised in regards to the retrenchments were that it was not necessary for the Respondent to effect the terminations; that the parties had despite facilitation, not agreed upon the selection criteria and that the criteria applied was not fair. It was further contended that to the extent that the Respondent sought to retain skills, such an approach had not been consistently applied; that no attempt was made at considering alternative positions; that the Respondent had not considered nor applied bumping; and that there was selective re-employment of certain employees which was unfair.
- [19] It is my view that upon a consideration of all the facts, the Applicants’ prospects of success on the merits of the main claim are indeed non-existent. It was common cause that following the of retrenchments of October 2015, the Respondent had followed with a similar exercise in February 2016, which was completed in June 2016. It was not disputed by the Applicants that the second round of retrenchments had resulted in all the employees of the Respondent (those not retrenched during the first round) being dismissed, and that as at 31 May 2016, the Respondent had no employees left. Based on this undisputed fact alone, it becomes difficult for any argument that there was no need to retrench in October 2015 to be sustainable. The mere fact that about 18

⁷ See *Brummer v Gorfil Brothers Investments (Pty) Ltd* [2000] (2) SA 837 (CC) at 839 F

employees were subsequently recalled in June 2016 on temporary contracts does not imply that there was no need to retrench at the time.

[20] Although there is a dispute about the selection criteria used in dismissing the employees, there is indeed some form of agreement that the Respondent utilised LIFO, with the proviso that skills would be retained. The Applicants in the founding affidavit went at length in comparing instances where the Respondent allegedly applied this selection criteria inconsistently, even though it had not been agreed to. In my view, however, this elaborate comparison between who should and should not have been identified for retrenchment based on LIFO and the retention of skills does not take the Applicants' case any further.

[21] It is trite that in accordance with the provisions of section 189 (7) (b) of the LRA, in instances where the parties have not agreed on the selection criteria, the employer is at liberty to apply a criterion that is fair and objective. Thus, LIFO as a stand-alone criterion is not the only fair and objective criteria. The employer, depending on its own operational requirements, is entitled to adopt criteria such as experience, competency, efficiency and skills. In this case, it was common cause that the Respondent applied LIFO, educational qualifications and retention of skills as a criterion, when selecting employees for retrenchment. That criteria might not necessarily have been to the liking of the Applicants, but that in itself does not make it unfair. Be that as it may, there is no merit in the Applicants' contention that the Respondent had 'cherry-picked' employees to be retrenched, and there is further nothing to suggest that in applying the criteria, the Respondent did so capriciously or in bad faith. *Prima facie*, there is no basis for a conclusion to be reached that overall, the criteria applied by the Respondent had not met the threshold of objectivity and fairness.

[22] The Applicants had also raised concerns surrounding the Respondents' failure to consider alternative positions or bumping prior to terminations. Be that as it may, it is not stated which of those alternative positions were available, and how bumping was to be effected. The Applicants also raised concerns surrounding voluntary packages that were offered to

affected employees without an agreement. To the extent that it is not stated that such voluntary packages fell short of basic requirements contained in section 41 (2) of the Basic Conditions of Employment Act, a failure to agree on voluntary packages does not in itself make the retrenchment exercise unfair.

- [23] It was also argued on behalf of the Applicants that since the Respondent had selectively re-employed some of the retrenched employees, that on its own was sufficient to set aside the terminations. There is clearly no merit in this assertion in the light of the Respondent's contention that the re-employment of some of the employees took place after June 2016 *albeit* on a temporary basis. It follows that in the light of all the above considerations, the Applicant's prospects of success are clearly remote, if not non-existent.

Conclusions:

- [24] In the light of the excessive nature of the delay in filing the statement of claim, the lack of a satisfactory or reasonable explanation for the delay, and the lack of prospects of success on the merits of the main claim, it follows that it would not be in the interests of justice to grant condonation. Worst still, in the light of these factors, it is the Respondent that stands to be severely prejudiced if condonation was to be granted, as it would be compelled to defend a claim that clearly has no merit.
- [25] I have further had regard to the requirements of law and fairness in considering costs. The Applicants' claim, other than being belated, was clearly ill-conceived. In the circumstances, there is no reason in law and fairness why AMCU should not be burdened with the costs of this application. Accordingly, the following order is made;

Order:

- i. The application for condonation the late filing of the Applicants' statement of claim is dismissed.

- ii. The Applicants' main claim is dismissed.
- iii. The First Respondent, (AMCU), is ordered to pay the costs of this application.

Edwin Tlhotlhemaje

Judge of the Labour Court of South Africa

LABOUR COURT

Appearances:

For the Applicant:

Adv. D Greyling-Coetzee

Instructed by:

Larry Dave Incorporated Attorneys

For the Respondent:

Adv. S Bekker

Instructed by:

Nothnagel Attorneys

LABOUR COURT