

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: JS944/2016

DATE: 2017-04-21¹

In the matter between

TIRISANO TRANSPORT & SERVICES WORKERS' UNION Applicant

obo Mnchunu & 12 others

and

KEUHNE & NAGEL (PTY) LTD Respondent

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J U D G M E N T

STEENKAMP, J:

The applicant, Tirisano Transport & Services Workers' Union, Union referred a dispute to this court on 5 December 2016. The Union had referred the dispute to the CCMA, conciliation failed and a certificate of non-resolution was issued on the 8th of August 2016 reflecting that fact.

The dispute had to be referred to this court within 90 days in terms of Section 191(11) of the LRA. The Union only referred it on the
20 6th of December 2016. The respondent through its attorneys, Shepstone and Wiley, delivered a statement of defence within the prescribed time period on the 20th of December.

In that statement it raised a point *in limine* that the referral was out of time.

¹ This *ex tempore* judgment was handed down on 21 April 2017. The transcript and file were only given to me for signature on 12 June 2017.

Despite the fact that the respondent pointed out to the Union and its attorneys that the statement was delivered out of time and that it necessitated an application for condonation, the Union's attorneys only delivered the application for condonation on the 6th of January 2017, a month after it had delivered its statement of claim.

I will return to the application for condonation itself in a moment. I will first deal with the second point *in limine* which was raised by the respondent, and that is that the statement of claim did not set out the details of the individual applicants in sufficient detail. It is
10 indeed so that the statement of claim refers to the applicants as "the Union on behalf of Mnchunu and 12 others" without attaching any list of applicants. That is not addressed in the application for condonation either.

The deponent to the founding affidavit, who is the attorney, Charlie Higgs, simply reiterates that the applicant, i.e. the Union, has an excellent explanation for the delay. He refers to the reasons therefor and he simply refers back to the statement of claim when dealing with the identity of the applicants.

In his argument today, Mr *Higgs* referred to the statement of
20 claim which contains as it must in terms of Clause 6 a list of books and documents and that list refers on the last page of the statement of claim to a "list of applicants" without setting out who those applicants are.

As Ms *Ngwenya*, for the respondent, pointed out, there is on the face of it a discrepancy in that the Union now purports to act on behalf of 13 of its members whereas the certificate of outcome dated

the 8th of August 2016 refers to the Union on behalf of 14 applicants. It is therefore not clear to the respondent who those applicants are on whose behalf the Union purports to act.

Of course the LRA itself allows a trade union to act on behalf of its members. That is dealt with in Section 200(1)(b) which states that,

“... a registered trade union ... may act in any one or more of the following capacities in any dispute in which any of its members is a party -- ...

b) on behalf of any of its members – “

10 In *Dunn v Hernic Exploration (Pty) Ltd* [2001] 2 BLLR 209 (LC) a similar situation occurred where a trade union, the NUM, purported to act on behalf of certain of its members who had been dismissed but who were not cited or listed. The Labour Court, following the earlier judgment of *Librapac CC v Moletsane NO* (1998) 19 ILJ 1159 (LC), found that in terms of section 200(2) a registered trade union may only be a party to proceedings if one or more of its members are party thereto. What was required of the applicant union, Francis AJ (as he then was) held, was

“...a clear schedule containing each person’s full names, his/her address and the signature to record that person’s wish
20 to be a party to the steps being taken.”

However, the *Hernic* decision was overruled on appeal in *NUM v Hernic Exploration (Pty) Ltd* [2003] 4 BLLR 319 (LAC) where Zondo JP, as he then was, pointed out that section 200(2) does not contain the word “only” and is permissive rather than prohibitory, since the dispute was between the members of the union and the respondent. He held that the

union was entitled to act in any one or more of the three capacities provided for in section 200(1). He held that the fact that the union did not furnish the names of the affected employees did not affect the jurisdiction either of the CCMA or the Labour Court, even though the best practise is for the union to give the names of the employees so that the employer knows which employees the proceedings relate to.

I agree that this court is not deprived of jurisdiction to hear the matter because of the failure to set out the details of the individual applicants, given that the Union acts on their behalf. I also agree with
10 Ms *Ngwenya* that, should the Union be successful in its application for condonation, the failure to cite the individual applicants should not be a bar to them proceeding, but that it should be given an opportunity to provide such a schedule within a certain time. I also agree with Mr *Higgs* that it would be practicable to do that at or before a pre-trial meeting and at least to record it in a pre-trial minute that is yet to be filed.

That then brings me to the main point *in limine* which is that of the application for condonation.

Mr *Higgs* concedes in his oral argument today for the first time
20 that the application is indeed out of time. Although he says in his heads of argument that it is 21 days out of time, that is not so. It is in fact 29 days out of time, i.e. just short of a month. I will deal with the application in terms of the well-known judgment in *Melane v Santam Insurance Company Ltd* 1962 (4) SA 531 (A) 538 C to E.

The extent of the delay, as I have said, is some 29 days already outside of the generous period of 90 days allowed by section 191 of the Act. In his explanation for the delay Mr *Higgs* states the following,

“The respondent avers, which averment the applicant denies, that the applicant’s statement of claim is filed outside the prescribed time limits. According to the respondent the statement of claim should have been filed on or before the 7th of November 2016. The applicant submits that an application in terms of section 191(11)(a) of the LRA must be made to this Honourable Court within 90 days from the date on which the CCMA has determined that the dispute remains unresolved. ...

10 “The applicant submits that when on is required to calculate a time period in days ... Saturdays, Sundays and public holidays are not accounted for.”

In his oral argument today, Mr *Higgs* quite properly conceded that that submission is wrong in law. He did so after Ms *Ngwenya* referred him to the case of *Latiff v Donro*, a case that Ms *Ngwenya* said is unreported, but is in fact reported and dealt with in at least one

20 commentary. The case is *Latiff v Donro (Pty) Ltd* [2004] 11 BLLR 1151 (LC). It is dealt with in *Labour Law through the Cases* [Du Toit et al] of which I have the outdated issue 27 of October 2015 to hand. [The latest issue in this loose leaf is in fact April 2017]. But be that as it may, the authors deal with section 191(11) in terms at page LRA 8-100 of issue 27.

Interestingly, when dealing with section 191(11), it also refers to the case on which Mr *Higgs* relied in his argument with regard to the identity of the applicants. That is *NUM v Hernic Exploration* [2001] 2 BLLR 209 (LC) confirmed on appeal at [2003] 4 BLLR (LAC). In that case the court noted that s 191(11)(a) is peremptory and prevented an employee from referring a dispute to the Labour Court for adjudication before the CCMA or a Council had issued a certificate of non-resolution. The court said that it

10 “... derives its jurisdiction in disputes of this nature only from the referral of a dispute for conciliation on time and a referral to this court for adjudication within 90 days from the date when the certificate of non- resolution has been issued.”

The calculation of those days has throughout the history of this Court been on the basis as set out in the Interpretation Act and not in Rule 1. The issue was dealt with in terms as far ago as 2004 in *Latiff v Donro* and that is dealt with on the same page at LRA 8-100.

The learned authors in *Labour Law through the Cases* also deal with it at page LC-2 under the definition of the word “day” when
20 dealing with Rule 1. They say the following:

“The Act contains no definition of “day”. In *Latiff v Donro* the court agreed with Landman & Van Niekerk *Practice in the Labour Courts* that Rule 1 applies to the rules and not to the LRA. The converse however is not true. If an expression in the rules is defined in the LRA it must bear the same meaning

for purposes of the rules. In order to interpret the term '90 days' in section 191(11)(a) of the LRA, therefore, the definition "day" in section 4 of the Interpretation Act was preferred over that in the rules."

The definition has therefore been dealt with in terms by Landman and Van Niekerk, a Judge of this Court and of the Labour Appeal Court respectively, in their commentary that is dated if I recall correctly around 2003, again in *Latiff v Donro* in 2004, and again in *Labour Law through the Cases* in each edition of the loose leaf publication dating from, if
10 memory serves, 2003 until today, 143 years later, and that situation has not been changed either by an amendment to the Act or the rules or by any higher court.

The explanation offered in the founding affidavit which simply denies the correctness of that calculation, therefore, is -- as Ms *Ngwenya* submitted -- no explanation at all. Although Mr *Higgs* today in his oral argument fell on his sword and conceded that his advice to his client was wrong, Ms *Ngwenya* correctly pointed out that that is not foreshadowed by the application itself. And in any event, as was held in *Saloojee's* case and a number of cases subsequently, there is a limit
20 beyond which a litigant cannot escape the negligence of its attorney. The explanation is not sufficient. I will nevertheless deal with the prospects of success as well as the issue of prejudice.

As far as prospects of success are concerned, the Union takes issue with the selection criteria used by the company when deciding who should be dismissed for operational requirements. It appears from

the papers before me that at least seven consultation meetings were held between February and May 2016. The company through its legal counsel, Mr Louis Velaphi Mthembu, says in its opposing affidavit that during the consultation process,

“It became apparent that those employees who were affected by the process and who were members of the Union ... were not, to their own detriment, prepared to participate in the recruitment process.”

The Union did not deliver a replying affidavit. On the principles set out
10 in *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) I am constrained to accept the version of the respondent, difficult as it may be to properly ascertain the prospects of success on affidavit in cases such as this where there are numerous disputes of fact. On the evidence before me I must accept that the Union did not participate in the process and that on that basis it has poor prospects of success in the main referral.

Although the Union and its members will be prejudiced if they are barred from proceeding with this matter by way of oral evidence, I agree with Ms *Ngwenya* that it is in the interest of finality that
20 condonation be refused. The Union is to some extent the author of its own misfortune and the matter has already been delayed for at least four months through its inaction and the inaction of its attorneys. There is simply no explanation for the four months during which it did not refer its dispute to this Court. Even given that the Union acted on the wrong advice, there is also, as Ms *Ngwenya* pointed out, no explanation why

there was no action taken even during the first 90 days after the CCMA issued the certificate of none resolution. For all these reasons the application for condonation must fail.

That leaves the issue of costs. Ms *Ngwenya* submitted that cost should follow the result. That was also the prayer of the Union in its application for condonation. Ms *Ngwenya* submitted that this should be the case especially in circumstances where the company through its attorneys had raised the two points *in limine* on at least three occasions and despite that, it is only today that the Union's attorneys accepted that
10 it had proceeded on the wrong legal basis and that therefore it was in the first place required of it to apply for condonation -- something that it only did the month after its belated filing of its statement of claim.

In all of these circumstances the application for condonation for the late filing of the applicant's statement of claim is dismissed with costs.

STEENKAMP J

20 APPEARANCES

APPLICANT : C Higgs (attorney).

RESPONDENT: Zinhle Ngwenya

Instructed by: Ms S Leyden of Shepstone & Wylie.

