



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JS 794/14

In the matter between:

**NATIONAL UNION OF METALWORKERS OF
SOUTH AFRICA**

First Applicant

JOROSIAH MOTUBATSE

Second Applicant

and

POWERTECH TRANSFORMERS

Respondent

Heard: 10 February 2017

Delivered: 5 December 2017

JUDGMENT

TLHOTLHALEMAJE, J:

Introduction and background:

- [1] The applicants seek condonation for the late filing of a statement of claim. The application is opposed by the respondent. The application is brought before the Court by National Union of Metalworkers of South Africa (NUMSA), on behalf of its member, Mr Jorosiah Motubatse (Motubatse), who was allegedly unfairly dismissed by the respondent, Powertech Transformers (Pty) Ltd (Powertech). The dispute has a protracted history dating back to March 2008.

- [2] The background facts are to a large extent common cause. In 1999, Powertech had contracted one Johan Marx, an accredited training assessor from Wings Training Centre, to provide training to its employees. For the purposes of this dispute, the training in question related to overhead crane and forklifting equipment. The training was arranged by Powertech's Training Manager, Ronald Graham, who had drawn a schedule of which employees were to be trained on a particular day in respect of a particular training.
- [3] The incident that led to the dispute took place on 6 August 2007 when forklift recertification training was to take place and to be attended by six employees nominated for the course. The trainees/employees had to be in possession of a medical certificate. Some of the employees did not possess the necessary medical certificates and were excluded from the training. It is alleged that Motubatse confronted Marx during the training of about three (3) employees on various occasions in an aggressive and threatening manner, demanding to know the reason other employees were excluded from the training. Marx then reported Motubatse's conduct to Graham, and thereafter, the incident was investigated including taking statements from witnesses.
- [4] Motubatse's training on overhead cranes was scheduled to take place on 15 August 2007. At that training, Motubatse is alleged to have been uncooperative and disruptive. It is further alleged that he had raised his voice towards Marx, and humiliated him in front of the other employees. Marx had to stop the training and had laid a further complaint against Motubatse. Marx came back to the training with Graham, who had asked to speak to Motubatse privately. Marx and the other trainees were also called upon to explain what had happened.
- [5] Motubatse then laid a grievance on 16 August 2007 against Marx, alleging that he was harassed, victimised and intimidated by him, and that he had also used offensive language towards him. He had accused Marx of being unprofessional and undermining towards the trainees. Marx had also responded in writing to the grievance and denied the allegations against him.

- [6] An independent person was appointed to investigate the allegations and counter allegations between Marx and Motubatse and to recommend any steps in that regard. The investigator, Pieterse after completion of his investigations, recommended that disciplinary processes be followed rather than a grievance procedure. A disciplinary process followed on 29 November 2007 at which Motubatse was found guilty of intimidation, making threats, false and malicious allegations against Marx, and falsely accusing Pieterse of racism¹. He was subsequently dismissed on 12 March 2008.
- [7] The applicants then referred an unfair dismissal dispute to the Metal and Engineering Industry Bargaining Council (MEIBC) in April 2008. Conciliation having failed, the matter was referred to arbitration. The arbitration was held over a number of days and had culminated in an award being issued by the late Commissioner Zodwa Mdladla on 25 January 2012. The Commissioner held that the dismissal of Motubatse was procedurally and substantively unfair, and he was reinstated back into Powertech's employ with backpay.

¹ In terms of Annexure A, the charges were:

- 1.1. Intimidation and/ or threats;
- 1.2. Initiating reports calculated to cause unrest, alarm, despondency and/ or leading to poor labour relations;
- 1.3. Unauthorised interference and disruption of a formal training process;
- 1.4. Removing employees from a formal training session without authority and thereby jeopardising their safety.

Details appear from the statement by Johan Marx dated 20 August 2007 a copy of which is attached hereto "A1"

2.

- 2.1. Making false and malicious allegation against Mr Johan Marx of Wings Training Centre, when you knew these allegations were false with regard to:
 - (a) harassment;
 - (b) victimisation;
 - (c) undermining the trainees;
 - (d) unprofessional and unbecoming attitude and behaviour; and
 - (e) not caring for the feelings of the workers.

Details appears from the grievance form dated 15 August 2007, a copy of which is attached hereto marked "A2"

3. Making false allegations of racism against Johan Pieterse, chairperson of the enquiry on 8 November 2007.
4. In acting as aforesaid you have destroyed the trust relationship and/ or the employment relationship between yourself and the company.

- [8] Powertech in September 2009 brought an application to this Court in terms of section 145 of the Labour Relations Act (LRA)² under case number JR 1250/09 to review and set aside the award issued on 25 January 2012. It appears that Powertech did not prosecute the review timeously, resulting in a Rule 11 application being launched by the applicants.
- [9] The Rule 11 application came before La Grange J on 25 January 2012, who had issued an order in terms of which Powertech's review application was dismissed, and the award was made an order of court in terms of the provisions of section 158(1)(c) of the LRA.
- [10] An application for rescission of La Grange J's order was then filed by the respondent on 26 March 2012. The rescission application came before Seedat AJ on 09 January 2013. In a written judgment delivered on 12 February 2013, Seedat AJ granted the application for rescission, and directed the parties to file the outstanding papers in the review application.
- [11] On 24 August 2014, the parties then approached Molahlehi J in chambers. By agreement, the Commissioner's award of 25 January 2012 was reviewed and set aside. The matter was then remitted back to the MEIBC for a hearing *de novo* before another Commissioner. The agreement was made an order of court.
- [12] Following a request by the applicants on 03 June 2014, the MEIBC then set the matter down for arbitration on 19 August 2014. At those proceedings, Mr. Cartwright, the applicants' attorney of record, advised Commissioner Frans Stassen that based on a certain judgment of this Court, he was of the view that the applicants' case pertained to an automatically unfair dismissal, and he therefore wished to withdraw the dispute before the MEIBC and to refer it to this Court. Commissioner Stassen accordingly issued a ruling on 19 August 2014 in that regard, indicating that the dispute was withdrawn, and directing the MEIBC to close the file.

² Act 66 of 1995

- [13] The applicants filed their statement of claim on 29 August 2014. In their statement of claim, the applicants contend that the dismissal of the second applicant was automatically unfair in terms of the provisions of section 187(d) of the Labour Relations Act. In the alternative, the applicants contend that the dismissal was unfair. Powertech filed its statement of response on 11 September 2014. The parties concluded pre-trial minutes on 11 June 2015. Powertech did not indicate any intention to raise any preliminary points, and the matter was enrolled for trial for 13 June 2016.
- [14] Prior to the trial date, the parties held a meeting on 25 May 2016, and an agreement was reached that the matter would be removed from the roll and that the applicants would file an application for condonation for the late filing of the statement of claim. The application for condonation was thereafter filed on 15 July 2016.

The application for condonation and evaluation:

- [15] In the statement of claim, it is alleged that the dismissal of Motubatse was automatically unfair within the meaning of section 187 (d) of the LRA, since it related to the reason that he had exercised his right to institute a grievance. In the alternative, it was alleged that the dismissal was unfair.
- [16] The provisions of section 191 (11) (a) of the LRA require the dispute such as lodged by the applicants to be referred to this Court within 90 days from the date that the matter is certified as unresolved. Under section 191 (11) (b), the Court may condone the non-observance of the time frames on good cause shown.
- [17] The factors to be considered in such applications are trite. In considering the application, the court will take into account the extent of the delay, the explanation therefor, the prejudice to the parties, and where necessary, whether the applicant has good prospects of success on the merits of the claim. Ultimately, upon a consideration of all these factors, the question the Court will have to answer is whether it is in the interest of justice to grant the

condonation sought³. In *Grootboom*, Bosielo AJ (As he then was) further held that;

'It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or the court's directions. Of great significance, the explanation must be reasonable enough to excuse the default.'⁴

[18] As already indicated, the certificate of outcome in this case was issued on 7 May 2008, whilst the statement of claim was filed on 29 August 2014, almost six years later after the initial dispute was referred to the MEIBC. Moreover, the application for condonation was only filed on 15 July 2016, almost 23 months after the statement of claim was filed. The sum degree of lateness may be said to be almost eight years. This does not even include the applicant's delay in filing a replying affidavit in respect of the condonation application.

[19] There can be no doubt that the delay in this case is excessive in the extreme, and the applicants are therefore required to present a truly reasonable explanation. In his founding affidavit in support of the application for condonation, the applicants' attorney of record, Cartwright conceded that the dispute having been conciliated on 7 May 2008, it was 8 years old since conciliation. He nonetheless contended that there was a reasonable

³ See *Melane v Santam Insurance Company Ltd* 1962 (4) SA 531 (A) at 532C-D; *Grootboom v National Prosecuting Authority and Another* [2014] 1 BLLR 1 (CC) at paras 50-51, where it was held that;

'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....

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.'

⁴ *Ibid* at para 23.

explanation for the delay within the context of the matter having gone through various stages including the conciliation, the arbitration, the review, the Rule 11 application, the rescission application, the in-chambers proceedings before Molahlehi J, and back to the MEIBC.

- [20] According to Cartwright, flowing from the parties' meeting of 25 May 2016, he was of the mistaken impression that because the matter had been referred back to the MEIBC; and because the cause of action that had underpinned the decision of the Court to set the matter aside and refer it back to the MEIBC was the same cause of action that led him to refer the matter to the Court, it was therefore not necessary to apply for condonation, as his authority for referring the matter without applying for condonation derived from the Court's decision to review the matter on 24 February 2014. Cartwright further averred that it was his mistaken misunderstanding that if the cause of action was the same, whether the Court referred it back to the MEIBC or whether as a result of his agency, the authority to refer for adjudication, would derive from the Court's order itself, which order would remain valid, and would not prescribe for a period of 30 years. He averred that he now realized his mistake and apologised.
- [21] There are inherent difficulties with the explanation proffered by Cartwright for the extreme delay. The explanation, when properly understood merely boils down to a mistake on his part and an apology. It was pointed out on behalf of Powertech that Cartwright was already on board when the matter was dealt with in chambers before Molahlehi J on 24 February 2014. Until Cartwright sought to have the matter referred for adjudication on 18 August 2014, the applicants' case from inception had always been that Motubatse's dismissal on the basis of alleged misconduct was procedurally and substantively unfair. The applicants were prepared to live with Commissioner Mdladla's award in terms of which it was found that Motubatse's dismissal was unfair. At no stage before 18 August 2014 was it the applicants' case that the dismissal of Motubatse was automatically unfair.
- [22] Significantly, after the matter was referred back to the MEIBC on 24 February 2014, only on 3 June 2014 was a request made to have it

arbitrated, and there is no explanation in regard to that delay. It further took the applicants another 23 months after the statement of claim was filed before this application could be launched. As to how there could have been a mistake in view of the subject matter that had led to the arbitration award being set aside and remitted back to the MEIBC without the applicants realising that they should have referred the matter for adjudication is not clear. Whilst still at this point, it is trite that an application for condonation ought to be filed as soon as a party realises the need to do so. Cartwright does not explain this 23 months' delay in filing the application for condonation, and this is despite the fact that the respondent had brought it to his attention on 9 and 25 May 2016 of the need to do so.

- [23] Cartwright's assertions that he had belaboured under a mistaken belief that an application for condonation was not necessary on the strength of the Court's decision to review the arbitration award on 24 February 2014 cannot be plausible. It is correct that to the extent that the matter was remitted back to the MEIBC, there would have been no need to apply for condonation for the matter to be arbitrated *de novo*. The matter before Molahlehi J as discussed with the parties and disposed of in chambers pertained to a review application. As to how such a matter could have morphed into anything akin to action proceedings is not clear, and any contention that the decision to refer the matter back to this court was as a result of a *bona fide* mistaken belief is rejected.
- [24] The further submission made on behalf of the applicants that the cause of action remained the same and that there was therefore no need to apply for condonation is equally misplaced. The fact that a certificate of outcome was issued does not on its own clothe the court with the necessary jurisdiction unless the provisions of section 191 (11) (a) and (b) of the LRA have been complied with. To hold otherwise would be to countenance the circumvention of those provisions.
- [25] Even if there was any merit to the contention that it was only as at 18 August 2014 that it had come to Cartwright's attention that Motubatse's claim could be characterised as an automatically unfair dismissal, in view of

the allegation that he was dismissed for laying a grievance, the earliest Labour Court decisions to be relied upon in that regard to sustain such a claim could only been *Jabari v Telkom SA (Pty) Ltd*⁵, delivered on 6 May 2006; *Mackay v ABSA Group & another*⁶, delivered on 28 July 1999. The respondent had also pointed out that the judgment of Steenkamp J in *De Klerk v Cape Union Mart International (Pty) Ltd*⁷ and delivered on 12 June 2012 was equally available. Thus, as at the time between the initial referral of the dispute, and when Molahlehi J referred the matter back to the MEIBC, any such authority was readily available to Cartwright and Motubatse if they had any inclination to pursue an alleged automatically unfair dismissal. Thus, any arguments or excuses surrounding any mistake in this regard, or the contention that such case law only came to the attention of Cartwright after the matter was remitted back to the MEIBC in August 2014 can hardly be sustainable nor serve as a reasonable excuse.

- [26] It is further trite that following from the Labour Appeal Court decisions in *NUMSA v Council for Mineral Technology*⁸ and *Moila v Shai*⁹, where in an application for condonation, the delay is excessive, and no explanation is given, or an explanation that has been given amounts to no explanation at all, it would not be necessary to consider the prospects of success. Equally so, an unacceptable delay and unsatisfactory explanation will preclude the granting of condonation irrespective of the prospects of success. In this case, Cartwright's explanation for the extreme delay in approaching the court with a statement of claim amount to no explanation at all, and that should be the end of the matter.
- [27] Even if the court was inclined to consider the merits of Motubatse's alleged automatically unfair dismissal claim, a further difficulty faced by the applicants is that the founding affidavit is deposed to by Cartwright. The statement of claim is not made under oath, and Motubatse had not filed any confirmatory

⁵ (2006) 27 ILJ 1854 (LC)

⁶ [1999] 12 BLLR 1317 (LC)

⁷ (2012) 33 ILJ 2887 (LC)

⁸ [1993] 3 BLLR (LAC) at 211G-H

⁹ (2007) 5 BLLR 432 (LAC)

affidavit regarding the merits of his claim. Thus, a case has not been made out in regard to any prospects of success Motubatse may have.

- [28] It cannot be doubted that to grant condonation in circumstances where the delay is so extreme and where this matter had gone full circle between the MEIBC and the Court would be extremely prejudicial to Powertech, and a lame apology from Cartwright cannot compensate for that prejudice. To compel Powertech to defend a matter which is more than ten years old, and which was properly before the MEIBC and then withdrawn from that forum for spurious reasons cannot be fair. In these circumstances, the interests of justice dictate that the application for condonation together with the main claim ought to be dismissed. I have further had regard to the requirements of law and fairness in regard to the issue of costs, and hold the view that such an order is not warranted in this case.

Order:

- [29] In the premises, the following order is made:

1. The application for condonation for the late filing of the applicants' statement of claim is dismissed.
2. The applicants' main claim is dismissed.
3. There is no order as to costs

E Tlhotlhemaje

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicants: Mr Louis Poriazis, of David Cartwright Attorneys

For the Respondent: Mr Jean du Randt, of Du Randt du Toit Pelser Attorneys

LABOUR COURT