



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Not of interest to other judges

Case no: JS19/17

**DHL SUPPLY CHAIN (SOUTH AFRICA)
(PTY) LTD**

Applicant

And

**ASSOCIATION OF MINEWORKERS &
CONSTRUCTION UNION (AMCU)**

Respondent

In the matter between:

Heard: 24 November 2017

Delivered: 5 December 2017

**Summary: Condonation – degree of lateness – delay of 100 Court days
excessive - absence of an explanation**

Condonation – failure to read statement of case – flagrant and gross failure to comply with the rules of Court – whether necessary to consider prospects of success

JUDGMENT

COETZEE AJ

Introduction

- [1] The applicant is DHL Supply Chain (South Africa) (Pty) Ltd.
- [2] The first respondent is Association of Mineworkers and Construction Union (AMCU), a duly registered trade union.
- [3] The second respondent is National Union of Metalworkers of South Africa (NUMSA), also a duly registered trade union.
- [4] The first respondent, AMCU, applied for condonation for the late filing of its response to the applicant's statement of claim. AMCU also applied for leave to amend its statement of defence to include a further number of its members as part of the proceedings.
- [5] The applicant dismissed several of its employees for alleged misconduct. Some of the employees are members of AMCU and some are members of NUMSA.
- [6] A dispute arose between the applicant and the two unions as to the fairness of the dismissals.
- [7] NUMSA referred two alleged unfair dismissal disputes to the National Bargaining Council for the Road Freight and Logistics Industry (the bargaining council). AMCU referred a similar dispute to the same bargaining council.

[8] The three disputes remained unresolved following upon conciliation and became the subject matter of referrals by the first and second respondents to the bargaining council for arbitration.

[9] The applicant took the initiative and applied to the Director of the Commission for Conciliation, Mediation and Arbitration (CCMA) for a ruling, *inter alia*, directing that the disputes between the parties be referred to the Labour Court for adjudication in accordance with the provisions of section 196 (6) of the Labour Relations Act (the LRA)¹.

[10] The director issued a Ruling (the ruling) on 13 January 2017 as follows:

"In the MATTER between

DHL SUPPLY CHAIN (SOUTH AFRICA) (PTY) LTD (Applicant)

And

ASSOCIATION OF MINeworkERS AND CONSTRUCTION UNION (AMCU)
obo SHABALALA & 129 OTHERS

NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA (NUMSA)
obo TSEBO NTSELANE MALATJI & 16 OTHERS

NATIONAL BARGAINING COUNCIL FOR THE ROAD FREIGHT AND
LOGISTICS INDUSTRY (NBCRFLI)

(First, Second and Third Respondents respectively)

.....

.....

5. RULING

5.1 I grant the application to refer the dispute to the Labour Court for adjudication."

[11] All the parties received the ruling. The ruling clearly referred to the three parties including AMCU.

¹ Act 66 of 1995 as amended.

[12] The applicant, as the employer, took the initiative to serve and file a statement of claim on 25 January 2017 upon the first and second respondents. The applicant in the heading of the statement of claim refers to AMCU as the first respondent.

[13] Paragraph 2 of the statement of claim reads as follows:

"2. If a party intends opposing the matter, its response must be delivered within 10 days of service of this Statement in terms of sub rule 6 (3) of the Rules of the Labour Court and in the absence of which the matter may be heard in that party's absence and an order for costs may be made against that party."

[14] In paragraph 4 of the statement of claim the applicant cites the first respondent as follows:

"4. The First Respondent is the Association of Mineworkers and Construction Union, a trade union duly registered in accordance with the relevant provisions of the Labour Relations Act of 1995 and having its principal place of business within the restriction of the above Honourable Court at 04 Palladium Street, Mantlato Building, Carletonville".

[15] In paragraph 19 the applicant states the following:

"To the extent that any issues arise by way of any response which may be delivered on behalf of First and/or Second Respondents, and which have not been addressed in the appropriate manner in the Statement of Claim, Applicant reserves its right to plead over to such issues."

[16] It is not in dispute that the applicant throughout the statement of claim refers to the employees dismissed by the applicant. It is also not in dispute that those employees are members of either AMCU or NUMSA.

[17] The applicant seeks the following relief:

"20. Applicant seeks an Order declaring that the dismissal of the individual Respondents was both procedurally and substantively fair and denies that the Individual Respondents are entitled to any relief as against the Applicant and as may be claimed by way of any responses filed on their behalf."

- [18] The applicant served a copy of the statement of claim upon NUMSA and AMCU.
- [19] The second respondent served and filed its statement of response within the prescribed period.
- [20] The first respondent served and filed its statement of response on 7 July 2017. The first part of the statement of response contains an application for condonation of the late filing thereof. The application for condonation was not an oath and formed part of the statement of response.

The degree of delay:

- [21] The first respondent stated that the response was approximately 150 days late.
- [22] The applicant calculated the delay to be 100 Court days. The applicant submitted that having regard to the 10 days within which the statement of response had to be filed, a delay equal to 10 times the period, is grossly excessive.

The reason for the delay

- [23] The first respondent explained the reason for the delay in a somewhat garbled fashion as follows:

"2.7 The third (sic) Respondent understood the ruling to mean that the dispute between Applicant and 3rd (sic) Respondent must be referred to the Labour Court for adjudication. This was after the First respondent consented to the Section 191 (6) application, meanwhile the third respondent (sic) opposed such application, therefore, was under impression that the dispute between Applicant and third Respondent in relation to the Section 191 (6) did not involve the first Respondent.

2.8 On the third July 2017, the first Respondent's representative made a call to Mr Hlela of the Applicant, and learned that actually the ruling of 12 January was in respect of the third (sic) Respondent's opposing of the applicant's 191 (6) application."

[24] What the first respondent tried to say is clarified in the replying affidavit. The first respondent's understanding was that:

"... the ruling involved The Applicant and the Second Respondent since the second Respondent opposed the section 191 (6) Application by the Applicant, and that the dispute between the former and the latter must be adjudicated by the court."

[25] The applicant takes issue with the reason for delay. The applicant submits that there is no credible explanation for the delay and the absence of a credible reason for the delay means that there is no necessity to consider the prospects of success.

[26] The applicant is of the view that the delay is excessive and constitutes a gross and flagrant disregard for the rules of the Labour Court.

The prospects of success

[27] I deal with the prospects of success in short.

[28] The first respondent alleges that the dismissal of the members of the first respondent was both procedurally and substantively unfair. The first respondent would also prove through evidence that there was no strike and that its members were dismissed after they demanded an explanation as to why the Provident Fund "funder" was substituted without any consultation resulting in irregular contribution statements and that the applicant unlawfully locked out its members who were reporting for a shift in full uniform while they had no idea of what was happening at the workplace.

[29] The applicant in its answering affidavit to the application for condonation denied that the dismissal of the first respondent's members was procedurally or substantively unfair. It refers to extracts from its statement of case to show that they committed various acts of misconduct. The applicant further alleged

that the misconduct was serious and endangered the safety of the people, caused damage to property and had the effect that the applicant's main customer could not receive suppliers and customers into its premises. Alleged that a fair procedure was followed prior to the termination of the services of the employees.

Prejudice to the parties

- [30] The first respondent alleges that its members would be prejudiced in the absence of condonation because they would not be able to present their case and obtain relief from the Court.
- [31] The applicant, amongst others, alluded to its interest in finality. The applicant has replaced all the dismissed employees with new employees and an outcome favourable to the first respondent at trial would have serious adverse consequences at both a financial and practical level for the applicant if the dismissed employees were to be reinstated or compensated.

The legal position and an analysis of the submissions

- [32] The delay is excessive.
- [33] The first respondent referred the Court to the judgment in *Theledi v Saficon Industrial Equipment (Pty) Ltd*² for the proposition that the Labour Court may condone an excessive delay of five months having regard to the prospects of success.:

"With regard to the degree of lateness, as already stated, the applicant was five months and three weeks late in referring this dispute to this court. However, although, the explanation given by the applicant for this delay is not satisfactory, in my view, the five months and three weeks delay is not so long that the matter cannot be entertained by this court. Also given the circumstances under which the applicant was dismissed, it is in the interests of justice at this late referral be condoned. I am aware of a plethora of cases decided by this Court that seek to suggest that a failure to give a satisfactory explanation should result in the refusal of the condonation. Some cases even state that it is the end of the enquiry. That is not my understanding of the

² [2012] ZALCJHB 63 (10 July 2012) at para 11.

Melane decision. The *Melane* decision is very clear that the factors are interrelated. Although I am not satisfied with the explanation for the delay, it is however, in my view, not the end of the enquiry. Consistent with the principle that none of the factors are decisive the failure to give a satisfactory explanation for the delay must be weighed with other factors. In other words, the explanation factor is not a decisive factor"

[34] The applicant submitted that the *Theledi* judgment did not assist the first respondent. The applicant submitted that in the absence of a satisfactory explanation it may be the end of the enquiry where there is a gross and flagrant failure to comply with the rules. The Labour Appeal Court in *Colett v Commissioner for Conciliation, Mediation and Arbitration and Others*³ said the following:

"The legal position was summarised as follows by the Constitutional Court:

'It is trite law that a court considering whether or not to grant condonation exercises a discretion. The discretion must, of course be exercised judicially on a consideration of all the facts and 'in essence it is a matter of fairness to both sides'. It is clear that the SCA may decide an application for condonation without considering the merits of the case, though it does so only where there is a gross and flagrant failure to comply with the rules⁴."

[35] The court in *Colett* went further to say: ⁵

"There are overwhelming precedents in this Court, the Supreme Court of Appeal and the Constitutional Court for the proposition that where there is a flagrant or gross failure to comply with the rules of court condonation may be refused without considering the prospects of success⁶."

[36] It is the applicant's submission that the first respondent's explanation falls within the category of a gross and flagrant failure to comply with the rules of the Labour Court.

³ (2014) 35 ILJ 1948 (LAC) at para 30.

⁴ *Mabaso v Law Society of the Northern Provinces and Another* 2005 (2) BCLR 129 (CC) at para 20

⁵ *Supra* at para 38.

⁶ *Mbutuma v Xhosa Development Corporation Ltd* 1978 (1) SA 681 (A) at 687A; *Darries v Sheriff, Magistrates' Court, Wynberg and another* 1998 (3) SA 34 (SCA) at 41 C-D and *Mabaso supra*

- [37] The applicant submitted that the explanation for the delay boils down to the first respondent saying that it has never read the statement of claim served upon it. There are several indications in the statement of case alerting the first respondent to the fact that it was a party to the case and that it had to comply with the rule that demands the service and filing of a response within 10 days from receipt of the statement of case. Had it read the statement of claim it could never have formed the view that the statement of claim referred only to a dispute between the applicant and NUMSA.
- [38] The submission that the first respondent's regional legal officer who handled this matter from inception had no basis to allege that he was under the misunderstanding as to whether AMCU was a party to the proceedings has merit. AMCU was party to the referral of a dispute to the bargaining council. AMCU was a party to the proceedings at the CCMA when the applicant applied for the matter to be transferred to the Labour Court. AMCU received the ruling that undoubtedly and in clear terms referred to all three the parties to the dispute, which dispute the CCMA had referred to the Labour Court. AMCU was cited in no uncertain terms in the statement of case which it received. The statement of claim makes various references to the dismissed employees, some of which were AMCA members. The statement of claim clearly required AMCU as a party thereto to respond within 10 days.
- [39] The submission that the only explanation for not filing a statement of response thereto is that AMCU did not read the statement of case, therefore has merit. It is inconceivable how, after having read the statement of case and being aware of the history of the matter, anyone could reasonably believe that AMCU was not a party to the proceedings initiated by the applicant in this court.
- [40] The inevitable conclusion is that AMCU was in flagrant disregard of the rules of the Labour Court.
- [41] There is yet another indication that AMCU was in default. AMCU's representative in Court could not explain what AMCU intended to do about the dispute between AMCU and its members on the one hand and the applicant on the other hand. If it were Amcu's understanding that it and its

members were not part to the dispute referred to the Labour Court for adjudication, then AMCU certainly would have had to initiate its own proceedings within the prescribed period which had long lapsed by July 2017. The fact that AMCU did not pursue the dispute that it referred to the bargaining council is indicative of the fact that AMCU had no intention of participating in the Labour Court proceedings initiated by the applicant. Otherwise it would have opposed the statement of case from inception or initiated its own proceedings against the applicant for allegedly unfairly dismissing its members.

[42] The application for condonation is dismissed. It follows that the statement of response is also dismissed.

[43] In view of this finding I do not have to make a finding on the first respondent's application to amend the statement of response to include a further number of dismissed employees in its statement of response. Those employees were dismissed approximately a year after those referred to in the statement of claim. They were also dismissed for alleged misconduct during the same events. They were dismissed pursuant to a different disciplinary enquiry. AMCU did not refer any dispute regarding their dismissal to the CCMA or the appropriate bargaining council. I would have dismissed this application.

Costs

[44] In relation to costs, the scope is a broad discretion in terms of s 162 of the LRA to make orders for costs according to the requirements of the law and fairness. There is no evidence that the parties have an established ongoing relationship. The applicant successfully opposed the application for condonation. In my view, it is fair and equitable that the first respondent pays the applicant's costs.

Order

[45] I make the following order:

1. The application for condonation is dismissed with costs.
2. The first respondent's statement of response is dismissed with costs

F. Coetzee

Acting Judge of the Labour Court of South Africa

LABOUR COURT

Appearances

For the Applicant: Advocate J Partington

Instructed by: Chris Baker and Associates.

For the Respondent: Vusi Masinga legal officer of AMCU

LABOUR COURT