



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

CASE NO: JS 807/17

In the matter between:

VELAPHI NGWENYA & 5 OTHERS

Applicant

and

INYONI BOERDERY (EDMS) BPK

Respondent

Application heard: 16 March 2018

Judgment delivered: 27 March 2018

JUDGMENT

VAN NIEKERK J

- [1] This is an application to condone the late referral of a statement of claim. The statement of claim was filed on 10 October 2017. The applicants contend that they were dismissed by the respondent, and that their dismissals were automatically unfair on account of their having made a protected disclosure. The respondent disputes that the applicants were dismissed, and avers that they signed a settlement agreement on termination of their employment for reasons related to its operational requirements.
- [2] The applicants referred an unfair dismissal dispute to the CCMA on 28 September 2015. The matter proceeded to arbitration, and a default award in the applicants' favour was issued on 28 October 2015. That award was rescinded. The matter was re-enrolled for hearing on 8 December 2015, when the applicants were each awarded compensation equivalent to ten months' remuneration. The respondent filed an application to review and set aside the award. That application came before this court on 12 January 2017. The applicants say that they were unaware of the date of the hearing. The court's judgment came to the applicants' attention on 4 May 2017 when they visited the court to ascertain what progress had been made in their case. In its judgment, the court upheld the review application and set aside the award. The applicants then sought the assistance of the *pro bono* office to make enquiries regarding the review application. It transpired that an *ex tempore* judgment had been delivered by the presiding judge. The basis on which the award was set aside was that the CCMA had no jurisdiction to entertain the dispute, since it concerned a reason for dismissal that is automatically unfair. The court held that the dispute ought to

have been referred to this court for adjudication. The *pro bono* clinic arranged for a transcription of the judgment to be obtained, which was made available on 27 September 2017. A consultation was arranged with the applicants and their statement of claim was filed on 10 October 2017.

- [3] It is trite that condonation is not there merely for the asking, nor are applications for condonation a mere formality (see *NUMSA v Hillside Aluminium* [2005] 6 BLLR 601 (LC); *Derrick Grootboom v National Prosecuting Authority & another* [2013] ZACC 37). A party seeking condonation must make out a case for the indulgence sought and bears the onus to satisfy the court that condonation should be granted.
- [4] This court is required to exercise a discretion, having regard to the extent of the delay, the explanation proffered for that delay, the applicant's prospects of success, and the relative prejudice to the parties that would be occasioned by the application being granted or refused.
- [5] In this court, that formulation, which has its roots in *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A), has long been qualified by the rule that where there is an inordinate delay that is not satisfactorily explained, the applicant's prospects of success are immaterial. In *National Union of Mineworkers v Council for Mineral Technology* [1999] 3 BLLR 209 (LAC) the LAC said the following:
 - ... 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.
- [6] None of the factors referred to above are in themselves definitive – the court must necessarily take into account all of the relevant facts and circumstances and exercise a discretion. In the present instance, the applicants have displayed a degree of diligence in pursuing their interests. The delay in filing the statement of claim is attributable directly to the outcome of the review application and in particular, the need to obtain and transcribe the *ex tempore* judgement delivered

by the court. The statement of claim was filed within a reasonable time after the transcribed judgement was made available to the applicants, and the jurisdictional implications of the nature of their claim explained to them. The applicants have been diligent throughout in pursuing their claim, and it was through no fault of their own that the matter was referred to arbitration and not to this court. Although the delay in referring the matter for adjudication is not inconsiderable, in my view, the reasons for the delay and the explanation proffered by the applicants provide a compelling reason to grant condonation. In so far as the prospect of success are concerned, these are at best a neutral factor given that there is a dispute between the parties as to the nature of the applicants' employment, whether they were dismissed at all, whether they were provided with protective clothing, and whether the reason for their dismissal was the termination of their fixed term contracts or a reason related to a labour inspection conducted on the respondent's farm. These are matters that are best determined by way of evidence in a trial and this court is not in a position to find, on the pleadings and the papers before it, that the prospects of success are either so overwhelming or so insignificant so as to determine this application one way or the other.

- [7] Finally, the prejudice to the applicants should they be precluded from pursuing their case clearly outweighs any prejudice that the respondent might suffer by being called upon to defend its case at trial. The applicants have pursued their interests with diligence in spite of the challenges of distance and their limited access to expertise in a case that raises complex legal issues. They do not deserve to have the doors of the court closed to them.
- [8] For the above reasons, in my view, the applicants have made out a case for condonation.

I make the following order:

1. The late filing of the applicants' statement of claim is condoned.

André van Niekerk

Judge

REPRESENTATION

For the applicants: In person

For the Respondent: Adv. ASL van Wyk, instructed by Seymore Du Toit Basson Attorneys.