



Of interest to other Judges

**THE LABOUR COURT OF SOUTH AFRICA,
HELD AT JOHANNESBURG**

Case no: JS 769/15

In the matter between:

SATAWU obo MATHISO J & 34 OTHERS

Applicants

and

PRIDE BULK LOGISTICS (PTY) LTD

Respondent

Heard: 18 May 2018

Delivered: 22 May 2018

Summary: (Condonation application – excessively late – employees faith in union not justified beyond a certain point – remainder of delay lacking an adequate explanation – inadequate explanation sufficient for refusing condonation – even if reasonable prospects considered, insufficient to outweigh delay, when it could have been easily avoided by more prompt action – in passing, whether strike to obtain closed shop agreement can only proceed if requirements of s 26(3) of the LRA met – negligence of union not attributable to members by virtue of membership relationship)

JUDGMENT

LAGRANGE J

Background

- [1] This is an application for condonation for the late referral of a statement of claim. Although SATAWU is still cited as acting in a representative capacity on behalf of the individual applicants, that is simply an incident of the original case citation. As will become apparent from the narrative below, the union has long abandoned the individual applicants who reasonably expected it to act on their behalf.
- [2] The applicants claim they were dismissed in consequence of allegedly participating in an unprotected strike, failure to comply with ultimatums to return to work and other unlawful conduct committed in the course of the strike. The employer ('Pride Bulk') claims they were only dismissed for failing to comply with ultimatums and the other misconduct. Pride Bulk claims it did not find them guilty of participating in an unprotected strike, not because it accepted that the strike was protected, but because it accepted that the union members acted on the advice of SATAWU's advice that it was a protected strike. The strike appears to have been in support of a demand to conclude a closed shop agreement.

Period of delay:

- [3] The applicants were dismissed on 28 May 2015 and referred the unfair dismissal dispute to the bargaining council the following day, 29 May 2015. The dispute was unsuccessfully conciliated on 29 June 2015. Accordingly, it should have been referred to the court within 90 days of that date, namely 27 September 2015, in terms of the judgement in ***F & J Electrical CC v MEWUSA obo E Mashatola and others***, in which the Constitutional Court made it clear that the 90 day period runs from the date on which the certificate of outcome is issued.¹
- [4] As frequently happens in a case where the protected status of a strike is in dispute, the applicants requested arbitration but on 9 September 2015, the arbitrator declined to hear the matter on the basis that the council did not have jurisdiction. The features he identified about the dispute which led him to that conclusion was the fact that there was a strike and that at least

¹ 2015 (4) BCLR 377 (CC) at 385-6, para [30].

part of the reason the applicants were dismissed was for failing to comply with ultimatums to return to work. At the time of the jurisdictional ruling, the applicants still had a couple of weeks to refer the dispute before the 90 day period expired.

- [5] However, the dispute was only referred to court in March 2018, nearly two and a half years after the expiry of the 90 day period which made the referral exceptionally late.

The explanation for the delay:

- [6] Initially, SATAWU appointed Seleka Attorneys ('Seleka') to act on behalf of applicants and a case number was obtained on or about 7 October 2015. If the referral had been made shortly thereafter, the delay would have been minimal.
- [7] A former shop steward and one of the individual applicants, Mr J Mathiso ('Mathiso'), deposed to the affidavit in support of the condonation application. He claims that he regularly followed up with the responsible organiser, Mr F Dabula ('Dabula'), who assured him that the matter was in hand and the applicants believed that it had been referred to the Labour Court. Subsequently, the organiser became increasingly difficult to contact and provided various explanations for the lack of progress promising frequently to revert to the applicants.
- [8] In mid-2016, Mathiso was advised by Dabula that, there was a 'misprint' on the court documents and that the court had sent the documents back to attorneys. Mathiso was rightly suspicious about this explanation and questioned the organiser further. At that point, it turned out that the union had not paid Seleka's fees and there was also an internal dispute in the union. Mathiso then requested the case documents so that the employees could arrange their own representation but was only successful in getting them towards the end of 2016. He was advised that the union was attempting to find alternative representation but it was too expensive. The deponent informed the organiser he expected to see progress by the end of February 2017 and was under the impression that the matter was under control.

- [9] He claims he attempted to find another attorney but was unsuccessful and he was also concerned about the potential costs because Dabula had mentioned that a sum of R100, 000 was required, which the individual applicants did not have. He further claims that the organiser continued to send him from pillar to post. He also then tried to make contact with the Deputy General Secretary but never got beyond his personal assistant. It was in August 2017 that an advocate assisted him and made enquiries on behalf of the applicants at the Springs local office and provincial offices of Satawu. Mathiso mentions that, after further investigations it turned out that Seleka had never been paid, by which I assume he meant that Seleka had still not been paid, as they already knew in 2016 that this was the case. It was only at the end of January 2017 that they eventually met their current attorney of record, Mr D Morgan, who agreed to act for them on a *pro bono*.
- [10] Pride Bulk obviously has no direct knowledge of the internal communications between the applicants, their union and Seleka, but points out that extensive delay is severely lacking in detail and for that reason alone condonation should be refused.

Prospects of success

- [11] The applicants argue that their strike was lawful and therefore their dismissals were impermissible. Pride Bulk emphasised that the failure to heed the ultimatum was not the only reason for dismissal as they allegedly committed other misconduct while on strike that also justified their dismissal.

Evaluation:

- [12] A delay of two and a half years beyond the 90 day period is extremely long. I accept that employees are entitled to place a certain amount of faith in the organisation that is supposed to represent them in such matters. However, it is obvious even from Mathiso's explanation for the delay that by the end of 2016, the applicants knew that Seleka had not been paid and that the union was not optimistic about obtaining alternative representation as it claimed it did not have the funds to pursue the matter.

He also knew that Dabula had misled them previously. Added to this there was an internal dispute within the union, which evidently complicated the prosecution of the court proceedings. They also had Seleka's draft statement of case in their possession by that time.

- [13] This state of affairs at the end of 2016 was a clear indication that the union had deceived them and that there were more obstacles to SATAWU assisting them than any promising signs that the situation would turn around. By then, they had every reason to doubt the union's will or ability to pursue their case and their abiding patience in the face of the union's utter neglect in handling their matter was unreasonable even for lay persons. They ought to have started to take steps to obtain independent representation or to refer the case themselves at that stage. It is true that Mathiso told Dabula that he expected to see progress by the end of February 2017, but nothing in his affidavit suggests Dabula had given him any reason to believe the situation would change.
- [14] It is a well-established principle that there is a point beyond which an applicant cannot blame delays purely on the failure of their representatives to act promptly. See :

"[18] As has often been stated the court is hesitant to debar a litigant from relief, particularly where it is his attorney who has been at fault: Meintjies's case at 264A; Saloojee's case at 140H-141A; Reinecke v IGI Ltd 1974 (2) SA 84 (A) at 92F-H. There are limits, however, even where the attorney is largely to blame for the delay, beyond which the courts are not prepared to assist an appellant. The remarks made in Saloojee & another v Minister of Community Development at 141C-E by Steyn CJ bear repeating again:

'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 whom 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.'

[19] It is also important to remember what was said in *Commissioner for Inland Revenue v Burger* 1956 (4) SA 446 (A) at 449G where Centlivres CJ remarked that: 'Whenever an appellant realizes that he has not complied with a Rule of Court he should, without delay, apply for condonation .' It is now four and a half years since the respondents were dismissed for operational reasons.

[20] The Supreme Court of Appeal has pointed out that an unacceptable explanation remains just that, whatever the prospects of success on the merits. *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 768B-C.

In this instance I believe that point was reached at the very latest at the end of 2016 but it took clearly applicants another eight months before they obtained independent assistance."

[15] In ***Seatlolo & others v Entertainment Logistics Service (A Division of Gallo Africa Ltd)***, the Labour Court said the following in a case where there had been a delay of over two years on the part of a union:

"[25] I am cognizant of Mr Boda's plea that the doors of justice should remain open to litigants who are laypersons and reliant solely on their union and who genuinely believed they were in safe hands. However, there are at the same time limits beyond which the doors of justice cannot but be closed - in these circumstances where they themselves are to blame for not holding their union accountable and where the Act is premised on expedition and the employer is likely to be prejudiced by permitting the matter to proceed on the merits. The applicants are in any event not entirely bereft of a remedy in that civil proceedings in delict may still be available to them."²

[16] I agree with the principle enunciated above. However, that judgment went further in stating that the situation of union members is even more dire than a client who relies on the negligence of his attorneys to excuse his

² (2011) 32 ILJ 2206 (LC) at 2217-8

delay, because “(i)t is a collective embodiment of its members and is akin to a curator at litem in civil proceedings - in other words, it is ‘the institutional embodiment of the several members involved in the dispute’ ”.³

- [17] While union members have a reasonable expectation that their union ought to assist them, within its means, when they are dismissed in consequence of a strike the union supported, I do not think the membership relationship is of such a nature that the negligence of the union ought to be imputed to the members simply by virtue of them being members rather than clients of the union. In this regard, I respectfully differ with the judgment in *Seatlolo* and other judgments which have followed this approach. I believe the real inquiry is whether, as union members, individual applicants have good reason to believe their matter is being prosecuted reasonably diligently by their union, in much the same way a client’s understanding of their attorney’s conduct would be assessed, albeit that there may be factual differences in how accessible a particular union is to its members relative to the how accessible an attorney is. However, these are factual issues which will differ from case to case.
- [18] In *Seatlolo*, the union had pursued the dismissal dispute, but had adopted a strategy they were warned would fail. In this case, SATAWU simply did nothing after it failed to pay the attorney, though nothing prevented it from referring the case even if it was already late, and applying to amend the statement of case if necessary. On the face of it, the union’s negligence appears to have cost the individual applicants a reasonable chance of successfully challenging their dismissals as automatically unfair, as discussed below. However, that does not make the applicants blameless in waiting on SATAWU to act, once they knew what they did by the end of 2016. There is no reasonable explanation why they continued to have any faith in the union beyond that point, which had shown itself to be useless and deceptive in its handling of their case referral. In effect, their explanation for only taking further steps in August 2017 and then not

³ At 2218-9, para [26].

acting with the greatest speed thereafter renders their explanation for a major part of the delay unacceptable. In my view, that is sufficient reason to refuse condonation, irrespective of the merits in line with the often repeated principle, recently restated by the LAC in ***Colett v Commission for Conciliation, Mediation & Arbitration & others*** :

"[38] There are overwhelming precedents in this court, the Supreme Court of Appeal and the Constitutional Court for the proposition I 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 success. In NUM v Council for Mineral Technology it was pointed out that in considering whether good cause has been shown the well-known approach adopted in *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532C-D should be followed, but —

'[t]here is a further principle which is applied and that is that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without good prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused'." ⁴

[19] That said, I believe the applicants did have some prospects of success if they had not delayed unjustifiably. The employer appears to be of the view that before a closed shop agreement could be concluded, the requirements of section 26(3) of the Labour Relations Act , 66 of 1995 ('the LRA') had to be met and believed that the union had to conduct a ballot before it could demand a closed shop agreement. However, it would seem that the requirements of s 26(3) simply state that a close shop agreement will not be binding before they are met⁵ and not that a close

⁴ (2014) 35 ILJ 1948 (LAC) at 1995-6.

⁵ The relevant provisions are:

26. Closed shop agreements

(1) A representative trade union and an employer or employers' organisation may conclude a collective agreement, to be known as a closed shop agreement, requiring all employees covered by the agreement to be members of the trade union.

(2)

shop agreement cannot be concluded before they are met. Consequently, on a *prima facie* view the strike would have been protected if the demand was simply to conclude a closed shop agreement. In that case, insofar as the applicants were dismissed for failing to comply with ultimatums to return to work, that might be construed as dismissing them for persisting with a protected strike and would have been automatically unfair.

[20] On the other hand, the other charges related to obstructing the entrance to Pride Bulk's premises and destruction of property and, if proven might have been sufficient cause for a dismissal for misconduct in the course of a protected strike.

[21] However, in ***Kroukam v SA Airlink (Pty) Ltd***,⁶⁶ in which the LAC found that the main reason for a dismissal was an automatically unfair one, it also held that it was sufficient to establish an automatically unfair dismissal if the illegitimate reason played a significant role in the dismissal decision, viz:

"[103] However, even if the reasons that I have found to constitute the dominant or principal reason or reasons for the dismissal did not constitute the principal or dominant reasons for the appellant's dismissal, I would still find that the dismissal was automatically unfair if such reasons nevertheless played a significant role in the decision to dismiss the appellant. In my view for policy considerations, where such reasons have influenced the decision to dismiss to a significant degree, the dismissal should be dealt with as an automatically unfair dismissal in order to deter

(3) A closed shop agreement is binding only if-

- (a) a ballot has been held of the employees to be covered by the agreement;
- (b) two thirds of the employees who voted have voted in favour of the agreement;
- (c) there is no provision in the agreement requiring membership of the representative trade union before employment commences; and
- (d) it provides that no membership subscription or levy deducted may be-
 - (i) paid to a political party as an affiliation fee;
 - (ii) contributed in cash or kind to a political party or a person standing for election to any political office; or
 - (iii) used for any expenditure that does not advance or protect the socio-economic interests of employees.

(emphasis added)

⁶⁶ (2005) 26 ILJ 2153 (LAC) at 2188.

as many employers as possible from entertaining such illegitimate matters as, for example, racism and the exercise of rights conferred by the Act as factors in their decisions to dismiss employees.”

[22] Despite these merits, the effective delay will mean that even if the matter went to trial, it is unlikely to be heard this year, which means that the delay will probably be in the region of four years. The prejudice to Pride Bulk in obtaining reliable testimony after so long is obvious particularly in relation to the testimony of other strike misconduct. It is true the prejudice to the applicants is great, but this is a case where they are not deprived of all remedies as they might still be able to sue their union in delict. I am also mindful of the oft repeated injunction that labour matters require expeditious resolution.⁷ Moreover, the prejudice to the applicants of not having their day in court or the merits of their claim is not a deciding factor, in a case like this, where the delay is so extensive and the respondent has not in any way contributed to it, or where the remedy was not beyond their reach. The real obstacles to proceeding were the union’s indifference to the applicants’ plight despite owing them a duty to assist them and the applicants’ own unreasonably persistent blind faith in the union. Had the applicants sought *pro bono* assistance earlier, or if the union had simply finalised the draft statement of case itself, the delay might have been negligible.

[23] Consequently, even if the merits were considered, I am not persuaded they outweigh the weakness of the explanation for the length of delay.

[24] The court is indebted to *Mr Morgan* for his diligent prosecution of the condonation application in a *pro bono* capacity.

Order

[1] The condonation application is dismissed.

[2] No order is made as to costs.

⁷ See e.g. *Colett* at 1955, para [34].

Lagrange J
Judge of the Labour Court of South Africa

APPEARANCES

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