



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J32/14

In the matter between:

FOOD AND ALLIED WORKERS UNION

RESPONDENT/APPLICANT

and

THE COLD CHAIN (PTY) LTD

APPLICANT/RESPONDENT

Considered: In Chambers

Delivered: 03 October 2018

JUDGMENT - LEAVE TO APPEAL

SHAI, AJ

Introduction

[1] On 13 May 2014, I delivered a judgment, the order of which was as follows:

1. "Permission is granted for the matter to be heard on an expedited basis.

2. That the notices of dismissal issued on the 13th December 2013 were issued prematurely and are of no force and effect.
3. That the members dismissed in terms of the notices issued on the 13th December 2013 are reinstated until such time that the Respondent has complied with a fair procedure.
4. The Respondent is ordered to pay the costs of this application.”

[2] The applicant has now applied for leave to appeal whole judgment as well as the above order. The application for leave to appeal was accompanied by an application for condonation of the late filing thereof. Both applications are unopposed.

Application for condonation

Degree of lateness

[3] The judgment was delivered on 13 May 2014; hence the application for leave to appeal should have been filed by the 2 June 2014. It was filed on 11 March 2015 and it is therefore late by about nine months which is a considerable delay.

Explanation of the delay

[4] The applicant submitted that the judgment was based on the principles as outlined in the case of *NUM vs De Beers Consolidated Mines Pty(Ltd)*¹ and *De Beers Group Services Pty Ltd vs National Union Of Mine Workers*². The effect of these decisions was that notices issued prematurely in terms of section 189A (8) read with 189A (2) of the Labour Relations Act³ (LRA) were of no force and effect. The applicant submitted that this position was unassailable at the time the application for leave to appeal should have been filed.

¹ (2006) 27 ILJ 1909(LC).

² (2011) 32 ILJ 1293(LAC).

³ 66 of 1995, as amended.

- [5] The applicant submitted that since then the courts of law in the case of *Edcon vs Karin Steenkamp and others*⁴, delivered on 3 March 2015 held that the above cases were wrongly decided. In this case the court stated as follows:

“it accordingly could not have been the intention of the legislature that a failure to comply with section 189A (8), read with section 189A(2) of the LRA would result in the dismissals being invalid”

- [6] The applicant further contended that since the basis on which the matter was determined was held to have been wrong, there now exists a proper basis on which to seek leave to appeal in respect of the said judgment.

Importance of the matter / prejudice

- [7] The applicant submitted that if the application is not granted, it will suffer prejudice in that it would not have an opportunity to ventilate this matter, more so that prejudice would arise from a decision adjudged to have been decided on wrong principle. Further, the applicant submitted, that no action has been taken in line with the very judgment sort to be appealed against. Thus nothing needs to be undone. It was submitted further that the prejudice that the applicant would suffer outweighs that of the respondent. Further, it was argued that the matter is of extreme importance, in particular in line with the new legal development outlined above.

Prospect of success

- [8] The applicant submitted that in line with the new legal development outlined above, it has good prospect of success.

⁴ JS648/13, JS51/14 and JS 350/14.

Legal exposition

[9] In the case of *Masixole Myosane v. National Bargaining Council for Chemical Industry and others*⁵ the Court said the following in respect of application for condonation.

“[7] The factors that need to be taken into account when determining whether there is sufficient cause to grant condonation were set out in *Melane v Santam Insurance Co Ltd 1962 (4) SA at 532* and involves weighing together the following factors; which are interrelated : degree of lateness, explanation thereof, the prospects of success and the importance of the case. The court went on and said that although these factors are interrelated, are not individually decisive, if there are prospects of success there would be no point in granting condonation.

[8] The Melane decision was followed in many subsequent decisions. In the case of *Moila v Shai NO and Others (2007) 16 LAC 1.23.1* reported at (Butterworth) 2007 JOL 19117 LAC, Zondo JP cited the case of *Chetty v Law Society, Transvaal, 1985 (2) SA 756 AD* with approval and said: “In *Chetty v Law Society, Transvaal 1985, (2) SA 756 (AD)* Miller JA, on behalf of the unanimous Court, dealt with the term “sufficient cause” or “good cause” when used in the context of an application for rescission of a Judgement. At 765 D-E he said:

“For obvious reasons a party showing no prospect of success on the merits will fail in an application for rescission of a default judgement against him, no matter how reasonable and convincing the explanation of his default. An ordered judicial process would be negated if, on the other hand, a party who could offer no explanation of his default other than his disdain of rules was nevertheless permitted to have a judgement against him rescinded on the grounds that he had reasonable prospects of success on merits.”

⁵ Unreported case - P 191/2010.

[9] The court went further to say that this principle should equally be applicable to the application for condonation.

[10] The court went further at 33, and in relation to the excessiveness of the delay and said:

“If ever there was a case in which one can conclude that good cause has not been shown for Condonation without even considering prospect of success, then this is it. When, in an application for Condonation the delay is excessive and an explanation been given for that delay or an “explanation” has been given, but such explanation amounts to no explanation at all, I do not think it is necessary to consider the prospects.”

[11] In the case of *Kritzinger v CCMA and Others (JR 2254/05 (2007) ZALC 85 (November 2007) Molahlehi J* said the following in relation to the test as initiated in *Melane v Santam Insurance Co. Ltd. 1962 (4) SA A532*:

“These factors are not individually decisive but are interrelated and must be weighed against each other. In weighing the factors for instance, a good explanation for the delay in lateness may assist the application in compensation for weak prospects of success. Similarly strong prospects of success may compensate for the inadequate explanation and the long delays”

[12] What it means therefor is that the court when exercising its discretion will consider the circumstances of each case to come to a reasonable conclusion”.

[10] Having read submissions herein, and having applied my mind there on, I am of the opinion that a good case for condonation has been made. The period of delay, *albeit* long, is mitigated by a plausible explanation and good prospect of success. This together with the importance of the case makes a compelling case

for condonation. I consequently grant condonation of the late filing of the application for leave to appeal.

Application for leave to appeal

[11] The applicants captured the grounds for appeal as follows:

- “The entire case of the Respondent as placed before the learned Judge was based upon the interpretation and application of Section 189A (8). The Respondent contended that the notices of termination of employment issued to members of the Respondent on the 13th December 2013, were issued prior to the expiry of the time limit as contemplated by section 189A(8) and were thus prematurely issued and as a result were null and void. This case was the only basis for the Respondent’s application in terms of Section 189A (13) before the learned judge.
- The Respondent never sought to challenge any aspect of the actual consultation process conducted between the Appellant and the Respondent and never sought to contend that such process was in any way unfair.
- The entire case before the learned Judge was thus founded on the judgments in Freund AJ in *National Union of Mineworkers v De Beers Consolidated Mines (Pty) Ltd*, Davis JA in *De Beers Group Services (Pty) Ltd v National Mineworkers*. In *Revan Civil Engineering Contractors and Others v National Union of Mineworkers and Others*, Landman AJA applied ratio in *De Beers Group Services*. In short, the core *ratio* of all these judgments were, in short, that any notice of termination of employment issued prior to the expiry of the time period as contemplated by Section 189A(8) were null and void, and consequently invalid. The learned Judge, in casu, applied this ratio in coming to the conclusion the learned Judge did in his judgment.
- In *Edcon v Karin Steenkamp and Others* the Labour Appeal Court has now, on 3rd March 2015, and following a detailed consideration of the

judgments referred to above, decided as follows: “It accordingly could not have been the intention of the legislature that failure to comply with section 189A(8), read with section 189A(2) of the LRA, would result in the dismissals being invalid.

▪ THE COURT IN EDCON CONCLUDED:

“In the premises, we are persuaded that non-compliance with section 189A (8) of the LRA was not intended by the legislature to result in the invalidity or nullity of any ensuing dismissals. Consequently, we are of the opinion that the decisions in *De Beers Group services (Pty) Ltd v NUM* and *Revan Civil Engineering Contractors and Others v NUM* were wrongly decided.”

- Therefore, the judgment of the learned Judge in *casu* was squarely based and founded on judgments that have been held to have been wrongly decided. In terms of the judgment in *Edcon*, the notices of dismissal issued by the Appellant on 13th December 2013, even if they were issued prematurely and prior to the expiry of the time period as contemplated by section 189A(8), could not have been held null and void, and consequently invalid.
- The Court in *Edcon* determined that the failure to comply with such time limits was only a procedural issue, and could be challenged in litigation process under section 189A(13) only on the basis of case of procedural unfairness. In such application, the issue of procedural fairness would be holistically considered. The Respondent in *casu* raised no case of procedural unfairness in its section 189A (13) and never contended that the procedure followed by the Appellant in arriving at the point where the notices of dismissal were issued was unfair. As a result, there is no basis on which the learned Judge could have granted the order.
- Therefore, it is the respectful contention of the Appellant that the learned Judge erred in coming to the judgment and making the order that the learned Judge did on 13th May 2014.

- The learned Judge thus erred in law in not dismissing the Respondent's section 189A (13) application.
- The learned Judge erred in awarding costs against the Appellant per se in the circumstances."

The test applicable in application for leave to appeal

[12] The test in an application for leave to appeal was stated as follows in the case of *Van der Merwe v Du Plessis*⁶:

'Leave to appeal is granted only if this Court is satisfied that another Court might reasonably reach a conclusion different from that appealed against.'

[13] In *National Union of Metal Workers of SA v Jumbo Products CC*⁷ the Supreme Court of Appeal described the test as one based on whether there is a reasonable prospect that a court of Appeal may come to a different conclusion to the one reached by the trial court.

[14] Having read the submissions and the judgment herein, and having applied my mind thereon, and taking the principles outlined above into account, I am satisfied that another court may reasonably come to a different conclusion than the one this court reached.

[15] In the premise I make the following order:

Order

1. The application for leave to appeal against my judgment is granted;

⁶(1999) 20 ILJ 1305 LC, at para 4.

⁷ 1996 (4) SA 735 SCA at 742 A-B.

2. There is no order as to costs.

Shai AJ

Acting Judge of the Labour Court of South Africa