



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not reportable

CASE NO: PS 30/17

In the matter between:

NATIONAL UNION OF METALWORKERS

OF SOUTH AFRICA

SIPHO ANTONI

KWANELE ADAMS

and

TRANSNET SOC LIMITED

First Applicant

Second Applicant

Third Applicant

Respondent

Application heard: 22 March 2018

Judgment delivered: 6 April 2018

JUDGMENT

VAN NIEKERK J

- [1] This is an application to condone the late referral of a statement of claim.
- [2] The material facts are not in dispute. The second and third applicants (the employees) were employed by the respondent as DAV (driver articulated vehicle) operators. In January 2014, they were suspended in connection with conduct relating to a dispute regarding changes to the shift pattern that the respondent had introduced. The employees were dismissed in August 2014 on charges of participation in an unprotected strike, alternatively, an unlawful work stoppage, gross insubordination in the form of a refusal to work a rostered shift, and countermanding an instruction.
- [3] The applicants disputed the fairness of their dismissals and referred a dispute to the bargaining council, and then to the CCMA. The matter was referred ultimately to arbitration. It is of some significance that the employees, in their evidence before the arbitration hearing, denied that there was any type of industrial action or work stoppage, denied that they had refused to comply with any instruction to return to work and denied having countermanded any instruction to work. After a review of the evidence, the arbitrator found that 'both applicants are guilty of failing to comply with a lawful and reasonable instruction and participating in an illegal work stoppage'. She also found that the second applicant had countermanded a lawful and reasonable instruction which severely affected workplace stability and his relationship with the respondent (see paragraphs 77 and 78 of the award).
- [4] For reasons that are not entirely clear to me, the award was reviewed and set aside in terms of a consent order. The founding affidavit suggests that the

respondent had accepted the applicant's assertion that the CCMA had no jurisdiction to arbitrate the dispute. In the answering affidavit, the respondent notes that the applicants '*belatedly took the point in their review application ... that the CCMA lacked jurisdiction to arbitrate the matter, since the reason for their dismissal, in part, related to their participation in a strike which did not comply with the provisions of the LRA. This resulted in the annexed award being set aside by consent between the parties*'.

- [5] The statement of case was filed on 23 May 2017. In the statement of case, the applicants aver that the award was set aside on account of the CCMA having lacked jurisdiction to arbitrate the dispute, 'pursuant to the Respondent consenting to an order in those terms.' The statement of case continues:

27. While some of the charges were not directly couched in terms participation in unprotected strike action, but rather in terms of insubordination, they have the element of unprotected strike action, or conduct in furtherance thereof, at their core. The Applicants therefore contend that that the Labour Court has jurisdiction to adjudicate the dispute about the dismissals of the Second and Third Applicants.

- [6] 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.
- [7] 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.
- [8] 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.

- [9] This principle was recently reaffirmed in *Collett v Commission for Conciliation, Mediation and Arbitration* [2014] 6 BLLR 523 (LAC), a unanimous judgement of the LAC, Musi AJA held as follows:

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 success. In *NUM v Council for Mineral Technology* [1999] 3 BLLR 209 (LAC) at para 10, 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:

'There is a further principle which is applied and that is 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 delay, an application for condonation should be refused.'

The submission that the court a quo had to consider the prospects of success irrespective of the unsatisfactory and unacceptable explanation for the gross and flagrant disregard of the rules is without merit.

- [10] The statement of case ought to have been filed within 90 days of 19 September 2014. It was filed on 23 May 2017. The explanation for the delay, in essence, is that the entire period from the date on which the dispute was referred to

conciliation to the date of which the statement of claim was filed was devoted to the pursuit of the arbitration proceedings. , followed by the challenge to the award by way of the review application. In relation to the prospects of success, the applicants record that they did not commit the misconduct for which they were dismissed, that if they are found to have done so, the sanction of dismissal is unfair, that the respondent implemented discipline in an inconsistent manner, and that the dismissals were procedurally unfair. In relation to prejudice, the applicants contend that the respondent will not be prejudiced as a result of any delay and that it is as good a position to state its case in response to the applicants' claim as it was at the time of the arbitration.

- [11] The respondent's opposition to the application for condonation is driven primarily by the assertion that the applicants have had the benefit of a full hearing, conducted over eight days, and that the arbitrator reached the considered conclusion that their case had no merit whatsoever. Given that the applicants have not made a case to the effect that the outcome would be any different in proceedings conducted by this court, there is no real prospect of a change in the outcome. The respondent also avers that it would be costly and time-consuming to commence a trial de novo, and that one of its key witnesses is no longer resident in South Africa.
- [12] It is not disputed that the delay in the present instance is some three and a half years. This is an inordinate delay, by any measure. The explanation for the delay, as I have observed, is that the parties were engaged in an arbitration hearing in respect of the same issues that have now been referred to this court. In regard to the applicants' prospects of success, the fact remains that the present dispute was heard by a senior commissioner over a lengthy period, that the commissioner considered all of the evidence and came to conclusion that there was no merit in the applicant's case. Even if I accept that the CCMA had no jurisdiction to entertain the claim,¹ the award is relevant to a determination of the

¹ It seems to me that the individual applicants were dismissed for participation in a work stoppage. That is an act of misconduct, and any dispute about the fairness of the dismissal effected in those circumstances is justiciable by the CCMA. In other words, the CCMA had jurisdiction. It is not

dispute. It is significant that the applicants do not aver that other or additional evidence will be led that might have the consequence of a different outcome.

[13] There are two further considerations that I must necessarily take into account. The first is the statutory objective of expeditious dispute resolution. The individual applicants were dismissed in August 2014, almost four years ago. It is unlikely that a trial would commence before the lapse of five years after the dismissal. A delay of that degree is inconsistent with the objective that labour disputes be resolved quickly and efficiently. Secondly, the prejudice to the respondent should the matter proceed to trial is significant. It is not, as the applicants suggest, the respondent's ability to file a statement in response that is at stake or the only potential cause of prejudice to the respondent. It is not disputed that one of the respondent's key witnesses no longer resides in South Africa, and that another no longer resides in the Port Elizabeth area. In my view, the respondent would be materially prejudiced by having to proceed to trial in these circumstances.

[10] For all of the above reasons, condonation for the late referral of the statement of case stand to be refused.

I make the following order:

1. The application to condone the late filing of the applicants' statement of case is dismissed.
2. There is no order as to costs.

André van Niekerk
Judge

immediately apparent that the 'core' of the dismissal is an alleged unprotected strike. The applicants' own case was that there had been no strike, let alone a work stoppage. It is not immediately apparent from the papers that the reason for dismissal was one that had an unprotected strike as its basis. The commissioner found that there was a work stoppage, not a strike. What this necessarily implies is that this court's jurisdiction to entertain the present dispute must be in some doubt. In the absence of any reasons for a review and setting aside of the award, I am not in a position to make any finding or draw any conclusions for present purposes in this regard.

REPRESENTATION

For the applicant: Adv. F Le Roux, instructed by Gray Moodliar Attorneys

For the respondent: Adv. M Euijen SC, instructed by Goldberg De Villiers.