THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case No: JS 382/18

In the matter between:

NATIONAL EDUCATION HEALTH AND ALLIED WORKERS UNION (NEHAWU) OBO SECOND TO SEVENTEENTH APPLICANTS	**First Applicant**
BONGANI DLADLA	**Second Applicant**
CATHARINE MOLEFE	**Third Applicant**
HLENGIWE BUTHELEZI	**Fourth Applicant**
SONGEZE JIYA	**Fifth Applicant**
GLADYS MAMATSHELE	**Sixth Applicant**
MATHLODI MASIPA	**Seventh Applicant**
LESIBA JIMMY MOGALE	**Eighth Applicant**
BONGA GEORGE DLADLA	**Ninth Applicant**
JOSEPH DIPUO	**Tenth Applicant**
CADWELL MAKHALE	**Eleventh Applicant**
LUCKY MPOFU	**Twelfth Applicant**

LESETJA THOMAS LEDIGA **Thirteenth Applicant**

DUDU VERONICA MBULI **Fourteenth Applicant**

DORAH MALEBYE **Fifteenth Applicant**

AUDREY KITIERENG NOGE **Sixteenth Applicant**

KEDIEMETSE ANNA ABRAHAMS **Seventeenth Applicant**

and

METROFILE (PTY) LTD **First Respondent**

INFOVAULT (PTY) LTD
(Registration No: 2002/021025/07) **Second Respondent**

DISCOVERY (PTY) LTD
(Registration No: 1997/013480/07) **Third Respondent**

ZAHEER CASSIM N.O. ***(Nomine Officio)*** **Fourth Respondent**

Heard: **15 February 2019**

Delivered: **08 March 2019**

JUDGMENT

NIEUWOUDT. AJ

Introduction

[1] This is an application for condonation of the late delivery of the statement of case by the applicant. There are 4 respondents in the matter but only the first respondent opposes the application for condonation. For the sake of convenience, the Court refers to that respondent as the respondent hereinafter.

[2] There is an issue about which of the individual applicants were included in the referral to the Commission for Conciliation Mediation and Arbitration (CCMA) but this Court will not deal with this aspect at this stage of condonation.

Background

[3] Only the facts that are material to this application will be highlighted herein. The individual applicants were retrenched. They viewed the retrenchment to be unfair and on or about 5 July 2017, the first applicant referred a dispute relating to the unfair retrenchment of the individual applicants, to the CCMA.

[4] The dispute was conciliated on or about 1 August 2017 and a certificate of outcome was issued on that date. The certificate indicated that the dispute had to be referred to this Court. Despite this, the first applicant referred the matter to arbitration on or about 20 September 2017. On 20 November 2017 the CCMA ruled that it did not have jurisdiction to arbitrate the dispute.

[5] The offices of the first applicant closed on a date that is not disclosed for the Christmas period and re-opened on 10 January 2018. The first applicant instructed its attorneys of record in this matter on or about 23 January 2018. On or about 29 January 2018 the attorney briefed counsel. On 28 February 2018 and again early in March 2018 the first applicant consulted with counsel.

[6] On 11 April 2018 the applicants delivered an application in terms of Rule 7. The respondent objected to this as an irregular step on a date which is not common cause but which can be accepted to have been 9 May 2018. The respondent afforded the applicants fourteen days to deliver a response to the notice of irregular step. The statement of claim was filed on 29 May 2018.

The test for condonation

[7] The test to be applied when considering such an application is trite.[1] In *Grootboom v National Prosecuting Authority and Another*[2], the Constitutional Court, in a majority decision, held that:

> "[22] … the standard for considering an application for condonation is the interests of justice. However, the concept 'interests of justice' is so elastic that it is not capable of precise definition. As the two cases demonstrate, it includes: the nature of the relief sought; the extent and cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the importance of the issue to be raised in the intended appeal; and the prospects of success. It is crucial to reiterate that both Brummer and Van Wyk emphasize that the ultimate determination of what is in the interests of justice must reflect due regard to all the relevant factors but it is not necessarily limited to those mentioned above. The particular circumstances of each case will determine which of these factors are relevant."

[8] In *Melane supra* the Court stated that the factors were interrelated and not individually decisive. What was needed was an objective conspectus of all the facts; therefore, slight delay and a good explanation may help to compensate

[1] See: *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) ; *Foster v Stewart Scott Inc*. (1997) 18 ILJ 367 (LAC) and *Grootboom v National Prosecuting Authority & another* (2014) 18 ILJ 367 (LAC).
[2] (2014) 18 ILJ 367 (LAC).

for prospects of success which are not strong. The importance of the issue and strong prospects of success could also compensate for a long delay.

[9] A further principle is important. In *Collett v Commission for Conciliation, Mediation and Arbitration and Others*[3] the Labour Appeal Court (LAC) stated as follows:

> "[38] 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 532 C-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 the delay, an application for condonation should be refused.'
>
> [39] 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] Although a strict application of the test in *Collet supra* in this matter could entail not having regard to the period of the delay and the explanation thereof, at all, the Court will nevertheless have regard to them.

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[3] [2014] 6 BLLR 523 (LAC).

The period of the delay

[11] The applicants, in the papers, contended for a shorter period of delay but Mr Moretlwe quite properly conceded that the period of delay was 211 days. Bearing in mind that the referral had to be made within 90 days, the delay is long.

The explanation for the delay

[12] The applicants do explain the delay. They do so with a varying degree of detail for different periods.

[13] The period from 1 August 2017 to 20 November 2017 is explained by the referral to arbitration. Bearing in mind that the 90-day period would only have expired in the beginning of November, this period is not particularly crucial. Had the applicants referred the dispute to this Court within a reasonable period after the CCMA informed them that it did not have jurisdiction, the explanation for the delay would probably have been acceptable. This is so despite the fact that it is not readily understandable why a union official would think that a dispute relating to the retrenchment of a number of employees by an employer that employed more than 10 employees, could be referred to arbitration.

[14] The Court is also of the view that the inactivity over the Christmas period should not be subjected to too intense scrutiny. People go on holiday for different periods and not much activity takes place. The following dictum by Sutherland AJ (as he then was) from *Transport & General Workers Union & others v Hiemstra NO & another*[4] apposite:

> "In my view I would be unduly shortsighted to fail to acknowledge that it is a norm of South African society that during the period mid-December to early

[4] (1998) 19 ILJ 1598 (LC) at para 7.

> January the nation slouches to a near halt. This customary annual shutdown may not have excused the appropriate degree of expedition in a matter which was truly urgent but it can hardly be said that the nature of this matter was one in which it was inexcusable not to disturb our collective slumber."

[15] The first applicant's offices opened on 10 January 2018. At this point it must have been clear that the delivery of the statement of claim was out of time and that it required urgent attention. Despite this, the matter did not get this kind of attention from either the first applicant or its attorneys. A period of a further three months lapsed before the invalid application in terms of Rule 7 was delivered. In this period there was not much activity. The activities included two consultations with counsel, the last of which occurred in the beginning of March 2018. The explanation for this period is woefully inadequate.

[16] The explanation for delivering an application, namely that no dispute of fact was envisaged, is bad in law and probably also unrealistic in any retrenchment dispute. Anybody with any experience in conducting employment disputes would know that retrenchment disputes require oral evidence and that Rule 6 applies.

[17] In order to complete the picture, the explanation for the period from the time that the invalid application was delivered until the delivery of the statement of claim is acceptable, save for the fact that it was triggered by the inexplicable step of proceeding in terms of Rule 7.

[18] In summary thus, the explanation for a significant period of the delay is poor.

Prospects of success

[19] The applicants do not deal with the prospects of success in the founding affidavit, save for a bald statement that *"[T]he Applicants stands (sic) good prospects of success procedurally and substantively*." This is a non-explanation of the prospects of success.

[20] Mr Moretlwe argued that the statement of claim should be incorporated in the affidavits in the condonation application by virtue of the fact that the respondent had in its answering affidavit requested that its special pleas should be incorporated as if specifically traversed. For this submission he relied on *Nature's Choice Products (Pty) Ltd v Food and Allied Workers Union and others*[5]. However, in that matter the appellant (the respondent in the court below) had expressly incorporated its response in its affidavit in support of its application for condonation. It is a long stretch from this state of affairs to suggesting that an incorporation of a limited portion of a response in an answering affidavit could extend to include the incorporation of a statement of claim.

[21] The Court was concerned about the fact that it could not have regard to the contents of the affidavit erroneously filed by the applicants and the statement of case due to the fact that there was no specific reference to either of these documents in the founding affidavit of the condonation application. Both parties advanced some submissions on the point but the Court requested them to make further submissions. In doing so the Court was mindful of the submission by Mr Van der Westhuizen that it would be unfair to take facts, which the respondent did not have the opportunity to respond to, into account in deciding the matter.

Further submissions:

[22] The applicants persisted with the submission already made, namely that the fact that the respondent incorporated its special pleas in its answering affidavit, which dealt with specific averments contained in the statement of claim, meant that the statement of claim was incorporated in the condonation application pleadings.

[5] (2014) 35 ILJ 1512 (LAC).

[23] This proposition is interesting, but cannot be accepted. If the rule applicable to applications is to be applied, an applicant must set out its case in its founding affidavit and the respondent must answer that case.

[24] Further, special pleas are destined for separate adjudication and the mere fact that the special pleas raised by a party might be bad, has no consequence on the merits of such party's case in the main case. Unless they are all that the respondent relies on, special pleas could never serve to strengthen an applicant's case.

[25] Mr Moretlwe referred to *Vivabet (Pty) Ltd v Gauteng Gambling Board*[6] in support of the contention that a party is permitted to rely on other pleadings in a matter. In that case the pleadings in a review application were relied on in an interim application.

[26] The matter does not assist the applicants. The High Court confirms the basic requirement that the crux of an applicant's case has to be set out in the pleading in the interim application but does hold that a party may refer to other pleadings for elaboration.[7]

[27] In this matter neither of the two requirements are met. If they had been, the concern of the respondent that it may be ambushed if regard is had to pleadings not dealt with, would not have arisen.

[28] In view of the aforegoing, this Court is of the view that it is not permitted to have regard to any pleading that the applicant did not (at least) incorporate by reference in their founding affidavit.

[29] The applicants have thus not shown any prospects of success.

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[6] (28058/2017) [2017] *ZAGP*JHC 304.

[7] Id fn 6 at para 22.

Other criteria

[30] Not much time was spent in argument on the other criteria. The issue of prejudice was raised in both the founding affidavit and the applicants' heads of argument. The initial inclination of the court was to attach great weight to this aspect. However, on reflection, the individual applicants in this matter are in the same position as any other employee who is retrenched in South Africa. It is unfortunately not likely that they would easily obtain employment again. They suffer obvious prejudice. If this stark reality should entitle employees to condonation in cases where there is a long delay, a poor explanation for it and no prospects of success, another very important principle in employment law, namely the speedy resolution of employment disputes, would be destroyed.

[31] Sight must not be lost of the fact that the time spent by the administrators of justice on dealing with condonation applications, including court time, could be spent on hearing matters where the parties have complied with the procedural requirements and accordingly lead to the speedy resolution of their disputes.

[32] Accordingly, the obvious prejudice that the individual applicants would suffer if the condonation application is declined does not outweigh the other factors.

Conclusion

[33] In the light of the aforegoing, the application for condonation must fail. Both parties submitted that costs should follow the result. However, the Court is not inclined to award costs. The Constitutional Court in *Zungu v Premier of the Province of Kwa-Zulu Natal*[8] quoted with approval the reasoning of the Labour Appeal Court in *Member of the Executive Council for Finance, KwaZulu-Natal v Dorkin N.O.*[9], which held that:

[8] (2018) 39 ILJ 523 (CC) at para 24.
[9] (2008) 29 ILJ 1707 (LAC) at para 19.

> "The rule of practice that costs follow the result does not govern the making of orders of costs in this court. The relevant statutory provision is to the effect that orders of costs in this court are to be made in accordance with the requirements of the law and fairness. And the norm ought to be that costs orders are not made unless those requirements are met. In making decisions on costs orders this court should seek to strike a fair balance between, on the one hand, not unduly discouraging workers, employers, unions and employers' organisations from approaching the Labour Court and this court to have their disputes dealt with, and, on the other, allowing those parties to bring to the Labour Court and this court frivolous cases that should not be brought to court."

[34] In the premises, I make the following order:

Order

1. The application for condonation is dismissed.

2. The referral by the applicants of an unfair dismissal dispute is dismissed.

3. There is no order as to costs.

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H. Nieuwoudt

Acting Judge of the Labour Court of South Africa

Appearances:

For the applicant : Advocate T. Moretlwe
Instructed by : Mdhluli Pearce and Mdzikwa Inc

For the respondent : Advocate GL van der Westhuizen

Instructed by : Norton Rose Fulbright SA Inc