THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

CASE NO:JS845/16

In the matter between:

ANGLO OPERATIONS (PTY) LTD

(KLEINKOPJE COLLIERY) **Applicant**

And

MAXWELL MADUNA **First Respondent**

PRECIOUS MASEKO **Second Respondent**

TUBATSI DLALDLA **Third Respondent**

CAIPHUS MATHEBULA **Fourth Respondent**

LUCKY MASILELA **Fifth Respondent**

Heard: 2 August 2019

Judgment delivered: 7 August 2019

JUDGMENT

VAN NIEKERK J

[1] This is an application to condone the late filing of a statement of response, brought by the respondents in the main proceedings. I refer to them for present purposes as 'the applicants'. The applicants were dismissed by the respondent on 11 October 2016. They were found to have committed various acts of misconduct, including the promotion of unlawful industrial action, willfully challenging the respondent's authority, insolence, defiance of the respondent's authority, disruptive, dangerous and unlawful behavior, and the like. The applicants were dismissed on the recommendation of an independent chairperson who conducted an enquiry over some 25 days in circumstances where both parties were represented by counsel.

[2] The applicants challenged the fairness of their dismissal. The dispute between the parties was referred to this court consequent on a ruling by the CCMA made in terms of s 191 (6) of the LRA. On 27 February 2017, the respondent filed a statement of claim in terms of Rule 6 (2), seeking a ruling to the effect that the dismissal of the applicants was substantively and procedurally fair. The applicants delivered their statement of response on 26 April 2017, approximately six months after it was due. The present condonation application was filed only on 12 May 2017.

[3] The court has a discretion, to be exercised judicially, to grant condonation. Among the factors usually relevant for consideration are the degree of lateness, the explanation therefor, the prospects of success, the prejudice that parties will suffer if condonation is granted or refused, and the importance of the case. None

of these factors are individually decisive and the court must consider all the facts. In the final analysis, it is a matter of fairness to the parties. Condonation applications require a court to balance various interests and factors, having regard to all of them with none of them being decisive. (See *Melane v Santam Insurance Co. Ltd* 1962 (4) SA 531 (A) at page 532; *NEHAWU obo Mafokeng and Others v Charlotte Theron Children's Home* [2004] 10 BLLR 979 (LAC).

[4] In *Foster v Stewart Scott Inc.* (1997) 18 *ILJ* 367(LAC), the Labour Appeal Court noted the following as factors which have to be considered or taken into account in a condonation application:

> the degree of lateness or non-compliance with the rules;
> the explanation therefor;
> the prospects of success;
> the importance of the case;
> the respondent's interest in the finality of the judgment;
> the convenience of the court; and
> the avoidance of unnecessary delays in the administration of justice

[5] The principles were also summarised in *South Africa Post Office Ltd v CCMA & Others* [2012] JOL 28463 (LAC). In this case, the court recognised that ultimately the test is whether it is in the interests of justice to grant condonation. The court accepted that in matters where importance is placed upon the speedy and expeditious resolution of a dispute, even a short delay may not be excusable, unless an explanation is proffered that sets out the reasons for the delay which the court should find acceptable. The court further held that:

> Where it is evident that the party seeking condonation has no prospects of succeeding in his principal claim or opposition, no purpose is served in granting condonation and the Court must in such circumstances refuse to grant condonation irrespective of the degree of delay or the explanation provided.

[6] In *National Union of Mineworkers v Council for Mineral Technology* [1998] (2) ZALAC 22, the LAC established the principle that given the extent of the delay and the poor explanation for the delay, it was not necessary to consider the applicant's prospects of success in the main application. This was affirmed more recently in *Collett v Commission for Conciliation, Mediation & Arbitration* [2014] 6 BLLR 523 (LAC) where the court stated 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 532 C-D... should be followed but:
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> '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.'
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> 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."

[7] It is trite that condonation is not a mere formality and there for the taking; rather, the applicant for condonation must provide a proper and full explanation for the period of the delay. In *Independent Municipal and Allied Trade Union on behalf of Zungu v SA Local Government Bargaining Council and Others* (2010) 31 *ILJ* 1413 (LC) at para 13, the Court held:

> In explaining the reason for the delay it is necessary for the party seeking condonation to fully explain the reason for the delay in order for the court to be in

> a proper position to assess whether or not the explanation is a good one. This in my view requires an explanation which covers the full length of the delay. …"

[8] In *eThekwini Municipality v Ingonyama Trust* 2013 (5) BCLR 497 (CC) at para 28, the court said the following where the explanation furnished did not cover the entire period and part of the delay was unexplained:

> As stated earlier, two factors assume importance in determining whether condonation should be granted in this case. They are the explanation furnished for the delay and prospects of success. In a proper case these factors may tip the scale against the granting of condonation. In a case where the delay is not a short one, the explanation given must not only be satisfactory but must also cover the entire period of the delay. Thus in *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae),* this Court said in this regard:
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> > "An applicant for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of delay. And, what is more, the explanation given must be reasonable. The explanation given by the applicant falls far short of these requirements. Her explanation for the inordinate delay is superficial and unconvincing."

[9] To the extent that the applicants seek to place blame on their legal representatives, a litigant cannot hide behind the tardiness of his representative. In *Saloojee and another v Minister of Community Development* 1965 (2) SA 135 (A) at paragraph 141C-E, the court said "*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 .* ."

[10] In *Mngomezulu and Another v Mulima NO and Others* (JR2744/12) [2017] ZALCJHB 415 (7 November 2017I) the court stated the following, at paragraph 12:

> … In *National Union of Metal Workers v Kroon Gietery and Staal* the court refused a condonation application wherein the deponent attributed the delay to his representative. The court quoted in approval the case of *Regal v African Superstate (Pty) Ltd* where the court held that 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. A litigant is not entitled to hand over his matter to his attorney and wash his hands of it.

[11] In the present instance, the delay in filing the statement of response is excessive. In *DHL Supply Chain (South Africa) (Pty) Ltd v Association of Mineworkers and Construction Union* (ZALCJHB 494, 5 December 2017), a case where the employer had filed the statement of claim and the employees filed a statement of response some 100 days late, the court refused condonation primarily on the basis of the inordinate delay. The time periods prescribed by the Rules are intended to expedite the process of litigation in this court, and thus fulfil the statutory promise of expeditious dispute resolution. The degree of delay is thus a factor that counts against the applicants.

[12] The explanation for the delay amount to the assertions that the transcript of the disciplinary hearing was voluminous and that it was necessary for the applicants' attorney to pursue the transcript prior to any consultation and secondly, that the applicants' counsel (who had represented them in the disciplinary hearing) was incapacitated for a protracted period. Mr. Snider, who appeared for the respondent, accepted without qualification the fact of counsel's indisposition, and accordingly that is not a matter in issue in the present proceedings. Mr. Snider submitted however that the explanation centred on a voluminous record and the difficulty that this posed for the preparation of a statement of case is unsatisfactory. In essence, he submitted that there was a comprehensive set of heads of argument drafted after the transcript was produced) and a comprehensive award made by the chairperson that would have enabled any legal practitioner (including the applicant's attorney) to prepare a response within the permitted time period. In any event, nothing prevented the applicant's from

briefing another counsel to settle the statement – by his estimate (which was not disputed) it would have taken an entirely new counsel a week to assimilate all of the material and prepare a proper response. There are two factors that weight against the applicants. The first is that their attorney did not at any stage after the filing of the statement of case seek any extension of the period within which to file a response. In fact, the response was filed shortly before the pre-trial conference. Further, the present application was filed only on 12 May 2017, pursuant to a ruling by the court at the pre-trial conference. Secondly, by its very nature, a statement of response is a brief summary of the factual and legal issue on which a respondent party intends to rely. In the present instance, the statement of response comprises mainly a summary of the factual background (all of which was available to the applicants' attorney by way of the heads of argument filed in the disciplinary hearing and the chairperson's report, a 278-page document) and a recordal of the charges against each of the applicants. The legal issues raised by the applicants are stated in some two and a half pages, with double spaced typing. In short, there is nothing disclosed in the statement of response to suggest that the matter was inherently complex, or that the relevant facts were unknown or had not been recorded elsewhere. This is not a matter where instructions had to be obtained from scratch – on the contrary, all of the factual and legal submissions were a matter of record. In any event, it is not disputed that the applicants' attorney had by 26 October 2016 perused the relevant documentation and consulted with the applicants. At that stage, the statement of response was only days late, in circumstances where the attorney must have been aware of this fact. Why the applicants' attorney failed to seek an indulgence from the respondent's legal representative is simply not explained.

[13] In my view, the explanation for the delay is not compelling, and given the excessive period of delay, the application for condonation stands to be refused on that basis alone. In accordance with the authorities referred to above, it is not necessary for me to take any view on the applicants' prospects of success, and I make no finding in that regard.

[14] In so far as costs are concerned, the interests of the law and fairness are best satisfied by each party bearing its own costs. The present application, although unsuccessful, does not disclose any malice or mala fides on the part of the applicants.

I make the following order:

1. Condonation for the late filing of the applicant's statement of response is refused.
2. There is no order as to costs.

André van Niekerk
Judge

REPRESENTATION

For the applicant: Adv. A Snider instructed by Cliffe Dekker Hofmeyr Inc.

For the respondent: Adv. S.K. Hassim SC, instructed by Maleboa Attorneys