IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: J 4215/18

In the matter between:

IMPERIAL CARGO a division of IMPERIAL LOGISTICS SOUTH AFRICA GROUP (PTY) LTD **Applicant**

and

DEMOCRATISED TRANSPORT LOGISTICS AND ALLIED WORKERS UNION **First Respondent**

LIST OF EMPLOYEES WHOSE NAMES APPEAR ON ANNEXURE "A" TO THE NOTICE OF MOTION **Second Respondent**

Heard: **7 August 2019**

Delivered: **11 September 2019**

JUDGMENT

TLHOTLHALEMAJE, J

Introduction:

[1] This Court on 12 December 2018 issued a *rule nisi* calling upon the first respondent (DETAWU) and its members, the second to further respondents (The Employees) to show cause on 8 March 2019 why an order in the following terms ought not be made final:

1.1. declaring that the strike action by the first of the respondent constitutes an unprotected and unlawful strike;

1.2. interdicting and restraining the first to further respondent from participating and embarking in an unprotected and unlawful strike or in any intended conduct in furtherance, in contemplation of such strike and to comply with their contracts or any other conditions of employment.

[2] On the return date on 8 March 2019, the matter came before van Niekerk J who had extended the *rule nisi* to 16 May 2019. DETAWU was further ordered to file an answering affidavit to the urgent application within 14 calendar days from the date of the order, and to pay the wasted costs for that day. Thus, the answering affidavit was to be filed no later than 22 March 2019.

[3] The answering affidavit was however filed and served on 9 May 2019, some 47 calendar days after the 14 days since the order of van Niekerk J. The answering affidavit was not accompanied by an application for condonation to explain the delay, and the applicant had in its replying affidavit served and filed on 15 May 2019, raised the same concerns.

[4] As at 16 May 2019 when the matter came before Nkutha-Nkontwana J, the application for condonation had still not been filed and delivered, and the *rule nisi* was extended to 7 August 2019, with DETAWU again being ordered to pay the applicant's costs.

[5] On 7 August 2019, an application for condonation for the late filing of the answering affidavit was filed and delivered by DETAWU, which the applicant had promptly opposed.

<u>Condonation:</u>

[6] The principles applicable to applications for condonation are trite. The Court will determine whether good cause has been shown for an indulgence to be granted, taking into account the extent of the delay, the explanation proffered in that regard, the applicant's prospects of success on the merits, any prejudice to the parties, and the overall interests of justice[1].

[1] *Brummer v Gorfil Brothers Investments* (Pty) Ltd 2000 (5) BCLR 465 ;2000 (2) SA 837 (CC) at para 3

[7] The starting point is that an applicant is required to bring such an application as soon as the need for it arises. This means that to the extent that DETAWU was aware that the 14 day period as granted by van Niekerk J had expired, it ought to have filed and served the answering affidavit to the main application together with an application for condonation. It failed to do so.

[8] Furthermore, notwithstanding the fact that the issue of condonation was raised by the applicant on 15 May 2019 in its replying affidavit, or the fact that the *rule nisi* was extended by Nkutha-Nkontwana J on 16 May 2019, the application for condonation was only filed and served on 2 August 2019. In line with the principle that an indulgence should be sought as soon it is acknowledged that the time frames were not met, it has further been said that the failure to do is a further reason for refusing condonation, when there is no good explanation why this was not done timeously.[2] In this case, despite DETAWU being aware that the deadlines were not met, as shall be demonstrated below, no attempt was made to proffer any good explanation.

[9] The founding affidavit in support of the condonation application was deposed to by Mr. Thomas Mnyakeni (Mnyakeni), the acting provincial chairperson of DETAWU. The extent of the delay, other than the 47 calendar days after the deadlines set in van Niekerk J's order, is a further 80 odd days, which is indeed excessive.

[10] The explanation for the delay as proffered by Mnyakeni is indeed cavalier as described by Mr Snider on behalf of the applicant. Mnyakeni simply averred that subsequent to the Court order issued by van Niekerk J, there was a need for the union to consult with its attorneys of record. However, due to his (Mnyakeni) prior commitments in the Western Cape in respect of disciplinary hearings, which had been scheduled for a period of three weeks subsequent to the date of the order, it was not possible to have such consultations for a period of three weeks. He further averred that when the answering affidavit was eventually drafted, it had to be delivered to counsel to be settled. However, the affidavit could not be immediately settled as the union's counsel fell ill.

[2] *Librapac CC v FEDCRAW & others* (1999) 20 ILJ 1510 (LAC) at 1513, para [13]

[11] Mnyakeni's explanation as above is clearly thin in substance, and no attempt was made whatsoever to give a full account of the delay from 22 March 2019 when the answering affidavit was due, until the application for condonation was filed and served on 7 August 2019. It is not known when Mnyakeni had ultimately consulted with attorneys of record; or when the founding affidavit was drafted; or which weeks or on which dates during the three weeks he was not available for consultations with attorneys; or why any other officials could not attend to the matter in his absence. Similarly as pointed out on behalf of the applicant, it is not known why Mnyakeni could not give instructions and consult with attorneys over the phone, by email or any other communication means. Inasmuch as it was important for Mnyakeni to attend to his prior commitments in Cape Town, of even greater importance was for him or DETAWU to attend to the answering affidavit and to make sure that the timelines were met. This was even moreso in the light of the alleged importance of the case to the respondents.

[12] As if that was not enough, it is further not known when counsel was approached with instructions to settle the founding affidavit; or what ailment befell counsel, and for how long counsel was indisposed for the purposes of settling the affidavit. Worst still, it is not explained why another counsel could not be briefed in the matter to settle the papers, or at most, and in the light of the realisation that the deadlines could not be met, why leave from the Court or a further indulgence from the applicant could not be sought.

[13] In the end, the explanation proffered for the delay in filing the answering affidavit is wholly inadequate. It is not reasonable nor satisfactory. It is indeed fallacious for the respondents to argue that the delay was as a consequence of circumstances beyond their control, or that it was not wilful. A simple explanation that a union official was too busy with other matters to attend to an answering affidavit within deadlines, or that counsel was too ill to settle the answering affidavit can clearly not amount to a good explanation. In effect, that explanation in the words of *Moila v Shai NO and Others,* amounts to no explanation at all.[3]

[3] [2007] 5 BLLR 432 (LAC) at para 34, where it was held that;

[14] Given the excessive nature of the delay, and further in the absence of reasonable and acceptable explanation for the delay, there would be no need for the Court to even consider the prospects of success, which are not even addressed by Mnyakeni in the founding affidavit. Other than Mnyakeni making a cursory reference to a number of points of law having been raised in the answering affidavit, no mention however is made in the founding affidavit that the answering affidavit should be read as incorporated in that affidavit. It is not for the Court in the absence of such a prayer, to trawl through the answering affidavit to find out what those points of law are insofar as it is alleged that the prospects of success are great.

[15] It is appreciated as it was stated in *SA Post Office Ltd v CCMA*[4] that each condonation application must be decided on its own facts bearing in mind the general criteria. The LAC further stated that while the rules are there to be applied, they are not inflexible but the flexibility is directly linked to and apportioned in accordance with the interests of justice; prejudice; prospects of success; and finally, degree of delay and the explanation thereof. The issue of delay must be viewed in relation to the expedition with which the law expects the principal matter to be resolve.

[16] In this case, the need for expedition, with which the law and the interests of justice expects the principal issues to be resolved, seemed to have escaped the respondents. The *rule nisi* was issued on 12 December 2018 in respect of issues that had been on-going since early 2018. Despite the return date as directed by the Court on 12 December 2018, nothing prevented the respondents from anticipating an earlier date, or at the most, filing an answering affidavit before the return date. Two further court sittings could not bring the matter to finality, with obvious prejudice to the applicant. In the end,

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"I do not have the slightest hesitation in concluding that this is a case where the period of delay is excessive and the appellant's purported explanation for the delay is no explanation at all. I accept that the case is very important to the appellant. However, the weight to be attached to this factor is too limited to count for anything where the period of delay is as excessive as is the case in this matter and the explanation advanced is no explanation at all. If ever there was a case in which one can conclude that good cause has not been shown for condonation without even considering the prospects of success, then this is it. Where, in an application for condonation, the delay is excessive and no explanation has been given for that delay or an "**explanation"** has been given but such "**explanation"** amounts to no explanation at all, I do not think that it is necessary to consider the prospects of success.

[4] [2012] 1 BLLR 30 (LAC) at para [23]

it cannot be in the interests of justice to grant condonation in circumstances where the respondents' approach to this matter has been cavalier and where they have shown little interests in bringing the dispute to an end. In the circumstances, and in the light of good cause not having been shown, it follows that condonation ought to be refused.

[17] The applicant seeks an order that the *rule nisi* issued on 12 December 2018 be confirmed. It is trite that on the return date, the court is required to determine the substantive merits of the applicant's claim, and whether a final order ought to be granted. Equally so, the Court must be satisfied that a proper case has been made out for each facet of the relief sought.[5]

[18] Central to the determination of whether the *rule nisi* should be confirmed is whether a case was made out to demonstrate that the strike or intended strike was unprotected. The background facts to this dispute are that;

18.1 The applicant is in the business of transport logistics and warehousing industry within the Republic and other neighbouring African countries. It transports consumable goods and freight cargo from depot to depot and to and from harbours and airports in and around the Southern African region. The applicant has also entered into various service level agreements with several clients in terms of which it is required to supply services to strict standards and in large quantities. Some of these clients includes Consol Glass, Royal Canin, Safripol, Afrox and Distell.

18.2 During 2014, another union, SATAWU, referred a dispute about overtime payments to the National Bargaining Council for the Road Freight and Logistics Industry (NBCRFLI) on behalf of about fourteen of its members, who were employed by the applicant to service the Distell contract.

18.3 On 9 August 2014 the applicant and SATAWU concluded a settlement agreement (The SATAWU Agreement) in terms of which the fourteen

[5] *Polyoak (Pty) Ltd v Chemical Workers Industrial Union & others* (1999) 20 ILJ 329 (LC) at 395 para B

employees were to be paid a fixed amount of overtime calculated at six hours per day or a 30 hours per week irrespective of the number of overtime hours that the employee might have worked.

18.4 It was further a term of the settlement agreement that those drivers who were transferred to other clients would no longer be covered by the terms of the settlement agreement. In other words, the terms of the settlement agreement only covered employees who were employed to service the Distell contract and as further identified in the addendum to the settlement agreement.

18.5 The applicant's other employees who were assigned to Safripol and Afrox contracts were paid overtime in accordance with the NBCRFLI Main Collective Agreement. In 2017 the Safripol contract came to an end and as a result, the applicant had embarked on a retrenchment exercise in respect of those employees assigned to that contract who were also members of DETAWU.

18.6 A number of consultation meetings in respect of the retrenchment exercise were held between the applicant and DETAWU, leading to a settlement agreement being concluded on 28 February 2018. Seven employees represented by DETAWU were offered positions within the Distell contract as an alternative to dismissal. As this was not a typical section 197 of the LRA transfer, the employees who took up the offer at Distell were to do so on the same terms and conditions as applicable under the Safripol contract. Thus, any overtime pay was to be made in accordance with the provisions of the Main Collective Agreement, *i.e.* as per hours actually worked.

18.7 The seven employees that were transferred to Distell from Safripol are members of the DETAWU. In total, there are 30 employees servicing the Distell contract, and DETAWU demanded that all of them be paid a fixed amount of overtime in accordance with the settlement agreement concluded with SATAWU on 9 August 2014.

18.8 On 19 November 2018, DETAWU referred a dispute to the Commission for Conciliation and Mediation (CCMA) alleging unilateral changes to the terms and conditions of employment of the Employees, who were transferred from the Safripol Contract to Distell Contract. It alleged that the applicant had infringed the Employees' conditions of employment as contemplated by the provisions of section 64(4) of the Labour Relations Act (LRA)[6] and sought the restoration thereof.

18.9 In a letter or notice dated 19 November 2018, DETAWU referred to a letter dated 1 October 2018[7] in which it protested that its members were not being paid a fixed rate of overtime, which constituted a unilateral change to the terms and conditions of employment of those Employees who were transferred to the Distell contract. The applicant was given an ultimatum to restore the terms and conditions by 5 October 2018, failing which DETAWU would be compelled to utilize the remedies provided for in section 64(4)[8] of the LRA.

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[6] Act 66 of 1995

[7] Letter dated 1 October 2018:

Re: unilateral change to the terms and conditions of employment at Distell and Consol Klip Wadeville

> …
> Will referred to the above matter and further which were values that prior to serving the company with the referral as required by section 64(4) of the LRA, would like to check your final position regarding the above changes which occurred the above-mentioned contract.
>
> We further would like to remind the company that the said changes or capturing the transfer of the employees from Safripol to Distell Contract, the previous arrangement prior to transferring company use to remunerate these employees 7 fax over time when performing duties at Distell. But the Consol Klip matter will referred to the change that affects one employee Mr Mahlangu which was discussed with Carel Malan without reaching an agreement.
>
> In the light of the above we still hold the view that this matter can be resolved between the parties without involving that the parties.
>
> We await your response, should we not hear from you before the close of business on fifth of October 2018 will be left with no other option but to invoke section 64(4) of the LRA.

[8] Section 64. **Right to strike and recourse to lock-out**

(1) Every *employee* has the right to strike and every employer has recourse to lock-out if -

(*a*) the *issue in dispute* has been referred to a *council* or to the Commission as required by *this Act*, and

(i) a certificate stating that the *dispute* remains unresolved has been issued; or

(ii) a period of 30 days, or any extension of that period agreed to between the parties to the *dispute*, has elapsed since the referral was received by the *council* or the Commission; and after that -

18.10 In the strike notice dated 19 November 2019, DETAWU implored the applicant to restore the terms and conditions within 48 hours of receipt of that notice, failing which there would be industrial action on 23 November 2018.

18.11 The applicant's stance was that the settlement agreement entered on 9 August 2014 with SATAWU only applied to those employees who were listed in the addendum to that settlement agreement and that all other unlisted employees were or are correctly paid overtime in accordance with the actual number of hours worked in accordance with the NBCRFLI Main Agreement. It was the applicant's view that the ultimatum to commence with the industrial action and further the withholding of labour by the Employees would constitute an unprotected industrial action.

(*b)* in the case of a proposed *strike*, at least 48 hours 'notice of the commencement of the *strike*, in writing, has been given to the employer, unless -

(i) the *issue in dispute* relates to a *collective agreement* to be concluded in a *council*, in which case, notice must have been given to that *council*; or

(ii) the employer is a member of an *employers' organisation* that is a party to the *dispute*, in which case, notice must have been given to that *employers' organisation*; or

(*c*) in the case of a proposed *lock-out*, at least 48 hours 'notice of the commencement of the lockout, in writing, has been given to any *trade union* that is a party to the *dispute*, or, if there is no such *trade union,* to the *employees,* unless *the issue in dispute* relates to a collective agreement to be concluded in a *council*, in which case, notice must have been given to that *council;* or

(*d* in the case of a proposed *strike* or *lock-out* where the State is the employer, at least seven days 'notice of the commencement of the *strike* or *lock-out* has been given to the parties contemplated in paragraphs *(b)* and *(c).*

…

(3) The requirements of subsection (1) do not apply to a *strike* or a *lock-out* if -

(*a*) the parties to the *dispute* are members of a *council* and the *dispute* has been dealt with by that *council* in accordance with its constitution;

(*b*) the *strike* or *lock-out* conforms with the procedures in a *collective agreement*;

(*c*) the *employees* strike in response to a *lock-out* by their employer that does not comply with the provisions of this Chapter;

(*d*) the employer locks out its *employees* in response to their taking part in a *strike* that does not conform with the provisions of this Chapter; or

(*e* the employer fails to comply with the requirements of subsections 4) and (5).

(4) Any *employee* who or any *trade union* that refers a *dispute* about a unilateral change to terms and conditions or employment to a *council* or the Commission in terms of subsection (1)*(a)* may, in the referral, and for the period referred to in subsection (1)*(a)* -

(*a*) require the employer not to implement unilaterally the change to terms and conditions of employment; or

(*b*) if the employer has already implemented the change unilaterally, require the employer to restore the terms and conditions of employment that applied before the change.

18.12 On 21 November 2018 the applicant's attorneys of record wrote to DETAWU expressing the view that the contemplated industrial action would be unprotected on the basis that the union failed to comply with the mandatory statutory procedural requirements set-out in the provisions of section 64(1) of the LRA, and further that the allegation of the unilateral change terms and conditions of employment was without merit. DETAWU was given an ultimatum to withdraw the strike notice by no later than 17h00 on 21 November 2018, and to further provide a written undertaking that the contemplated industrial action would not proceed. On the same date, DETAWU notified the applicant that the intended industrial action would be suspended pending further meetings scheduled for 28 November 2018.

18.13 The various meetings held between the parties failed to resolve the matter as at 11 December 2018, and DETAWU issued another strike notice, informing the applicant that the contemplated industrial action, as per the first strike notice, would resume with *immediate effect.*

[19] The applicant's case in seeking that the *rule nisi* be confirmed is that the Employees' terms and conditions of employment are covered by the NBCRFLI Main Agreement, with the Council being the exclusive forum for the negotiation and conclusion of agreements on substantive issues between employers and employees. It was submitted that DETAWU seeks to call out an industrial action in respect of issues which are substantive in nature and which fall within the jurisdiction of the Main Agreement. In this regard, it was submitted that the underlying dispute pursued by the respondents is for an increase in the payment of overtime in excess of the provisions of the Main Agreement, and that section 57 of the Main Agreement specifically prohibited strike action in respect of substantive issues.

[20] In the light of the above, it is apparent that the dispute between the parties is alive, more particularly with regard to the respondents' belated opposition to the confirmation of the *rule nisi.* Further as submitted on behalf of the applicant, the SATAWU Agreement that the respondents seek to be extended to them is not applicable to them in the light of the specific employees

mentioned in the addendum to that agreement. To the extent that the intended strike action would be unlawful and unprotected, I am satisfied that the applicant has established a *prima facie* right to the relief that it seeks in view of the fact that the intended strike is unprotected by virtue of the provisions of section 65(3) of the LRA. I am further satisfied that should the industrial action proceed, this would obviously cause irreparable harm to the applicant in relation to its relationship with the contracts it services, and further in circumstances where the strike would be unlawful. In the end, the applicant has no other alternative remedies, and I am further satisfied that the balance of convenience favours that the *rule nisi* be confirmed. Accordingly, the applicant has made out a proper case for each facet of the relief it seeks.

[21] The conduct of the respondents since the *rule nisi* was issued on 12 December 2018 is taken into account when regard is had to an award of costs. In the light of the conclusions reached in regards to the application for condonation, it is my view that considerations of law and fairness dictate that DETAWU in particular, be burdened with the costs of the failed application for condonation and of the main application.

[22] In the premises, the following order is made;

<u>Order:</u>

1. The application for condonation for the late delivery of the First, Second and Further Respondents' answering affidavit is dismissed.

2. The *Rule Nisi* issued by this Court on 12 December 2019 is confirmed.

3. The First Respondent is ordered to pay the costs of the application for condonation, together with the costs of this application.

Edwin Tlhotlhalemaje

Judge of the Labour Court of South Africa

<u>Appearances:</u>

For the Applicant:	A. Snider, instructed by Cliffe Dekker Hofmeyr
For the First, Second and Further Respondents:	P. Malesela, instructed by Madlela Gwebu Mashamba Incorporated