

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: JS175/01

In the matter between:

**NATIONAL UNION OF METALWORKERS
OF SOUTH AFRICA**

First Applicant

HLONGWE AND OTHERS

Second and Third Applicants

and

KHOTSO INSULATION CC

First Respondent

**KAEFER THERMAL CONTRACTING
SERVICES (PTY) LIMITED**

Second Respondent

JUDGMENT

JAMMY AJ

The hearing of this matter concerned three points *in limine* raised by the First and Second Respondents in their response in terms of rule 6(3) of the rules of the Labour Court to the Applicants' statement of claim.

The First Respondent is a temporary employment service as defined in section 198(1) of the Labour Relations Act 1995 ("the Act"), colloquially known as a "labour broker". Section 198 of the Act regulates the position of labour brokers in the employment environment. Section 198(2) provides that –

“For the purposes of this Act, a person whose services have been procured for or provided to a client by a temporary employment service is the employee of that temporary employment service, and the temporary employment service is that person’s employer”.

It is common cause that, on 2 December 1999, the Second and Further Applicants, *inter alia*, were dismissed by the First Respondent for alleged misconduct in the context of an unprotected strike, having, it was alleged, refused to perform work for the Second Respondent in terms of their contracts with the First Respondent, read with the First Respondent’s contract with the Second Respondent. More or less simultaneously with that dismissal, this latter contract was also cancelled.

The fairness of that dismissal was disputed and on 8 December 1999 that dispute was referred by the Applicants to the Metal and Engineering Industries Bargaining Council. In that referral only the First Respondent was cited as the employer.

A conciliation meeting on 7 February 2000 failed to resolve the matter and on 15 February 2000, the Bargaining Council issued a certificate of outcome recording that “the dispute between L Hlongwe and others (Applicant) and Khotso Insulation (Respondent) remained unresolved”.

Section 191(11)(a) of the Act provides that any referral of a dispute to the Labour Court for adjudication must be made within 90 days after the issue of a certificate to the effect that, after conciliation, the dispute in question remains unresolved. On that basis, the referral of the dispute to this court should have been made by the Applicants no later than 16 May 2000. Whatever the date of application to the Registrar of this court for a case number might have been, I have no doubt that referral in the context of section 191(11)(a) involves the service and filing of the Applicants’ Statement of Case.

As a fact however, the Statement of Case was served on the Respondents on 31 May 2001, one year and sixteen days later than the due date thereof.

The initial referral was unaccompanied by an application for condonation of such late filing. That application was eventually made on 5 July 2001, some three weeks after the Respondents had, on 14 June 2001, filed their formal response to the Applicants' statement of claim, in which, *inter alia*, the point *in limine* relating to the late filing thereof was raised.

It is that application for condonation which, in the context of that first point *in limine*, must now be determined.

. There is plethora of authority in this and other courts dealing with the circumstances in which condonation of a failure by parties to observe time limits prescribed by rules of court will be condoned. The immutable principle emerging from those cases is that condonation is an indulgence which will be granted only in exceptional circumstances and in consideration of an acceptable explanation for the delay in question.

. In order not unnecessarily to burden this judgment, I do not propose to review those authorities in detail but reference in that regard may be made, *inter alia*, to the *locus classicus* of –

Melane v Santam Insurance Company Limited 1962(4)SA 531(A)

and to –

Foster v Stewart Scott Inc (1997) 18ILJ 367(LAC):

Num v Western Holdings Goldmine (1994) 15ILJ 610(LAC)

Swanepoel v Albertyn (2000) 21ILJ 2701(LC)

. It is not contested that the delay in this instance was an inordinately lengthy one and, once again without canvassing the particularity thereof in unnecessary detail, the

explanation therefor is in my view inadequate and unsatisfactory.

It appears to be sourced in difficulties experienced by the First Applicant's local organiser in identifying the names of the individual Applicants before 18 December 2000 and in further problems of communication between her and the First Applicant's Regional Legal Officer and in a further delay of some five months in initiating the litigation. The facts that the local organiser was "inundated with high work pressure" and uncertain as to the nature of the dispute, cannot excuse what, to my mind, is a situation of patent neglect and laxity. The delay, quite simply, is not explained. No facts supporting it are submitted to this court and, as I have indicated, in the absence of a proper and acceptable explanation for what, in this case, was an excessive and unreasonable period, condonation cannot be countenanced. As stated in **Swanepoel** (supra),

"... the issue of the explanation for the delay requires careful scrutiny in the circumstances described above and in the exercise of my discretion in this matter this factor appears likely to swing the scales one way or the other. I am also mindful of the fact that this court has tended to grant condonation for non-compliance with time limits only in exceptional circumstance and to require a full and proper explanation for the entire period of the delay in question".

For these reasons, condonation cannot be granted and the Respondents' first point *in limine* succeeds. In these circumstances it is unnecessary for me to deal with the remaining issues raised by the Respondents but I would record, in passing, that the second point *in limine*, to the effect that the Second Respondent, not having being cited in the referral of the dispute to the Bargaining Council for conciliation, cannot, in the absence of such conciliation, properly be joined in the proceedings now before this court, has unanswerable validity.

The referral for adjudication to this court having been made out of time and condonation of that late referral being refused, this court is not properly seized of the matter and the main application is dismissed. The First and Further Applicants are ordered jointly and severally to pay the First and Second Respondents costs.

B M JAMMY
Acting Judge of the Labour Court

8 August 2001

Representation:

Mr L Makua: National Union of Metalworkers of South Africa

ndents: Mr C Todd: Bowman Gilfillan Inc.