

IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG

CASE NUMBER: JR 819/06

In the matter between:

CHEMICAL, ENERGY, PAPER, WOOD

And Workers' Union

First Applicant

S TSHABALA & 12 OTHERS

SECOND AND FURTHER APPLICANTS

AND

ART MOULDINGS INTERNATIONAL (PTY) LTD

RESPONDENT

JUDGMENT

MOLAHLEHI J

Introduction

- 1] The Applicants seek an order condoning the late filing of their statement of case. In terms of section 191(11) (a) of the Labour Relation Act 66 of 1995 ("the LRA"), a dispute must be referred to the Labour Court within 90(ninety) days after the Commissioner has certified that the dispute remains

unresolved.

- 2] The Applicants served and filed their statement of case on 20 November 2006, some 95 (ninety five) days late and applied for condonation for such late filing only after the issue was raised by the Respondent in its answering affidavit.

Background

- 3] It is common cause that the First Applicant and the Respondent engaged in a consultation process during the later part of 2005, concerning restructuring and the contemplated retrenchments.
- 4] After several consultation meetings between the parties, the Respondent terminated the services of the Second to further Applicants on the 25 January 2005.
- 5] Following the dismissal the Applicants referred a dispute to the Commission for Conciliation, Mediation and Arbitration (“the CCMA”) for conciliation on the 8th February 2006. The parties could not reach consensus at the conciliation meeting and the Commissioner issued a certificate of outcome

on 19 March 2006.

- 6] The Applicants served and filed their statement of case on 20th November 2006, some 90 (ninety) days out of the period prescribed by s191 of the LRA.

Legal principles

- 7] Section 191(11) of the LRA reads as follows:

“(a) *The referral, in terms of subsection (5) (b), of a dispute to the Labour Court for adjudication, must be made within 90 days after the council or (as the case may be) the commissioner has certified that the dispute remains unresolved.*

(b) *However, the Labour Court may condone non-observance of that timeframe on good cause shown.”*

- 8] The fundamental principle in considering condonation is that the Court has a discretion which is to be exercised judicially after taking into account all the facts before it. The factors which the Courts take into consideration in assessing whether or not to grant condonation are: (a) the degree of lateness or non compliance with the prescribed time frame, (b) the explanation for the lateness or the failure to comply with time frames, (c) prospects of success or *bona fide* defence in the main case; (d) the

importance of the case, (e) the Respondent's interest in the finality of the judgement, (f) the convenience of the Court; and (g) avoidance of unnecessary delay in the administration of justice. See *Foster v Stewart Scott Inc* (1997) 18 ILJ 367 (LAC).

9] These factors are not individually decisive but are interrelated and must be weighed against each other. In weighing these factors for instance, a good explanation for the lateness may assist the applicant in compensating for weak prospects of success. Similarly strong prospects of success may compensate the inadequate explanation and the long delay.

10] In an application for condonation, good cause is shown by the Applicant giving an explanation that shows how and why the default occurred. There is authority that the Court could decline the granting of condonation if it appears that the default was wilful or was due to gross negligence on the part of the Applicant. In fact the Court could on this ground alone decline to grant an indulgence to the Applicant.

11] Prospects of success or *bona fide* defence mean that all what needs to be determined is the likelihood or chance of success when the main case is

heard. See *Saraiva Construction (Pty) Ltd v Zulu Electrical and Engineering Wholesalers (Pty) Ltd* 1975 (1) SA 612 (D) and *Chetty v Law Society* 1985 (2) SA at 765A-C.

12]In *Melane v Santam Insurance Co Ltd*, 1962 (4) SA 531 (A) at 532C-F, the Court held that 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. It has also been held by the Courts that the Applicant should bring the application for condonation as soon as it becomes aware of the lateness of its case. See *Zululand Anthracite Colliery v Commission for Conciliation, Mediation and Arbitration & Another* (2001) 22 ILJ 1213 (LC).

13]It has been held that good cause is shown by the Applicant giving an explanation that shows how and why the default occurred. It was further held in this case that the Court could decline the granting of condonation if it appears that the default was wilful or was due to gross negligence on the part of the Applicant. In fact, the Court could on this ground alone decline to grant an indulgence to the Applicant. See *Saraiva Construction (Pty) Ltd v*

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14] In my view, the Applicants' explanation is unreasonable and unacceptable and their application for condonation for the late filing of the statement of case stands to be dismissed on this basis alone. The other basis upon which the application stands to be dismissed is the fact that the prospects of success are also not good. In fact except for the bald averment concerning the principle of "*last in first out*" (LIFO), not sufficient information has been placed before this Court to determine the chances of the Applicants succeeding when the main case is heard. The reasons are set out below.

Reasons for the lateness

15]In providing the reasons for the lateness, Mr Ntshangase, the local organizer of the First Applicant states in his founding affidavit that by the time the certificate of outcome was issued the First Applicant had already transferred him to its Springs office. The transfer took place, it would appear during March 2006. He was transferred back to the Johannesburg office during early October 2006.

16]The matter was handed over to Mr Mothoagae, another union official, when

Mr Ntshangase was transferred to Springs. Mr Ntshangase was transferred back to the Johannesburg during October 2006, only to discover on his arrival that this dispute had not been filed with the Court. The matter was not filed with the Court because Mothoagae, had failed to hand over the matter to another colleague when he became ill.

17]Having discovered that the matter was not filed with the Court, Ntshangase contacted the regional secretary of the First Applicant and requested authorization to refer the matter to attorneys. Authorization could not be obtained immediately because the regional secretary was at that stage away attending a COSATU congress in Johannesburg.

18]The delay was further according to Ntshangase, occasioned by the fact that after the COSATU conference, he had to attend a two weeks industrial relations course in Cape Town.

19]Authorization to refer the matter to attorneys was granted on 17th October 2006. Two days thereafter, on 19 October 2006, the First Applicant's internal dispute referral form was completed and thereafter Ntshagase unsuccessfully sought a consultation with the union's internal legal advisor

who was away attending negotiations regarding an unprotected industrial action.

20]It is not clear why the legal officer needed to approve the referral to attorneys when the regional organizer had already authorized the same. Be that as it may the legal officer approved the instructions for attorneys on 31st October 2006, some 10 (ten) days after Ntshangase had become aware that the statement of case was late.

21]At the consultation meeting on the 2 November 2006, the attorneys advised Ntshangase that they needed to consider *“the merits and the prospects of success in the condonation application, before drafting the referral.”*

22]It took over 10(ten) days again for Ntshangase to consult with attorneys to finalize the filing of the statement of case. The only explanation provide by Ntshangase, which has not been confirmed by the attorneys of record is that Mr Mahlango, of the attorneys of record attempted to consult with him on 8th November 2006, to no avail as he was away on annual leave.

Prospects of success

23]In as far as the prospects of success are concerned the Applicants in their founding affidavit state that they stand a good chance of winning the case because they have good prospects of success. In this regard they aver that the dismissal occurred whilst the parties were still finalizing the alternatives like short-time and voluntary retrenchment.

24]The prospects of success are also based on the averment that the Respondent failed to apply LIFO properly. In this regard the Applicants contend that certain employees with longer services were retrenched. It is not stated whether or not the alleged improper application of LIFO applied to all of the Applicants or other retrenched employees and if not all of them who amongst them was retrenched whilst they have longer services. It is also not stated who are those employees who have not been retrenched whilst their services are shorter than those retrenched.

25]In my view, the Applicants have failed to show that the existence of prospects of success in the main case.

26]I see no reason why costs should not follow the result.

27]In the premises, the application is dismissed with costs.

MOLAHLEHI J

DATE OF HEARING : 23 NOVEMBER 2007

Date of Judgment : 25 January 2008

APPEARANCES

For the Applicant: Peter Mahlangu of Cheadle Thompson & Haysom Inc.

For the Respondent: Jean D Randt of D Du Randt Attorneys