IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

Case No : JS554/08

In the matter between:

SOUTH AFRICAN TRANSPORT AND

ALLIED WORKERS' UNION Applicant

P TSHABALALA AND 77 OTHERS Second to Further Applicants

and

CONREE TRANSPORT (PTY) LTD Respondent

JUDGMENT

BHOOLA J:

Introduction

[1] The applicants seek an order condoning the late referral of their unfair dismissal dispute to this court.

Background

[2] The dispute concerns the alleged unfair dismissal by the second to further applicants ("the individual applicants") arising from an unprotected strike. The dispute was referred to the National Bargaining Council for the Road Freight Industry ("the Bargaining Council") for conciliation following which it was arbitrated. At the arbitration on 17 June 2008 the respondent raised a point *in limine* that the Bargaining Council

lacked jurisdiction and Commissioner Cilliers issued a ruling to this effect. The applicants were required to file their statement of case on or before 8 July 2008, but only did so on 19 August 2008. The referral was some 42 days late.

[3] This application for condonation was moreover brought some five months after the applicants' had filed their statement of case and is opposed by the respondent.

The legal test

[4] The test for condondation is now well established. In *Melane v Santam Insurance Company Limited* 1962 (4) SA 532 (A) Holmes J.A set out the applicable principles as follows:

"*..the basic principle is that the court has a discretion, to be exercised judicially upon a consideration of all the facts, in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation thereof, the prospects of success and the importance of the case. Ordinarily these facts are interrelated : they are not individually decisive, for that would be a piecemeal approach, incompatible with a true discretion, save of course that if there are no prospects of success there will be no point in granting condonation. What is needed is an objective conspectus of all the facts. Thus, a slight delay and a good explanation may help to compensate for the prospects of success which are not strong. On the importance of the issue and strong prospects of success may tend to compensate for a long delay. The Respondents interest in finality must not be overlooked".*

[5] It is trite that a *bona fide defence* and good prospects of success are not sufficient in the absence of a reasonable explanation for the default: *Chetty v Law Society Transvaal* 1985 (2) SA 756 (A) at 765. This principle has been interpreted as follows by the Labour Appeal Court in *NUM v Council for Mineral Technology* (1999) 3 BLLR 209 (LAC) at 211 G-H :

"There is a further principle which is applied and that is that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without prospects of success, not matter how good the explanation for the delay, an application for condonation should be refused".

[6] Where an applicant's exculpatory explanation is based on negligence or other misconduct on the part of his legal advisors, the courts have often been hesitant to bar him from relief : See *Meintjies v HD Combrinck (Eiendoms) BPK* 1961 (1) SA at 263 H – 264 A.

Merits of the application

[7] The applicants provide as an explanation for the delay the fact, *inter alia*, that:

(a)The jurisdictional ruling of Commissioner Cilliers "left a lot of confusion" and they needed to obtain legal advice on the ruling;

(b)The delay was caused by their representatives who incorrectly referred the dispute to arbitration instead of to the Labour Court for adjudication;

(c)The applicants were unaware that the period in which they were required to file their statement of case was 90 days from the date of issue of the certificate of outcome by the Bargaining Council;

(d)The applicants did not have the benefit of 90 days' in referring their dispute to this Court.

[8] Ms Chenia, for the respondent, submitted that the need for expeditious resolution of labour disputes is a key principle underpinning our labour relations dispensation, as has been recognized in *National Union of Metal Workers of SA v Fry's Metals (Pty) Ltd* 2005 (5) SA 433 (SCA) at para 41 and *Amalgamated Clothing and Textile Workers' Union v Veldspun (Pty) Ltd* 1994 (1) SA 162 (A). Furthermore, the maxim *vigilantibus non dormientibus iura subvenit* (the law aids those who are vigilant and not those who sleep upon their rights) is well established: see *Pathescope Union of SA Limited v Mallinik* 1927 AD 305 where it was held that a plaintiff may in certain circumstances be debarred from obtaining relief because of unjustifiable delay in seeking it. This principle has been applied by the Industrial Court and the respondent seeks to rely on it as a basis for relief in that, it was submitted, the delay in this instance has caused it to suffer prejudice. Ms Chenia further urged this Court to exercise its inherent jurisdiction to prevent abuse of its process and rules, as was confirmed in *Autopax Passenger Services (Pty) Ltd v Transnet Bargaining Council and Others* (2006) 27 ILJ 2574 (LC) at para 7.

[9] The explanation for the delay, the respondent submitted, is sorely lacking in detail, incomplete and unsatisfactory. The application stands to be dismissed on this ground alone.

[10] The courts have regarded a delay of seven weeks' as substantial: *Mkhize v First National Bank and another* (1998) 11 BLLR 1141 (LC). However, in *Van Dyk v Autonet (a division of Transnet Ltd)* (2000) 21 ILJ 2484 (LC) a delay of two months' was held not to be substantial.

[11] The delay *in casu*, the respondent submitted, was excessive and unreasonable when it is borne in mind that the applicants are represented by a trade union which should have been aware of the time periods and jurisdictional issues.

[12] In *Catering Pleasure and Food Workers Union v National Brands Limited* (2007) 28 ILJ 1065 (LC) the applicant union's application for condonation was dismissed on the grounds that the delay was excessive and the prejudice occasioned to the respondent in having to defend a retrenchment effected some time before, would be severe. In *casu* it was submitted that the respondent would be unduly prejudiced were condonation to be granted and the applicants permitted to prosecute their claim after such a long delay.

[13] Ms Chenia further submitted that condonation should not be granted in the absence of an "*extremely cogent explanation*" for the entire period of the delay coupled with *"indisputably strong merits".*

[14] The applicants moreover cannot seek to blame their legal representatives for incorrectly referring their dispute to the Bargaining Council. It is trite that default caused by a representative does not constitute a valid defence: *Saloojee v Minister of Community Development* 1965 (2) SA 135 (A). In *Royal Auto Spares cc v NUMSA and Others* (2001) 10 BLLR 1164 (LC), the court held that although it was slow to visit the consequences of negligence by legal representatives on lay litigants, there were limits to such indulgences. The LAC has held as follows in *Universal Product Network (Pty) Ltd v Mabaso and others* (2006) 27 ILJ 991 (LAC) at para 18 – 20:

"As has often been stated the court is hesitant to debar a litigant from relief, particularly where it is his attorney who has been at fault. There are limits, however, even where the attorney is largely to blame for the delay, beyond which the courts are not prepared to assist an Appellant. The attorney after all is the representative who the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with the rule of court, the litigant should be absolved from the normal

consequences of such a relationship, no matter what the circumstances of the failure are….

The Supreme Court of Appeal has pointed out that an unacceptable explanation remains just that, whatever the prospects of success on the merits (see Chetty v Law Society, Transvaal (1985) (2) SA 756 (A) at 768 B-C).”

[15] In addition, it was submitted, the first applicant is a registered well established trade union and the applicants were at all times represented by an experienced union official, Mr Nkosi, who ought to have been aware of the provisions of section 191 (5) (b) (iii) of the Labour Relations Act, 55 of 1996 (“the LRA”). Accordingly, the applicants cannot seriously contend that that the ruling of Commissioner Cilliers *“left a lot of confusion*”. They were simply negligent and tardy in pursuing the claim on behalf of the individual applicants. Moreover, they fail to provide any explanation for the period between 9 April 2008 and 20 August 2008. Commissioner Cilliers’ furthermore directed that the dispute be referred to the Labour Court and stipulated the time period for such referral. Thus the applicants cannot contend that, as from the date of the ruling (17 June 2008), they were unaware of the requirements and therefore failed to comply.

[16] Mr. Mathabathe, on behalf of the applicants, submitted that the reason for the delay emanated from the direction issued by a third party (Commissioner Cilliers), and that the delay was caused by a *bona fide* error in the part of the first applicant in prosecuting in the wrong forum. Relying on *National Union of Metal Workers’ of South Africa v SA Truck Bodies (Pty) Ltd* (2007) 28 ILJ 1603 (LC), he submitted that this is in itself a reasonable explanation for the delay. In addition, where the explanation for the delay is that the dispute was erroneously referred to the wrong forum by the trade union, and the simplicity of its explanation reveals that the union took the court into its confidence, coupled with good prospects of success, condonation should be granted: *National Union of Metalworkers of South Africa & others v Crisburd (Pty) Ltd* (2008) 29 ILJ 694. Furthermore, where a delay is caused by a representative, in exceptional cases the courts will grant condonation if refusal to do so will result in a failure of justice: *Swanepoel v Albertyn* (2000) 21 ILJ 2701 (LC). The applicants allege that they were busy preparing for the arbitration and did not realise that the dispute was in the wrong forum. Furthermore, the first applicant’s legal officer states in her founding affidavit that when this came to light they filed their statement of claim in less than 90 days, and they sought legal advice as to whether the ruling issued by Commissioner Cilliers was correct.

[17] It was submitted by Ms Chenia that the applicants have no prospects of success. This is clear from the respondent's pleadings. In essence it is common cause that the individual applicants were dismissed on 22 February 2008 for an unprotected strike. It is further common cause that on 18 February 2008 the respondent instructed the individual applicants not to report for duty until 4 March 2008, and that the issues that led to the dispute were scheduled for discussion with the first applicant on 4 March 2008. They nevertheless embarked on an unprotected strike. After issuing various ultimata and complying with procedural fairness requirements, the individual applicants were dismissed. The applicants' clearly dispute this version, as Mr. Mathabathe submitted, in that notwithstanding the scheduled meeting, the respondent unilaterally imposed a requirement that the applicants sign an agreement, and that the individual applicants had complied with the respondent's instructions not to perform their duties but to remain on the premises.

[18] It was submitted that the respondent took steps to ensure that the dismissals were effected in accordance with fair procedure and were substantively fair, and has a justifiable interest in finality of the dispute. If condonation were granted it would be prejudicial to the respondent due to no fault of its own while the prejudice alleged by the applicants has been entirely of their own making. The applicants submitted that they will suffer severe prejudice should condonation not be granted and that it was in the interests of justice that the dispute should be ventilated and brought to finality.

Order

[19] It is trite that this court exercises discretion as to whether or not to grant condondation. However, an applicant seeking condonation has to show good cause. This requires the applicant to place before the court facts concerning the delay, which are reasonable and plausible, and which will assist it in considering and exercising its judicial discretion as to whether or not to excuse the delay. In the absence of an acceptable explanation for the non-compliance with the Rules of the Labour Court ("the Rules") and with the LRA, condonation cannot be granted: *Glansbeek v DG Trading (Pty) Ltd* (1998) 3 BLLR 223 (LAC).

[20] Furthermore the relevant factors are not individually decisive but are interrelated and must be weighed against each other. In considering the explanation for the delay, the degree of lateness, the prospects of success in the main matter, the importance of the case, the respondent's interests in finality, the convenience of the court, and the avoidance of unnecessary delay in the administration of justice (as set out for instance by my brother Molahlehi J in *National Union of Metalworkers of South Africa & others v*

Crisburd, *supra* at para [5] – [6]), as a whole, in my view the lateness stands to be condoned. The degree of lateness cannot be said to be substantial in the context of the explanation advanced, and although the explanation for the delay is not compelling, it is in my view reasonable and acceptable. It does not have to be "extremely cogent" as the respondent submits, but enough to persuade the court that it would not be reasonable to finally determine the main matter on that basis. I must point out however, that the conduct of the first applicant does reveal a somewhat dilatory approach to representing the interests of its members effectively. Although I am strictly not required to have regard to the prospects of success, it would appear to involve a material dispute of fact on the issue of the unprotected strike. At the very best for the respondent therefore, the prospects are indifferent. Moreover, in the overall interests of justice it would appear to be justified to grant the application. The delay is not such as to cause extreme prejudice to the respondent in the sense that it is no longer in contact with material witnesses or such as their recollection may be affected, none of which was submitted. Finally, this matter falls outside the ambit of the dictum in *Queenstown Fuel Distributors CC v Labuschagne N.O and others* (2002) 21 ILJ 166 (LAC) at para [24], where it was held that: *"Condonation in the case of disputes over individual dismissals will not readily be granted. The excuse for non-compliance will have to be compelling, the case for attacking the defect in the proceedings would have to be cogent and the defect would have to be of a kind which will result in a miscarriage of justice if it were allowed to stand*". It involves a significant number of individual applicants who will be affected by the outcome of this dispute and that it is in the interests of justice that it be ventilated fully.

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

(1) The late filing of the applicants' statement of case is condoned.

(2) There is no order as to costs.

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Bhoola J

Judge of the Labour Court of South Africa

Date of hearing: 18.02.2010

Date of judgment: 2 March 2010

Appearance:

For the applicants: Advocate Mathabathe instructed by MM Baloyi Attorneys

For the respondent: Ms Chenia, Glyn Marais Inc.