



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JS 887/15

In the matter between:

GIWUSA OBO MEMBERS

Applicant

and

ZIBO CONTAINERS (PTY) LTD

First Respondent

COMMISSIONER GAYNAW J, NO

Third Respondent

Heard: 22 February 2016

Delivered: 8 April 2016

Summary: Application for the condonation for the late filing of the statement of case. Application dismissed

JUDGMENT

GUSH J

[1] This is an application by the Applicant, a union representing eight of its members, for condonation for the late filling of the Applicant's Statement of Case.

[2] The Applicant's members were found guilty of misconduct involving, *inter alia*, participating in an unprotected strike and intimidation and were dismissed on 9 September 2014.

- [3] The Applicant referred an unfair dismissal dispute to the bargaining council. The Second Respondent issued a certificate of non-resolution on 22 October 2014. According to section 191(11)(a) of the Labour Relation Act¹ (the Act), the Applicant had to file its Statement of Case by no later than 90 days after the date on which the certificate of non-resolution was issued. The Applicant's Statement of Case was filed on 10 November 2015. The 90 day period stipulated in the Act required the Applicant to file its Statement of Claim on 21 January 2015. The Applicant filed the Statement of Claim on 10 November 2015 some nine months and two weeks after the 90 day period.
- [4] Before considering the merits of the Applicant's application for condonation, it is necessary to first consider the principles which the courts have applied in determining whether to condone the late filing of an application.
- [5] These principles have been set out by this Court on many occasions. It is necessary to reiterate these principles against which the Applicant's application for condonation must be considered before considering the merits of the Applicant's application.
- [6] In *Melane v Santam Insurance Co Ltd*,² it was held:
- i. In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case.³
- [7] In the matter of *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd and Others*,⁴ the Supreme Court of Appeal referred to the judgment of Holmes JA in *Federated Employers Fire & General Insurance Co Ltd and Another v McKenzie*⁵ in support of the proposition that:

¹ Act 66 of 1995.

² 1962 (4) SA 531 (A).

³ at page 532.

⁴ ([2013] 2 All SA 251 (SCA).

⁵ 1969 (3) SA 360 (A) at 362F-G)

'Factors which usually weigh with this court in considering an application for condonation include the degree of non-compliance, the explanation therefor, the importance of the case, a respondent's interest in the finality of the judgment of the court below, the convenience of this court and the avoidance of unnecessary delay in the administration of justice.'⁶

- [8] In the judgment, the court also referred to the matter of *Uitenhage Transitional Local Council v South African Revenue Service*⁷ where the court held:

'One would have hoped that the many admonitions concerning what is required of an applicant in a condonation application would be trite knowledge among practitioners who are entrusted with the preparation of appeals to this Court: condonation is not to be had merely for the asking; a full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility. It must be obvious that, if the non-compliance is time-related then the date, duration and extent of any obstacle on which reliance is placed must be spelled out.'⁸

- [9] The Constitutional Court in the matter of *eThekweni Municipality and Ingonyama Trust*,⁹ the court said the following:

'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* this Court said in this regard:

"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

⁶ At para 11.

⁷ 2004 (1) SA 292 (SCA) para 6

⁸ At para 12.

⁹ 2013 (5) BCLR 497 (CC); 2014 (3) SA 240 (CC).

requirements. Her explanation for the inordinate delay is superficial and unconvincing.¹⁰

[10] The Labour Court and the Labour Appeal Court have both in similar vein dealt with the requirements and principles applicable to an application for condonation. In *High Tech Transformers (Pty) Ltd v Lombard*,¹¹ the Honourable Basson J dealt with an application for condonation as follows:

'Condonation is not merely for the asking as was duly pointed out by the court in *NUMSA & another v Hillside Aluminium* [2005] 6 BLLR 601 (LC):

'[12] Additionally, there should be an acceptable explanation tendered in respect of each period of delay. Condonation is not there simply for the asking. Applications for condonation are not a mere formality. The onus rests on the applicant to satisfy the court of the existence of good cause and this requires a full, acceptable and ultimately reasonable explanation. One of the primary purposes of the Labour Relations Act is to ensure that disputes are resolved expeditiously, especially dismissal disputes. The intention is that disputes alleging unfair dismissal should be referred to conciliation within 30 days of the dismissal (section 191(1)(b)(i) (Act 66 of 1995)); that the conciliation process be completed within 30 days (section 191(5) (Act 66 of 1995)) and that disputes for adjudication by the Labour Court should then be referred within 90 days of the end of the conciliation process. For a variety of reasons, these time periods are often not complied with in practice. Nevertheless, to do justice to the aims of the legislation, parties seeking condonation for non-compliance are obliged to set out full explanations for each and every delay throughout the process. An unsatisfactory and unacceptable explanation for any of the periods of delay will normally exclude the grant of condonation, no matter what the prospects of success on the merits. The latter principle was stated by Myburgh, JP in *NUM v Council for Mineral Technology* [1999] 3 BLLR 209 (LAC) at 211G-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, no matter how good the explanation for delay, an application for condonation should be refused." ¹²

¹⁰ At para 28.

¹¹ (2012) 33 ILJ 919 (LC) 2012 ILJ at page 919

¹² At para 25.

[11] This principle was followed in the matter of *Moila v Shai NO and Others*¹³ in which the then Honourable Judge President Zondo held:

‘Indeed, it is clear from **PE Bosman Transport Wks Com v Piet Bosman Transport 1980(4)SA 794(4)** at 799 D that in a case such as this one, it is not necessary to consider the prospects of success and that condonation could be refused no matter how strong the prospects of success are in a case such as the present one. PE Bosman was a case where the appellant had failed to note the appeal and deliver the appeal record timeously and there were periods of delay for which there was either no acceptable explanation or no explanation at all...’¹⁴

[12] The test to apply in determining whether to grant or refuse condonation applications is the interest of justice,¹⁵ Zondo J P in his separate judgment reasoned as follows:

‘In this Court the test for determining whether condonation should be granted or refused is the interests of justice. If it is in the interests of justice that condonation be granted, it will be granted. If it is not in the interests of justice to do so, it will not be granted. The factors that are taken into account in that inquiry include:

- (a) the length of the delay;
- (b) the explanation for, or cause for, the delay;
- (c) the prospects of success for the party seeking condonation;
- (d) the importance of the issue(s) that the matter raises;
- (e) the prejudice to the other party or parties; and
- (f) the effect of the delay on the administration of justice.

Although the existence of the prospects of success in favour of the party seeking condonation is not decisive, it is an important factor in favour of granting condonation.

¹³ (2007) 28 ILJ 1028 (LAC)

¹⁴ At 1038; para 36.

¹⁵ *Grootboom v National Prosecuting Authority* (2014) 2 SA 68 (CC) at paras 50 and 51.

The interests of justice must be determined with reference to all relevant factors. However, some of the factors may justifiably be left out of consideration in certain circumstances. For example, where the delay is unacceptably excessive and there is no explanation for the delay, there may be no need to consider the prospects of success. If the period of delay is short and there is an unsatisfactory explanation but there are reasonable prospects of success, condonation should be granted. However, despite the presence of reasonable prospects of success, condonation may be refused where the delay is excessive, the explanation is non-existent and granting condonation would prejudice the other party. As a general proposition the various factors are not individually decisive but should all be taken into account to arrive at a conclusion as to what is in the interests of justice.'

- [13] There is no doubt that the delay in filing the statement of claim in this matter is excessive. It is incumbent upon an applicant, particularly in circumstances such as those in this matter, to provide a detailed full, acceptable and ultimately reasonable explanation and where necessary to confirm the averments with regarding the explanation tendered in the affidavit filed in support thereof. In this matter, the Applicant has seen fit to file only one inconsequential confirmatory affidavit concerning the late filing of the Statement of Claim. This affidavit takes the matter no further. There is not a single affidavit filed by any of the individual members whom the Applicant union represents nor the protagonists best placed to explain the delay.
- [14] According to the Applicant, the main reason for the delay involved infighting amongst officials within the Applicant union and suggested incompetence by the attorneys. Conspicuous by its absence is any explanation by the officials why despite the so-called infighting no attention was given to the individual member's dispute. Likewise there is no explanation from the attorney who was apparently instructed in the matter but failed to file the referral.
- [15] Paragraphs 50 to 54 of the affidavit set out in the referral but with no explanation as to the reason for the delay. There is no explanation by the official concerned regarding the delay of cause thereof. What follows is a general and disturbingly unspecific account of the Applicant's internecine

strife without any reference to or explanation of the why the individual members' matter was continually delayed.

- [16] The deponent to the affidavit setting out the litany of the Applicant's woes, refers to the individual members having "incessantly contacted me and other officials calling and also visiting the offices to get feedback". The absence of detail and confirmatory affidavits leaves the Applicant's explanation as "either no acceptable explanation or no explanation at all"
- [17] It is common cause that the delay in this matter is excessive. The certificate of outcome confirming that the parties have failed to resolve the dispute was issued on 22 October 2014 and the Applicant filed its Statement of Case nine months and a half later. The Applicant argued that the delay was by what clearly demonstrates an unexplained negligent inefficiency on the part of the union and a named official (paragraphs 50 to 54 of the affidavit), internal strife between the union officials (a number of them named) and the unexplained apparent negligence of their attorney of record in failing to timeously file the Statement of Claim and/or timeously file the application for condonation (still the attorney of record). None of these averments are substantiated by confirmatory affidavit.
- [18] In relation to prejudice, the contention made by the First Respondent that had the Applicant invoked its challenge timeously; the First Respondent would have arranged its affairs accordingly. Instead, the First Respondent now faces the risk of a potential retrospective reinstatement order. In *CUSA v Tao Ying Metal Industries and Others*,¹⁶ the court noted the following:

'The LRA introduces a simple, quick, cheap and informal approach to the adjudication of labour disputes. This alternative process is intended to bring about the expeditious resolution of labour disputes. These disputes, by their very nature, require speedy resolution. Any delay in resolving a labour dispute could be detrimental not only to the workers who may be without a source of income pending the resolution of the dispute, but it may, in the long run, have

¹⁶ (2009) 1 BLLR (CC).

a detrimental effect on an employer who may have to reinstate workers after a number of years.¹⁷

[19] I am not persuaded that the Applicant, in setting out the reasons for the delay have satisfactorily, or at all, provided an acceptable explanation justifying consideration of their prospects of success.

[20] However should consideration be given to the Applicant's averment that they enjoy good prospects of success, it is trite that:

‘...without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused.’¹⁸

[21] On the pleadings there is little to suggest or support the Applicants averment that they have good prospects of success, particularly in the light of the first Respondents denial.

[22] As far as the issue of costs is concerned, I am not persuaded that in the circumstances of this matter an award of costs is justified.

[23] In the circumstances and for the reasons set out above, I make the following order:

The Applicant's application for condonation is refused.

Gush J

Judge of the Labour Court South Africa

¹⁷ At para 62.

¹⁸ *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A).

APPEARANCES:

FOR THE APPLICANT

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A Bakker

Instructed by:

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LABOUR COURT