THE LABOUR COURT OF SOUTH AFRICA
JOHANNESBURG

Case Number: JS 699/15

In the matter between:

GIWUSA **First applicant**

KEKANA & others **Second and further applicants**

and

MAXAM DANTEX SA (PTY) LTD **Respondent**

Heard: 12 February 2016

Judgment: 12 February 2016

EX-TEMPORE JUDGMENT

STEENKAMP J:

[1] This is an application for condonation for the late filing of the applicants' statement of claim. It arises from the dismissal of the individual applicants, represented by their trade union (GIWUSA), for participation in an unprotected strike.

[2] The application is marred by the unprofessional and negligent conduct of the applicants' attorney, Ms Jegeh, who is inexplicably still the attorney of record for the applicants. Despite the fact that almost the entire explanation, such as it is, for the late filing of the application is to blame the attorney, she has not even graced the court with her presence this morning. And Mr *Mqechane*, who appears on her instructions, appeared here today without an attorney present and with no explanation why he is appearing without his attorney. I will return to that aspect when I deal with the issue of costs.

[3] Firstly though, using the well-known principles set out in *Melane v Santam Insurance Company Limited*,[1] I will look at the elements of the application.

[4] The extent of the delay is excessive. The application is more than four months late, over and above the generous 90-day period in which the applicants had to refer the matter. I must also stress that the applicants have been represented by both their trade union and their attorney, Ms Jegeh, throughout.

[5] Having referred an unfair dismissal dispute to the CCMA, a certificate of outcome was issued on the 27th of January 2015. The statement of claim was only delivered on the 16th of September 2015. In the interim, having already waited for three months and after the period of 90 days had already expired, Ms Jegeh, again inexplicably, filed an application for review. When I

[1] 1968 (4) SA 531 (A).

say ‘filed’, I use that word advisedly because she did not deliver the application as defined in the rules, because she only served it on the respondent, Maxam Dantex, in July of 2015. There is no explanation for that delay. The applicants simply blame the delay on their attorney and offer no explanation at all for the delay.

[6] After the application was served on the respondent on 21 July 2015, the respondent’s attorneys of record, Webber Wentzel, immediately brought to the attention of the applicants’ attorney that she had followed the wrong procedure. Despite the diligence of the respondent’s attorneys, the applicants’ attorney still did nothing. For the period of July to September 2015, when the proper statement of claim was eventually served, the only explanation offered by the applicants is that some of the individual applicants visited the court and drew the court file on about five occasions. There is no explanation as to whether they instructed their attorneys to follow up or, for that matter, their trade union. In any event, there is no explanation offered as to what the trade union, who is the first and nominal applicant in this matter, did to follow up with the attorneys that it chose to instruct and who is still representing them even today.

[7] To add further insult to this unhappy state of affairs characterised by the negligence of the applicants’ representatives, from September, when their current counsel was briefed, they still did not bring an application for condonation until November of 2015. There is also no explanation for that further delay.

[8] This court has pointed out on numerous occasions that there is a measure beyond which a litigant cannot escape the negligence of its chosen representatives. Firstly, dealing with the inaction of the trade union, La Grange J remarked as long ago as 2011 in *NEHAWU v Vanderbijlpark Society for the Aged* (2011) 32 *ILJ* 1959 (LC) at paragraph 9 that the LRA has been in existence for more than 15 years; and it is reasonable to expect that trade unions ought to be well aware of the need to act timeously in the interest of their members. The same goes for this trade union in the circumstances of this case.

[9] As far as the negligence of the attorney is concerned, our courts have stated on numerous occasions, starting with *Saloojee v Minister of Community Development* 1964 (2) SA 135 (AD), that a party cannot escape the negligence of its legal representatives beyond a certain point. In *Superb Meat Supplies CC v Maritz* (2004) 25 *ILJ* 96 (LAC) the Labour Appeal Court said:

> "It has never been the law that invariably the litigant will be excused if the blame lies with the attorney. To hold otherwise might have a disastrous effect upon the observance of the rules of this court and set a dangerous precedent. It would invite or encourage laxity on the part of practitioners. The courts have emphasised that the attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a rule of court, the litigant should be absolved of the normal consequences of such a relationship, no matter what the circumstances of the failure are."

[10] Given the extent of the delay and the poor explanation for it, which amounts to no explanation at all, the court need not consider the prospects of success.[2] However, Mr *Mqechane* has addressed me on the prospects of success at length. I have had regard to his argument as well as the respondent's comprehensive answering affidavit and the findings of the chairperson. On the evidence before me, it appears to me that the employer followed a fair process; that it provided the employees with an opportunity to state their case; that they took part in an unprotected strike, which is per definition misconduct in terms of the LRA; and that the chairperson, a senior advocate from the Johannesburg Bar, came to a fair conclusion. The prospects of success are poor.

[11] That brings me to the remaining issue of costs. I was sorely tempted to order costs *de bonus propriis* against the applicants' attorney, Ms Jegeh. That is so because her counsel, Mr *Mqechane*, readily admitted that she has been grossly negligent in the conduct of this matter and that that has led to prejudice to her clients – the unfortunate 138 individual employees who are sitting here in court this morning. They have been badly served by the attorney appointed by their trade union and who is presumably being paid by the trade union. Had the applicants not at least been represented by a trade union, which is presumably footing the bill, I would have asked Ms Jegeh – who, as I said, did not bother to grace the court with her presence here today – to

[2] *NUM v Council for Mineral Technology* [1999] 3 BLLR 209 (LAC).

make submissions as to why she should not be held liable for the costs *de bonus propriis*. However, in circumstances where the trade union has also been negligent and where it will have to foot the bill, I think it is not unreasonable to simply make a normal costs order in law and fairness. Whether the union should pay its attorney's fees is something for it to discuss with the attorney. And whether the individual applicants here should go further and sue both their trade union and their attorney for negligence, as Ms *Tolmay* suggested, is again something that I leave in their hands. I do note, however, that they do have that recourse.

Order

[12] The application for condonation is dismissed with costs.

AJ Steenkamp

Judge of the Labour Court

APPEARANCES

APPLICANTS:	T Mqechane
Instructed by:	Jegeh attorneys
RESPONDENT:	E Tolmay
Instructed by:	Webber Wentzel.

Counsel for Applicant: Advocate Mqechane

Counsel for Respondent: Advocate Tolmay

Date of Judgment: 2016-02-12

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