IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JS 333/15

In the matter between:

NATIONAL UNION OF METAL WORKERS OF SOUTH AFRICA	**First Applicant**
TJ KOBEDI & 2 OTHERS	**Second Applicant**
S XABA	**Third Applicant**
J RADEBE	**Fourth Applicant**

and

MALASELA TAIHEN ELECTRIC (PTY) LTD	**Respondent**

Heard: **12 August 2016**

Delivered: **08 March 2017**

JUDGMENT

TLHOTLHALEMAJE J

[1] The applicants seek an order condoning the late service and filing of the fourth applicant's application in terms of rule 22 of the Rules of this Court. They further seek an order joining the fourth applicant as a party to the proceedings as his right to relief depended on the determination of substantially the same question of facts and/or law. The respondent opposed the application.

[2] The relief above is sought against the following background.

2.1 The individual applicants, except for the fourth applicant (Radebe), were dismissed from the respondent's employ on 25 February 2015 on allegations of *inter alia*, having participated in an unprotected strike action. An automatically unfair dismissal dispute was referred to the Metal and Engineering Industries Bargaining Council (MEIBC) on 6 March 2015, and a certificate of outcome was issued on 26 March 2015.

2.2 Radebe was dismissed on 24 March 2015, and National Union Metal Workers of South Africa (NUMSA) had referred an unfair dismissal dispute to the MEIBC on his behalf on about the same date, stating that he was dismissed for reasons unknown. The MEIBC had on 6 July 2015, issued a ruling that it lacked jurisdiction to arbitrate the dispute as Radebe was dismissed for taking part in industrial action, and that the dispute ought to be referred to this Court.

2.3 The applicants' statement of claim, which did not include Radebe as one of the individual applicants was filed and served by NUMSA on or about 25 May 2015. Condonation was sought in respect of the statement of defence which had been filed out of time; and on 11 September 2015 Van Niekerk J granted condonation. On 5 November 2015, Ruth Edmonds Attorneys Inc. came on record, and

indicated the applicants' intention to amend their statement of case and to join Dlamini (Sic) in the proceedings.

2.4 The amended statement of claim was filed on 7 December 2015. The respondent's amended statement of defence followed promptly on 23 December 2015, wherein two points *in limine* were raised, viz, the fact that the referral of the dispute to the MEIBC, and the certificate of outcome recorded that the dispute referred pertained to an alleged automatically unfair dismissal, whereas the dismissals of the individual applicants were pursuant to their participation in an unprotected strike action.

2.5 The second point *in limine* raised was that Radebe's referral and joinder to the proceedings was out of time in view of the fact that the MEIBC ruled on 6 July 2015 that it had no jurisdiction, and that it was only on 10 November 2015 that he sought to be joined to the proceedings.

2.6 The notice of application in terms of rules 22 of the Rules of this Court to join Radebe was filed and served on 10 November 2015. No condonation was however sought until 07 March 2016. Radebe also on 7 March 2016, filed a supplementary affidavit. The respondent opposed the application.

[3] The principles applicable to applications for condonation are well-known. The court has a discretion in such applications, to be exercised judicially upon a consideration of all the facts, including the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case.[1] Other factors to be considered in such applications include the respondent's interest in the finality of the matter, the convenience of the court, and the avoidance of

[1] *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A).

unnecessary delay in the administration of justice[2]. Ultimately however, the standard for considering an application for condonation is the interests of justice. Whether it is in the interests of justice to grant condonation will depend on the facts and circumstances of each case.[3]

[4] In the founding affidavit deposed to by Mr Vuyisile Daniel Mpetsheni (Mr Mpetsheni), a NUMSA official, it was averred that the application to join Radebe was some 35 days out of time in view of the ruling issued by the MEIBC on 6 July 2015. Mr Mpetsheni attributed the delay to the internal processes of NUMSA, including that after the MEIBC ruling, the matter was then referred to the regional office; that the individual applicants had requested NUMSA to instruct its attorneys of record in the matter, which required the matter having to go through the office of the Deputy General Secretary's office on 10 September 2015. It was only on 29 September 2015 that it was agreed at a meeting that Radebe should be joined to the matter and for it to be referred to attorneys.

[5] Mr Mpetsheni also attributed further delays to officials' tight schedule, and only on 27 October 2015 were consultations held with Ruth Edmonds, and a final decision to instruct her in the matter and to join Radebe was taken on 4 September 2015, followed by further instructions with the attorneys on 27 October 2015.

[6] A period of 35 days is excessive, *albeit* not in the extreme. Be that as it may, it has been held that an applicant for condonation must give a full and reasonable explanation for the delay, and that the explanation must cover the entire period of delay[4]. Mr Mphetshini's founding affidavit falls short of these requirements, and does not cover the period of the delay. It merely referred to dates upon which certain steps in accordance with NUMSA's internal workings were undertaken, including correspondence by the shop stewards to

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[2] *Federated Employers Fire & General Insurance Co Ltd & Another v McKenzie* 1969 (3) SA 360 (A) at 362F-G).

[3] *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others* 2000 (2) SA 837 (CC) at para 3.

[4] *Van Wyk v Unitas Hospital and Another* 2008 (2) SA 472 (CC) at para 22.

NUMSA on 31 August 2015 to instruct Ruth Edmonds Attorneys; further correspondence sent to the office of the Deputy General Secretary on 10 September 2015; and meetings with Ms Ruth Edmonds on 27 October 2015.

[7] As at 5 September 2015 when a meeting was held with the individual applicants to decide on instructions to Ruth Edmonds Attorneys, it would have become apparent to NUMSA that time was of the essence, and yet the final instruction to instruct attorneys was taken on 27 October 2015, when the time frames had already elapsed.

[8] As correctly pointed out on behalf of the respondent, the purported explanation is not adequate as it fails to account for each period of the delay since 6 July 2015 after the MEIBC had issued its ruling. Furthermore, an excuse pertaining to the NUMSA's officials hectic schedule can hardly be considered as reasonable.

[9] Significant in this case is whether a lack of an adequate explanation can be compensated by other considerations, it being trite that factors to be considered in such cases are indeed interrelated, and further bearing in mind the interests of justice. It has been held that 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. However, where the period of the delay is not excessive and the explanation is not satisfactory, but there are reasonable prospects of success, condonation should be granted.[5]

[10] The applicants' main contention was that the dismissals were challenged on the basis that the respondent had failed to apply its rules consistently when dismissing the individual applicants; had failed to issue ultimatums, and had also refused to afford them a hearing prior to dismissing them. It was contended that Radebe was equally denied the benefit of a hearing prior to his dismissal.

[5] *Grootboom v National Prosecuting Authority* 2014 (1) BCLR 65 (CC) at para 51.

[11] I have taken regard of the respondent's contentions that the applicants had no prospects of success in the matter, including that Radebe was on a final written warning and had failed to take an opportunity to submit written reasons as to why he should not be dismissed, and further that the individual applicants failed to lodge an internal appeal.

[12] Based on the pleadings and the circumstances that led to the dismissals, I am not satisfied that it can be said in this case that the applicants' success on the merits are non-existent. Furthermore, having taken regard of the non-excessive nature of the delay, it would not serve the interests of justice to deny the applicants an indulgence. The respondent had contended that it would suffer prejudice because of the delay which was the applicants' own making. In my view, however, in the absence of any other contention, that delay as already indicated is not excessive, and there can be no basis for a conclusion that the applicants had abandoned their claim. Furthermore, I am of the view that it is the applicants who stand to suffer more prejudice if they were to be denied the right to ventilate the merits of their case.

[13] Aligned to the question of condonation was whether Radebe should be joined to the proceedings or not. There does not appear to be much contest in regards to the circumstances that led to his dismissal, and I am prepared to accept that they were identical to those that led to the dismissal of the other individual applicants. It would therefore make sense to join him in these proceedings, as the refusal to do so might end with potential multiple claims in respect of what appears to be the same cause of action. It would not in the circumstances, be in the interest of either party to have to deal with multiple claims emanating from the same set of facts.

[14] I have further had regard to the issue of costs, and I am not persuaded that the circumstances of this case call for any cost order.

Order

[15] Accordingly, the following order is made:

1. The late service and filing of the fourth applicant's application in terms of rule 22 of the Rules of this Court is condoned.
2. The fourth applicant, Mr J Radebe, is joined as a party to these proceedings.
3. The parties are directed to convene a pre-trial conference within thirty (30) days from the date of this order, and to file minutes in that regard.
4. There is no order as to costs.

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Judge of the Labour Court of South Africa

APPEARANCES

For the Applicants:	Mr X Ngako of Ruth Edmonds Attorneys
For the Respondent:	Ms M Chenia of Cliffe Dekker Hofmeyer Inc