

**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

**JUDGMENT**

**Not reportable**

**CASE NO: JS405/16**

In the matter between:

**STEPHEN LEFIFI & 15 OTHERS**

**Applicant**

and

**SPECIALIZED SECURITY SERVICES (PTY) LTD**

**Respondent**

**Heard: 1 February 2019**

**Judgment delivered: 4 February 2019**

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**JUDGMENT**

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VAN NIEKERK J

- [1] This is an application to condone the late referral of an unfair dismissal dispute.
- [2] The referral was made some seven months late. The explanation proffered by the applicants is that after their dismissal, they consulted their attorney, who agreed to assist them and requested a deposit. The applicants managed over a period of some six months to raise the required amount and instructed the attorney to proceed. The statement of case was delivered on 10 August 2016.
- [3] The applicants state in support of their application that they have excellent prospects of success, in that they were dismissed on the basis of the respondent's operational requirements without any of the requirements of the LRA being met. In the statement of response, the respondent avers that the applicants were dismissed following a retrenchment process in the form of a joint consensus seeking exercise, and that they were dismissed only after reasonable alternative positions could not be found.
- [4] When the application was argued, I invited Mr Crafford, who appeared for the respondent, to make submissions in relation to the applicants' prospects of success. He submitted that after the applicants were removed from the client's premises, they were advised that alternative placements would be secured within three days. These alternatives were in fact secured, but the applicants refused to be redeployed. In essence, they had not been dismissed by the respondent.
- [5] This is patently not the case made out by the respondent in its statement of response. It is also not a case supported by the respondent's own documentation, annexed to the statement of claim, in which it is clearly stated that in the absence of alternative deployment, the applicants' contracts would be terminated. A letter issued to the applicants on 31 July 2015 makes clear that attempts to secure alternatives had been unsuccessful, and that the applicants' employment was terminated 'with immediate effect' on the basis of the respondent's operational requirements. There is no suggestion of any prior consultation with the applicants, or of the 'meaningful joint consensus-seeking' that Mr Crafford says occurred.

- [6] The test to be applied is well-established. The court has a discretion, to be exercised judicially, to grant condonation. Among the factors usually relevant for consideration are the degree of lateness, the explanation therefor, the prospects of success, the prejudice that parties will suffer if condonation is granted or refused, and the importance of the case. None of these factors are individually decisive and the court must consider all the facts. In the final analysis, it is a matter of fairness to the parties. Condonation applications require a court to balance various interests and factors, having regard to all of them with none of them being decisive. (See *Melane v Santam Insurance Co. Ltd* 1962 (4) SA 531 (A) at page 532; *NEHAWU obo Mafokeng and Others v Charlotte Theron Children's Home* [2004] 10 BLLR 979 (LAC).
- [7] The delay in the present instance is excessive. However, I accept that the applicants were always intent on pursuing the claim, and that the obstacle they faced was the need to raise funds. During the period of the delay, they raised the funds and paid the attorney. One might criticise the conduct of the attorney who must have known at the time he was consulted that the referral was already out of time. He might have advised them to contact the pro bono clinic for assistance. The fact remains that he did not, and that the applicants took steps to secure the necessary funds to pursue their claim. Their election to proceed with the claim to the exclusion of those of their number who had been unable to contribute to the fund raising effort is an indication of their resolve. In these circumstances, the applicants' explanation for the delay in referring the claim is not unreasonable.
- [8] In so far as the applicants' prospects of success are concerned, Mr Crafford either did not open his file before he came to court, or he deliberately misled the court when making his submissions on this issue. Either way, his conduct is mendacious. What made matters worse is that when Mr Crafford was confronted by his own client's letters recording the fact of a dismissal for operational requirements, Mr Crafford could say no more than that the letters were not legible. These letters are annexures to the statement of case, and Mr Crafford no doubt took full instructions from his client when he drafted the statement of

response which, as I have indicated, says in as many words that the respondent did not find alternative employment for the applicants and that they were accordingly retrenched. It seems to me that on the respondent's own pleaded version and having regard to the documents filed, the applicants were dismissed for failing a polygraph test in circumstances where they were not suspected of any particular misconduct, and that they were dismissed for reasons related to the respondent's operational requirements without any of the procedural requirements prescribed by the LRA being followed. I agree with them that on the face of it, their prospects of success are excellent, and this must weigh heavily in their favour in the exercise of the discretion relevant to the present application.

- [9] In so far as costs are concerned, the court has a broad discretion to make an order for costs according to the requirements of the law and fairness. In my view, those interests dictate that the applicants should not be deprived of the costs that they have incurred in bringing this application, and that Mr Crafford's conduct deserves censure.

For these reasons, I make the following order:

1. The late referral of the applicants' statement of claim is condoned.
2. The respondent is to pay the costs of these proceedings.
3. The parties are directed to file a pre-trial minute within 14 court days of the date of this order.

André van Niekerk  
Judge

#### REPRESENTATION

For the applicants: Ms. F Sithole, Ndumiso Voyi Inc.

For the respondent: Mr C Crafford, Crafford Attorneys