

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

Not reportable

Case no: JS 77/18

In the matter between:

**PTAWU obo ZILE AND 2 OTHERS**

**Applicant**

And

**BENHAUL TRANSPORT (PTY) LTD**

**Respondent**

**Heard: 8 February 2019**

**Delivered: 21 February 2019**

**Summary: Condonation application for the late filing of a statement of case.  
No proper explanation for the delay tendered. Application dismissed.**

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**JUDGMENT**

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**PRINSLOO, J**

Background facts

- [1] The Applicant union, PTAWU, is acting on behalf of Zile and two others (the employees).
- [2] The employees were employed by the Respondent, who embarked on a retrenchment process in March 2017. All the Respondent's employees were issued with a section 189(3) notice, as provided for in the Labour Relations Act<sup>1</sup> (LRA) and they were informed that their positions may be affected by a restructuring process and they were invited to consult on the prescribed topics.
- [3] The employees were notified on 31 March 2017 that their services would terminate on 30 April 2017 due to retrenchment. The Applicant subsequently and on 23 May 2017 referred an unfair dismissal dispute to the National Bargaining Council for the Road Freight and Logistics Industry.
- [4] The dispute was conciliated on 3 July 2017 and as the matter remained unresolved, it was referred to the Labour Court for adjudication.
- [5] The Applicant filed a statement of case on 5 February 2018.
- [6] The Applicant filed an application for condonation for the late filing of the statement of case on 8 November 2018 and the condonation application was enrolled for hearing on 8 February 2019.

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<sup>1</sup> Act 66 of 1995, as amended.

[7] The application for condonation is opposed.

The test for the grant of condonation

[8] The relevant legal principles to be applied in an application for condonation are well established.

[9] This Court has a discretion, which must be exercised judicially on a consideration of the facts of each case and in essence it is a matter of fairness to both sides<sup>2</sup>.

[10] In *Melane v Sanlam Insurance Co Ltd*<sup>3</sup> it was held that:

‘... Among the facts usually relevant, are the degree of lateness, the explanation therefore, 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.’

[11] In this Court however, the principles have long been qualified by the rule that where there is an inordinate delay that is not satisfactorily explained, the applicant’s prospects of success are immaterial.

[12] This Court has conventionally applied the approach that in the absence of a satisfactory explanation for the delay, the applicant’s prospects of success are

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<sup>2</sup> ‘Civil Procedure in the Superior Court, Harms at B27.6.

<sup>3</sup> 1962 (4) SA 531 (A) at 532 C - F.

ordinarily irrelevant.<sup>4</sup> This principle was confirmed in *National Education Health and Allied Workers Union on behalf of Mofokeng and Others v Charlotte Theron Children's Home*<sup>5</sup> where the Labour Appeal Court (LAC) held that without a reasonable and acceptable explanation for the delay the prospects of success are immaterial.

[13] In *Collett v Commission for Conciliation, Mediation and Arbitration*<sup>6</sup> the LAC confirmed that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial and without good prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused.

[14] The onus is on the applicant to satisfy the court that condonation should be granted. In employment disputes there is an additional consideration which applies in determining whether the onus has been discharged, as was held in *National Union of Metalworkers of SA on behalf of Thilivali v Fry's Metals (A Division of Zimco Group) and Others*<sup>7</sup>:

'There is, however, an additional consideration which applies in employment disputes in determining whether an applicant for condonation has discharged this onus. This is the fundamental requirement of expedition. The Constitutional Court has, as a matter of fundamental principle, confirmed that all employment law disputes must be expeditiously dealt with and any determination of the issue of good cause must always be conducted against the back drop of this fundamental principle in employment law.'

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<sup>4</sup> See *NUM v Council for Mineral Technology* [1999] 3 BLLR 209 (LAC).

<sup>5</sup> (2004) 25 ILJ 2195 (LAC) at para 23.

<sup>6</sup> (2014) 6 BLLR 523 (LAC).

<sup>7</sup> (2015) 36 ILJ 232 (LC).

- [15] The fundamental requirement of expedition is not to be ignored. In *Toyota SA Motors (Pty) Ltd v CCMA and Others*<sup>8</sup> the Constitutional Court emphasised that one of the fundamental purposes of the LRA was to establish a system for the quick adjudication of labour disputes. When it assesses the reasonableness of the delay, the court must not lose sight of this purpose.
- [16] In summary: The Courts have endorsed the principle that where there is a delay with no reasonable, satisfactory and acceptable explanation for the delay, condonation may be refused without considering prospects of success and to grant condonation where the delay is not explained, may not serve the interests of justice. The expeditious resolution of labour disputes is a fundamental consideration.
- [17] Condonation for delays in all labour law litigation is not simply there for the taking. The starting point is that an applicant in an application such as the present seeks an indulgence and bears the onus to show good cause.
- [18] It is in this context that the application for condonation stands to be determined.

#### The degree of lateness

- [19] Section 191(11)(a) of the LRA prescribes a 90-day period for referral of a dispute to the Labour Court for adjudication. The 90-day period is calculated from the date a commissioner has certified that the dispute remained unresolved.

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<sup>8</sup> (2016) 37 ILJ 313 (CC).

- [20] *In casu*, the dispute relating to an unfair dismissal for operational requirements had to be referred within 90 days from 3 July 2017, thus it had to be filed by 1 October 2017. The statement of case was filed with this Court only on 5 February 2018, clearly outside the prescribed 90-day period.
- [21] The dispute relating to unfair dismissal for operational requirements was referred more than 4 months late.
- [22] The delay is no doubt material. In fact, it is excessive given the context within which labour litigation takes place and the system that is designed to ensure the effective and expeditious resolution of labour disputes. This is even more so where the LRA provides for a period of 90 days to file a statement of case, which period is in itself generous and lengthy.
- [23] *In casu* there is a further delay that cannot be ignored and that is the fact that the condonation application was only filed on 8 November 2018, more than one year after the statement of case was supposed to be filed and more than 9 months after the statement of case was indeed filed. The degree of lateness in filing the application for condonation is material.
- [24] It is trite that an application for condonation must be brought as soon as it was discovered to be necessary to bring such application, and this fact should have been clear to the Applicant in February 2018, when the statement of case was filed.
- [25] The delay in filing the application for condonation is excessive and not minimal or insignificant.
- [26] The degree of lateness is also material considering the fact that the dispute arose as far back as April 2017 when the employees were retrenched and

almost two years later, the matter is not one step closer to trial, let alone ready for trial. This is significant as the Applicant seeks an order directing the Respondent to reinstate the employees retrospectively with full back pay.

[27] The degree of lateness should however not be considered in isolation.

#### Explanation for the lateness

[28] A failure to comply with the generous period of 90 days, has to be explained and the reasonableness of the delay should be considered by having regard to the explanation for the delay.

[29] As the Applicant seeks an indulgence from the court and as it bears the onus to satisfy the court that condonation should be granted, it is incumbent upon the Applicant to provide the court with a full explanation for every period of the delay. It is not sufficient simply to list significant events that occurred during the period in question as that does not assist the court properly to assess the reasonableness of the explanation<sup>9</sup>.

[30] The explanation for the delay has to be compelling, convincing and comprehensive, and should cover every period of the delay.

[31] In the founding affidavit before me in support of the application for condonation, the Applicant provided the following explanation for the delay:

31.1 The failure to comply with the prescribed period was not due to a flagrant disregard of the time limits, but was due to circumstances

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<sup>9</sup> See: *IMATU obo Zungu v SALGBC and Others* (2010) 31 ILJ 1413 (LC).

beyond the employees' control as they relied on Mr Puncho Ndevu. After one of the employees, Mr Stephen Matlala, went to the Labour Court on 5 February 2018 to check if their case was filed, he discovered that no case was filed and he was advised to take the necessary forms and to report the matter to the union. It was only after the employees consulted with the present union official that the union became aware that the matter was not filed.

31.2 On 12 April 2018, the union issued a notice of precautionary suspension to Mr Ndevu, wherein he was invited to make submissions as to why he should not be suspended. It is not evident from the application whether Mr Ndevu was indeed suspended or not.

31.3 It is alleged that Mr Ndevu was dismissed from the union on 26 April 2018 for misconduct in that he accepted a bribe and acted as a chairperson for a company in a disciplinary hearing of one of the union's members and he dismissed the member. This conduct of Mr Ndevu caused a loss of trust, as 25 members resigned from the union as a result of Mr Ndevu's conduct. The annexure to the Applicant's founding affidavit however does not support this version as it is evident from the attached document that the parties have agreed to terminate Mr Ndevu's employment by mutual agreement.

[32] This is the entire explanation provided by the Applicant.

[33] I have already alluded to the fact that the Applicant should provide a full explanation for every period of the delay. The longer the delay, the better the explanation should be.

- [34] The dispute relating to unfair dismissal for operational requirements had to be referred by 1 October 2017. There is no explanation for the period between 1 October 2017 and 5 February 2018 when the statement of case was filed. There is not a single averment made to explain why the statement of case was not filed timeously.
- [35] There is absolutely no explanation for the late filing of the condonation application and this Court is not told why it took the Applicant from February to November 2018 to file a condonation application.
- [36] The Respondent, in its opposing affidavit, took issue with the explanation tendered and raised concerns *inter alia*, that the union dismissed Mr Ndevu only in April 2018, more than three months after the statement of case was already filed, and it is unclear how Mr Ndevu's dismissal bears any relation to the late filing of the employees' statement of case. The disciplinary action taken against Mr Ndevu as a result of his conduct, was taken in relation to matters unrelated to this case and it could not have had any bearing on the late filing of the statement of case.
- [37] A further difficulty is that the employees do not explain what steps they took between October 2017 and February 2018 and why Mr Matlala only bothered to follow up in February 2018, after the certificate of outcome was issued already in July 2017. Mr Matlala did not depose to a confirmatory affidavit and the allegations relating to him, constitute nothing but hearsay evidence, which this Court cannot attach any weight to.
- [38] It is evident that the explanation tendered for the period of delay is bereft of any detail and lacks particularity. Material periods of the delay remained completely unexplained and the Applicant has tendered no version as to what happened during those periods.

[39] The Applicant has to provide an explanation for every period of the delay to enable this Court to assess the reasonableness of the delay and the explanation for it. The Applicant failed to do so and the explanation tendered is inadequate and far from compelling, convincing or comprehensive.

#### Prospects of success

[40] Having found that the delay is inordinate and the explanation tendered not compelling or adequate, it leaves the issue of prospects of success.

[41] In the authorities referred to *supra*, the Courts have endorsed the position that the failure to provide a reasonable and acceptable explanation for the delay renders prospects of success immaterial.

[42] *In casu*, and in light of the said authorities and given the fact that the Applicant has not provided a comprehensive, compelling or convincing explanation for the delay, the prospects of success are immaterial, and thus need not be considered.

#### Prejudice

[43] The Respondent submitted that it would suffer prejudice if condonation is granted as the Applicant provided no proper explanation for the late referral of the statement of case. Furthermore, the Respondent followed a proper retrenchment process and invited the union to participate but the union had no interest and declined to attend the scheduled meetings and consultations. The Applicant did not file a replying affidavit to deny, challenge or rebut this

version presented by the Respondent and applying the *Plascon Evans* rule<sup>10</sup>, I accept this version. The Respondent submitted that if condonation is granted, it will be prejudiced as it will have to incur further costs to defend a meritless case.

- [44] The Applicant on the other hand submitted that the employees would be prejudiced should the application for condonation fail. This is so because the employees have a good case on procedural and substantive fairness and will suffer harm if the doors of justice are shut on them.
- [45] The refusal to condone the late filing of the statement of case will have the result that the Applicant will be denied the opportunity to pursue this case before Court. However, the Respondent's prejudice outweighs the Applicant's prejudice, for the reasons stated *supra*. It is evident that the Applicant has not pursued this matter diligently, which is supported by the fact that the condonation application was only filed more than one year after the date the statement of case was to be filed, with absolutely no attempt to explain the delay. Almost two years after the employees had left the Respondent's employ, they are not one step closer to finality in this matter.
- [46] I have to endorse the aim of the LRA namely to resolve labour disputes speedily and without delay. Granting condonation in a case like this would not be in the interest of justice as it would undermine the statutory purpose of expeditious dispute resolution, another factor that weighs heavily in the Respondent's favour.

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<sup>10</sup> In *Plascon-Evans Paints (TVL) Ltd. v Van Riebeck Paints (Pty) Ltd.* [1984] ZASCA 51; [1984] 2 All SA 366 (A); 1984 (3) SA 623; 1984 (3) SA 620, the Court held that when factual disputes arise, therefore, relief should be granted only if the facts stated by the respondent, together with the admitted facts in the applicant's affidavits, justify the order.

[47] On an objective conspectus of all the facts, the Applicant's application for condonation falls hopelessly short off the mark. The Applicant did not discharge the onus to show good cause and to provide an acceptable and plausible explanation for the delay. For the above reasons, it will not be in the interests of justice that the application for condonation be granted.

[48] In so far as costs are concerned, this Court has a broad discretion in terms of section 162 of the LRA to make orders for costs according to the requirements of the law and fairness. In my view the interest of justice will be best served by making no order as to costs.

[49] In the premises I make the following order:

Order

1. The application for condonation for the late filing of the Applicant's statement of case is dismissed;
2. There is order as to costs.

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Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr Amos Mogano of PTAWU

For the Respondent: Mr L Hatting of Wentzel & Partners Attorneys

LABOUR COURT