

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JS 751/2020

In the matter between:

**SOUTHERN AFRICAN CLOTHING & TEXTILE
WORKERS UNION**

First Applicant

RATAPOLA, M.E & 27 OTHERS

Second to Further Applicants

and

FAEROES PROPERTIES (PTY) LTD

Respondent

Heard: 06 February 2023

Delivered: 07 February 2023

(This judgment was handed down electronically by circulation to the parties' legal representatives, by email, publication on the Labour Court's website and released to SAFLI. The date on which the judgment is delivered is deemed to be 07 February 2023.)

JUDGMENT

VAN NIEKERK, J

- [1] The applicants claim that that they were unfairly retrenched by the respondent and referred their dispute to this court by way of a statement of claim, delivered on 20 October 2020. The respondent duly filed a statement of response and the parties concluded a pre-trial minute. The matter was enrolled for trial on 3-5 May 2022. Shortly before the trial, it became apparent

that the certificate of outcome issued by the CCMA had not been included in the schedule of documents. This led to a preliminary point raised by the respondent to the effect that the statement of claim had been delivered outside of the prescribed 90-day time period. The matter was accordingly removed from the roll with a directive that the applicants attend to the filing of an application for condonation, which they did approximately two weeks later.

- [2] The general principles applicable to condonation are well-established. Condonation is not there merely for the asking, nor are applications for condonation a mere formality (see *NUMSA v Hillside Aluminium* [2005] 6 BLLR 601 (LC); *Derrick Grootboom v National Prosecuting Authority & another* [2014] 1 BLLR (CC)). A party seeking condonation must make out a case for the indulgence sought and bears the onus to satisfy the court that condonation should be granted.
- [3] This court is required to exercise a discretion, having regard to the extent of the delay, the explanation proffered for that delay, the applicant's prospects of success, and the relative prejudice to the parties that would be occasioned by the application being granted or refused. Ordinarily, these factors are not individually decisive but are interrelated, and must thus be weighed one against the other. In this court, that formulation, which has its roots in *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A), has 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. In *National Union of Mineworkers v Council for Mineral Technology* [1999] 3 BLLR 209 (LAC) the LAC said the following:
- ... 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 the delay, an application for condonation should be refused.
- [4] An applicant seeking condonation must offer an explanation for the full length of the delay (see *Independent Municipal and Allied Trade Union obo Zungu v SA Local Government Bargaining Council and others* (2010) 31 ILJ 1413

(LC)). In *eThekweni Municipality v Ingonyama Trust* 2013 (5) BCLR 497 (CC), the Constitutional Court said the following:

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 v Unitas Hospital and another (Open Democratic Advice Centre as Amicus Curiae)*, this Court said in this regard:

- i. 'An applicant for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of the delay. And, what is more, the explanation given must be reasonable.'

- [5] The applicant's prospects of success, insofar as they are relevant, is determined on the basis that the applicant must show that there is a bona fide case which prima facie carries some prospects of success.
- [6] The present instance, the delay, calculated from the expiry of 30 days from the date of referral to conciliation, is some 62 days. This is not insignificant.
- [7] The explanation for the delay largely concerns the inexperience of the first applicant's official (Kgwale) and also the incorrect advice given to him by the CCMA commissioner regarding the period of time within which the matter must be referred to the court. It seems to me from the papers that Kgwale had been working for the union for some three years, is a sufficient period for him to become proficient in matters such as dealing with retrenchment disputes. It is not disputed that after a Covid- related delay in the processing of the dispute by the CCMA, and a referral of the dispute to arbitration, that on 6 August 2020, the presiding commissioner issued a ruling that the CCMA does not have the jurisdiction to arbitrate the dispute and that the matter be referred to this court for adjudication. Kgwale states that he inquired from the commissioner regarding the time period within which the matter is to be referred to this court and was advised that the union had 90 days within which to make the referral. The commissioner was of course mistaken. Kgwale avers that his request for legal assistance made to the union's head office was approved on 1 September 2020, and that he received confirmation of this assistance on 29 September 2020 after which he contacted the union's

attorneys to arrange a consultation. Consultations were subsequently held and the statement of claim delivered on 9 November 2020.

- [8] I am satisfied that the applicants have proffered a satisfactory application for the delay. While it is correct that the delays were occasioned by Kgwale's ignorance of the applicable rules, I must necessarily take into account that he actively pursued the matter, and also that it was not unreasonable of him to have accepted the advice of the commissioner in relation to the applicable time period. Further, the statement of claim was filed within a reasonable time after the jurisdictional ruling was made. The prospects of success are a neutral factor. Whether section 189A applied to the retrenchment process, whether the consultation process was adequate and whether the applicants were bound by a settlement agreement reached after the consultation process are matters best determined by the trial court. The late referral of the statement of claim thus stands to be condoned.

I make the following order:

1. Condonation for the later referral of the applicants' statement of claim is condoned.
2. The registrar is directed to enrol the matter for trial, after consultation with the parties on a suitable venue for the hearing.

André van Niekerk
Judge of the Labour Court of South Africa

Appearances:

For the Applicant: M Makhura, Cheadle, Thompson & Haysom

For the respondent: Adv P Kirstein

Instructed by: Thomas & Swanepoel Inc