



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: JS 639/21

In the matter between:

**ASSOCIATION OF MINeworkERS AND
CONSTRUCTION UNION obo MEMBERS**

Applicant

and

NCTS (PTY) LTD

Respondent

Heard: 26 May 2023

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email and publication on the Labour Court's website. The date and time for hand-down is deemed to be on 18 September 2023

JUDGMENT

TLHOTLHALEMAJE, J

[1] The applicants seeks condonation for the late filing of their statement of claim. Other than opposing the application, the respondent equally seeks an order condoning the late filing of its statement of response, which the applicants similarly opposed.

[2] Following their dismissal on 4 June 2020 on account of the respondent's operational requirements, the four individual applicants as represented by AMCU had on 5 August 2020, referred an alleged unfair dismissal dispute to the Commission for Conciliation Mediation and Arbitration (CCMA). On 30 December 2020, the CCMA issued a certificate of non-resolution of the

dispute and the matter was referred for arbitration, which was set down for 13 May 2021.

- [3] At the arbitration proceedings, the respondent had raised a point *in limine* disputing the jurisdiction of the CCMA to arbitrate the dispute. In a jurisdictional ruling dated 13 May 2021, a CCMA Commissioner concluded that the matter ought to have been referred for adjudication since it involved a dismissal of a number of employees on account of the respondent's operational requirements, and further since the respondent had a workforce in excess of 50 employees.
- [4] Some two months later on 28 July 2021, AMCU delivered a statement of claim on behalf of the dismissed employees. On 17 June 2022, the respondent served and filed its statement of response together with an application for condonation for its late filing.
- [5] The test when considering applications for non-compliance with the court's rules and timeframes is fairly settled emanating from a long line of authorities. In *United Plant Hire (Pty) Ltd v Hills*¹ it was held that when considering an application for condonation, the court has a discretion which must be exercised judicially upon the consideration of all the relevant factors. These factors include *inter alia* the degree of lateness, the explanation therefor, the prospects of success, and the avoidance of unnecessary delays in the administration of justice. In the end, the interests of justice remains the overall consideration on whether or not to grant an application for condonation.²

AMCU's application for condonation:

- [6] A certificate of outcome having been issued on 30 December 2020, the statement of case ought to have been filed on 30 March 2021. Since it was only filed on 23 July 2021, the delay is about 115 days, which is indeed excessive. In explaining the delay, the deponent to the founding affidavit and AMCU's Northern Cape Secretary, Mr Tau attributed the delay to his lack of knowledge of Court processes hence the matter was subsequent to the issuance of the

¹ 1976 (1) SA 717 (A) at 720E – G.

² See *Brummer v Gorfil Brothers Investments (Pty) Ltd* [2000] (2) SA 837 (CC) at 839F; *Grootboom v National Prosecuting Authority and Another* [2014] 1 BLLR 1 (CC) at para 22 & 50.

jurisdictional ruling on 13 May 2021, referred to AMCU's legal department on 21 June 2021 for an assessment on the prospects of success of the claim. He further contended that there was an incorrect interpretation of the 90 days' timeframe contemplated in terms of section 191(5)(b)(ii) of the Labour Relations Act³ (LRA) hence the matter was subsequently referred to AMCU's attorneys of record. Further delays were however caused by lack of proper consultations with the dismissed employees, who at the time in the light of their dismissal had already returned to their different places of residence, resulting with the statement of claim only being eventually filed on 22 July 2021.

- [7] It has been held that the erroneous referral of a matter for arbitration shall in certain circumstances constitute a reasonable and acceptable explanation for a delay, even in circumstances where the delay is excessive.⁴ In this matter, it is common cause that the substantial portion of the delay between the issuing of the original certificate of outcome on 30 December 2020 and the jurisdictional ruling of 13 May 2021, was attributed to the incorrect referral of the dispute to arbitration. To this end, the Court is prepared to accept the reasonableness of the explanation for the delay in that regard.
- [8] It is further common cause that upon issuing a ruling on 13 May 2021, the CCMA had also issued an amended certificate of outcome. As to what effect that amended certificate of outcome was intended is unclear. The issue however remains that AMCU was still obliged to give an explanation for the delay between 13 May 2021 and 28 July 2021 when the statement of claim was ultimately delivered. That delay is two months and two weeks.
- [9] That delay was explained as being attributable to the matter having been referred to AMCU's legal department after the jurisdictional ruling was obtained, and the problems associated with convening consultations with the employees once the attorneys of record got involved in the matter. This latter period of the delay is in my view not excessive. The explanation proffered in that regard is equally reasonable and satisfactory notwithstanding Tau's alleged ignorance of

³ Act 66 of 1995, as amended.

⁴ *South African Transport and Allied Workers' Union obo Members v South African Airways (Pty) Ltd and others* [2015] 2 BLLR 137 (LAC) at para 16.

the Court processes. I am of the view that it would be iniquitous to punish the dismissed employees for AMCU's dilatoriness in regards to this delay, which is in any event not that excessive⁵.

[10] In regards to the prospects of success, AMCU's contention was that the respondent unfairly retrenched the employees since they were the only ones selected; that there were no operational reasons proffered which necessitated their dismissal, and that they were merely pre-selected for dismissal in a '*cherry picking exercise*'. AMCU further contended that the respondent failed to properly consult with it and therefore the dismissals were *fait accompli*.

[11] Of course the respondent refuted all of AMCU's contentions regarding the alleged unfairness of the dismissal. In the light of the disputes of fact in regards to the processes followed when the employees were retrenched, and further having had regard to the prejudice that the employees would suffer should their claim not be fully ventilated in the light of the length of the delay and the explanation proffered in that regard, I am of the view that the interests of justice dictates that condonation be granted

The late filing of the statement of response.:

[12] The respondent received the applicants' statement of claim on 22 July 2021 and ought to have filed its statement of response on 4 August 2021 in line with the provisions of rule 6(3)(c) of the Rules of this Court. The respondent however only did so on 14 June 2022, some 214 days out of time. The degree of lateness is manifestly excessive in the extreme.

[13] In explaining the delay, the deponent to the founding affidavit, Mr Louw, averred that the respondent is based in the Northern Cape and is unfamiliar with the court processes and time periods. The matter was then referred to a legal representative known as Joblaw (Pty) Ltd, who had in turn in August 2021, referred the matter to the respondent's attorneys of record based in Cape Town.

⁵ See *Saloojee and Another, NNO v Minister of Community Development* 1965 (2) SA 135 (A) at 141H – 142H.

The attorneys of record had also in turn referred the dispute to the correspondence attorneys who are based in Johannesburg.

- [14] Louw further attributed the delays to the correspondence attorneys' having relocated premises on 1 September 2021, which had resulted in technical difficulties with them having access to their files which were stored on a cloud system. These technical difficulties had further made it impossible for the correspondence attorneys to receive and send emails for several weeks on end. The correspondence attorneys were eventually able to access their systems at the end of November 2021. It was further averred that in February 2022, the attorney seized with the matter had resigned from the employ of the correspondence attorneys.
- [15] Another attorney was thereafter assigned to this matter and it was at that point that it was discovered that the matter had laid dormant since November 2021. The attorney thereafter took the necessary steps in finalising the papers for the purposes of opposing this dispute. The statement of response was eventually filed on 17 June 2022.
- [16] In *Mulaudzi v Old Mutual Life Assurance Co (South Africa) Ltd and Others*⁶ it was held that a full, detailed, and accurate account for the causes of the delay should be provided for the purposes of a proper determination of the facts by the court. Similarly in *NUMSA and Another v Hillside Aluminium*⁷, the Court held that condonation is not a formality and that the onus rest on an applicant to demonstrate good cause by providing a full, acceptable and reasonable explanation for the delay.
- [17] The applicants are correct in their submission that the respondent's explanation for the excessive delay is not satisfactory in the light of a full account not being proffered. General statements are made without giving much detail in terms of the time frames, as to when Joblaw (Pty) Ltd was approached, why it took further periods to approach attorneys in Cape Town, or when the corresponding attorneys in Johannesburg were approached. Furthermore, there is a long gap

⁶ 2017 (6) SA 90 (SCA) at para 26; see also: *Uitenhage Transitional Local Council v South African Revenue Service* 2004 (1) SA 292 (SCA) at para 6.

⁷ [2005] 6 BLLR 601 (LC) at para 12.

between November 2021 and February 2022 and into 17 June 2022 when the statement of response was filed, which remains unexplained. Even if Louw might not have had knowledge of court processes and time frames, it was long stated in *Saloojee*,⁸ that where a party is aware that the prescribed timeframes have expired and condonation is required, it is not entitled to simply handover a matter to its attorneys, remain passive without making enquiries as to its progress, and expect to be exonerated of all the blame. In this case, Louw on behalf of the respondent appears to have simply handed over the matter to the attorneys and washed his hands of it rather than ensuring that it was properly and expeditiously attended to.

- [18] In *Moila v Shai N.O. and Others*⁹ it was held that little weight ought to be attached to the other factors relevant for a consideration of condonation in circumstances where the period of delay is excessive and there is no explanation or the explanation proffered amounts to no explanation at all. In *Foster v Stewart Scott Inc*¹⁰, it was nonetheless pointed out that the court has a discretion, to be exercised judicially upon a consideration of all the facts, and that the factors to be considered are not individually decisive but are interrelated and must be weighed against each other. As also stated in *National Union of Mineworkers v Council for Mineral Technology*, the exercise of that judicial discretion involves a consideration of fairness to both parties¹¹.
- [19] It has already been concluded that other than the excessive nature of the delay, the respondent has not proffered a full account of the delay. Ordinarily in such circumstances, and based on the authorities mentioned above, this ought to be the end of the matter. However, taking into account the history of this matter from the moment it was referred to the CCMA, and further taking into account that even though the respondent was supine after the filing of the statement of claim which was in itself late, it is my view that the consideration of fairness to both parties, their rights to access to justice, the prejudice caused to the applicants notwithstanding their own dilatoriness and the award of costs to be

⁸ *Supra*.

⁹ (2007) 28 ILJ 1028 (LAC) at para 34.

¹⁰ (1997) 18 ILJ 367 (LAC) at para 369.

¹¹ at para 10

made below, the interests of justice upon a consideration of all the factors and circumstances of this case, dictate that the respondent's late filing of its statement of response be condoned. This view is informed further by my assessment of the parties' prospects of success on the merits, and my conclusions as already made with regards to the applicants' own application for condonation, that in the light of the dispute of facts, this matter further needs proper ventilation by the Court. It is against these considerations that it is concluded that the interests of justice dictate that the late filing of the statement of response be condoned.

[20] I however agree with the submissions made on behalf of the applicants that the respondent ought to be mulcted with costs. This is particularly so in that upon either Joblaw (Pty) Ltd, Carlo Swanepoel Attorneys or Etienne De Heus Attorneys having realised that the time frames would not be met, no attempt was made nor was it deemed necessary to approach AMCU's attorneys of record to explain whatever predicament may have been encountered, and to seek an indulgence. At some point the applicants had sought a default judgment resulting with the matter being removed from the unopposed roll on 8 July 2022, as it had belatedly become opposed. Of course, the dilatoriness caused the applicants immense prejudice, inclusive of having to be burdened with the costs of the opposition to the respondent's application for condonation. In these circumstances, clearly the requirements of law and fairness dictate that the respondent be burdened with the costs of its application for condonation.

[21] Accordingly, the following order is made:

Order:

1. The late filing of the applicants' statement of claim is condoned.
2. The late filing of the respondent's statement of response is condoned.
3. The parties are directed to within 30 days of the date of this order, convene, conclude and to deliver to the Registrar of this Court, a signed copy of their Pre-trial minutes.

4. The respondent is ordered to pay to the applicant, the costs of the application for condonation for the late filing of the statement of response.

Edwin Tlhotlhemaje

Judge of the Labour Court of South Africa

LABOUR COURT

APPEARANCES:

For the Applicants:

A.L. Cook, instructed by Larry Dave Incorporated Attorneys.

For the Respondent:

N. Rambachan-Naidoo, instructed by Carlo Swanepoel Attorneys.

LABOUR COURT