REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not Reportable

CASE NO: PS 56/13

In the matter between:

FOOD & ALLIED WORKERS UNIONS **Applicant**

ERIC TATI & 72 OTHERS **Second & Further Applicants**

~~and~~And

COCA-COLA FORTUNE (PTY) LTD **Respondent**

Heard: 6 May 2014

Delivered: 19 February 2015

Summary: An application for condonation will be granted when the interests of justice require so.

JUDGMENT

LALLIE J

[1] This is an application for the condonation of the late filing of the applicants' statement of claim. It is opposed by the respondent. The facts of this matter are briefly that the second and further applicants lodged a grievance of racism and assault against Mr Barnard (Barnard), one of the respondent's team leaders. They were not satisfied with both the manner in which it was handled

and its outcome. The second and further applicants allegedly embarked on an unprotected strike on 16 April 2013. They were subjected to a disciplinary enquiry on 24 May 2013 and dismissed on 19 July 2013. The applicants referred an unfair dismissal dispute to the Commission for Conciliation Mediation and Arbitration (CCMA) on 22 July 2013. An attempt to resolve the dispute through conciliation was unsuccessful and a certificate to that effect was issued on 12 August 2013. The CCMA scheduled the dispute for arbitration on 4 October 2013. As the dispute fell outside the jurisdiction of the CCMA it was eventually referred to this court on 22 January 2014 outside the 90 day period prescribed in section 191 (11) (a) of the Labour Relations Act 66 of 1995 (the LRA). It is because of the delay that the first applicant filed this application to have the late referral of the dispute to this Court condoned.

[2] The first applicant submitted that the referral of this matter was delayed by 16 days. Giving reasons for the lateness, the deponent to the founding affidavit, Mr Macingwane(Macingwane), who is the first applicant's attorney, submitted that the second and further applicants were initially represented by three firms of attorneys. Attorneys from the firms were present at the CCMA in October 2013 when the dispute was scheduled for arbitration and agreed that the CCMA lacked the necessary jurisdiction over the dispute. He explained that the first applicant was at pains to establish from the second and further applicants who wanted to be represented by it. He stated that members ducked and dived until the first applicant decided to launch the referral and represent all the dismissed employees in fear of a recurrence of being sued for damages for failure to represent the interests of its members.

[3] The first applicant further submitted that it has good prospects of success in that the second and further applicants did not take part in an illegal work stoppage. The charges against them were fabricated and a strategy to get rid of them for lodging a grievance against Barnard who had told them that they would be dismissed even before the disciplinary enquiry was instituted. It was further submitted that the respondent will not suffer any prejudice should this application be granted. On the contrary, the second and further applicants who are presently unemployed and the majority of whom are breadwinners

will suffer the grave prejudice of losing their right to present their case with immense repercussions to their families. It was further submitted that it was always the applicants' intention to have the dispute which they even referred to con-arb resolved expeditiously.

[4] The respondent denied that the applicants established good cause for the delay and relied on inadmissible hearsay evidence which did not assist it make out a case for condonation. It submitted that the dispute was referred 2 months and 10 days late as the degree of lateness had to be calculated from the date on which the certificate of the non-resolution of the dispute was issued. The respondent denied that Macingwane has personal knowledge of the allegations the first applicant sought to rely on in proving the applicants' good prospects of success. The allegations are factually incorrect as the second and further applicants were dismissed fairly for participating in an unprotected strike. It was denied that the decision to dismiss the second and further applicants was premeditated. The respondent submitted that the second and further applicants' ducking and diving does not justify condonation. It denied that it will not suffer prejudice as a result of the delay because it is in the interests of all the parties that the matter is heard as soon as possible while it is fresh in the minds of those involved.

[5] In the replying affidavit Macingwane denied that his evidence constituted hearsay evidence as he was entitled to depose to the founding affidavit as he was responsible for the case. He reiterated that trade union officials provided the information which he verily believed to be correct. He added that he was a member of the team which 'formulated the strategy from the inception of setting in motion the disciplinary process' and could therefore swear positively to the facts of the case.

[6] In *Melane v Santam insurance Co Ltd*[1] the leading authority on condonation the court, expressed just cause as follows:

[1] 1962 (4) (SA) 531 at 532 C-F

> "In deciding whether sufficient cause has been shown, the basic principle is that the court has a discretion to be exercised judicially upon a consideration of the facts and in essence, is a matter of fairness to both sides. Among the factors usually relevant is the degree of lateness, explanation thereof prospects of success and the importance of the case..."

The Constitutional Court has held that the interests of justice need to considered in determining whether condonation should be granted.

[7] The respondent argued that Macingwane's omission to disclose the source of the contents of his founding affidavit rendered it inadmissible hearsay evidence. It sought to rely on the following dictum of *The Master v Slomowitz*[2]:

> "In exceptional cases an application may be based on hearsay but then the deponent must state that the allegations of fact are true to the best of his information, knowledge and belief and state the basis of the knowledge or belief".

[8] The contents of the first applicant's founding affidavit should have consisted of admissible evidence. Any reliance on hearsay evidence should have been explained properly. The applicant omitted to attach to the founding affidavit, confirmatory affidavits of the trade union officials who provided the deponent with the information he had no personal knowledge of. The deponent's explanation that he can swear positively to the facts of this case because "he was part of a team that prepared and formulated a strategy from the inception of setting in motion disciplinary process" does not assist the applicant prove that it has good prospects of success. The deponent alleged that the second and further applicants did not take part in an illegal work stoppage when he did not witness the second and further applicants' conduct on which a decision can be based whether they participated in an illegal work stoppage or not. He therefore had no personal knowledge of the relevant facts which remained inadmissible hearsay evidence in the absence of the union officials' confirmatory affidavits. The first applicant, therefore, failed to prove that it has good prospects of success.

[2] 1961 (1) SA 669 (T) at 627 B-C

[9] The applicant gave two reasons for the delay. Firstly, the CCMA erroneously scheduled the dispute for arbitration after the unsuccessful attempt to resolve it through conciliation. Secondly, the union had to determine its members who had given it a mandate to represent them at the Labour court. The certificate of the non-resolution of the dispute was issued on 12 August 2013 and the first applicant should have referred their matter to the Labour Court 90 days thereafter. The legislature deliberately afforded applicants who have been dismissed for participating in an unprotected strike ninety days from the date the certificate of the non-resolution of the dispute is issued, to file their dispute at the Labour court. Almost two thirds of the ninety days went into waiting for the arbitration hearing which was scheduled for 4 October 2013. When the CCMA informed the parties that it lacked jurisdiction, the applicants had already lost more than half of the time the legislature intended them to have to file their matter the Labour court. On 4 October 2013 three firms of attorneys were involved in the dispute and the applicant had to determine those members who preferred to be represented by it. The applicant adopted a cautious approach as it feared a recurrence of being sued for damages for failure to represent the interests of its members. As three law firms were involved the applicant had to be sure of its mandate. The exercise involved 73 employees. The second and further applicants cannot be prejudiced because the deponent to the founding affidavit chose to say they ducked and dived instead of making factual averments of what they did. He was involved in the matter even before the disciplinary enquiry was held. From the date of the second and further applicants' dismissal, the applicant took active steps to pursue their case. I am satisfied that the reasons proffered for the delay are reasonable.

[10] I have considered the submissions made on behalf of both parties on the question of prejudice and this court's duty to be fair to both parties. While it is important that the matter be heard why it is still fresh in the memory of the parties, it was not the respondent's case that the memories of its witnesses have faded as a result of the delay. The applicants will therefore suffer more

prejudice should this application be refused. The intention of the legislature was to afford applicants 90 days which is a substantial amount of time from the date the certificate of the non-resolution of the dispute was issued to refer their cases to the Labour Court. I cannot turn a blind eye to the reality that the CCMA scheduled the dispute for arbitration and informed the parties on 4 October 2013 of its lack of jurisdiction. The delay between the date the certificate was issued and 4 October 2013 should be condoned reducing the extent of the delay to 16 days which is not substantial in the circumstances. I have considered that this matter involves 73 employees, the extent of the delay is 16 days and that the extent of the prejudice on the applicants is serious and concluded that it is in the interests of justice that this application should be granted.

[11] Although the first applicant is the successful party, it is the one seeking an indulgence and should bear to costs of this application.

[12] In the premises the following order is made:

12.1 Application for condonation is granted.

12.2 The first applicant pay the respondent's costs.

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Lallie J

Judge of the labour Court of South Africa

Appearance

For the Applicant: Macingwane of Macingwane Attorneys

For the Respondent: Kirchmanns of Kirchmanns Inc