IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN

2004-11-12 CASE NO: JS 528/04

In the matter between

JOSEPH SHALI Applicant

and

CAPACITY Respondent

J U D G M E N T

TODD, AJ: This is an application for condonation for the late delivery of a statement of case. The matter is unopposed. The applicant was dismissed from his employment on 25 April 2003. The matter was initially, after being conciliated unsuccessfully, referred to the applicable bargaining council, that is the Metal and Engineering Industry's Bargaining Council, for arbitration. But at a hearing on 27 October 2003 the relevant commissioner found that the dispute concerned the retrenchment of several employees of which the applicant was one, and that in those circumstances the matter must be referred to the Labour Court in accordance with the provisions of section 191(5)(b)(ii).

In his application for condonation the applicant states that following that ruling he handed everything over to his attorney, Mr Kubheka, who was supposed to refer the matter to this court once the council had failed to deal with the matter on 27 October 2003. The applicant goes on to state that his attorney admits that it is his fault that he failed to refer the matter in time. Assuming in the applicant's favour that the period of 90 days during which he was required, with the assistance of his attorney, to refer the matter to this court started only on 27 October 2003, the matter should have been referred by no later than the last week of January 2004. The statement of case is in fact signed on 12 July 2004, nearly six months later. The only explanation given for the applicant's failure to

refer the matter timeously and for the delay of some six months to which I have referred, is the explanation already described by me, namely that Mr Kubheka, the applicant's attorney, failed to refer the matter in time. There is no indication whatsoever of what steps, if any, the applicant himself took to advance his interests or to enquire as to the progress in the matter during the period 27 October 2003 until the matter was finally referred in July 2004. There is no mention in the condonation application of any attempt by the applicant to communicate with his attorney, to establish what progress had been made in the matter or to ensure that proper steps were taken to have the matter referred.

Although it is frequently the case that an applicant in these circumstances relies completely on the attorney that he has appointed to assist him, I should say that the procedure for referring a dispute to this court is relatively straightforward and is routinely complied with by unrepresented applicants by the completion of standard form documents that are available from the Registrar of this court. That is in fact the manner in which this dispute was ultimately referred to this court on 13 July 2004, that is by the applicant completing, presumably with the assistance of his attorney, the standard form referral documents together with a standard form condonation application.

In relation to his prospects of success the applicant states in the condonation application that he has a good case and believes that he has good reasons to contend that his dismissal was unfair because "there was no thorough consultation between the employer and the affected employees about the retrenchment, we were just offered payment and dismissed".

The matter before me is unopposed and there is proof in the file that the papers were served on the respondent by registered mail although I should indicate that there is no evidence on the papers before me from which I could independently conclude that the address on which the papers were served is the correct address. Be that as it may, I must decide the condonation application that is before me and I intend to decide that application on the basis that the applicant's contentions in relation to his prospects of success are correct. The applicant alleges, it is apparent from that affidavit, that there was no proper consultation prior to his retrenchment. He does not put in dispute the substantive fairness of the retrenchment.

The difficulty faced by litigants who are let down by their legal representatives is not a new one. In *Saloojee v Minister of Community Development* 1965 (2) SA 135 (AD) at 141, the Appellate Division, as it then was, had the following to say:

"This Court has on a number of occasions demonstrated its reluctance to penalise a litigant on account of the conduct of his attorney. A striking example thereof is to be found in *R v Chetty* 1943 (AD) 321. In that case there was an even

longer delay than here, and the excuses offered by the attorney concerned were clearly unsatisfactory, but the court nevertheless granted condonation (at 140H-141A)"

The court continued as follows:

"In *Regal v African Superslate (Pty) Ltd* 1962 (3) SA 18 (AD) at 23, also, this Court came to the conclusion that the delay was due entirely to the neglect of the applicant's attorney, and held that the applicant's neglect should not, in the circumstances of the case, debar the applicant, who is himself in no way to blame, from relief. I should point out, however, that it has not at any time been held that condonation will not in any circumstances be withheld if the blame lies with the attorney. There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the rules of this court. Considerations *ad misericordiam* should not be allowed to become an invitation to laxity. In fact, this court has lately been burdened with an undue and increasing number of applications for condonation in which the failure to comply with the rules of this court was due to neglect on the part of the attorney. The attorney, after all, is the representative that the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a rule of court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are." (at 141B-E)

The judgment continues:

"A litigant, moreover, who knows, as the applicants did, that the prescribed time period has elapsed and that an application for condonation is necessary, is not entitled to hand over the matter to his attorney and then wash his hands of it. If, as here, the stage is reached where it must become obvious also to a layman that there is a protracted delay, he cannot sit passively by, without so much as directing any reminder or enquiry to his attorney ... and expect to be exonerated of all blame; and if, as here, the explanation offered to this court is patently insufficient, he cannot be heard to claim that the insufficiency should be overlooked merely because he has left the matter entirely in the hands of his attorney. If he relies upon ineptitude or a remissness of his own attorney, he should at least explain that none of it is to be imputed to himself. That has not

been done in this case. In these circumstances I would find it difficult to justify condonation unless there are strong prospects of success (*Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (AD) at 532)."

In my view, in the circumstances of this case, the length of the delay is so considerable and the explanation given by the applicant in his condonation application so far from what would be required to explain such a lengthy delay, that even in circumstances where, on the evidence before me, the applicant has prospects of showing that the dismissal was at least procedurally unfair, condonation should not be granted. I point out in this regard that the Labour Relations Act makes express provision for the expeditious resolution of labour disputes. The Act provides quite far reaching remedies which benefit and protect employees who find themselves in the unfortunate position that they lose their jobs. But what goes hand in hand with those remedies is a responsibility to pursue those remedies in a proper and expeditious manner. The time periods prescribed in the Labour Relations Act itself are intended to provide for the expeditious resolution of disputes. To allow lengthy unexplained or inadequately explained delays would completely undermine the fundamental purpose of the expeditious dispute resolution provided for in the Labour Relations Act.

As articulated in the case of *Melane v Santam Insurance Co Ltd,* to which I have referred, at 532:

"A slight delay and a good explanation may help to compensate for prospects of success which are not strong or the importance of an issue or strong prospects of success may tend to compensate for a long delay. And the respondent's interests in finality must not be overlooked."

In my view, on a judicial consideration of the material that is put before me in the condonation application, no proper case has been made for condonation and the condonation application is accordingly dismissed.