IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

REPORTABLE

CASE NO: JS 72/09

In the matter between:

NUMSA obo **SIPHO MTSHALI** APPLICANT

AND

ESKOM HOLDINGS (PTY) LTD RESPONDENT

JUDGMENT

Molahlehi J

Introduction

[1] This is an application for condonation for the late referral of the applicant's statement of case to the Court. The application was opposed by the respondent.

Background facts

[2] The applicant, Mr Mtshali who prior to his dismissal was employed as a manager protection unit service of the respondent was charged with several counts of misconduct. The essence of the charges against the applicant concerned changing or modifying the terms and conditions of a contract with one of the service providers of the respondent without following proper procedure. The other charges relates to the manner in which the applicant

handled the issuing of the fire arms and ammunitions to subordinates in contravention of the policy.

[3] The outcome of the disciplinary hearing was that the chairperson found that the applicant had committed dismissable offences and recommended that he be dismissed.

[4] At the time of his dismissal the employee had been with the respondent for a period of 13 (thirteen) years and had no previous record of discipline.

[5] The applicant being unhappy with the outcome of the disciplinary hearing referred the matter to the CCMA for conciliation and upon failure to resolve the dispute in that process referred it to arbitration. The matter was set down for the arbitration hearing on the 28th February 2008, and at that stage the respondent made an application for an order referring the dispute to the Labour Court in terms of section 191(6) of the LRA. The application to have the matter referred to the Labour Court was opposed by the applicant. The arbitration hearing never proceeded on the scheduled day. The applicant was required to make written submissions with regards to its position for the application to have the matter referred to the Labour Court.

[6] On the 29th April 2008, Commissioner Kekana issued a jurisdictional ruling under case number GAJB41526/07 dated 25thApril 2008, in terms of which he directed that the matter be referred to the Labour Court for adjudication. In concluding that the matter should be referred to the Labour Court in terms of section 191(6) of the LRA the commissioner reasoned as follows:

"29. The argument by the employer on the conflict between the Constitutional and the Labour Appeal Court does have a bearing on how the parties present their cases. I believe the Labour Court is better placed to clarify these judgments.

30. I am therefore satisfied that the employer has submitted plausible arguments and has complied with section 191(6) of the Act."

[7] In line with the above directive the applicant referred his dispute to this Court on the 29th July 2008. The application ought to have been made in terms of the Labour Relations Act within 90 days of the commissioner issuing the certificate of non resolution of the dispute by the applicant. At the time of referring the dispute to the Labour Court on the 3rd February 2009 the applicant was some 6 (six) months late.

The principles relating to condonation

[8] The principles governing an approach to be adopted when considering whether or not to grant condonation for the late filing of a matter in this Court, can be found in *Melane v Santam Insurance Co Ltd 1962(4) SA 531 (A) 532C-F* where the Court held as follows:

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

case. Ordinarily these facts are interrelated; they are not individually decisive, for that would be a peacemeal approach incompatible with the true discretion, save of course that if there are no prospects of success they would be no point of granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexile discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation helps to compensate for the prospects of success which are not strong or the importance of the issue and the strong prospects of success may tend to compensate for a long delay. And the respondent's interests in finality must not be overlooked. I would add that discursiveness should be discouraged in canvassing the prospects of success in the affidavit."

[9] The explanation for the delay in referring this matter to the Court is set out by Mr Mdlalose, the regional legal officer of NUMSA in the founding affidavit. The essence of his explanation is that at the time of his employment on the 7th August 2007, he had to take over the work load of three previous legal officers who had resigned. The total number of cases he had to handle in this respect were some 50 (fifty) files per month.

[10] According to Mdlalose the fact that this matter was not attended to was discovered during an audit by Mr Mashego who after that discovery took the file to national office. The file was then allocated to Ms Goba on the 12th December 2008. During the same period of taking over the file and having to

deal with some of her own files Goba went on leave during December 2008. On her return from leave Goba had to attend an arbitration hearing on the 14th and 15th January 2009. The following week which was the week of the 18th to the 23rd January 2009, Goba had to attend to a matter at the Labour Court in Port Elizabeth and specifically attend to the upliftment and transcription of the record relating to another matter involving a NUMSA member.

[11] On the 28th January 2009, Goba realised that the referral was late and therefore needed an application for condonation. She then after consultation with the head office of NUMSA referred the matter to the then attorneys of NUMSA with the instruction that they draft the condonation application together with the statement of claim. The respondent contended that condonation should not be granted because the explanation proferred in the respect of the reasons for the delay relate to the applicant's union tidiness. In this respect the respondent argues that the catalogue of events set out by the applicant reveals gross recklessness, incompetence and dilatoriness by the applicant's union.

Evaluation

[12] There can be no doubt that the delay of 6 (six) months is serious and the explanation for the delay has its own difficulties. I do not however agree that the delay was due to wilfulness on the part of the applicants as was argued by the respondent relying on the decision in *Librapac CC v Fedcraw and Others (1999) 20 ILJ 510 (LAC)*. In that case the LAC declined to entertain the prospects of success because of the inadequate explanation tendered. The

distinguishing feature between the present matter and that of *Librapac* is that in that matter *Librapac* on the advise of its own attorneys, applicant ignored the arbitration award and decided not to institute the review proceedings until the employee sought to compel enforcement of the award by seeking to make it an order of Court in terms of section 158(1)(c) of the LRA. The delay in that case was based on a deliberate, wilful decision not to comply with a lawful and binding award issued in terms of the LRA. The Court found that the attitude of the employer amounted to a flagrant and cynical disregard for the express provisions and underlying purpose of the structure of the LRA. The Court held in this respect that:

> *"[12] … in view of the wilful and deliberate decision not to bring the review application earlier, condonation should be refused without further enquiry to the merits, prospects of success…"*

[13] In *National Union of Metalworkers of South Africa and Others v Crisburd (Pty) Ltd (2008) 29 694 (LC),* this Court in dealing with facts which are very similar to the present case held as follows:

> *"[11] A further delay after issuing of the ruling regarding jurisdiction was, according to the applicants, due to the workload of the national legal officer who could not cope because of the staff turnover at the first applicant's national office. The other contributing factor in this regard relates to the bureaucratic*

process within the first applicant's operations when dealing with having to obtain a mandate to litigate.

[12] I do accept that there are difficulties with the explanation by the applicants but do not believe that it is so unreasonable that fairness would require that the matter be determined and concluded on that basis alone. The other point to be noted is that even if the national legal officer can be criticized for the explanation given, it is however an explanation that is above reproach in relation to taking the court into her confidence. Its simplicity reveals the honesty behind it.

[13] Refusing to grant condonation would amount to punishing the further applicants for the poor management and inefficiencies within the administrative process of the first applicant. The circumstances of this case are such that it would be unfair to criticize the further applicants for not following up and enquiring about progress in the prosecution of their case. Their hopes and confidence in the system must have been confirmed when the matter went to arbitration. There seems to be no reason why they would have suspected that the first applicant was not doing what it was supposed to do. The first applicant had referred the dispute to conciliation, in the first instance, and thereafter to arbitration. After the first applicant had processed the matter through

conciliation and to the arbitration stage, there seems to me to be no reason why the further applicants would have had doubts that their matter was not properly attended to. It is for this reason that I do not believe that they can be criticized for not enquiring or making a follow up on the matter."

[14] Whilst I accept the criticism about the strength of the reasons proferred by the applicant's union and to some extent its tardiness in dealing with the matter I do not believe that the explanation is so unreasonable such that the door to making further enquiry into the prospects of success should be closed and the importance of the matter should not be considered.

[15] The approach to be adopted in dealing with the issue of prospects of success has received attention in number of decisions of the Courts. The essential aspect in the assessment of prospects of success is the consideration of the likelihood or chance of success when the merits are considered in the main case. At the level of condonation application the applicant has to demonstrate that *prima facie* there is a reasonable probability of succeeding when the matter is finally determined on its merits. See *Chetty v The Law Society, Transvaal 1985 (2) SA 756 (AD), Kaefer Insulation (Pty) Ltd v President of the Industrial Court & Others High at paragraph 27, Saraiva Construction (Pty) Ltd v Zululand Electrical and Engineering Wholesalers (Pty) Ltd 1975 (1) SA 612 (D) and SA Democratic Teachers Union v Commission for Conciliation, Mediation and Arbitration and Others (2007) 28 ILJ 1124 (LC).*

[16] The contention of the applicant in the present matter is that his dismissal was both substantively and procedurally unfair. In assessing his prospects of success account should be taken of the allegations that had been made against him. He had been accused of having acted to the detriment of the respondent in that he had *"on various occasions modified the terms and conditions"* of the contract without *"adhering to proper commercial procedure"* and that he had *"contracted with the said supply without authorization and in contravention of Eskom's procedures."* The chairperson of the disciplinary hearing found him guilty of the misconduct and reasoned as follows:

> *"28 Mtshali did not dispute that he had access to all of Eskom's policies. He must thus be presumed to have been aware of the (undisputed) requirement that contracts between Eskom and service providers … and their modifications, required prior approval by the procurement and tender committee.*
>
> *29 His failure to first acquaint himself with the contract … is not acceptable of a manager in his position. It shows negligence in the performance of his functions."*

[17] It is apparent from the above that the applicant was in essence found guilty of not complying with the internal procedures and that constituted negligence. That in my view, indicates that there is a reasonable chance that when the matter is considered on its merits the sanction of dismissal could be found to have been unfair in weighing the seriousness of the offence. In other words the

applicant was not found guilty of gross negligence but of simple negligence. The period of employment which as indicate above is some 13 (thirteen) years and the fact that he in that period had a clean disciplinary record may count in his favour. It should further be noted that although the chairperson of the disciplinary enquiry found that Eskom was entitled to dismiss the applicant, he seems to have been in doubt about the appropriateness of the dismissal sanction. In this respect the chairperson had the following to say:

> *"Should Eskom decide to impose a lesser sanction than a sanction of dismissal, which should be justified by the possibility of corrective action, …"*

[18] As concerning the importance of the matter, there are three aspects which in my view need to weigh in favour of granting condonation for the late filing of the applicant's statement of case. The first aspect relates to the very application by the applicant to have this matter referred to the Labour Court and secondly, the granting of that application by the commissioner to have the matter referred to the Labour Court. The third aspect relates to the claim by the respondent that the applicant had made allegations of racial discrimination during the course of disciplinary hearing.

[19] In the light of the above I am of the view that the applicant's application for condonation for the late filing of his statement of case stand to succeed. Assuming that there is an ongoing relationship between the parties it seems to me that it would not be appropriate to order that costs should follow the results.

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

(i) The late filing of the statement of case by the applicants is condoned.

(ii) There is no order as to costs.

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Molahlehi J

Date of Hearing : 17th September 2009

Date of Judgment : 22nd December 2009

Appearances

For the Applicant : Mr M Niehaus of Minnaar Niehaus Attorneys

For the Respondent: Mr A Patel of Cliffe Dekker Hofmeyr Inc