THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not reportable

Case no: C258/2019

In the matter between:

SOUTH AFRICAN CATERING COMMERCIAL WORKERS UNION **First Applicant**

TABISA NOMATSHAKA **Second Applicant**

and

CHECKERS (PTY) LTD **Respondent**

Heard: **21 August 2019**

Delivered: **19 September 2019**

Summary: **Application for leave to file a further affidavit – no exceptional or special circumstances that warrant the filing of a further affidavit. Condonation application – time is of the essence in individual dismissal disputes – extensive delay ensuing from the trade union's inability to the pay attorneys' legal fees is inexcusable – condonation is refused without considering prospects of success.**

JUDGMENT

NKUTHA-NKONTWANA, J

Introduction

[1] The applicants seek an order condoning the late filing of the statement of case challenging the fairness of the dismissal of the second applicant, Ms Tabisa Nomatshaka (Ms Nomatshaka), a member of the first applicant (SACCAWU).

[2] Ms Nomatshaka was employed by the respondent (Checkers) as a front end controller. Amongst her responsibilities was overseeing the cashiers and was required, *inter alia,* to ensure that cash in the tills is secured. On 5 and 6 February 2018, SACCAWU embarked on a protected strike nationally. According to the applicants, Ms Nomatshaka was requested by the cashiers to close their tills in order to enable them to join the strike picket which was due to take place at 13h00. Indeed, she acceded to the request and closed the tills in order to secure the cash in the tills. She also joined the strike picket.

[3] The respondent charged Ms Nomatshaka for closing the tills without permission as, in doing so, it was alleged that she had sabotaged the business of Checkers. She was found guilty and accordingly dismissed. The applicants referred the dispute of unfair dismissal to the Commission for Conciliation Mediation and Arbitration (CCMA). Upon being certified as unresolved at conciliation, the matter was set down for arbitration at the instance of the applicants.

[4] Commissioner Gail McEwan (commissioner) was appointed to arbitrate the matter. The arbitration proceedings sat on 6 June 2018. The applicant briefly testified and the respondent's representative, Mr Malganyana testified under oath in support of the respondent's case. Thereafter, the commissioner, *mero motu,* raised the issue of automatically unfair dismissal in terms of section 187(1)(a) of the Labour Relations Act[1] (LRA).

[5] The commissioner issued the jurisdictional ruling dated 13 June 2018 wherein she found that CCMA lacked jurisdiction to arbitrate the dispute and that the matter should proceed to this Court for adjudication. In paragraph 5 of the ruling, she records the reason for her finding as follows:[2]

> 'Section 67 of the LRA states: An employer may not dismiss an employee for participating in a protected strike or for any conduct in **contemplation or furtherance of a protected strike** (my emphasis). There was no other reason for Nomatshaka to close the tills of nine cashiers other than them requesting her to do this for them to be able to join a strike action. The action of Nomatshaka can only be seen as her furtherance of the strike.'

[1] Act 66 of 1995 as amended.
[2] See: Jurisdictional ruling at page 52.

Application to have the respondent's further affidavit admitted

[6] The respondent staged an impassioned opposition to the granting of condonation. It also seeks an indulgence to have its further affidavit admitted as well as the transcribed record of the arbitration proceedings. Mr Jorge, who appeared for the respondent, submitted that the applicants sought to mislead the Court when they alleged in their replying affidavit that it was the respondent that had raised the jurisdictional point during the arbitration proceedings. Also, it is alleged that the applicants raised a new issue in their replying affidavit that the respondent could have unlocked the tills if it wanted to.

[7] The applicants objected to the admission of the respondent's further affidavit. Ms Ganditze, the applicants' attorney, submitted that there was no basis for the filing of the further affidavit.

[8] Indeed, the Court does have discretion to permit the filing of further affidavits as per Rule 6(5)(e) of the Rules of the Court. However, a case must be made that there are exceptional or special circumstances that dictate a filling of further affidavits contrary to the general rule that only three sets of affidavits are allowed in motion proceedings.[3]

[9] In this instance, there is no need to traverse the merits in detail as this is an interlocutory application and the pertinent facts are mostly common cause. In any event, the *Plascon-Evans* rule[4] would apply to the extent that there are material disputes of fact.

[10] Accordingly, I am not convinced that there are exceptional or special circumstances that warrant the filing of a further affidavit by the respondent. As such, the request by the respondent to file a further affidavit is not granted. In effect, the respondent's further affidavit and the record of the arbitration proceedings fall to be regarded as *pro non scripto*.[5]

[11] I now turn to the condonation application.

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[3] See: *Zarug v Parvathine* 1962(2) SA 872 (D) at 873 H to 874 E.

[4] See: *Plascon-Evans Paints (TVL) Ltd. v Van Riebeck Paints (Pty) Ltd* [1984] 2 All SA 366 (A); 1984 (3) SA 623; 1984 (3) SA 620.

[5] See: *Standard Bank of SA Ltd v Sewpersadh and Another* 2005 (4) SA 148 (C) at paras 12 to 13.

Degree of lateness and explanation

[12] SACCAWU applied for the case number on 24 July 2018 with the intention to review the jurisdiction ruling. However, no application was filed but SACCAWU sought a legal opinion on a process to be undertaken. The applicants' attorneys of record opined that the matter be pursued as directed by the commissioner in her jurisdictional ruling.

[13] On 13 August 2018, a request was made to the SACCAWU Head Office for the authorisation to brief the attorneys of record to draft the statement of case. The reason according to the union official, Mr Clin Tyhalidikazi (Mr Tyhalidikazi), the deponent to the applicants' founding affidavit, was that he does not have the necessary expertise to draft a statement of case. The authorisation was granted the next day and on 15 August 2018, the applicants' attorneys of record were according briefed.

[14] However, the applicants' attorneys of record did not attend to the clients' instructions because the SACCAWU accounts on the files in other matters with the firm had fallen in arears. SACCAWU was duly informed that no further work will be attended to unless the accounts were settled.

[15] SACCAWU only managed to settle the outstanding fees sometime in February 2019. The attorney allocated to deal with the matter was on annual leave and returned on 25 February 2019. When the attorney returned, he had to deal with all SACCAWU files on numerous matters that were already out of time. That happened between end February 2019 and early April 2019.

[16] The consultation with the SACCAWU official and Ms Nomatshaka took place on 15 April 2019 and the statement of case was filed on 16 April 2019. The degree of lateness is nine months.

[17] The applicants conceded that nine months' delay is extensive and the explanation is not the best but they submitted that it is nonetheless sensible.

[18] On the other hand, the respondent submitted that given the excessive protraction, the applicants' explanation for the delay had to be compelling. However, the explanation proffered in the applicants' founding affidavit is lacking in particularity and is deficient. When it exposed this fact in the

respondent's answering affidavit, the applicants went into great length addressing the deficiencies in their replying affidavit. As such, it was submitted on behalf of the respondent that the applicants must stand and fall by the case made in the founding affidavit, so it was further submitted.

Legal principles and application

[19] In *Steenkamp and Others v Edcon Limited,*[6] the Constitutional Court endorsed the factors that must be considered in determining whether it is in the interest of justice to grant condonation as set out in *Grootboom v National Prosecuting Authority.*[7] It was stated:

'[36] Granting condonation must be in the interests of justice. This Court in *Grootboom* set out the factors that must be considered in determining whether or not it is in the interests of justice to grant condonation:

"[T]he standard for considering an application for condonation is the interests of justice. However, the concept 'interests of justice' is so elastic that it is not capable of precise definition. As the two cases demonstrate, it includes: the nature of the relief sought; the extent and cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the importance of the issue to be raised in the intended appeal; and the prospects of success. It is crucial to reiterate that both *Brummer and Van Wyk* emphasise that the ultimate determination of what is in the interests of justice must reflect due regard to all the relevant factors but it is not necessarily limited to those mentioned above. The particular circumstances of each case will determine which of these factors are relevant.

It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or court's directions. Of great significance, the explanation must be reasonable enough to excuse the default.

[6] 2019 (7) BCLR 826 (CC); (2019) 40 ILJ 1731 (CC)
[7] 2014 (2) SA 68 (CC); 2014 (1) BCLR 65 (CC) at para 20.

> The interests of justice must be determined with reference to all relevant factors. However, some of the factors may justifiably be left out of consideration in certain circumstances. For example, where the delay is unacceptably excessive and there is no explanation for the delay, there may be no need to consider the prospects of success. If the period of delay is short and there is an unsatisfactory explanation but there are reasonable prospects of success, condonation should be granted. However, despite the presence of reasonable prospects of success, condonation may be refused where the delay is excessive, the explanation is non-existent and granting condonation would prejudice the other party. As a general proposition the various factors are not individually decisive but should all be taken into account to arrive at a conclusion as to what is in the interests of justice."
>
> [37] All factors should therefore be taken into account when assessing whether it is in the interest of justice to grant or refuse condonation.'[8] (Emphasis added)

[20] Given the concession that the period of the delay is substantial and that the explanation is not best, the applicants are basically asking for the indulgence on the basis of the prospects of success. Ms Ganditze submitted that even though it is trite that where the delay is substantial and the explanation is unreasonable and unacceptable, the Court may refuse condonation without considering the other factors, that principle is not in any way inflexible. To fortify this submission, I was duly referred to the Labour Appeal Court (LAC) decision in *South African Post Office Ltd v Commission for Conciliation Mediation and Arbitration and Others.*[9] However, the *Post Office* decision is distinguishable as the appellant's explanation in that case was found to be acceptable. Notwithstanding, the LAC also pertinently stated:

> '[21] As stated earlier in cases of individual dismissal, time is of the essence and a substantial delay even where the delay is explained is not itself sufficient to obtain condonation. Another obstacle to overcome is the decisions of this Court, that state that an applicant seeking condonation cannot rely on the negligence of its legal representatives as a reason for not complying with the prescribed time periods.

[8] The factors expounded in *Grootboom* clearly accords with the principles outlined in *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532- E.

[9] [2012] 1 BLLR 30 (LAC); (2011) 32 ILJ 2442 (LAC) at para 22.

> In *Waverly Blankets*[10] this Court went on to say that even where an attorney's neglect of his client's affairs may be inexcusable and "despite the blamelessness of the client" condonation could still be refused.'[11] (Emphasis added)

[21] Clearly, the LAC emphasised the importance of timeous action when it comes to disputes over individual dismissals and, as such, condonation will not readily be granted. Also, the delay resulting from the ineptness of legal representatives or the internal procedures of trade unions may not constitute a compelling reason for the grant of condonation even though the client or member may not be culpable.[12] These labour law specific factors and considerations are trite and have since been sanction by the Constitutional Court in *Steenkamp.*[13]

[22] Mr Jorge correctly submitted that SACCAWU is one of the established trade unions and, as such, ought to have been well aware of the need to act timeously in the interest of its member. If indeed SACCAWU was cash strapped, it is mind boggling that its head office sanctioned the briefing of attorneys in this matter. Worse still, even when informed that the matter would not be attended to until outstanding accounts are settled, SACCAWU did not take any steps to act with the necessary speed in prosecuting the matter despite a concession that they had, at least, already received a legal opinion on the course of action to pursue.

[23] The assertion that Mr Tyhalidikazi lacked the necessary skill to deal with the issues that are raised in this matter, hence SACCAWU briefed the attorneys, is untenable. Firstly, SACCAWU is a big organisation and it is not clear as to why assistance was not sought elsewhere within the organisation. Secondly, what was expected from Mr Tyhalidikazi was to draft a mere statement of case. To the extent that he had no necessary knowledge, this Court has various *pro forma* court documents (like affidavit, statement of case, notice of motion, etc.) that are easy to complete or adapt. So far, they have been

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[10] [1999] 11 (BLLR) 1143 (LAC) at 1145 I-J; see also *NUM v Council for Mineral Technology* [1999] 3 (BLLR) 209 (LAC) at para 21.
[11] *Supra* n 7 at para 21.
[12] See: *National Education, Health & Allied Workers Union and Others v Vanderbijlpark Society for the Aged* [2011] 7 BLLR 690 (LC); (2011) 32 ILJ 1959 (LC) at para 9.
[13] *Supra* n 4 at para 41.

utilised by less sophisticated unrepresented litigants with great success. It does not take the wisdom of Solomon to attend to that.

[24] Therefore, it is not uncalled-for to expect the trade union officials, particularly, of a trade union of SACCAWU's calibre, to assiduously handle disputes of its members as they are, in a sense, mainly tasked with that.

Conclusion

[25] In the circumstances, I do not have to consider the prospects of success, given the extensive degree of lateness and the explanation that is unreasonable and unsatisfactory.[14] Therefore, the application for condonation stands to be dismissed.

Costs

[26] It is now an accepted principle that costs do not follow the result in this Court especially in instances where there is a persisting collective bargaining relationship as typified in the instance.

[27] In the circumstances, I make the following order:

Order

1. The application for condonation is dismissed.

2. There is no order as to costs.

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P Nkutha-Nkontwana

Judge of the Labour Court of South Africa

Appearances:

Applicant: Ms T Ganditze of Cheadle Thomson & Haysom Incorporated

[14] See: *Collet v Commission for Conciliation Mediation and Arbitration and Others* (2014) 35 ILJ (LAC); 2014 6 BLLR 523 (LAC) at para 38.

Respondent: Mr J Jorge of Cliffe Dekker Hofmeyr Incorporated