IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

Case no: C301/20

In the matter between:

LUPHO MHAMBI & OTHERS Applicant

and

ELGIN POULTRY ABATTOIR Respondent

Date heard: 4 December 2020

Delivered: 23 March 2021 by means of scanned email

JUDGMENT

RABKIN-NAICKER J

[1] This is an opposed application for condonation for the late filing of a referral to this Court. The referral concerns the dismissals of more than 100 employees following their participation in an unprotected strike. The employees were originally represented by SACCAWU and their dismissals were referred to the CCMA. On the date of the arbitration on 3 November 2020, it became evident that SHOWUSA (which the applicants had now joined) had already referred the above matter to this Court. The upshot of a jurisdictional ruling was that the parties agreed that the CCMA did not have jurisdiction to hear the matter, this having been raised by the employer's representative.

[2] The applicants were dismissed on 17 January 2020.The Statement of Claim was delivered at Court on 8 September 2020. The conciliation proceedings at the CCMA failed to resolve the dispute on the 25 February 2020.

[3] As the respondent submits, the matter should have been referred to this Court on or before 25 May 2020. It was therefore referred some 3 months and 15 days after the expiry of the 90 day period provided for in terms of section 191(11)(a) of the LRA.

[4] The explanation for the delay is set out in the founding affidavit to this application as follows:

"After conciliation of this matter, the then applicant's trade union Saccawu informed the applicants that the matter had been referred to arbitration.

Applicants made several follow ups with Saccawu and had taken steps to ensure that this matter had been finalized, but unfortunately due to the state of disaster which was proclaimed, it made it very difficult for the applicants to move around looking for advice and help In ensuring that the matter is finalized, applicants made several messages to Saccawu….."

[5] The applicants got hold of Mr James Dladla of Showusa in mid-August and mandated him to investigate the progress of the matter on their behalf. They state that in summary, the delay was caused by the lockdown and the difficulties they had in moving around and getting assistance.

[6] The respondent submits that it is untrue that the delay was caused by the lockdown stating that the lockdown only started on 27 March 2020 and therefore the applicants had one month after conciliation to refer the dispute had they or their former union had any faith in their case, and wished to present it to this Court.

[7] In the Court's view given that this was a mass dismissal of more than 100 employees and the period of delay in referring the dispute took place during a National State of Disaster, the delay should not be regarded as excessive and

the reasons for it accepted. The applicants, over and above emphasizing the pandemic, also explain that their previous union had incorrectly referred the dispute to the CCMA. The application for condonation was filed on 8 September 2020, after the statement of response was filed. This respondent also takes issue with this delay on the basis that it should have been sought at the earliest instance. I do not consider this delay to be material.

[8] On the question of prospects of success, I note that on respondent's version no pre-dismissal hearing took place because it was not practical or feasible and because its authority and that of its Human Resources Manager was not recognized by the applicants. The applicants rely on the *audi* issue in respect of procedural fairness, and the allegation in respect of substantive fairness, that the employer applied the sanction of dismissal inconsistently against the strikers, allegedly without justification. On the issue of alleged inconsistency it is respondent's case that the employees who were not dismissed whose names are recorded in Annexure '3' to the Statement of Claim are employed by a separate corporate entity and not the respondent.

[9] The applicants dispute that notices to make representations and/or appeal their dismissals by the employer were received by them. In general, applicants further point to the allegation that the trigger for the strike was the conduct of the Human Resources Manager which they describe as abusive and bullying. The applicants claim that the respondent reneged on an undertaking to remove him from his post. That there were a number of grievances amongst the workforce prior to the strike is evident from respondents version, which records that three days before the strike there were consultations held with a range of role players where it was agreed that issues would be handed over to the Department of Labour and the CCMA for investigations and further conciliation.

[9] In **Grootboom v National Prosecuting Authority & another**[1] the Constitutional Court set out the standard for considering an application for condonation:

> '[22] ... [T]he standard for considering an application for condonation is the interests of justice. However, the concept "interests of justice" is so elastic that

[1] 2014 (2) SA 68 (CC)

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.

[23] 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. ...

[51] 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.'

[10] Having found that the delay in the circumstances of this case cannot be considered as excessive and unexplained, I have considered the allegations made regarding the prospects of success in this application, also taking into account the statements of case and response. A further factor which I take into consideration is the very high number of employees who have been dismissed from their employment. I am also mindful of the type of dispute the Court may

be adjudicating. In **Association of Mineworkers & Construction Union on behalf of Members & another v Samancor Western Chrome Mines**[2] the LAC was considering the question of whether individual employees should have been permitted to give evidence about final written warnings they were given during an unprotected strike and referred to the Code of Good Practice: Dismissals as follows:

"[24] Item 6 of schedule 8 to the Labour Relations Act (the LRA) offers clear guidance regarding the purpose and implications of an employer issuing an ultimatum during an unprotected strike. While making it clear that participation in a strike that does not comply with the provisions of the LRA is misconduct, item 6 recognises that such conduct does not always deserve dismissal. The substantive fairness of a dismissal for participation in an unprotected strike must be determined in the light of the facts, including the seriousness of the contravention, attempts made to comply with the LRA, and whether or not the strike was in response to unjustified conduct by the employer…"

[11] Taking all of the above into consideration, I am of the view that the applicants have prima facie some prospects of success if the matter goes to trial. The interests of justice will be served if both parties are able to bring all the facts to light in an adjudication of the dismissals.

[12] In view of the above, I make the following order:

Order

1. The application for condonation is granted.

[2] (2020) 41 ILJ 2771 (LAC)

H Rabkin-Naicker

H. Rabkin-Naicker

Judge of the Labour Court of South Africa

Appearances

For the Applicant: Union Official (Showusa)

For the Respondent: RGL Stelzner SC instructed by Rufus Dercksen Inc