REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, HELD AT DURBAN

JUDGMENT

Not Reportable

Case no: D774/10

In the matter between:-

NATIONAL UNION OF METAL WORKERS OF SOUTH AFRICA (NUMSA)

on behalf of Nkululeko Kunene & 15 others **Applicants**

and

VENTURE OTTO (PTY) LTD **Respondent**

Heard: 28 February 2013

Delivered: 07 May 2013

Summary: Condonation application – whether it is n the interests of justice to grant relief

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JUDGMENT

CHETTY AJ

[1] This is an application for condonation for the late filing of their statement of claim by the applicants, which was filed 102 days late, or approximately three months and three weeks late. The respondent in the matter has also applied for condonation for the late filing of its reply. Unlike the delay of the applicant, the respondent's delay is minimal at nine (9) days.

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[2] The background to the dispute is that the applicants embarked on a strike in November 2009 which they considered to be a protected strike. In the lead up to the strike, the applicant referred a dispute regarding certain wage anomalies to the Metal Industries Bargaining Council on 5 October 2009. On 27 October 2009, the respondent referred a dispute to the Council as to the interpretation and application of a clause in the collective agreement which governs the issue of wage disputes, contending that the agreement contains a peace clause, effectively precluding the applicants from striking over the issue. A certificate was issued on 9 November 2009 and on the same day the applicants gave notice in writing that a strike would start at 11h30 on 11 November 2009. The respondent states that it attempted to convince the union against embarking on a strike and drew to its attention the potential adverse effects of a strike on the company's business. As far as the applicants were concerned, they believed that they were acting lawfully and all the requirements under the Labour Relations Act 66 of 1995 ('the LRA'), had been complied with.

[3] At 15h00 on 10 November 2009, the respondent approached this Court for an urgent interdict restraining the applicant and its members from embarking on a strike as they contended that the collective agreement precluded a strike over a wage anomaly. The applicant's attorney at the time informed the respondent's attorney that in light of the interdict having been granted, the union would be withdrawing the strike notice. The respondent states that the interdict was posted onto various notice boards but notwithstanding this, the union proceeded to go on strike on 11 November 2009. It is not in dispute that the strike lasted from 12h00 on 11 November 2009 to 13h00 on 12 November 2009. Following the strike, the respondent took disciplinary action against 15 (fifteen) of those who participated, seven (7) of whom were union shop stewards. The respondent sought to justify the selection of those who faced disciplinary action on the grounds that a number of the individual applicants were on final warnings for having engaged in an unprotected work stoppage in May 2009. All 15 employees were eventually dismissed, after what the union refers to as "hastily convened disciplinary enquiries".

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[4] Subsequent to their dismissals, the applicant referred the matter to the Dispute Resolution Committee which issued a certificate of outcome on 16 February 2010. It is common cause that in terms of section 191(1)(b) of the LRA the applicants were obliged to refer the matter to this Court on or before 16 May 2010. In a statement of claim dated 24 August 2010, apart from the applicant's articulating the grounds on which they contend the dismissals were unfair, they also, as part of their relief, sought an order "*granting leave to enroll the statement of claim, and that the late referral be and is hereby condoned*". In accounting for the delay, the applicants alluded to internal delays in the union obtaining authorisation to instruct attorneys to act on its behalf, as well as the fact that many of the individual applicants reside in remote rural areas, making it difficult to obtain timeous instructions from them. In its reply to the statement of case, the respondent did not deal at all with the issue of condonation.

[5] On 9 July 2012, the applicants brought a formal application, on affidavit, seeking condonation for the late filing of their statement of claim. This application was opposed by the respondents. Mr Seery, who appeared for the applicants, conceded that the applicants had followed the incorrect form in applying for condonation when they included this as part of their statement of claim. This error, he submitted, cannot be attributed to the individual applicants, but rather to their attorneys. In opposing the application for condonation, Mr van Staden for the respondents submitted that there had been no adequate explanation for the delay of 102 days and then too, the application for condonation was defective.

[6] It is evident from the papers that even though the applicant's attorneys were misguided as to the procedure in applying for condonation, (where it formed part of the statement of claim), there is no doubt that the essential ingredients for the granting of condonation were foreshadowed in the statement of claim. The respondent also 'measures' the delay up to 24 August 2010, being the

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date when the statement of claim was filed. The delay has not been calculated to the date when the condonation application was finally lodged in September 2012. The matter must therefore then be determined on the basis of whether a delay of approximately three months and three weeks is excessive, and whether any reasonable and adequate explanation has been provided.

[7] It is now trite that in an application for condonation, an applicant must set out a satisfactory explanation for the lateness, as well as establishing that the prospects of success favour the granting of an order for condonation. In *NUM v Council for Mineral Technology*,[1] the Court affirmed the well-established principle that the discretion in deciding such applications must be exercised judicially, adding that

> 'A slight delay and a good explanation may help to compensate for prospects of success which are not strong. The importance of the issue and strong prospects of success may tend to compensate for a long delay. There is a further principle which is applied and that is that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused.'[2]

[8] Counsel for the applicants accepted that even if the delay was long (but not excessive) and that the explanation was adequate (but not overwhelming convincing), this Court was bound to consider the prospects of success and the importance of the case for the applicants. Mr Seery submitted, without any contention to the contrary, that the applicants are still without employment, that they were the sole breadwinners for their families who live in remote parts of the province, and that if condonation were not granted, this would effectively mean the "end of the road" for their case. He further submitted that the prospect of them suing the union for damages were remote. Whilst not agreeing entirely with counsel for the applicants, Mr van Staden accepted that

[1] [1999] 3 BLLR 209 (LAC).
[2] Above at 211G-I.

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the pivotal enquiry in this case is whether it would be in the interests of justice to grant condonation to the applicants. This enquiry expands the traditional test in *Melane v Santam Insurance Company Ltd*[3]. This test was developed in *SA Post Office Ltd v Commission for Conciliation, Mediation & Arbitration & others*[4] where Waglay DJP said the following

> 'The degree of delay and the reason therefor complement each other. While the degree of delay is a mere arithmetic calculation, it is significant in relation to the expeditiousness with which the matter was required to be resolved. Hence, in matters where importance is placed upon the speedy and expeditious resolution of a dispute, even a short delay may not be excusable unless an explanation is proffered that sets out the reasons for the delay which the court finds acceptable. With the factor of delay, go the prospects of success. Where it is evident that the party seeking condonation has no prospects of succeeding in its principal claim or opposition, no purpose is served in granting condonation and the court must in such circumstance refuse to grant condonation irrespective of the degree of delay or the explanation provided. Where the prospects of success are reasonably good or even fair then, depending on the delay and the explanation, consideration must be given to the prejudice that the parties may suffer before the discretion can be exercised on whether to grant the indulgence sought. The factor of prejudice plays a role only when the delay is substantial.'[5]

With regard to the condonation being considered in the 'interests of justice', the Court had the following to say

> 'The appellant has explained the delay. The delay was due to the fact that its erstwhile attorneys gave false reports to it about the progress of the matter. The appellant's conduct up to the date of granting of the petition cannot be ignored. It is clear that the appellant diligently persisted with the case from the very outset when the arbitration award went against it, to the time of the granting of the petition. What went wrong thereafter was ultimately the fault of the appellant's erstwhile attorneys. Although the delay is satisfactorily explained and the prospects of success favour the appellant, because this dispute deals with an individual dismissal I am of the view that this Court

[3] 1962 (4) SA 531 (A)
[4] (2011) 32 ILJ 2442 (LAC)
[5] Above 2448A-E.

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> cannot come to the aid of the appellant unless this is a matter where the interest of justice demands the Court's intervention. (See *Queenstown Fuel Distributors CC* as quoted in para 20 above.)
>
> This then leads to the crucial question of whether this is a kind of matter where the interest of justice demands that this court intervenes and grants the condonation sought.
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> The interest of justice is not a vague and catch-all phrase that may be latched onto in order to justify one's own feeling of the inequity that may result if there is no interference from the Court. This factor must be utilized only where the absence of interference by the court would offend one's sense of justice.'[6]

[9] A similar approach has been developed by the Constitutional Court in *Van Wyk v Unitas Hospital*[7] where the Court held that

> This Court has held that the standard for considering an application for condonation is the interests of justice. (See *S v Mercer* 2004 (2) SA 598 (CC) (2004) (2) BCLR 109) in para 4 [also reported ar 2004 (1) SACR 1-Eds]; *Head of Department, Department of Education, Limpopo Province v Settlers Agricultural High School and Others* 2003 (11) BCLR 1212 (CC) in para 11; and *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others* 2000 (2) SA 837 (CC) (2000 (5) BCLR 465) in para 3.) Whether it is in the interests of justice to grant condonation depends on the facts and circumstances of each case. Factors that are relevant to this enquiry include but are not limited to 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. (See *Brummer id.*)[8]

[10] In considering whether it is in the interests of justice to grant condonation, I have had regard to the applicant's case on the merits and its prospects of success. The applicant contends that the dismissal of the individual applicants must be seen against the backdrop that they embarked on the strike in the

[6] Above 2453E-2454A.
[7] 2008 (2) SA 472
[8] Above 477A-C.

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belief that their actions were lawful. The respondent contends that the applicants cannot pretend to be ignorant of the withdrawal of the strike notice as they had been addressed by a union official Mr Hlatswayo on the morning of 11 November 2009, about the interdict which had been obtained the day before. There is nothing on the papers to substantiate who was there at the meeting addressed by Hlatswayo and exactly what was conveyed to the employees. A crucial point stressed by Mr Seery is that if condonation is not granted, the respondent will have succeeded in weakening union representivity at the workplace in light of the number of shop stewards dismissed as a result of the strike. Moreover, the duration of the strike was for no more than 25 hours and there is no evidence of damage to property or other similar allegations. The applicants contend that the respondent's actions in holding disciplinary enquiries, targeted at the union leadership, was disproportionate and for an ulterior purpose. While the respondent argues that the dismissals were based upon the individual applicants having prior valid warnings for similar conduct within the past 6 (six) months, this is disputed by the applicants who challenge the validity of the warnings and contend that they have expired. Moreover, it is also contended that 3 (three) of the individual applicants were not on any warnings at the time.

[11] I am satisfied that despite the delay in filing its statement of case, it would not be in the interests of justice to shut the door on the applicants in refusing condonation. The respondent also recognises the importance of the matter being fully ventilated at trial. No blame can be attached to the individual applicants for the delay which resulted and for these reasons, I would grant the application for condonation.

[12] The respondent also brought an application for condonation for being 9 (nine) days late in the filing of its reply to the applicant's statement of claim. In order to prepare a response, the respondent had to locate the personnel records of each applicant and thereafter these were forwarded to counsel, and incorporated as part of its papers. The applicant did not oppose the

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application and I am satisfied that the explanation is satisfactory, with minimal delay occasioned by the late filing. I would therefore grant the application.

[13] In the result, I make the following order:

1. The applicant's application for condonation for the late filing of its statement of claim is granted;
2. The respondent's application for condonation for the late filing of its reply is granted.
3. No order as to costs.

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Chetty, AJ

Acting Judge of the Labour Court

For the Applicant: Adv. T Seery.

Instructed by Harkoo Brijlal & Reddy.

For the Respondent: Mr M van Staden

Instructed by Savage Jooste & Adams

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