**IN THE LABOUR COURT OF SOUTH AFRICA**

**CASE NO: D274/21**

In the matter between:

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| **NUMSA** | **FIRST APPLICANT** |
| **BHEKABANTU MJWENI AND 5 OTHERS** | **FURTHER APPLICANTS** |

and

| | |
|---|---|
| **INDUSTRIAL OLEO CHEMICAL PRODUCTS** | **RESPONDENT** |

**Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court's website and released to SAFLII. The date and time of the hand--down is deemed to be 10h00 on 6 May 2022.**

**JUDGMENT**

**Hiralall AJ**

**Introduction**

[1] This matter was scheduled for the hearing of an application for condonation filed by the applicants for the late referral of their alleged unfair dismissal dispute to this court. The respondent opposed the application for condonation and raised a point *in limine* that this court has no jurisdiction to determine the application for condonation since it has no jurisdiction to determine the referral itself because the dispute which the

court is called on to adjudicate ultimately has not been referred to conciliation in terms of s191 of the Labour Relations Act (the LRA).

[2] The respondent contended that the court is enjoined to consider the point in limine first. The applicant opposed this contention.

**Background**

[3] It is common cause that the further applicants were initially dismissed by the respondent in July 2020, and that following an urgent application to this court which was heard on 25 August 2020, the court ordered the reinstatement of the further applicants. It appears to be common cause that the court also ordered that the respondent was required, if the retrenchment was to be proceeded with, to issue the requisite retrenchment notice and comply with its obligations in terms of section 189 and 189A.

[4] Following the issue of the court order, the respondent issued a new notice in terms of section 189(3); a facilitator was appointed by the CCMA; four facilitation meetings were held; the parties were unable to reach consensus and on 12 November 2020 the further applicants' services were terminated.

[5] According to the applicants, the second retrenchment exercise mirrored the first, the respondent's stance did not change, and what followed was a 'sham consultation process'. There were no proper and substantive reasons advanced by the respondent to support the dismissals of the further applicants. Since the dismissals of the further applicants, the respondent has been in full operation and has inter alia hired further employees and moved existing employees into the positions formerly occupied by the further applicants. The respondent denied the version of the applicants in relation to the second retrenchment exercise. It is not necessary to detail the substantive merits of the dismissal dispute further at this point.

[6] It is common cause that following the dismissal of the further applicants on 12 November 2020, the applicants referred the dispute to this court on 29 April 2021. They did not refer the dispute to conciliation. The applicants contend that it was not necessary to refer to conciliation a dispute relating to the substantive fairness of the dismissals, this in terms of s189A(7)(b)(ii) read with s191(11) of the LRA, since the dismissals followed a facilitation process. According to the applicants, the referral is some two and a half months late.

[7] According to the respondent, the applicants were required to refer the dispute to the CCMA (or to the relevant bargaining council) within 30 days of the dismissals. A period of five and a half months elapsed before it was drawn to the respondent's attention that the applicants were challenging the dismissals. The respondent contends that in the absence of the applicant's referral of the dispute to conciliation, this court lacks jurisdiction to determine the alleged unfair dismissal dispute, and therefor the application for condonation as well.

**Evaluation**

[8] The parties were in dispute as to whether the application for condonation should be considered first (and together with it the issue of jurisdiction under the heading of prospects of success), or whether the issue of jurisdiction should be considered as pleaded, as a point *in limine*.

[9] As stated earlier, the matter was scheduled for the hearing of an application for condonation. However, I am in agreement with the respondent's argument that the point *in limine* should be considered first, firstly because the point has been raised in both the respondent's answering affidavit and the reply to the applicants' statement of claim, and secondly, because as a matter of law and logic, the first enquiry that must be made in any matter before this court is whether the court has jurisdiction to hear and determine the matter. It makes no sense for the court to consider an application for condonation

where it might not have jurisdiction, but more importantly, where the point is raised *in limine*.

*No referral to conciliation*

[10] As a starting point, the relevant provisions of the LRA are quoted below:

> *Section 191*
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> '(1) (a) If there is a dispute about the fairness of a dismissal, or a dispute about an unfair labour practice, the dismissed employee or the employee alleging the unfair labour practice may refer the dispute in writing to –
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> (i) a council, if the parties to the dispute fall within the registered scope of that council; or
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> (ii) the Commission, if no council has jurisdiction.
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> (b) A referral in terms of paragraph (a) must be made within -
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> (i) 30 days of the date of a dismissal or, if it is a later date, within 30 days of the employer making a final decision to dismiss or uphold the dismissal;
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> (ii) 90 days of the date of the act or omission which allegedly constitutes the unfair labour practice or, if it is a later date, within 90 days of the date on which the employee became aware of the act or occurrence.
>
> …
>
> (5) If a council or a commissioner has certified that the dispute remains unresolved, or if 30 days or any further period as agreed between the parties have expired since the council or the Commission received the referral and the dispute remains unresolved-
>
> (a) the council or the Commission must arbitrate the dispute at the request of the employee if –
>
> (i) the employee has alleged that the reason for dismissal is related to the employee's conduct or capacity, unless paragraph (b)(iii) applies;

(ii) the employee has alleged that the reason for dismissal is that the employer made continued employment intolerable or the employer provided the employee with substantially less favourable conditions or circumstances at work after a transfer in terms of section 197 or 197A, unless the employee alleges that the contract of employment was terminated for a reason contemplated in section 187;

(iii) the employee does not know the reason for dismissal; or

(iv) the dispute concerns an unfair labour practice; or

(b) the employee may refer the dispute to the Labour Court for adjudication if the employee has alleged that the reason for dismissal is -

(i) automatically unfair;

(ii) based on the employer‘s operational requirements;

(iii) the employee’s participation in a strike that does not comply with the provisions of Chapter IV; or

(iv) because the employee refused to join, was refused membership of or was expelled from a trade union party to a closed shop agreement.

…

(11) (a) The referral, in terms of subsection (5)(b), of a dispute to the Labour Court for adjudication, must be made within 90 days after the council or (as the case may be) the commissioner has certified that the dispute remains unresolved.

(b) However, the Labour Court may condone non-observance of that timeframe on good cause shown.

*Section 189A (7) and (8)*

‘(7) If a facilitator is appointed in terms of subsection (3) or (4), and 60 days have elapsed from the date on which notice was given in terms of section 189(3)

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(a) the employer may give notice to terminate the contracts of employment in accordance with section 37(1) of the Basic Conditions of Employment Act; and

(b) a registered trade union or the employees who have received notice of termination may either-

(i) give notice of a strike in terms of section 64(1)(b) or (d); or
(ii) refer a dispute concerning whether there is a fair reason for the dismissal to the Labour Court in terms of section 191(11).

(8) If a facilitator is not appointed-

(a) a party may not refer a dispute to a council or the Commission unless a period of 30 days has lapsed from the date on which notice was given in terms of section 189(3); and
(b) once the periods mentioned in section 64(1)(a) have elapsed-

(i) the employer may give notice to terminate the contracts of employment in accordance with section 37(1) of the Basic Conditions of Employment Act; and
(ii) a registered trade union or the employees who have received notice of termination may-
(aa) give notice of a strike in terms of section 64(1)(b) or (d); or
(bb) refer a dispute concerning whether there is a fair reason for the dismissal to the Labour Court in terms of section 191(11).'

[11] S 157(4) of the LRA provides as follows:

'(4)(a) The Labour Court may refuse to determine any dispute, other than an appeal or review before the Court, if the Court is not satisfied that an attempt has been made to resolve the dispute through conciliation.
(b) A certificate issued by a commissioner or a council stating that a dispute remains unresolved is sufficient proof that an attempt has been made to resolve that dispute through conciliation.'

[12] The respondent placed reliance on *National Union of Metalworkers of South Africa v Intervalve (Pty) Ltd and Others*[1]*, and The South African Equity Union obo Van Wyk and 100 members v Lodestone Confectionary (Pty) Ltd t/a Candy Tops*[2], in its contention that this court has no jurisdiction to determine the main dispute, and therefor the application for condonation as well.

[13] The applicant relied on *NUMSA obo Members and others v Bell Equipment Co SA (Pty) Ltd*[3] and *Edcon v Steenkamp and Others*[4] in its contention that this court has jurisdiction to determine the dispute since, so it was argued, it was not necessary to refer the dispute to conciliation prior to the referral to this court.

[14] In *Intervalve,* the Constitutional Court stated that a referral to conciliation is a pre-condition to this court's jurisdiction over unfair dismissals:

> 'Referral for conciliation is indispensable. It is a precondition to the Labour Court's jurisdiction over unfair dismissal disputes. NUMSA therefore had to refer the dispute between the employees and Intervalve and BHR for conciliation. The question is whether it did so.'

[15] The court went on to state as follows at paragraph 46 of the judgment:

> 'The purpose of section 191 is to ensure that, before parties to a dismissal or unfair labour practice dispute resort to legal action, a prompt attempt is made to bring them together and resolve the issues between them. Resolving the issues early has benefits not only for the parties, who avoid conflict and cost, but also for the broader public, which is served by the productive outputs of peaceable employment relationships.'

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[1] [2014] ZACC 35, paragraph 40; judgment dated 12 December 2014
[2] Case No. PS19/16, LC judgment handed down on 26 May 2017
[3] (2011) 32 ILJ 382 (LC)
[4] 2015 (4) SA 247 (LAC)

[16] In a concurring judgment Zondo J (as he then was) stated as follows:

> '[108] The main judgment holds that the Labour Court has no jurisdiction to adjudicate the Intervalve dismissal dispute and the BHR dismissal dispute as these disputes were never referred to conciliation. This is right. The Labour Court does not even have a discretion to adjudicate a dismissal dispute that has not been referred to conciliation. The union is using the joinder provision of the Rules of the Labour Court for a purpose for which they were not made. It is using them to get the Labour Court to adjudicate dismissal disputes that were not referred to conciliation because the council refused condonation in respect of the second referral which covered those dismissal disputes. The effect of that decision was that the council refused the union permission to refer the dismissal disputes relating to Intervalve and BHR outside the prescribed 30-day period.
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> …
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> [116] Section 191(5) captures a principle of the dispute resolution dispensation for labour disputes that has been part of various statutes in South Africa for at least the past 90 years. It is not a new principle. The principle is that, before a labour dispute may be the subject of an arbitration or adjudication or industrial action, it should first have been referred to a process of conciliation.'

[17] In *Lodestone*, the employer requested facilitation of the consultations in terms of s189A(3) in a large scale retrenchment. Following a failure by the parties to reach consensus, the employer dismissed the employees for operational requirements. The Labour court, faced with similar facts to the present case, stated as follows:

> ' [8] The fundamental difference between the versions before me is that the applicant is of the view that a purposive interpretation of the LRA exempts applicants whose consultation was facilitated by the CCMA from referring they unfair retrenchments disputes to conciliation. The reason for the exemption is that during the facilitation the parties, with the assistance of the CCMA attempt to reach agreement on all the issues they are required to consult on. A

subsequent conciliation will serve no purpose other than to confirm the outcome of the facilitation. The respondent correctly pointed out that the applicant's argument cannot be correct. Facilitation and conciliation are two different processes. They play different roles. Facilitation is held pre-dismissal with a view to avoid unfair retrenchment. Conciliations are held post dismissal in an attempt to resolve the unfair dismissal dispute.

[9] A proper reading of *Bell Equipment* supports the respondent's version. The decision is based on section 189A(8) of the LRA …

[10] it will be noted that section 189A(8)(a) expresses the need to refer unfair mass retrenchment disputes to the CCMA. The sentiment is echoed by reference to section 191(11) in section 189A(a) and (bb). Section 191(11)(a) provides that the referral of a dispute based on the employer's operational requirements to the Labour Court must be made within 90 days after the CCMA or bargaining council has issued the certificate of the non-resolution of the dispute.

[11] The applicant's argument that *Intervalve* (supra) excludes dismissal of unfair mass retrenchments has no basis as the court did not qualify the word "dismissal". The applicant presented no valid legal basis for their interpretation. The relevant provisions of the LRA are couched in clear and unambiguous language. There is therefore no reason not to give them their literal meaning. The Constitutional Court confirmed that the referral of a dispute to the CCMA or bargaining council and the issuing of the certificate of the non-resolution of the dispute constitute the necessary jurisdictional fact for the Labour Court to have jurisdiction over unfair dismissal disputes which include unfair mass retrenchment disputes. …'

[18] In *Bell Equipment*, the court stated as follows:

'[24] In my view it is clear from subsection (bb) that the referral of a dismissal dispute to the Labour Court does not because of the reference to section 191(11) require yet a further referral to the CCMA or a Bargaining Council because that would already have occurred in terms of subsection 8(a). Likewise, I would consider it to be absurd if the reference to section 191(11) were to be read in that manner in the context of subsection 7(b)(ii) (quoted in paragraph 14 above). In arriving at this conclusion I take into account two important factors. The first is that in the event of the appointment of a facilitator, the parties benefit from the facilitation process which is not identical to but not dissimilar from the facilitation process. What is more, a period of 60 days must elapse from the date on which the section 189(3) notice is given before an employer may give notice to terminate. Secondly, subsection 7(b)(i) does not require a trade union or the employees who have received notice of termination to refer a dispute to the CCMA or the Bargaining Council for conciliation and for a certificate of non-resolution to be issued should the employees wish to give notice of a proposed strike in terms of section 64(1)(b) of the LRA. I can see no reason why the legislature in drafting subsection 7(b)(ii) would require employees to refer disputes to the CCMA or a Bargaining Council if they wish to refer such disputes to the Labour Court.'

[19] I am inclined to agree with the reasoning in *Bell Equipment*.

[20] In my view, the reference in s189A(8) to s64(1)(a)[5], is indicative of the fact the applicant may refer the dispute to conciliation after the expiry of 30 days from the issue

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[5] 64. Right to strike and recourse to lock-out

(1) Every employee has the right to strike and every employer has recourse to lock-out if -

(a) the issue in dispute has been referred to a council or to the Commission as required by this Act,

and

(i) a certificate stating that the dispute remains unresolved has been issued; or

of a s189(3) notice, and thereafter *upon the issue of a certificate of non-resolution or the expiry of 30 days, the applicant may give notice of a strike or refer the matter to adjudication in terms of s 191(11).* The reference in s189A(8) to s 191(11) clearly envisages the position where the dispute was already referred to conciliation and a certificate of non-resolution was issued or a period of 30 days had expired.

[21] In the case of s189A(7), there is no reference to any requirement of a referral in terms of s64(1)(a) as there is in s189A(8). The employer is entitled, after a period of 60 days has elapsed, to give notice of termination in accordance with s37(1) of the BCEA, and the employees are entitled to either give notice of a strike in terms of *s64(1)(b) or (d)*, or refer a dispute concerning whether there is a fair reason for the dismissal to the Labour Court in terms of s191(11).

[22] In my view, if the legislature intended that the dispute be referred to conciliation after the expiry of the 60-day period, it would have stated that the employees were entitled to refer a dispute to the Labour Court in terms of section 191(1).

[23] It is to be noted that the *Facilitation Regulations*[6] provide as follows*:*

'9. Referral of dispute to Labour Court
A dispute in terms of section 189A(7)(b)(ii) must be referred to the Labour Court within 90 days of the notice of termination or, if no notice is given, *within 90 days of the dismissal.*' ( my emphasis)

[24] The court in *Edcon* stated of s189(A)(7) as follows at paragraph 15:

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(ii) a period of 30 days, or any extension of that period agreed to between the parties to the dispute, has elapsed since the referral was received by the council or the Commission; and after that -

[6] Regulations for the Conduct of Facilitations in terms of S189A; GoN R1445, G25525 (c.i.o. 10 October 2003)

'[14] It is immediately evident from this provision that where facilitation has been attempted and 60 days have lapsed since the employer issued a section 189(3) notice inviting consultation and disclosing relevant information, the employer may give notice to terminate the contracts of employment of the employees selected by it for retrenchment in accordance with agreed or fair selection criteria as required by section 189(7) of the LRA. Section 37(1) of the Basic Conditions of Employment Act ("the BCEA") stipulates notice periods for the termination of employment which are variable depending on the employee's period of service.

[15] The notice given by the employer in terms of section 189A(7)(a) of the LRA, after the 60 day period allowed for facilitation has elapsed, triggers the right of the employees or their representatives to resort to either strike action in terms of section 189A(7)(b)(i) of the LRA or litigation in terms of section 189A(7)(b)(ii) of the LRA. There are two notable features of the right to strike conferred by section 189A(7)(b)(i) of the LRA. The first is that the dispute does not have to be referred to a bargaining council or the CCMA for conciliation over a 30 day cooling-off period, as is normally required in terms of section 64 of the LRA. Where there has been a facilitation process, it would be unnecessary duplication to require an additional 30-day conciliation process at the end of the 60 day period allowed for facilitation - bearing in mind that the parties may agree to extend the facilitation period in terms of section 189A(2)(c) of the LRA. Likewise, the envisioned referral to the Labour Court in terms of section 191(11) of the LRA does not require a prior referral to conciliation. Secondly, the requirement of 48hrs notice of the commencement of the industrial action remains applicable.

[16] Where a facilitator is not appointed a different process is followed. In such instances, the legislature contemplated that the ordinary conciliation and cooling-off provisions should continue to apply. …'

[25] It was submitted by the respondent that the above statement in *Edcon* was *obiter* and is not binding on this court. It is accepted that the statement was made *obiter* in the course of determining the actual import of s189A(8), however, the interpretation is

nonetheless persuasive. It is noted that although the judgment in *Lodestone* makes no reference to the reasoning in the *Edcon* judgment, the views expressed by the court in the *Bell Equipment* judgment were echoed in the *Edcon* judgment, although obiter.

[26] I take note of the *Intervalve* judgment and the overall requirement that a referral to conciliation is a pre-requisuite to arbitration or adjudication by the Labour Court. However, the references to s191(11) in both s189A(7) and (8) both envisage prior involvement or assistance by a conciliator or facilitator of the CCMA or a bargaining council. In my view, the interpretation imputed to the requirements of s189A(7)(b)(ii) and s189A(8)(b)(ii)(bb) do not contradict the *Intervalve* judgment.

*Application for condonation*

[27] The principles applicable to applications for condonation are trite. The applicant must show good cause for the Court to condone the non-observance of the time frames.

[28] In *Melane v Santam Insurance Co. Ltd*[7], the court stated as follows of 'good cause':

> 'In deciding whether sufficient cause has been shown, the basic principle is 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 therefor, the prospects of success and the importance of the case. Ordinarily these facts are interrelated, they are not individually decisive, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate prospects which are not strong. Or the importance of the issue and strong prospects may tend to

[7] 1962 (4) SA 531.

compensate for a long delay. And the Respondent's interests in finality must not be overlooked"

[29] In *Brummer v Gorfil Brothers investments (Pty) Ltd and Others*[8], the Constitutional Court has since added that an application should be granted if it is in the interests of justice:

'It is appropriate that an application for condonation be considered on the same basis and that such an application should be granted if that is in the interests of justice and refused if it is not. The interests of justice must be determined by reference to all relevant factors including the nature of the relief sought, the extent and cause of the delay, the nature and cause of any other defect in respect of which condonation is sought, the effect on the administration of justice, prejudice and the reasonableness of the applicant's explanation for the delay or defect.'

[30] In *Department of Home Affairs and Another v Ndlovu and Others*[9], the court stated as follows:

' Of course it is well established that the factors in a condonation application "are not individually decisive but are interrelated and must be weighed one against the other." See Melanie v Santam Insurance Co Ltd 1962 (4) SA 531. In Jansen v General Public Service Sectoral Bargaining Council and Others,[2] the Labour Court applying the decision in PPWAWU and Others v AF Dreyer and Co (Pty) Ltd [1] [1997] 9 BLLR 1141 (LAC) stated that:

'*Even if it is found that explanation does not constitute a reasonable explanation it will not necessarily be regarded as an absolute bar to condonation.*'

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[8] [2000] ZACC 3; 2000 (5) BCLR 465 (CC) at para 3

[9] (DA11/2012) [2014] ZALAC 11; [2014] 9 BLLR 851 (LAC); (2014) 35 ILJ 3340 (LAC) (27 March 2014)

[31] The applicant employees were retrenched with effect from 12 November 2020. The dispute was referred to the Labour Court on 29 April 2021.

[32] According to the applicants, the reason for the delay in referring the matter to this court is as follows:

a. According to Lawrence Mlangeni who deposed to the applicants' founding affidavit, the matter was initially dealt with by a former official of the first applicant, Paulos Maduna, who retired from service with the first applicant with effect from 31 January 2021. Elton Gordon, another union official was tasked by the applicant to delegate the many matters that Maduna had been dealing with. He delegated the matters that he had been tasked to deal with according to their urgency as he saw fit in his delegation exercise. He focused *inter alia* on matters that had been set down for hearing and others that were obviously urgent from the notes or documents in the files. The Covid 19 pandemic has also had a massive effect on the workload of the first applicant.

b. The first applicant had closed its offices for its annual break on 15 December 2020 and reopened on 20 January 2021. The respondent had closed for its annual shutdown on 16 December 2020 and resumed its operations on 14 January 2021.

c. In the latter part of January 2021, the further applicants began calling the first applicant's offices enquiring about their matter. All the calls were answered by Gordon. However, Gordon did not make a record of the calls that he received and has been unable to provide exact dates and times of the calls which he received and who the callers were. He was unaware, despite the calls that he received, that the further applicants had been dismissed and was under the mistaken impression that the retrenchment exercise was still underway.

d. Gordon delegated the matter to Mlangeni towards the end of February 2021. By this time, although they did not know it, the matter should have been referred to the Labour Court on or before 13 February 2021. Mlangeni examined the file and from his perusal it appeared that the retrenchment process had not been finalised. (There was no note or reference to the dismissal of the further applicants and he had no knowledge as to why Maduna had not referred the matter to the Labour Court.) He was under severe work pressure and managed to arrange a consultation with the further applicants on the first date that he was available being 16 March 2021 outside normal business hours at 06h 30.

e. According to Mlangeni, although it is almost unbelievable, he was not made aware during the consultation that the further applicants had been retrenched. He knew that they were not attending work at the respondent's plant and had not attended since their reinstatement on 25 August 2020. He left the consultation under the firm belief that the retrenchment process was still underway.

f. On 31 March 2021, after receiving the go ahead from the relevant structures of the first applicant, he made contact with the applicants' attorneys of record and arranged a consultation with Brett Purdon for the first available date which was 8 April 2021. The matter was dealt with by Jenine Soobramoney-Pillay of the attorney's office.

g. He was not present at the consultation but that was the first time that they learnt of the dismissal of the further applicants.

h. During the consultation, it turned out that further information was required from the further applicants with regard to what took place at the facilitation meetings, Such information was provided to the legal representatives by the shop stewards on 13 April 2021. Further consultations were arranged with the legal representatives for the preparation of the application papers. The further delays

from 13 April 2021 where on account of the availability of the attorneys, their workload and Mlangeni's own workload with section 189 meetings at various companies as well as arbitrations. The earliest date that he was available was 26 April 2021. He met with Soobramoney-Pillay on 26 April 2021 but Maduna was unavailable and they had to piece together as best they could what had occurred both at the respondents plant and outside of it. This disadvantage was the direct cause of the multiple consultations that took place and the further delays that resulted. It was submitted that the further applicants were not the cause of any delay and should not be disadvantaged by something that was outside of their control as they showed continued interest in the matter.

i. According to Lawrence Mlangeni, Maduna has since his departure been unavailable and the applicants have had to piece together what occurred both at the respondent's plant and outside of it in this matter between November 2020 and the date of deposing to the affidavits in support of the application for condonation.

j. Elton Gordon and Soobramoney-Pillay deposed to confirmatory affidavits.

[33] The deponent to the respondent's affidavit confirms that Maduna was involved in the consultation process leading up to the retrenchments of the further applicants on 12 November 2020, and states that an email was sent on 22 October 2020 to him and the shop stewards representing the further applicants confirming a number of issues arising out of the facilitation process including the fact that the further applicants would be retrenched with effect from 12 November 2020. The shop stewards involved in the consultation process were S. Sithole and B. Mthembu. They are still employed by the respondent.

[34] The respondent contends that the applicants provide no explanation, in the absence of Maduna and the further applicants' assertion that they were unaware that their services were terminated, as to why the shop stewards were not consulted as they

were part of the consultation process leading up to the retrenchment of the further applicants, they were involved at the time of the retrenchment, and knew that the further applicants had been retrenched. Furthermore, three of the further applicants namely Mjweni, Dlamini and Thwala signed retrenchment agreements terminating their employment and were accordingly not dismissed.

[35] It was submitted that there was no confirmatory affidavit from Maduna and no explanation as to why there was no discussion with him regarding this matter prior to his departure. It could never be that the deponent to the founding affidavit was unaware that the retrenchment exercise had been completed as this would have been clear from the correspondence between the parties and the file. The further applicants consulted with the union on 16 March 2021. According to the respondent, it was unbelievable that the further applicants did not make Mlangeni aware that they had been retrenched particularly since the union and the shop stewards were advised on 22 October 2020 and the further applicants advised on 12 November 2020. Furthermore, one of the further applicants, Mjweni, signed an agreement regarding his retrenchment on 19 November 2020. The applicant's version was clearly an attempt to mislead the court. The explanation proferred by the applicants was poor. Furthermore the dispute had not been referred to conciliation and this was fatal to the applicant’s claim.

[36] The respondent submits that the applicants appear to attach the sole blame for the delay in referring the dispute to this court on the fact that Maduna retired and have not explained why the shopstewards were not consulted.

[37] Clearly there was no proper handover because if there had been, the first applicant would have been better prepared to take over the workload of Maduna. However, it is noted that according to Mlangeni, in addition to the increased workload on account of Maduna’s departure, the Covid 19 pandemic had also had a massive effect on the workload of the first applicant. This is not inconceivable.

[38] Furthermore, according to Mlangeni there were no notes on file which would have alerted the first applicant to the urgency of the further applicants' case. In the absence of any gainsaying evidence on this issue the court accepts this as a probable version.

[39] More important is Mlangeni's explanation that he did not realise, even after consulting with the further applicants on 16 March 2021, that they had already been retrenched. He believed that the retrenchment process was still continuing. In view of the history of the dispute, and the fact that it is not in dispute that the further applicants had not attended work since the order for their reinstatement on 25 August 2020, his explanation is not an unreasonable one. The respondent has not disputed that the further applicants' tender of services was never accepted and that they remained off site thereafter. Mlangeni stated that he did not consult the shop stewards because he had no reason to do so given his belief that the retrenchment had not been finalized. This is a reasonable explanation.

[40] With regard to the prospects of success, the applicant's version, further to what has been detailed earlier, was that the further applicants tender of services after the court order was never accepted and they remained off-site.

[41] According to the respondent, following the issue of the order in favour of the applicants on 25 August 2020, it recommenced the consultation process by issuing a new notice in terms of s189(3) of the Act. A facilitator was appointed by the CCMA, four facilitation meetings were held, and the facilitation meetings dealt with inter alia the reasons why the respondent proposed retrenching the further applicants; the selection criteria to be applied which was LIFO subject to a skill retention and/or where employees positions had become redundant; the period over which the consultation process would take place; alternatives to the proposed retrenchment and the severance packages to be paid in the event employees were to be retrenched. The parties were unable to reach consensus and on 12 November 2020 the further applicants services were terminated based on the respondent's operational requirements. Maduna and the

shopstewards had been sent an email confirming a number of issues arising out of the facilitation process including the fact that the further applicants would be retrenched with effect from 12 November 2020. The respondent had not at any stage hired new employees to undertake the work of the further applicants. As part of the restructuring exercise, Mjweni and Ndlovu's positions were made redundant and their functions were incorporated into those of other employees. The positions of Dlamini, Van der Byl and Thwala have not been filled. Insofar as Ntuli was concerned, a decision was taken to reduce the number of engineering assistants from three to two, and there was no need for another engineering assistant. Three of the further applicants, Mjweni, Dlamini and Thwala signed retrenchment agreements terminating their employment and as such were not dismissed.

[42] On the facts presented, I am unable to conclude that the applicants have no reasonable prospects of success. The applicants' version, that after the issue of the court order, the further applicants' tender of service was never accepted and that they remained off-site, has not been specifically disputed. The respondent's version that it had employees tender their services at different times due to the various Covid pandemic regulations imposed by the government appears to address only the period prior to the court order, and does not adequately respond to the applicants' contention. According to the applicants, the second retrenchment exercise mirrored the first, the respondent's stance did not change, and what followed was a 'sham consultation process'.

[43] Furthermore, according to the applicants, the respondent has not put up any of the agreements purportedly signed by the further applicants, they do not have copies of any documents which they may have signed, and such applicants did not forfeit their rights to refer an unfair dismissal dispute to this court.

[44] There is clearly a dispute on the facts which is best ventilated at trial.

[45] Any prejudice to be suffered by the respondent is outweighed by that to be suffered by the further applicants who have been retrenched in the circumstances of this case.

[46] If one considers the fact that the dispute was referred to this court some five and a half months after the date of termination of the further applicants' services, the delay was two and a half months which although long, is not excessive in the circumstances.

[47] I do not find it necessary to make any costs orders in this case.

[48] In the premises, I make the following order:

Order

1. Condonation is granted in respect of the late filing of the applicant's statement of claim.

2. There is no order as to costs.

Narini Hiralall
Acting Judge of the Labour Court of South Africa

APPEARANCES

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|---|---|
| For the Applicant : | Adv. Aldworth |
| Instructed by. : | Purdon and Moonsamy Attorneys |
| For the Respondent : | Adv. Cithi |
| Instructed by : | Mervyn Taback Inc. t/a Andersen |