

SOUTH AFRICA / JUDGMENT

Monyela and Others v Diri Aluminium (Pty) Ltd (JS 579/2021) [2023] ZALCJHB 54 (8 March 2023) [2023] ZALCJHB 54

COURT

Labour Court Johannesburg

BEFORE

Van Niekerk

CASE / FILE NUMBER

JS 579/2021

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THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

Reportable

Case

No: JS 579/2021

In

the matter between:

TSENGWAKO

JOEL MONYELA AND 7 OTHERS Applicant

and

DIRI

ALUMINIUM (PTY) LTD

Respondent

Heard:

07 March 2023

Delivered:

08 March 2023

(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 SAFLI. The date on which

the judgment is delivered is deemed to be 08 March

2023.)

JUDGMENT

VAN NIEKERK, J

- [1] The applicants seek condonation for the late referral of their statement of claim. The applicants were dismissed by the respondent in December 2020. On 8 December 2020, the applicants referred an unfair dismissal dispute to the CCMA. On 29 December 2020, the CCMA issued a certificate to the effect that the dispute remains unresolved. The 90-day period within which the statement of claim was to have been filed thus expired on 29 March 2021.
- On 21 May 2021, the applicants referred their dispute to arbitration. On 1 June 2021, the CCMA is suited ruling to the effect that it lacked jurisdiction. On 27 October 2021, the statement of claim was filed in this court. In response to a special plea raised by the respondent, the present application for condonation was filed in this Court, but served on the respondent's attorney only on 27 January 2023.
- [2] The general principles applicable to condonation are well-established. Condonation is not there merely for the asking, nor are applications for condonation a mere formality (see *NUMSA v Hillside Aluminium* [2005] ZALC 25; [2005] 6 BLLR 601 (LC); *Derrick Grootboom v National Prosecuting Authority & another* [2014] 1 BLLR (CC)). A party seeking condonation must make out a case for the indulgence sought and bears the onus to satisfy the court that condonation should be granted.
- [3] This court is required to exercise a discretion, having regard to the extent of the delay, the explanation proffered for that delay, the applicant's prospects of success, and the relative prejudice to the parties that would be occasioned by the application being granted or refused. Ordinarily, these factors are not individually decisive but are interrelated, and must thus be weighed one against the other. In this court, that formulation, which has its roots in *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A), has long been qualified by the rule that where there is an inordinate delay that is not satisfactorily explained, the applicant's prospects of success are immaterial. In *National Union of Mineworkers v Council for Mineral Technology* [1999] 3 BLLR 209 (LAC) the LAC said the following:
- ... 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.
- [4] An applicant seeking condonation must offer an explanation for the full length of the delay (see *Independent Municipal and Allied Trade Union obo Zungu v SA Local Government Bargaining Council and others* (2010) 31 ILJ 1413 (LC)). In *eThekweni Municipality v Ingonyama Trust* 2013 (5) BCLR 497 (CC), the Constitutional Court said the following:

In a case where the delay is not a short one, the explanation given must not only be satisfactory but must also cover the entire period of the delay. Thus in *Van Wyk v Unitas Hospital and another* (Open Democratic Advice Centre as Amicus Curiae), this Court said in this regard:

- i. An applicant for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of the delay. And, what is more, the explanation given must be reasonable.’
- [5] In the present instance, the period of delay is inordinate. The statement of claim was filed some 7 months out of time. The application for condonation was delivered only in January 2023 almost 2 years after the expiry of the statutory time limit. So far as the reasons for the delay of consent, as counsel for the respondent pointed out, the founding affidavit in support of the condonation application is deposed to by a Mr. Boloka. Boloka is not one of the persons who is recorded in the annexure to the referral of the dispute to the CCMA as a party to the dispute. Nor is Boloka recorded as an applicant in the statement of claim. In his affidavit, Boloka explains that he was traumatized by the dismissal and emotionally not in a state to instruct an attorney. This explanation is personal, and specific to Boloka. There is simply no explanation proffered by those persons who were party to the referral to the CCMA, and who are party to the statement of claim. For this reason alone, in the absence of an explanation for the delay by any of the parties to the dispute, the application for condonation stands to be dismissed.
- [6] In any event, there are significant periods of delay that are simply not explained. Even if I accept that part of the delay was occasioned by a mistaken referral to arbitration, the CCMA made clear on 1 June 2021 that it had no jurisdiction to arbitrate the dispute. There is no explanation for the delay between that date and 27 October 2021, when the statement of case was delivered. Further, there is no explanation for the delay in filing the application for condonation with the registrar only online in February 2022, and no explanation for the almost 12 months it took to serve on its attorneys, and thus deliver the application as required by the rules.
- [7] In accordance with the authorities referred to above, in the absence of an acceptable explanation for an inordinate delay, the applicant’s prospects of success are irrelevant.
- [8] The respondent (charitably) did not pursue the issue of costs.

I make the following order:

1. The application for condonation dismissed.

André van Niekerk

Judge of the Labour Court of South Africa

Appearances:

For the applicant:

Adv V Nethavhani

Instructed by:

Ramavu Attorneys

For the respondent:

Adv J Prinsloo

Instructed by:

De Villiers & Plessis Attorneys

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