

SOUTH AFRICA / JUDGMENT

P3 Mining Services v National Union of Mineworkers and Others; In re: National Union of Mineworkers and Others v P3 Mining Services (JS960/13) [2014] ZALCJHB 358 (16 September 2014)

[2014] ZALCJHB 358

COURT

Labour Court Johannesburg

BEFORE

Tlhotlhemaje

CASE / FILE NUMBER

JS960/13

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REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JS 960/13

P3 MINING SERVICES and NATIONAL UNION OF MINEWORKERS NOZIPHO MJAMBA VUYISILE DLADLA MPHO MANAKWANA JOHN KLEINBOY In re: Applicant First Respondent Second Respondent Third Respondent Fourth Respondent Fifth Respondent NATIONAL UNION OF MINEWORKERS NOZIPHO MJAMBA VUYISILE DLADLA MPHO MANAKWANA JOHN KLEINBOY and P3 MINING SERVICES First Applicant Second Applicant Third Applicant Fourth Applicant Fifth Applicant Respondent

Heard: 26 February 2014

Delivered: 16 September 2014

TLHOTLHALEMAJE, AJ

Introduction:

- [1] The Applicant (Respondent in the main application) approached the Court to seek condonation for the late filing of its opposition to the Respondents' statement of claim. The Respondents had opposed the application for condonation.

Chronological

background:

- [2] The First Respondent (NUM) filed a Statement of Case on 14 October 2013, to challenge the fairness of the retrenchment of its members being the Second to Fifth Respondents. On 28 October 2013, the Applicant filed its Notice of Intention to Oppose. The actual Opposing Affidavit was however filed by the Applicant on 11 December 2013. On or about 13 December 2013, NUM filed a “Notice of Objection to Late Filing” of the Applicant’s notice to oppose. The Applicant filed an application for condonation in respect of the late filing of the Opposing Affidavit on 8 January 2014. NUM filed a statement of reply on or about 20 January 2014, wherein it also raised the issue of the late filing of the statement of response.

The legal framework in respect of applications for condonation:

- [3] When considering whether or not to grant condonation, the Court should take regard of the well known principles which were set out in *Melane v Santam Insurance Co Ltd*[1] as follows:

'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 of success may tend to compensate for a long delay. And the respondent's interests in finality must not be overlooked.'[2]

Degree of lateness:

- [4] The extent of the lateness of delivery of the Opposing Affidavit is in dispute. The Applicant contended that the delay is about 16 days, whilst the Respondents were of the view that the delay is in effect 47 days late. In explaining the extent of the delay, the Applicant’s Director, Andile Nokama, averred in his Founding Affidavit that he was legally advised that he had 15 days within which to serve and file the Opposing Affidavit from 29 October 2013. He had thought that he had until 18 November 2013 within which to file the Opposing Affidavit. However, due to other unforeseen circumstances, the Applicant was only able to file and serve its Opposing Affidavit on 11 December 2013.

- [5] In terms of Rule 6 (3) (c) of the Rules of this Court, a response must be delivered within 10 days of the date on which the statement of claim is delivered. ‘Day’ as defined in the Rules ‘means any day other than a Saturday, Sunday or public holiday, and when any particular number of days is prescribed for the doing of any act, the number of days must be calculated by excluding the first day and including the last day’.
- [6] The Statement of Claim was served on the Applicant on 10 October 2013 whilst the actual Opposing Affidavit was filed on 11 December 2013. In line with the above definition, the Applicant was obliged to file its response to the statement of claim on 27 October 2013.
2013. To the extent that the actual opposition was filed on 11 December 2013, the delay in filing the Opposing Affidavit is 33 days, which in my view is significant, but not excessive.

Explanation for the delay:

- [7] It is trite an application for condonation must be filed as soon as a party becomes aware of the need to do so. Furthermore, the explanation proffered for the delay must account for each period that the delay occurred, and a detailed account in that regard is required. Nokama’s explanation is essentially that the Applicant’s Board of Directors only gave a mandate on 14 November 2013 for Counsel to be briefed and to compile a draft opposing affidavit. Nokama averred that he also had to travel to the Eastern Cape from 16 November 2013 until 5 December 2013 to attend to urgent family matters. He averred that during the said period, he did not have access to his e-mails due to lack of a signal, and could not access his e-mails pertaining to the draft Opposing Affidavit and other correspondence sent by the Applicant’s attorneys of record until 5 December 2013.
- [8] Nokama returned from the Eastern Cape on 6 December 2013 and immediately contacted the Applicant’s attorneys of record to finalise the drafting of the Opposing Affidavit. This was done on 10 and 11 December 2013 when the Applicant’s attorneys of record became available.
- [9] The Respondents contend that condonation should not be granted and that the delay is excessive and that there is an absence of a reasonable explanation for that delay.
- [10] Having had regard to the averments made on behalf of the Applicant, I am of the view that the reasons for the delay are not fully explained by Nokama, and further that he had not given account for each period of the delay. Firstly, it is apparent that the legal advice he had received was incorrect in the light of the calculation of days and the time periods to be complied with as contemplated in Rules of this Court. Secondly, notwithstanding the fact that even on his incorrect calculation, the deadline was 18 November 2013, the opposing affidavit was not even attended to as at 16 November 2013 when Nokama had left for his own personal business

to the Eastern Cape. The nature of the urgent business he allegedly had to attend to is not explained, and it is not known in what

material respects this trip had prevented him from attending to the opposing affidavit before then. In my view and on the whole, there is clearly no satisfactory explanation proffered for the delay.

Prospects of success:

- [11] The Respondent's contention was that the Applicant failed to address its prospects of success, and further that the selection criteria used in retrenching the individual respondents was subjective and unfair. The Respondents further submitted that the retrenchments were not in accordance with the agreement.
- [12] The Applicant did not address the prospects of success in its application but alleges that it has made out "a good, clear and compelling case as more fully set out from the Opposing Affidavit." In its response to the main claim, the Applicant submitted that the final decision to retrench was consensual; that proper consultations were held with all shop stewards in attendance; that the Respondents were fully aware of the selection criteria and that an agreement was reached after the consultation process.
- [13] In *Brummer v Gorfil Brothers Investments (Pty) Ltd*[3], Jacob J had stated that the interests of justice should be an overall consideration when dealing with applications for condonation.

The Constitutional Court also stated that although the existence of prospects of success in favour of the party seeking condonation is not decisive, it is a weighty factor in favour of granting condonation.

- [14] Notwithstanding the fact that an agreement may have been concluded in ultimately retrenching employees, it is expected that invariably, disputes will always arise in regards to the reasons for the retrenchment and the fairness of the process embarked upon in retrenching those employees. In view of a number of dispute of facts as raised by the parties as to the fairness of the retrenchment in question, even though prima facie it appears that the prospects might favour the Applicant, it is my view that it would not be in the interests of justice to deprive it an opportunity to defend against the Respondent's claim, more so in the light of the non-excessive nature of the delay in filing the opposing affidavit.

Other considerations and conclusions:

- [15] It cannot be doubted that this case is of importance to both parties, and it is in this regard that it has been concluded that they should be granted an opportunity to properly ventilate the dispute before the Court. The Labour Appeal Court in *Kerradam Properties (Pty) Ltd t/a Cabanga Conference Centre v Sonica Matthee*[4] emphasised that the factor of prejudice plays a role only when the delay is substantial. In this case, I have already indicated that the delay was not excessive in the extreme, and to this end, I am of the view the prejudice that the Respondents suffered is not incurable, whilst it is the Applicant that stands to suffer more prejudice if condonation were to be declined.

- [16] The Applicant in its Replying Affidavit in respect of the condonation application had also raised an issue surrounding the authority of Mr. Bongi Zwane to depose to the Answering Affidavit, and further raised an issue about the said affidavit not complying with the requirements prescribed by the Justice of the Peace and Commissioner of Oaths Act, 16 of 1963. In this regard, it was contended that the Answering Affidavit was defective.
- [17] In the Answering Affidavit in respect of this application, Mr Zwane had clearly not stated in what capacity he had deposed to that affidavit and whether he had authority to do so. On the face of it, the affidavit appears to be defective. I am however of the view that the defect is not material to have that affidavit completely disregarded for the purposes of opposing the application. Furthermore, there is no substance to the allegation that the affidavit is not properly deposed of, signed and sworn before a Commissioner of Oaths as evident from page 23 of the pleadings bundle.
- [18] Having had regard to the the above and other circumstances pertaining to this application, it is therefore considered appropriate to make the following order:

Order:

- i. The late filing of the Opposing Affidavit to the Respondents' statement of claim is condoned.
- ii. The parties are directed to hold a pre-trial conference and to file a signed pre-trial with the Court within 30 days of the handing down of this judgment.
- iii. There is no order as to costs.

Tlhotlhemaje, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

On behalf of the Applicant: Adv M Bengequla

Instructed by:

Ehlers Fakude Inc

On behalf of the Respondents: Mr B Zwane of the National Union of Mineworkers

[1] 1962

(4) SA 531 (A)

[2] At 532B-E

[3]

[2000] ZACC 3; [2000]

(2) SA 837 (CC) at 839 F

[4] Case no: JA 72/2010 at para 5

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Prepared on 11 October 2026 · Esheria