

SOUTH AFRICA / JUDGMENT

Sehwana and Others v Meribrite (PTY) Ltd (Bendor Engen) (JR 443/2018)

[2022] ZALCJHB 205 (2 August 2022)

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COURT

Labour Court Johannesburg

BEFORE

Van Niekerk

CASE / FILE NUMBER

JR 443/2018

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THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

Reportable

Case

No: JR 443/2018

In

the matter between:

MATEBETA ABRAM

SEHWANA

1st Applicant

RATSOMA

ANN

2nd

Applicant

LEGODI

JACK

3rd Applicant

LEGWADI

LUCAS

4th Applicant

LEGWADI

MARIA

5th Applicant

MABOTJA

COLLINS

6th Applicant

MANGANYI

BERNARD

7th Applicant
MOKWENA
MOSES
8th Applicant
MOTHAPO
CHRISTINA
9th Applicant
MANOKO
RETHABILE
10th Applicant
MOTHAPO
SARAH
11th Applicant
MADUBANYA
MARIA
12th Applicant
MOKWELA
VELMINAH
13th Applicant
LETSOALO
MAGDELINE
14th Applicant
MOLEPO
ELSI
15th Applicant
MABITSELA
FRANK
16th Applicant
CHWEU
HELLEN
17th Applicant
LEDWABA
PAUL
18th Applicant
KGASAGO
CHUENI
19th Applicant
BALOYI
ELIZABETH
20th Applicant
LEKALA
BENNY
21st Applicant
RAMOROKO
ISAAC
22nd Applicant
SELEPE
SILVER
23rd Applicant
MAFOIKA
CRAUSE

24th Applicant
MPHELA
KENNETH
25th Applicant
MATLOU
PAULINA
26th Applicant
RAMMALA
VINCENT
27th Applicant
MAHUMA
TITUS
28th Applicant
MABOTJA
BERNARD
29th Applicant
And
MERIBRITE (PTY) LTD
(BENDOR ENGEN)
Respondent

Heard: 28 July 2022

Delivered: 02 August 2022
(In
view of the measures implemented as a result of the Covid 19
pandemic, this judgement was handed down electronically by
circulation
to the parties' representatives, by email. The date
on which the judgment is delivered is deemed to be 02 August 2022.)

JUDGMENT

VAN NIEKERK, J

- [1] The applicants seek condonation for the late referral of a dispute in terms of Rule 6.
- [2] The applicants contend that they were unfairly dismissed by the respondent in April 2017. It would appear from the statement of case that they contest the substantive and procedural fairness of their dismissal.
- [3] The applicants initially referred a dispute concerning an alleged unfair labour practice to the bargaining council. That referral was dismissed on 10 July 2017 when the presiding panellist found that the nature of the dispute was one that concerned unfair dismissal. The matter was again referred, this time on the correct basis, with an application for the late referral of the dispute. On 5 February 2018, the presiding panellist condoned the late referral of the dispute, and on the same date issued a certificate of outcome, recording that an unfair dismissal dispute between the parties remained unresolved, and indicating that the matter could be referred to this court for adjudication.

- [4] On 8 May 2018, the applicants' attorney filed an application headed "NOTICE ITO S 185 READ WITH S 145 OF THE LRA' in this court. By way of a notice of motion and attached founding affidavit, the applicants sought reinstatement with retrospective effect. The applicants' attorney concedes that the application was an irregular step, since it did not constitute a referral in the form prescribed by Rule 6. Be that as it may, when the matter was enrolled on 21 August 2018, the applicant was directed

to file a statement of case in terms of Rule 6. The applicant did so on 5 September 2018. The respondent filed a statement of response on 26 September 2018. A pre-trial conference was held on 16 November 2018, and a minute and addendum to the minute filed. On 21 October 2019, the matter again came before the court when it was postponed sine die and the applicant directed to file an application for the late filing of the statement of case. This is the application that serves before the court.

- [5] The general principles to be applied 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.

- [6] 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.

- [7] 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.

- [8] The application for 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:

‘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.’

[9] The 90-day period within which the statement of case ought to have been filed expired on 6 May 2018. The statement of case was thus filed some four months out of time. It is not correct, as the applicant’s attorney submitted, that the matter was only four days late, relying as he did on the abortive application filed on 8 May 2018. The delay between the issuing of the certificate of outcome and the filing of the compliant statement in terms of Rule 6, is significant but it is not excessive. The explanation for the delay is one that centres on the lateness of the filing of the application. That notwithstanding, it is clear from the papers that when the applicants were ordered on 21 August 2018 to file a statement of case

within 14 days, they did so. The true explanation for the delay is the ineptitude of the applicant’s attorney and in particular,

his referral by way of notice of motion. Although, as I have indicated, that was an irregular step, it is indicative of the applicants’ intent to pursue the dispute. Any shortcoming in procedure compliance cannot be laid at the door of the applicants. The applicants cannot be blamed for assuming, as they no doubt did, that the matter was in the hands of their attorney and that when it came before the court on 21 August 2018, the trial would proceed. What further counselling the applicant’s favour is the fact that when ordered to do so, the applicants filed the statement of case within the required time period. In short, there is a satisfactory explanation for a lengthy but not inordinate delay.

[10] Insofar as the prospects of success are concerned, this is a neutral factor and it will remain for the trial court to determine the merits of the applicant’s claim. Turning finally to the question of prejudice, a refusal to condone the late referral of the statement of claim or close the doors of the courts to the applicants in circumstances where the delays thus far are not of their own making. The respondent is entitled to put its case before the court and defend the position that it took when the applicants’ contract of employment terminated. The matter remains ripe for hearing, a pre-trial minute having been filed. In these circumstances, and on a conspectus of all of the relevant factors, the interests of justice are best served by an order that late referral of the statement of claim be condoned.

[11] Finally, insofar as costs are concerned, for the purposes of section 162 of the LRA, the requirements of the law and fairness are best served by each party bearing its own costs.

I make the following order:

1. The late filing of the applicant’s statement of claim is condoned.

2. The registrar is directed to allocate a trial date.

André van Niekerk

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

M Mashao, Mashao Attorneys Inc.

For the respondents: M Vittee, Mayet Vittee Inc.

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