

SOUTH AFRICA / JUDGMENT

Selvan v Crossroads Distribution (Pty) Ltd (JS182/17) [2017] ZALCJHB 406 (3 November 2017) [2017] ZALCJHB 406

COURT

Labour Court Johannesburg

BEFORE

Cele

CASE / FILE NUMBER

JS182/17

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IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JS 182/17

In the matter between

BRYAN DAVID SELVAN Applicant and CROSSROADS DISTRIBUTION (PTY) LTD Respondent

Heard:

01 September 2017

Delivered: 01 September 2017

Edited:

03 November 2017

EX TEMPORE JUDGMENT

Cele, J:

Introduction:

- [1] The application before me is one brought in terms of section 191 (11)(a) and (b)[1] of the Labour Relations Act,[2] hereafter referred to as the LRA or the 'Act', where the applicant seeks to be granted condonation for the late referral of an unfair dismissal dispute relating to retrenchment, to this court.

- [2] The respondent opposes the application acting on its capacity as the erstwhile employer of the applicant.

Factual

background.

- [3] The applicant was employed by the respondent in the capacity of a National Human Resources Manager.
- [4] In August 2015 the respondent commenced a process of retrenching some 45 operational staff. This action was precipitated in part by the respondent having some difficulty in receiving payment on one of the larger accounts, that is, from the South African Post Office.
- [5] On 11 January 2016 the respondent then issued a Notice in terms of section 189A[3] of the LRA indicating that a further 120 operational staff members were likely to be retrenched, given that the SAPO (South African Post Office) contract was due to come to an end on 31 March 2016.
- [6] The retrenchment process was facilitated by the Commission for Conciliation, Mediation and Arbitration (CCMA).

On 15 April 2016 the scope of the section 189 (A) process was extended by the respondent to include additional functions, such as support services. This is despite the fact that the employees in these functions had not participated in the facilitated process referred to earlier on. In other words, what the respondent did in April, was to serve further notices to those of its employees who had not been affected by the January notice.

- [7] By virtue of the position held by the applicant, the National HR Manager, he (the applicant) was intimately involved in the

retrenchment process, which started in January as already alluded to.

- [8] On 20 April 2016 the applicant was advised of the respondent's intention to retrench him, on account of alleged redundancy of his role.
- [9] Assertions by the applicant: He says that there was no real reason to retrench him. Alternatively, his retrenchment could have been avoided. His dismissal was presented as a *fait accompli*. He was not given proper notice of the respondent's intention to retrench him, as required by section 189[4] of the LRA.
- [10] The consultation process undertaken by the respondent was a sham and no real attempt was made by the respondent to engage in a meaningful joint consensus seeking process, and he says, the procedure followed by the respondent was so grossly unfair and done with such *mala fides* that it rendered the dismissal substantively unfair.

[11] He was dismissed on account of the respondent's alleged operational requirements, with effect from 30 June 2016.

[12] At the time of his dismissal, he was a member of the Solidarity union, which was active in the workplace, which union had been

involved in the retrenchment process that had begun on the previous year and also in January of the same year.

[13] On 27 July 2016, Solidarity referred an unfair dismissal dispute to the National Bargaining Council for the Road-freight and Logistics industry, (the Bargaining Council,), on the applicant's behalf.

[14] Conciliation was then attempted by the Bargaining Council. This, according to the applicant, was on 1 September 2016, and it remained unresolved. I think I saw a Certificate of Outcome that said that it was issued on 1 October, not on 1 September,

2016. I will just confirm that.

[15] In the applicant's papers he refers to it being September, but I examined the Certificate and I have the Certificate. It is yes, 1 September. So the papers are correct. That is 1 September 2016, is the date when the Certificate of Outcome was issued. This is important in this matter.

[16] The applicant says that he had reservations whether the Bargaining Council had jurisdiction over his dispute, and these reservations, he says, were explained to his union representative. According to him, the union dismissed those concerns that he had, and insisted that the dispute, after a fair conciliation had to be referred to the Bargaining Council.

[17] At the commencement of the application proceedings on 8 December 2016, the respondent as one would have expected,

raised an objection regarding the jurisdiction of the Bargaining Council to arbitrate in this dispute, as it pertained to a retrenchment that involved a number of employees.

[18] On 14 December 2016, the commissioner presiding issued a ruling in terms of which she found that the Bargaining Council lacked jurisdiction to arbitrate this dispute.

[19] According to the applicant, the ruling came to his knowledge only on 10 January 2017, and not in December, when it had been issued.

[20] He then says that despite reservations of the applicant's prospects of establishing that he had been unfairly dismissed at arbitration at that stage, the union representative failed to provide the applicant with any indication that the union would be unwilling to prosecute his claim in this court. That is what he alleges himself.

- [21] I must comment at this stage that the union is not to blame here. It took a position, clearly from the correspondence given to me, that the exchange that the union had with the applicant was such that the unfair procedure would not be applicable because of the fact that it was a section 189 (A) retrenchment process.
- [22] The union had also formulated an opinion that there were no merits to the substantive claim of unfair dismissal. That was clearly communicated to the applicant in the correspondence that he filed in the papers before me.
- [23] The union, notwithstanding the position it had taken, still referred the dispute to this Court, after the ruling that the Bargaining Council had no jurisdiction.
- [24] On 6 February 2017, the applicant says that he was informed that the matter had been referred to the union labour department, so that they would then consider it.
- [25] In the meantime, the applicant had consulted an advocate of his about his matter, whilst he was negotiating and/or interacting with the union, he had an advocate that as also consulted by him and that was assisting him in this matter.
- [26] He says then he regularly followed the status of his case, and attempted to ensure that progress was made in prosecuting his matter.
- [27] He says on 9 March 2017, he was compelled to approach the court directly for guidance, as he was uncomfortable about the lack of progress when it comes to what the union was actually doing.
- [28] And then he says, in an effort to minimise legal costs, he attempted to prepare his own statement of claim and a condonation application. However, he soon realised that this was not a simple matter, and he then decided to allow the union to proceed as it were assisting him, but at the same time he had recourse to the advocate that he heard approached earlier on.
- [29] He says the services of the advocate could not be effectively utilised, given the fact that the union representative took a position that they would not continue to represent him, whilst he was consulting another attorney. In other words, they would not take brief from an advocate that he was consulting.
- [30] He however, decided finally to terminate the services of the union, because he was not happy with what was going on, and he then briefed counsel on 22 March 2017, but counsel was not available. There was a bit of a delay and a statement of case was finally filed or delivered on 10 April 2017.

- [31] When it was filed it was way out of time. It had to be accompanied by a condonation application, which application is before me.
- [32] In summary therefore, in terms of the delay, the applicant concedes that there was quite a sizeable delay, which is clearly more than 90 days. In addition to the 90 days that he had within which he could refer the dispute to this court.
- [33] The explanation he tendered is that the union was not as actively involved as he wanted it to be in prosecuting the referral, firstly. Secondly, he says that he was misguided by the union, by referring this dispute to the Bargaining Council, instead of the referral to this Court.
- [34] He annexed emails that suggested that he was communicating with the union, trying to make out that the matter was supposed to come to this court a failed conciliation process, but that the union was of the view that the matter had to go to the Bargaining Council.
- [35] What is clear, though, is that the applicant and the union [Cell phone/internet interference] [indistinct] as I have alluded to before. Clearly, the union was of the mind that the applicant had no case, both on procedural and substantive fairness. But they somehow reluctantly proceeded to try and assist him. It might well be that they contributed to some delay in the referral of this matter.
- [36] The explanation for the delay, according to him is therefore ascribable to the activities of the union, but certainly to the non-availability of counsel in time to assist him. He had consulted counsel earlier on.
- [37] It remains clear to me that the calculation for the delay does not depend on the date that the jurisdictional ruling was issued.

But it depends on two considerations. First would be the date on the Certificate of Outcome, [Cell phone/internet interference] 30 [?] days after the referral of the dispute. Whichever comes first. And Mr van Zyl has highlighted this

issue in the submissions that were made.

- [38] It is clear, therefore, that the delay is much longer than 30 days if one considers the fact that the referral was made in July and calculates 30 days from July up to August, the delay began to run.
- [39] The fact that the dispute was initially referred to the Bargaining Council is an explanation which somehow in my finding has an effect that the applicant was actively involved in this matter. It is true that he went into a wrong forum. Whether it was him doing it himself or whether it was the union doing it, it is part of the facts that are before me.
- [40] But even if I were to hold, as the respondent wants me to hold that it was him who was opined to taking it to the Bargaining Council, the fact of the matter is that he was trying to exercise what he believed was his right.

- [41] It would not be a case of a person referring a dispute stupidly and carelessly to the Bargaining Council. It could be that he believed that the Bargaining Council might have had jurisdiction. It also was at a time when there was a new amendment in the Act where possibly the Bargaining Council could have had jurisdiction. One might have to give room for that consideration.
- [42] As to the delay, it is incumbent on the person seeking condonation to explain in detail why there was a delay. Particularly if the delay is excessive.
- [43] In the consideration of the condonation application, I have to refer to a few cases that provide a guideline. The very known one is the *Melane v Santam Insurance Company Ltd*[5] where the Appellate Division heard the following. This is an often cited paragraph:

“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 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, for that would be a piecemeal approach, incompatible with a true discretion. 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. I would add that discursiveness should be discouraged in canvassing the prospects of success in the affidavits.”

- [44] Also of importance, is what was said in the case of *Motloi v SA Local Government Association*[6] where the following was said:

“In my judgment the discretion conferred on the court of first instance in deciding whether or not to grant condonation for the late referral of a dispute is a wide discretion or a discretion “loosely so called”. The court of first instance is required to arrive at a decision “in the light of all relevant considerations” such as the length of the delay, the prospects of success in the main application, the possible prejudice to the parties and the blame attaching to the parties.”[7]

- [45] Of importance is also what was said in the often cited decision in *Saloojee and another v Minister of Community Development*[8] , where the following appears:

“There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of the court. Considerations ad misericordiam should not be allowed to become an invitation to laxity in fact. This court has lately been burdened with an undue increase in the number of applications for condonation in which the failure to comply with the rules of the court was due to neglect on the part of attorneys. The attorney, after all, is the representative whom the litigant has chosen for himself and there is little reason why in regard to condonation of the failure to comply with a rule of the court, the litigant should be absolved from the normal consequences of such a

relationship, no matter what is the circumstances of the failure are.”

- [46] These are important considerations when one looks at the condonation application as they are often used in this court.
- [47] I have at this stage referred to them because I am about to look at the prospects of success of this application.
- [48] The applicant was dismissed due to the operational requirements of the respondent. What would be essential at the trial, if the trial proceeds is that the court will then have to consider whether the dismissal was procedurally and substantively fair.
- [49] In this particular case, procedural fairness, as a standalone ground will not be applicable, because this was a facilitated retrenchment, in terms of section 189 (A). The remedies available to the applicant were those as are outlined in section 189 (A)(13), and the applicant did not utilise them in this case.
- [50] In terms of subsection (13) the trial court will be debarred from considering procedure or unfairness of the procedure as a standalone ground.
- [51] It is so that some of the procedural considerations do impact on substantive fairness. So to the extent that the condonation

application relates to the showing of good cause, and to the extent that this refers to unfair procedure, the applicant has no case in that respect. Good cause can only be shown by the applicant evincing or demonstrating to this court that he has good prospects of success when it comes to substantive fairness.

- [52] There is a large dispute between the parties on whether or not there was a rationale underlying the retrenchment of the applicant.
- [53] The respondent stated in his affidavit why there was a good reason to retrench. The applicant insisted in his founding papers, but somewhat in his replying affidavit he tended to take a position that says that there could have been bumping or there could have been someone else retrenched instead of him. There could have been an avoidance of him being dismissed by the respondent.
- [54] I am not of the mind, on considering this application, that it would be fair to be harsh on the applicant and find that his case is necessarily weak when it comes to this question whether he was supposed to be retrenched or not. In fairness to him, this is an issue that should be trial based through evidence and through cross-examination. It would be improper of me to find that in this case I should sustain the version of the respondent.
- [55] I am saying, clearly there is a very live dispute between the parties about that issue. And for condonation purposes therefore, I am not satisfied that the defence raised by the respondent should hold the day. There is still room that the applicant might be able to succeed on substantive fairness.

[56] There is no prejudice to be suffered by this party when it comes to whether or not condonation is granted, save to say that if I do not grant it the applicant's door to access to justice in this case will be shut. In relation to the respondent, all there is would be a delay, and perhaps financial expenses when it defend itself, but beyond that, I would find that it is appropriate not to shut the door when it comes to the consideration of prejudice.

[57] I now have to weigh the prospects of success, which appear to be there, against the explanation that has been tendered by the applicant.

[58] I must express my displeasure at an applicant who comes to court and lies and lying under oath. The applicant lies and says that he communicated with the union and asked that time be not wasted, which is true, he did communicate, but the union did send a letter to him. It explained why it was slow in its activity because it did not believe in the merits of his case. It comes about and says he did not want to hang his dirty linen in public. He did not want this Court to know that the union was not sharing the same view as himself.

[59] There was nothing wrong in disclosing that. He was entitled to take a different stance from that of the union. He could not be bound by the union was saying. As he actually did, and proceeded to have a second opinion through his counsel. But that notwithstanding, I cannot discredit him for the lie that he told. He still believed that he had the merits. He has been very active in this matter. He wanted justice to be done in this case.

[60] In my view, his explanation for the delay is not the best of them. It is worthy of criticisms as has been done by the respondent. But when I weigh that against the prospects of success, I find that condonation ought to be granted.

Order

[61] In the result, the following order is made:

1. Condonation for the late filing of the applicant's statement of claim is granted;
2. There is no order as to costs.

H Cele

Judge of the Labour Court of South Africa.

APPEARANCES:

For the Applicant: Advocate P.M. Pillay

Instructed by:

Bagraim Sachs per Steven Sac

For the Respondent : Advocate B Van Zyl

Instructed by:

Van Zyl- Rudd Inc

[1] Section 191: Disputes about unfair dismissals and unfair labour practices (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 -

(i) a council, if the parties to the dispute fall within the registered scope of that council; or (ii) The Commission, if no council has jurisdiction. ... (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; (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.

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the dispute in writing to -

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- (ii) The Commission, if no council has jurisdiction.

...

- (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;

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- (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.

[2] Act 66 of 1995, as amended

- [3] Section 189A: Dismissals based on operational requirements by employers with more than 50 employees (1) This section applies to employers employing more than 50 employees if- (a) the employer contemplates dismissing by reason of the employer's operational requirements, at least-
- (i) 10 employees, if the employer employs up to 200 employees; (ii) 20 employees, if the employer employs more than 200, but not more than 300, employees; (iii) 30 employees, if the employer employs more than 300, but not more than 400, employees; (iv) 40 employees, if the employer employs more than 400, but not more than 500, employees; or
 - (v) 50 employees, if the employer employs more than 500 employees; or ...
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 - (iv) 40 employees, if the employer employs more than 400, but not more than 500, employees; or
 - (v) 50 employees, if the employer employs more than 500 employees; or
- [4] Section 189: Dismissals based on operational requirements (1) When an employer contemplates dismissing one or more employees for reasons based on the employer's operational requirements, the employer must consult - (a) any person whom the employer is required to consult in terms of a collective agreement; (b) if there is not collective agreement that requires consultation -
- (i) a workplace forum, if the employees likely to be affected by the proposed dismissals are employed in a workplace in respect of which there is a workplace forum; and (ii) any registered trade union whose members are likely to be affected by the proposed dismissals;
 - (c) if there is no workplace forum in the workplace in which the employees likely to be affected by the proposed dismissals are
- employed, any registered trade union whose members are likely to be affected by the proposed dismissals; or (d) if there is no such trade union, the employees likely to be affected by the proposed dismissals or their representatives nominated for that purpose. ... (3) The employer must issue a written notice inviting the other consulting party to consult with it and disclose in writing all

relevant information, including, but not limited to – (a) the reasons for the proposed dismissals; (b) the alternatives that the employer considered before proposing the dismissals, and the reasons for rejecting each of those

alternatives; (c) the number of employees likely to be affected and the job categories in which they are employed; (d) the proposed method for selecting which employees to dismiss; (e) the time when, or the period during which, the dismissals are likely to take effect; (f) the severance pay proposed; (g) any assistance that the employer proposes to offer to the employees likely to be dismissed; (h) the possibility of the future re-employment of the employees who are dismissed; (i) the number of employees employed by the employer; and (j) the number of employees that the employer has dismissed for reasons based on its operational requirements in the preceding 12 months.

[4] Section 189: Dismissals based on operational requirements

(1) When an employer contemplates dismissing one or more employees for reasons based on the employer's operational requirements, the employer must consult -

(a) any person whom the employer is required to consult in terms of a collective agreement;

(b) if there is not collective agreement that requires consultation –

(i) a workplace forum, if the employees likely to be affected by the proposed dismissals are employed in a workplace in respect of which there is a workplace forum; and

(ii) any registered trade union whose members are likely to be affected by the proposed dismissals;

(c) if there is no workplace forum in the workplace in which the employees likely to be affected by the proposed dismissals are

employed, any registered trade union whose members are likely to be affected by the proposed dismissals; or

(d) if there is no such trade union, the employees likely to be affected by the proposed dismissals or their representatives nominated for that purpose.

(3) The employer must issue a written notice inviting the other consulting party to consult with it and disclose in writing all

relevant information, including, but not limited to –

(a) the reasons for the proposed dismissals;

(b) the alternatives that the employer considered before proposing the dismissals, and the reasons for rejecting each of those

alternatives;

- (c) the number of employees likely to be affected and the job categories in which they are employed;
- (d) the proposed method for selecting which employees to dismiss;
- (e) the time when, or the period during which, the dismissals are likely to take effect;
- (f) the severance pay proposed;
- (g) any assistance that the employer proposes to offer to the employees likely to be dismissed;
- (h) the possibility of the future re-employment of the employees who are dismissed;
- (i) the number of employees employed by the employer; and
- (j) the number of employees that the employer has dismissed for reasons based on its operational requirements in the preceding 12 months.

[5] 1962 (4) SA 531 (A),

[6]

[2006] 27 ILJ 298 (LAC),

[7] At para 16.

[8] 1965 (2) SA 135 (A)

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