IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Case No: D502/2023
Not Reportable

In the matter between:

NATIONAL UNION OF MINEWORKERS
obo WS DLADLA — Applicant

and

INTERCEMENT SA (PTY) LTD — Respondent

Second Respondent

Third Respondent

Heard: 26 April 2024

Delivered: This judgment was handed down electronically by circulation to the parties and / or their legal representatives by email. The date and time for handing-down is deemed 11h00 on 3 December 2024.

JUDGMENT

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ALLEN-YAMAN J

Introduction

[1] The applicants applied for condonation for the late delivery of their statement of claim, which application was opposed by the respondent.

Background

[2] On 11 September 2023 the applicants (referred to as 'NUM' and 'Mr Dladla' where it is necessary to distinguish them) delivered a Statement of Claim in circumstances in which they had seemingly been unaware that another Statement of Claim had previously been delivered under D432/2023 in respect of the same dispute on 31 August 2023. The latter had been initiated by the applicants' previous attorneys of record whose mandate to act in the matter had by then already been terminated.

[3] The applicants' claim is premised on their contention that Mr Dladla's dismissal on 27 January 2023 was automatically unfair, it having been alleged that he had been dismissed for performing the lawful activities of the trade union of which he was a shop steward, NUM.

[4] The applicants referred a dispute to the CCMA pursuant to his dismissal and a certificate of non-resolution indicating that the dispute was required to be adjudicated by this court was issued on 8 March 2023. This being the case, they were required to have initiated proceedings in the Labour Court on or before 6 June 2023. As they disregarded for present purposes the Statement of Claim which had been delivered on 31 August 2023,[1] the period of delay which is required to be condoned is three months and five days.

[1] This was withdrawn upon the applicants having become aware thereof.

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Analysis

[5] It is trite that when courts exercise their discretion in relation to the granting of condonation the inter-related factors which are required to be taken into account are the period of the delay, the explanation therefor and the prospects of success. The ultimate question to be answered is whether the interests of justice are best served by the granting or the refusal of the indulgence sought.

[6] The delay in question, although not inordinate, is not insignificant.

[7] The explanation provided by the applicants rested on the steps which were taken by NUM since having become aware of the need to approach this court on 8 March 2023.

[8] On the applicants' version, Mr Dladla approached NUM after the certificate of outcome had been issued and reported the matter, whereupon a trade union official, Ms Clementine Agula, prepared a requisition for legal services in accordance with NUM's protocols. Her request was authorised by NUM's Regional Secretary, Mr Muzikayise Zakwe, on 12 April 2023. In response to Ms Agula's transmission of the requisition to NUM's Legal Administrator: Head Office, Mr Moroesi Msimango, on he addressed certain queries to her the following day, including an enquiry as to why the matter was not being referred to the CCMA. Ms Agula forwarded the email to another NUM official, Mr Jabulani Madlala, three days later on 21 April 2023 for his response.

[9] On 17 May 2023 Ms Agula addressed an email to Mr Zakwe, to which was attached a pdf document entitled 'dladla sgungu'. The body of her email read,

'As per our telcom, please see below attachment and explanation to Organiser as well. From the region we sent all documents timeously. There was a query from head office which was remedied by attaching a payslip and re-stating that he was a shop steward. Mohale Inc needs to prepare an affidavit for the signature of the organizer, which is yet to be done.

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This matter will most likely appear in the 3rd quarter legal report of Mohale as it was referred after the 2nd quarter legal report.
I hope you will [find] this information satisfactory.'

[10] This email, together with the email of 17 April 2023 referred to therein, were asserted by the applicants to have evinced that Mr Dladla's matter had been referred to Mohale Inc.

[11] On 30 May 2023, erroneously referred to as 20 May 2023 in the founding affidavit, Mr Dladla addressed an email to various NUM officials, including Ms Agula, which was headed, *'Request for private lawyer of my choice who will be paid by National Union of Mineworkers.'* It is evident that he sought to persuade the recipients thereof of the need for him to be so assisted, premised on the complexity of the matter as an automatically unfair dismissal dispute. Ms Agula forwarded the email to Mr Bongani Dlamini, Mr Zakwe and Mr Msimango later that day in which she requested that they advise the region in writing.

[12] At NUM's subsequent Legal Operations Meeting held on 8 June 2023, Mr Dladla's matter was mentioned, the report in respect of which indicated that his dispute had been referred to the Labour Court and that further documents were then awaited. At that time all those involved including Ms Agula and Mr Dladla, believed that Mohale Inc had referred the matter to the Labour Court.

[13] On 27 June 2023 Mohale Inc reported on the matters in which it had received instructions to Mr Dlamini. He, in turn, disseminated the reports received to various NUM officials the following day with the instruction that they were to consider the reports and indicate if they reflected all the matters which had been sent to the firm. Ms Agula duly considered the reports and notified Mr Dlamini on 4 July 2023 that Mr Dladla's matter, along with several others, did not appear thereon.

[14] This led to Mr Dlamini having emailed the offices of Mohale Inc on 14 July 2023, to which email an attachment was appended. In the course of the email exchange which ensued during the month of July 2023 Mr Dlamini requested the

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recipients thereof to revert to him urgently. The response given by Mohale Inc was that the matter was being dealt with by one Mr Seema who had been in contact with the region, which was busy compiling documents for him as Mohale Inc had by then only received the referral form and the certificate of outcome. On 21 July 2023 Ms Agula transmitted an email to various individuals in which she advised that the organiser had been in touch with Mr Seema telephonically and had agreed to share the documents which he had in his possession the following Monday.

[15] On the applicants' version, it was only in July 2023 that it became aware that the matter had not been referred to this court. Mohale Inc's mandate was terminated on 31 July 2023 whereafter NUM instructed its present attorneys of record.

[16] A consultation was arranged for 8 August 2023 between counsel, Ms Agula, Mr Dladla and Mr Madlala. This was, however, unable to take place and was rescheduled on 11 August 2023. Documents which had been requested were duly provided on 15 August 2023. At that time it was hoped that Mr Dladla's issues could be resolved at a relationship building meeting which had been scheduled between NUM and the respondent at the end of August 2023, however Counsel was instructed to commence preparation of the Statement of Claim in the meantime.

[17] The Statement of Claim was not completed by the end of August and nor did the relationship building meeting take place by then. In respect of the former, a further consultation took place at which further documentation was requested. In respect of the latter, the meeting was postponed until 5 and 6 September 2023. Whatever outcome had been anticipated by NUM was not achieved at the meeting of 5 September 2023, and the Statement of Claim was duly delivered thereafter.

[18] The respondent expressed a number of concerns regarding the applicants' explanation for the delay, which concerns were not unjustified. These concerms related to the absence of any real explanation for the cause of the delay, that

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periods of time had been wholly unexplained, and the absence of objective evidence which might have demonstrated the correctness of the assertions made by the applicants. In particular, if consideration is given to the explanation provided in the founding affidavit in relation to the contents of the emails which were relied upon, a number of inconsistencies may be discerned.

[19] Although NUM was aware of the need to refer Mr Dladla's claim to this court on 8 March 2023, the first step taken by it to this end was alleged to have occurred only on 12 April 2023 when Mr Zakwe signed the authorisation form which had been given to him by Ms Agula. Nothing evinced that NUM's legal unit had then in fact approved the proposed expenditure, notwithstanding that the queries raised within that department had been responded to on 21 April 2023. Despite the fact that such approval remained awaited on 21 April 2023, Ms Agula indicated in an email of 17 April 2023 that the matter had by then already been referred to the Labour Court.

[20] The period of almost one month between 21 April 2023 and 17 May 2023 was wholly unexplained. On that day in May 2023 Ms Agula stated in a further email that the firm of attorneys, Mohale Inc, then needed to prepare an affidavit for signature by one of NUM's organizers. Given that the initiating document in the applicants' matter was to be a Statement of Claim, which would not at that time have required a condonation application, precisely what affidavit would then have been necessary to prepare cannot be surmised, and nor was it explained.

[21] Although relied upon to demonstrate Mr Dladla's continued interest in his own dispute, his email of 30 May 2023 in which he sought to motivate the appointment of an attorney of his own choice casts considerable doubt on the suggestion that Mohale Inc had, at that stage, been instructed to act on his behalf. This doubt is compounded by the absence of any positive assertion by any of NUM's officials that such an instruction had, in fact, ever been given prior to July 2023. When considered in its totality, the explanation provided in relation to this aspect does no more than suggest a belief held by those officials responsible for the prosecution of Mr Dladla's dispute that this firm had been instructed. This,

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without any explanation as to how such belief arose or basis upon which this court might assess the reasonableness thereof.

[22] On 4 July 2023 Ms Agula drew to the attention of Mr Dlamini and Mr Zakwe that Mr Dladla's matter was not included in the report of matters being dealt with by Mohale Inc. The explanation provided by the applicants for the actions taken by them immediately upon such discovery were,

'Between 14 and 21 July 2023 a number of emails passed between the applicant and Mohale Inc – they concerned only this (Dladla) matter, with Mohale Inc calling for documents.'

[23] The email transmitted by Mr Msimango on 14 July 2023 had as its subject, *'NUM obo Sgungu Dladla / InterCement South Africa (Pty) Ltd'*, and referred only to an attachment for the attention of the recipients thereof, all of whom bore Mohale Inc email addresses. The attachment was neither identified nor explained. Five days later he addressed a further email to the recipients of his email of 14 July 2023 in which he noted that NUM had not had a response regarding the matter and he requested they revert to him urgently.

[24] The response given the following day was to advise Mr Dlamini that one Mr Seema was dealing with the matter. Later that day a further email was addressed to Mr Dlamini in which he was advised,

'Kindly note that we have already been in contact with region herein who are busy compiling documents to send to us as we only received the referral form and the Certificate of outcome of Conciliation.'

[25] On 21 July 2023 Ms Agula informed Mr Dlamini that the organiser had made contact with Mr Seema telephonically and would provide him with the documentation in his possession the following Monday.

[26] The contents of the emails authored by Mr Dlamini are not indicative of a litigant whose dispute has been left unattended for some months by its appointed

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attorney. Nor do the responses transmitted by Mohale Inc evince so much as tacit acknowledgement of any type of negligence on its part. The series of emails certainly do not demonstrate that they related only to a request for documentation as alleged by the applicants; they evince that the documentation which was furnished to the firm on 14 July 2023 led to steps being taken to obtain further documentation and information, which was then arranged to be provided to it.

[27] Although that firm's mandate was said to have been terminated on 31 July 2024, the reasons for such termination were not explained. This court was presumably required to infer that the reason for the termination was as a result of its failure to have instituted the applicants' claim. In view of the fact that Mohale Inc delivered a Statement of Claim in relation to Mr Dladla's matter on 31 August 2024, it is reasonable to believe that Mohale Inc did not itself understand that its mandate had been terminated.

[28] Notwithstanding that the applicants were well aware in the middle of July 2023 that Mr Dladla's statement of claim had not been delivered, it took them a further two months to achieve this.

[29] Having changed attorneys at around the beginning of August 2023, the first consultation with counsel was able to be convened on the 11th of that month, and the documentation that was then requested was provided on 15 August 2023. Notwithstanding that counsel was then to attend to the drafting of the papers necessary for the institution of the action whilst the outcome of an intended meeting with the respondent was awaited, neither the Statement of Claim nor the condonation application was completed by the time it had become apparent that the issues between the parties could not be resolved on 5 September 2023. It took almost one more week for the applicants' claim to be initiated.

[30] The applicants' explanation can only be described as poor. Although a chronology of events was provided, consideration thereof reveals not only that there were lengthy periods of time which were wholly unaccounted for, but their

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reiteration of the events did not itself shed any light on the actual cause of the failure to have instituted the action timeously.

[31] The further issue is whether the applicants enjoy any prospects of succeeding in challenging the fairness of Mr Dladla's dismissal, it having been contended to have been both procedurally and automatically unfair.

[32] When called upon to attend a disciplinary enquiry on 23 January 2023 it was alleged by the respondent that the basis upon which Mr Dladla was perceived by it to have committed misconduct was,

'… on the grounds that there has been continued and unabated levels of disrespect directed at the Executive Manager of Human Resources (the Executive) which most recently has taken the form of scurrilous grievances raised against the Executive which are unsupported by the alleged grievants.'

[33] In calling upon Mr Dladla to answer a charge of disrespect and insolence, the respondent alleged that,

'5. The grievances of the 20th October 2022 are replete with gross disrespect and insolence directed at the Executive, to with [sic]:

5.1 "HR Manager Gross Dishonesty / Fraudulent Conduct and Gross Insubordination. Gross dishonesty, manipulation of Company Procedure, Gross Insubordination – Company trusted you with their policies but you ignored all this policies when you were supposed to use them fairly or lawfully. Failure or unlawful advised on our overtime of Tippler employees in Grades PG10-19 (standard procedure … 5.1.2, 5.2.1 and 5.1.2). Failure to pay Tippler employees Saturday overtime, unlawful advised when Company supposed to pay our public holidays / manipulation of Company Policies and Procedure. Discriminated all Union members at Tippler your advised to Payroll that they must not pay Tippler that 6% negotiated increase."

5.2 "All your unlawful advised damaging to the morale of employees and operational efficiency …"

5.3 "Your actions doesn't present Code of Conduct that is directed to you by this global organisation."

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5.4 "Gross negligence. Each and every month you fail to pay us according to Company Payment Procedure."

5.5 "Blaming system error all this blaming same effect the employees every month and their salaries. Our understanding Sapna Maraj should take responsible as NPC employees like any other employee.""

[34] Neither Mr Dladla nor his union representative attended the disciplinary enquiry, which issue will be reverted to hereunder.

[35] The minute of the disciplinary enquiry which proceeded in his absence reflected that the respondent led the evidence of two witnesses. In the absence of any challenge to such evidence, the chairperson accepted the correctness thereof and concluded that,

'The Employee, despite being given numerous opportunities, to verify and furnish proof of his allegations, has failed to do so. Employees may no longer toss out allegations with impunity and expect no action from the Employer.'

The sanction of summary dismissal was recommended, which recommendation was accepted and imposed by the respondent on 7 January 2023.

[36] Insofar as the applicants' assertion that Mr Dladla's dismissal had been automatically unfair is concerned, this was premised upon their contention that the primary reason for his dismissal had been his membership with NUM, and the performance of activities associated with his position as a shop steward. The only amplification of the basis upon which this conclusion was drawn was contained in the statement of claim, incorporated by reference to his condonation application,

'As the facts above illustrate, Dladla was dismissed for performing lawful (union) activities at the respondent.

The dismissal for alleged "disrespect and insolence" improperly elevated by the respondent's plant manager to "gross respect and insolence" when informing Dladla of his dismissal) was not the primary reason for his dismissal, rather his union activities.'

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[37] In the present application the applicants were obliged to demonstrate that they enjoy good prospects of success in their main claim. That which is required to be established in disputes concerning dismissals which are alleged to have been automatically unfair was set out in National Union of Mineworkers and Others v Black Mountain Mining (Pty) Ltd (2010) 31 ILJ 387, citing Kroukan v SA Airlink (Pty) Ltd (2005) 26 ILJ 2153 (LAC),

'It is trite that the applicants have an evidential burden to prove the true reason for the dismissal. The applicants bear an evidential burden to prove the true reason for the dismissal. The applicants bear an evidential burden to produce evidence which is: "sufficient to raise a credible possibility that an automatically unfair dismissal has take place" after which the company is required to "produce evidence to show that the reason for the dismissal did not fall within the circumstances envisaged in s187 for constituting an automatically unfair dismissal.'[2]

[38] Save to have drawn the conclusion that the dismissal was automatically unfair for the reason that it occurred as a result of his having undertaken the duties of a shop steward, the applicants did not articulate a factual basis upon which such a conclusion should be drawn, and nor did it address the reasons upon which the respondent had relied in having dismissed him. The respondents' reason for his dismissal had been that the grievances which had been raised had been incapable of substantiation, notwithstanding invitation to Mr Dladla to do so. Accordingly, in the absence of substantiation, it was believed that his conduct in having raised the grievances in the manner described in the charges constituted insubordination.

[39] Our law acknowledges that whilst shop stewards are to be afforded a modicum of latitude when acting in such capacity, they nonetheless remain employees who are bound to adhere to the same standards as other employees. This was explained in National Union of Metal Workers of South Africa obo Motloba v Johnson Controls Automative SA (Pty) Ltd and Others (2017) 38 1IJ 1626 (LAC),

[2] At paragraph 89

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'The principle formulated in the considerable body of authority both in the Labour Court and in this Court is that a shop steward should fearlessly pursue the interest of his/her constituency and ought to be protected against any form of victimisation for doing so. However, this is no licence to resort to defiance and needless confrontation. A shop steward remains an employee, from whom his employer is entitled to expect conduct that is appropriate to that relationship. … It is unacceptable to hold that when one acts in a representative capacity "anything goes".'[3]

[40] Whilst it must be accepted that Mr Dladla's dismissal was effected for reasons related to the grievances raised, given the dearth of particularity provided by the applicants in substantiation of their assertion that they enjoy excellent prospects of success, this court is unable to objectively arrive at the same conclusion.

[41] Insofar as the applicants' complaint concerning the procedural unfairness of Mr Dladla's dismissal was concerned, it was alleged that the respondent had agreed at a meeting on 19 January 2023 that the disciplinary enquiry would not proceed on 23 January 2023, however, contrary to such agreement, it did. In substantiation of the existence of that agreement the applicants referred to an email which had been transmitted to one Ms Terisha Govender of the respondent on the day of the enquiry at 11:50 by Mr Dladla's representative in which he conveyed his understanding that the parties had agreed at the meeting of 19 January 2023 that the grievances would firstly be dealt with and that any disciplinary action against the shop stewards would be held in abeyance pending the outcome thereof.

[42] Although the respondent argued that such an email had been transmitted to an email address known to be unattended that day, there was no dispute that the email itself had been sent. In response to the allegation that there had been an agreement to suspend the disciplinary proceedings against Mr Dladla, the deponent to the answering affidavit, Mr Wiseman Sishi, alleged that,

[3] At paragraph 48

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'The allegation that there was an agreement to stop the disciplinary process against Mr Dladla is simply false.'

[43] In reply, the applicants denied that Mr Sishi had any personal knowledge of the agreement as, not only had he not been in attendance at the meeting of 19 January 2023, but he had not been employed by the respondent at the time. Although the respondent did not attempt to deliver a supplementary affidavit to deal with this particular issue, it was addressed in its heads of argument,

'The point raised in respect of the deponent to the opposing affidavit being employed after Dladla's dismissal is without merit. The opposition to the application arises from the applicant's documents attached to the founding affidavit and did not require Mr Sishi to be present at the time.'

[44] Successful challenge to the applicants' assertion that an agreement had been reached on 19 January 2023 that the disciplinary enquiry would not proceed on 23 January 2023 required a positive statement to the contrary by one with personal knowledge of the facts. The respondent's acceptance that Mr Sishi had no personal knowledge of the facts, and the agreement relied upon not having been premised upon any document attached to the founding affidavit, this court must accept the correctness of the applicants' assertions that such an agreement was entered into and was subsequently breached. This court is accordingly constrained to find that the applicants have established that they enjoy good prospects of success in their claim concerning the procedural fairness of Mr Dladla's dismissal.

[45] The final issue is that of prejudice. In the event that condonation is refused, Mr Dladla will be barred from challenging the fairness of his dismissal in circumstances in which the evidence before this court has established that such dismissal may well be found to have been procedurally, if not automatically, unfair. The totality of the prejudice to which the respondent lays claim, on the other hand, is the potential prejudice caused by the delay, being the fading of witnesses memories over time, and the possibility that the witnesses who will be

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required to testify may not be in the employ of the respondent at the time of the trial. Neither of those eventualities have yet arisen and, at this stage, the prejudice claimed by the respondent is both potential and purely speculative.

[46] In consideration of the relevant factors this court accordingly finds that the delay is not insignificant and the explanation is poor; the applicants have not demonstrated any prospects of establishing that Mr Dladla's dismissal was automatically, or even substantively unfair, but that the converse is true in respect of the issue of procedural fairness; and that the respondent will suffer no prejudice as a result of granting the applicants condonation, whereas Mr Dladla would be barred from proceeding with his claim.

[47] In consideration of the delay, it is evident that Mr Dladla himself was not responsible therefor. Rather, the responsibility lay with NUM's legal department who seemingly overlooked the need to finalise the request for approval of the appointment of legal representation on his behalf. NUM's local organisers, in the meantime, appeared not to have monitored the situation to thereby ensure that this was done. Mr Dladla, on the other hand, had no control over the events of which there was no evidence he had been aware. On the contrary, the evidence of his email of 30 May 2023 demonstrates that he remained determined that his claim be prosecuted. This court accordingly finds no basis to attribute the apparent negligence of NUM's officials to Mr Dladla.

[48] Given that Mr Dladla himself cannot be blamed for the delay which ought not to be imputed to him, potentially enjoys good prospects of success in his claim that his dismissal was procedurally unfair, and would be prejudiced by the refusal of condonation, in circumstances in which the respondent will suffer no conceivable prejudice by the granting thereof, this court is of the view that the interests of justice require it exercise its discretion in favour of granting the applicants the indulgence sought.

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Costs

[49] The respondent asked that the application be dismissed with costs. Whilst the application will not be dismissed, there is no reason why NUM ought not to be ordered to pay the respondent's costs.

[50] Albeit that there is a relationship between NUM and the respondent, this in and of itself does not automatically operate as a bar to the awarding of costs. The applicants sought an indulgence for a delay which was clearly of NUM's own making in circumstances in which the explanation provided to this court has been found to have been wanting in many respects. This being the case, the respondent's opposition cannot be said to have been unreasonably advanced.

Order

1. The later delivery of the applicants' Statement of Claim is condoned.

2. The National Union of Mineworkers is ordered to pay the respondent's costs of opposition.

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K Allen-Yaman

Judge of the Labour Court of South Africa

Appearances

Applicants:

Mr T Seery, instructed by Cheadle Thompson & Haysom

Respondent:

Mr M Maeso, Shepstone & Wylie

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