Not reportable

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JS 1098/14

In the matter between:

NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA	**First Applicant**
GIBSON MOTSHABI & 16 OTHERS	**Second to Further Applicants whose names appear on Annexure "A"**

and

UBUNTU RECRUITMENT & OUTSOURCING (PTY) LTD	**First Respondent**
REEFLITE (PTY) LTD	**Second Respondent**

Heard: 28 October 2016

Delivered: 01 November 2016

Summary: (Condonation-excessively late referral-explanation for leaving matter in abeyance unsatisfactory-reasonable prospects of success not demonstrated-balance of prejudice not decisive)

JUDGMENT

LAGRANGE J

Introduction

[1] The applicants have applied for condonation for the late referral of a dismissal dispute to this Court. Previously, condonation was granted on an unopposed basis but that order was rescinded by this Court on 13 May 2016.

[2] Although the respondents had raised a preliminary objection, they did not persist with the point, so it is not addressed. However, the second respondent claims it has wrongly been joined in the matter as an employer as it was merely the client of the first respondent, which supplied labour to it as a labour broker. I will deal with this below.

The condonation application

[3] The applicants are seeking condonation for the late referral of unfair retrenchment claim to this Court which had originally been referred under case number MEGA4 954 on 4 December 2013 to the relevant bargaining Council.

[4] That dispute was referred to conciliation but the applicants claim they never received the notice of set down and the only person who attended the conciliation on 29 January 2014 was a representative of the first respondent.

[5] On 14 April 2014, at a meeting at the first respondents premises between the applicants and the first respondent, settlement agreements were purportedly reached between the respondents and the individual applicants, in terms of which they supposedly waived all their rights arising from their employment for a payment of R100. Inexplicably, according to the applicant's statement of case, a union organiser was present at the meeting where the so-called settlement agreements were signed and it was claimed that he attempted to engage the first respondent in

consultations under section 189 of the LRA that the process collapsed and he then decided that the dismissal had taken place on that date.

[6] This appears to have resulted in a second dispute being referred to the bargaining Council on 24 April 2014, this time under case number MEGA43153. It is not in dispute that the matter was conciliated and that it was referred to arbitration and it is not in dispute that it was set down for arbitration on 11 November 2014. It is also not in dispute that the matter was withdrawn on 10 November 2014, though the respondents wish to claim that this meant that the applicants abandoned all rights to have the matter determined and not simply that they abandoned the referral to arbitration.

[7] It is noteworthy that the reason given by the applicants for the withdrawal of that matter was that, the union organiser informed the Commissioner that the matter would be withdrawn because it did not indeed deal with the entirety of issues in dispute. Elsewhere in the founding affidavit the applicants claim that the reason that dispute was not pursued was that, both parties had agreed that the matter concerned dismissal for operational requirements and therefore could not proceed to arbitration. However, this version is disputed by the respondents who denied that there was ever an agreement on this and point out that in the first place, they contend that no further dispute arising from the terminations could be entertained in any forum because of the purported settlement agreements.

[8] The statement of claim was filed just under a month later on 5 December 2014.

[9] Accordingly, the period of delay must be calculated with reference to the first dispute referral in December 2013. In terms of section 191(11)(a) of the Labour Relations Act 66 of 1995 (‘the LRA’) , the referral to the Labour Court should have taken place 90 days after the unsuccessful conciliation of the matter on 29 January 2014. Consequently, the referral on 5 December 2014 was just over seven months late, which is an excessively long period amounting to more than twice the period permitted in the Act for such referrals.

[10] In relation to the explanation for the delay, the following difficulties arise:

10.1 Between the referral of the dispute in December 2013 and the meeting of applicants on 14 April 2014, there is no explanation why no further steps were taken to pursue the original dispute. There is also no explanation why nothing was done once the certificate of outcome had been issued. The initial 90 day period for the referral expired at the end of April 2014. In the founding affidavit, the applicants fail to explain why they did not pursue the dispute initially.

10.2 However, the initial period of inactivity fell within the 90 day period which expired at the end of April in respect of the first referral. By that stage an event had taken place on 14 April, which muddied the water somewhat. It is apparent from the founding affidavit in the condonation application that the local union organiser adopted the view at that stage that the applicants' dismissal had in fact taken place when settlement agreements were purportedly signed on 14 April 2014. This led to the referral of a new dispute which the union then later abandoned.

[11] Different explanations are offered in the founding affidavit for abandoning the second dispute, which do not assist the Court in understanding what really informed the actions of the applicants between the end of April and the time they withdrew the second dispute on the eve of arbitration proceedings due to commence on 11 November 2014. What is clear is that after the referral of the second dispute until it was abandoned, the applicants had effectively given up on the first dispute. They only turned their attention back to it when they abandoned the second referral. The only conclusion to draw is that the union must have concluded that the applicants had not in fact been dismissed when the first referral was made and that their dismissals had only taken place subsequently at the meeting of 14 April 2014.

[12] Essentially, what is before the Court is a narrative of a dispute which was not pursued with any enthusiasm after 29 January 2014, but which was then revisited several months late after it was decided that the second dismissal claim based on the meeting of 14 April 2014 should be abandoned. In the circumstances, given the length of delay, I believe the

condonation application ought to be dismissed on the grounds of the absence of a proper explanation for it. What is missing from the explanation is why the applicants were so ready to abandon their claim that they had been dismissed in 2013. Even if I accept that there were conflicting views in the union about how the matter should be advanced, there is not really any coherent explanation why the first claim was so easily put aside in favour of pursuing a dismissal based on a completely different set of events. It is not a sufficient explanation simply to say that a view was taken at the time that the applicants were dismissed on 14 April 2014. The applicants also owed it to the court to be candid in explaining why they no longer regarded their dismissal as having taken place the previous year. The failure to explain fully the change of direction also has ramifications for assessing the prospects of success. It must be mentioned at this juncture that there is no suggestion on the papers that the individual applicants were unaware or ignorant of the changes of strategy adopted by the union, or that they were not aware of the reasons for doing so.

[13] In the circumstances, it is simply not a sufficient explanation to argue that there was just a change of strategy which was embarked on in good faith but which the applicants subsequently decided was wrong. The explanation tendered does not explain why the first referral was left in abeyance in favour of the second referral. To the extent that it can be said that any explanation was provided at all, at best it is that the applicants decided that 14 April 2014 was the date of their dismissal but did not explain why the reliance on a dismissal in 2013 was no longer considered to be correct. The failure to provide a plausible explanation for first abandoning then reverting to the initial dismissal dispute means that the applicants have failed to provide an acceptable explanation for the delay.

[14] Even if other factors are considered, such as the prospects of success, I am of the view that this would not incline me to grant condonation. The applicants contend that they were told that their contracts had been terminated because they supposedly did not have the necessary skills required by the second respondent. The first respondent, a labour broker, had assigned the applicants to work for the second respondent. The respondents contend that all that happened was that there had been a

termination of the assignment because the second respondent no longer needed staff at certain departments. However they claim that the applicants had been instructed to report for reassignment on more than one occasion and that the matter was eventually settled by way of a so-called' nuisance payment' paid to the applicants on 14 April 2014.

[15] It is true that the sum of 100 Rand paid to each of the applicants when they apparently signed the settlement agreements appears to have been a disproportionately small sum to waive all their rights arising from their employment and its termination, but it is not implausible that the reason for the small amount is that the respondent only agreed to the termination of their services because the applicants had requested it so that they could claim UIF monies.

[16] The assessment of reasonable prospects of success based on the averments made on the papers is never easy. However, on the face of it, what the applicants do not even begin to try and explain is why they engaged in a meeting with the first respondent in April if they believed they had already been dismissed in December. It also does not make sense that the organiser would have attempted to engage the first respondent in retrenchment discussions in circumstances where they claim the dismissals already took place the previous year. The court cannot be expected to speculate about what reasonable explanation might be advanced for this turnabout by the applicants. It was there duty to explain their initial abandonment of their first referral. In essence, I believe there are significant difficulties in concluding that the applicants have reasonable prospects of establishing that they were dismissed in 2013, even on their own version of events. Thus, even if the lack of a satisfactory explanation for the delay is insufficient to dismiss the condonation application, a consideration of the merits on the papers does not lead me to the conclusion that the applicants have reasonable prospects of success.

[17] In so far as the relative prejudice to the parties would be considered in so far as it is necessary to consider other factors, they appear to be evenly balanced and do not favour one party rather than the other.

Joinder of the second respondent as a party to the proceedings

[18] On the question of the misjoinder of the second respondent, it does seem that it is more likely that the second respondent was the client of the labour broker, both respondents were parties to the purported settlement agreements signed by the applicants on 14 April 2014, so the issue of which of the respondents was the true employer may be a genuine matter of dispute, even though the amended provisions of section 198 of the LRA would not apply to the individual applicants irrespective of whether that dismissal took place in 2013 or 2014. Consequently, I am reluctant to exclude the second respondent as a party in these proceedings.

Order

[19] The condonation application is dismissed.

[20] No order is made as to costs.

Lagrange J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	S Jackson instructed by Finger Phukubje Attorneys
RESPONDENTS:	R Atcheson of Lee and McAdam Attorneys