

-----LABOUR BULLETIN-----

April 11

Compiled by: Adv J Delpont
Delpont Labour Consultants



FROM THE BENCH

National Education, Health & Allied Workers Union and Others v Vanderbijlpark Society for the Aged [2011] ZALCJHB 10

This was an application for condonation of the late filing of a statement of claim. The individual applicants are 50 members of the First applicant, N E H A W U, a trade union,, who claimed they were unfairly retrenched in March 2004 by the respondent, a society running four old age homes ('the society').

The degree of lateness

The dispute was referred to the CCMA and on 28 January 2005 a certificate of non-resolution was issued. The dispute ought to have been referred to the Labour court by 28 April 2005, that was only filed on 22 July 2005, making the referral 87 days late.

The explanation for the delay



Delpont Labour Consultants

Visit our website for more information - www.delpontlabour.co.za

-----LABOUR BULLETIN-----

The deponent to the founding affidavit is the legal coordinator of the first applicant. He explains the principal reason for the lateness of the referral as follows: "I submit that the reason for the lateness in filing our Statement of case is primarily due to the fact that various bodies within NEHAWU had to give their approval before attorneys could be instructed to prepare papers on our behalf. The reason for the lateness was therefore more to do with the lengthy process that has to take place before approval is given than anything else." The deponent then went on to elaborate in more detail about the various internal steps which must be followed before a matter that can be referred to the union's attorneys.

The LRA has been in existence for more than fifteen years, and the time limits governing referrals have not changed in that time. It is reasonable to expect that trade unions ought to be well aware of the need to act timeously in the interests of its members and would adapt their internal procedures to accommodate those time limits, not *vice versa*. The scale of an organisation cannot serve as a justification for delays. On the contrary, it is reasonable to expect that larger organisations, be they trade unions or businesses ought to be able to see to it that they are organised to deal with disputes of this nature in a systematic matter to ensure that they do not fall foul of the time limits in the LRA. Where handling such disputes is a core function of the organisation, this should go without saying.



-----LABOUR BULLETIN-----

The merits of the claim

The applicant seeks to rely on the merits of the case as set out there as a basis for indicating the prospects of success, though not specifically confirming the contents thereof on oath. Nevertheless, much of the chronology appears to be common cause. In January 2004 the respondent identified the need to outsource services provided by staff because it could not cope with the increased cost of wages and benefits which the union had succeeded in negotiating previously and the anticipated demands it would have to meet in the future. The management of the old age home explained that the only income of the society was the levies paid by residents all of whom were pensioners and it was unable to increase levies to cater for costs of salaries and other operational expenditures. It was anticipated that approximately one third of the staff positions would be affected by the outsourcing of certain services. One of the measures proposed to limit the possible adverse consequences of the measure, was that any contractor engaged would be asked to employ as many of the retrenched employees as possible as a condition of being awarded the contract.

An overview of the available evidence suggests that the fundamental needs of the society to cut costs was never seriously disputed, that the only alternative proposed by the union was considered and the society explained the reasons why shorter working hours would not be a viable alternative. Further, the society both consulted and adopted



Delpport Labour Consultants

www.delpportlabour.co.za

-----LABOUR BULLETIN-----

proactive measures to alleviate the impact of retrenchment and the union had ample opportunities to make representations on all matters affecting the retrenchment. In the circumstances, it seems unlikely that a court would find that the retrenchments were substantively or procedurally unfair. Accordingly, the applicant's prospects of success appear to be weak rather than reasonable.

Prejudice

The union submits that the society will suffer no prejudice if the matter proceeds, whereas the unprocedural and unilateral implementation of retrenchment which led to the dismissal of the individual applicants outweighs any prejudice that the society may have suffered. It is noticeable that the union makes no reference to the fact that the persons affected by the exercise are unemployed. The society reiterates the details of the retrenchment consultations and that they proceeded without objections from the union. It also points out that the condonation application had only been served in October 2005. Given the measures which were adopted to alleviate the impact of the retrenchment and the fact that the vast bulk of those affected did obtain alternative employment, and considering the prospects of success the court held that it did not believe that the prejudice to the individual applicants outweighs the prejudice to the society of having to now defend their actions at that stage.



-----LABOUR BULLETIN-----

The court said it was mindful of the fact that although the condonation application ought to have been ripe for a hearing 2006, for reasons which are not apparent, the matter lay dormant until 2010. Based on the contents of the court file, little seems to have happened since the parties were directed to file a pre-trial minute by 15 November 2006, by this court. It does not seem since then that any effort was made by the applicant to have the matter enrolled earlier.

In view of the above consideration of the factors laid down in *Melane v Santam Insurance Co. Ltd* 1962 (4) SA 531 (A) the court was of the belief that this is not a case in which condonation is warranted.

Confederation of South African Workers Union (CONSAWU) v Nedlac and Others [2011] ZASCA 57

The National Economic Development and Labour Council – NEDLAC – serves as a forum for various constituencies to find consensus on matters of economic and labour policy. The principal constituencies are business, labour and the state. Business is represented by Business Unity South Africa – a federation of employer and business organisations. Three trade union federations – Cosatu, Nactu and Fedusa – represent labour (we will refer to them as the founding federations).



-----LABOUR BULLETIN-----

The Confederation of South African Workers' Unions (CONSAWU) applied to NEDLAC to gain entry to its ranks but its application was declined. CONSAWU applied to the North Gauteng High Court for relief that we come to presently. The application was dismissed by Msimeki J and CONSAWU now appeals with the leave of that court.

The court held that NEDLAC is not a forum for settling wages and conditions of employment, in which employers and employees might each wish to confront a friendly face. NEDLAC serves as a forum for attempting to reach tripartite consensus on national economic and labour policy. The interest that each constituency has in the composition of the other in those circumstances is only to ensure that it properly represents the most influential voice that has been chosen by that other constituency. The interest of each lies in confronting the most influential and cohesive voice of the other and that must necessarily be one that has been chosen by the particular constituency.

The court held that the case that emerged comes down to this: CONSAWU says that NEDLAC must state in the constitution itself what the criteria are for admission of a federation to 'organised labour' so as to comply with s 4(d). It may not permit those criteria to be set by the constituency itself – as it has purported to do in clause 9.5 – because that would be an unlawful delegation of its power to determine those criteria.



-----LABOUR BULLETIN-----

The court held that the submission rests on the supposition that clause 4(d) confers power on NEDLAC to determine the criteria for admission to 'organised labour' and that is not correct. The section does not purport to confer any powers on NEDLAC at all. Indeed, we have considerable doubt that NEDLAC even existed until the constitution was adopted.¹³ Clause 4(d) does no more than to require that the constitution that was to be adopted must make provision for the relevant criteria. So far as clause 9.5 empowers the labour constituency to set those criteria the labour constituency is not exercising delegated powers when it does so. It is exercising original powers that emanate from the constitution.

The court held that the application was correctly dismissed. The appeal should be dismissed with costs that include the costs of two counsel.

It is worthy to note that Streicher JA delivered a dissenting judgement, which is not dealt with here.



-----LABOUR BULLETIN-----

LABOUR NEWS AND DEVELOPMENT

- CCMA Director, Nerine Khan has been re-appointed for a five year term, according to CCMA website.
- CCMA has established new tariffs of fees effective from 1 April 2011, according to the CCMA website.
- Increase in appointment of labour inspectors expected, according to Department of Labour Website.

TOPIC FOR THE MONTH

Chapter II of LRA: Freedom of Association(section 4-10)

Every employee has the right to form and join a trade union, a federation of trade unions and to take part in its lawful activities.



-----LABOUR BULLETIN-----

In the same fashion, every employer has the right to form and join an employer's organization a federation of employer's organizations and to take part in its lawful activities.

No person may discriminate against an employee or employer or victimize them for exercising their rights in terms of this chapter. No person may offer an employee or employer any advantage for not exercising their rights in terms of this chapter.

If there is a dispute about the interpretation and application of this chapter, it will follow the following dispute resolution route:

- ✚ Employee or employer can refer a dispute to the CCMA or bargaining council(accredited) for conciliation.
- ✚ If the dispute remains unresolved after conciliation, the matter would need to be referred to the Labour Court for adjudication.
- ✚ Parties may consent in writing in terms of section 141 of the LRA, to arbitration of the matter by the CCMA.

