

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

HELD AT DURBAN

CASE NO :

PA5\00

IN THE MATTER BETWEEN :

**JACOBS ABRAHAM JACOBS RADEMAN
and**

APPELLANT

CONTAINERLINK

RESPONDENT

JUDGMENT

COMRIE A.J.A:

1. This is an appeal against the judgment of **Revelas J** in the Labour Court refusing condonation of the late institution of proceedings. Leave to appeal was granted by the Court a quo.
2. The background to the matter is as follows. The appellant was employed by the respondent at Port Elizabeth in a managerial capacity. During July 1999 the respondent informed the appellant that, for operational reasons, his services would be terminated with effect from 31 August 1999. Aggrieved at his dismissal, the appellant referred the matter to the Commission for Conciliation and Arbitration

(**“the CCMA”**). Conciliation proved unsuccessful, and a certificate of outcome to that effect was issued on 29 September 1999. The appellant’s next correct step would have been to refer the dispute to the Labour Court. See s.191(5) (b) (ii) of the Labour Relations Act 66 of 1995. He had 90 days from 29 September within which to do so. See s.191(11) (a). Instead, however, the appellant referred the dispute to arbitration. He states that he did so on the advice of an articled clerk employed by the firm of attorneys which he consulted and whom he mistook for an admitted attorney. This wrong step caused the first delay, as the arbitration only came up for hearing on 1 March 2000. On that occasion the respondent successfully objected to the commissioner’s jurisdiction.

3. The appellant then consulted an official of the Labour Court at Port Elizabeth who turned out to be an interpreter. The appellant was advised that he had 90 days within which to institute proceedings. The advice was half right : 90 days was the correct period, but it ran from 29 September 1999 and not from 1 March 2000. Indeed, the period had long expired by 1 March.
4. No application for condonation was brought at that stage. The reason appears to be that the appellant was not aware of the need to bring such application.
5. Believing that he had 90 days from 1 March, the appellant accepted temporary work on fishing vessels and was at sea for lengthy

periods, up to two weeks at a time. Meanwhile, he consulted other attorneys who on 8 June 2000 filed and served his statement of case. (I point out, en passant, that this was a few days out of time on the advice received from the interpreter). On 22 June 2000 the respondent filed its statement of response in which the point was taken that the claim was out of time. This precipitated the application for condonation, which was opposed.

The application was launched on 7 July. The period from 1 March to early June, represents the second delay.

6. In her judgment **Revelas J** pointed out that a period in excess of seven months had elapsed from late November 1999 (by when the claim should have been commenced) to early July 2000 (when the application for condonation was launched). She referred to the matters which should properly be taken into account when weighing up “good cause” in terms of s.191 (11)(b). **Melane v Santam Insurance Co Ltd 1962 (4) 551(A)**. She described the degree of lateness as “severe” and cited **Chemical Workers Industrial Union v Darmag Industries (Pty) Ltd [1999]8 BLLR 754 (LC)** where a delay of nearly seven months was not condoned by the same Judge. She said that the Labour Relations Act contemplated the expeditious resolution of disputes. She pointed out further that even from 1 March the appellant had not expedited matters. She concluded :

“In my view, the degree of lateness of the referral is such that it cannot be outweighed by the explanation given by the applicant”.

7. It has to be remembered that the Court a quo exercised a discretion. We, as a Court of appeal, are not at liberty to interfere unless we are satisfied that the discretion was not exercised judicially, even though we might have decided the matter differently at first instance.

8. The learned Judge correctly set out the matters which Melane's case, supra, required her to take into account: the degree of lateness, the explanation for the delay, the prospects of success and the importance of the case. The judgment does not indicate that she had any regard to the prospects of success or to the question of importance. The case was undoubtedly important to both parties : the appellant's retrenchment, if held to be unfair, had significant financial implications. The prospects of success were addressed in the statements of case and response and also in the affidavits. They were in dispute. It is not possible on the papers to resolve that dispute or to hold that the appellant's prospects are

excellent. Equally, however, it is not possible to hold that the appellant's prospects are poor or slender. It is not that the appellant's case on the merits disclosed a glaring weakness or that the respondent adduced a deadly piece of evidence. It is accordingly fair to conclude on the papers that the appellant's prospects are reasonable.

9. Coming to the appellant's explanation for the delay, the Court below said :

“[6] The applicant’s explanation for the late referral is that his

former attorney advised him that the appropriate step was

to refer the matter to arbitration before the CCMA. If that were the case it is surprising that it was not pointed out to the applicant at the arbitration hearing that his dispute should be adjudicated and not arbitrated.

[7] The second reason advanced by the applicant for the delay,

is his unfortunate reliance on information provided to him

by a Labour Court official regarding the time limits relevant to this nature.

[8] It appears to me that the applicant blames the delay on other persons rather than on himself and gives no adequate explanation why he did not prosecute his dispute properly.”

In para [9] the learned Judge dealt with the appellant’s failure to expedite the matter from 1 March onwards. At para [10], quoted earlier, she concluded ;

“[10] In my view, the degree of lateness of the referral is such that it cannot be outweighed by the explanation given by the applicant”.

10. It appears to me from paras [6]-[8], quoted above, that **Revelas J** either rejected the appellant's explanation, or accepted it subject to

serious qualification. It was this unacceptable, alternatively doubtful, explanation which she weighed in para [10] against the degree of lateness. In my view she erred in adopting this approach. There was no reason not to accept the appellant's explanation for the first delay until 1 March. His affidavit reveals that he continually enquired when a date for the arbitration would be assigned. There is nothing to gainsay the appellant's statement that in going to arbitration, he bona fide acted on (wrong) legal advice. The probabilities favour that explanation. The absence of a confirmatory affidavit from the articulated clerk or his principals is of no moment in the circumstances. When the appellant was

told by the commissioner that he was in the wrong forum, it was perfectly logical for him to have gone to the Labour Court itself for advice on how to pursue his claim. That the appellant contacted the Labour Court, and was advised as above, was questioned in the respondent's affidavit, but again there was no evidence to controvert the appellant's plausible statement.

11. It may be a criticism of the appellant that after his setback on 1 March, he failed to expedite matters. On the other hand, he had a living to earn and he had been led to believe that he had 90 days within which to proceed. Had the appellant acted more promptly at that stage, a month or two could have been saved.

With regard to the final month, from early June to early July, the appellant was reliant on his new attorneys. It appears therefore that

all, or at any rate most of the seven month delay was not attributable to the fault of the appellant.

12. It is evident from what I have said that the Court erred in two fundamental respects: first, with regard to the explanation, she put the wrong weight into the scale; second, with regard to prospects and importance, she put no weight in to the scale at all. The scale was consequently out of balance to such a degree that, in my opinion, it must be concluded that the learned Judge failed to exercise the discretion which was entrusted to her. It is accordingly open to this Court to interfere with the decision of the Court below.

13. Prejudice to the parties was debated before us. It does not appear from the papers when the respondent realised that the appellant was in the wrong forum. We do know that the objection to the jurisdiction was first taken, without prior warning, on 1 March. However one looks at the position, it seems to me that the respondent can have little cause for complaint about the first delay. Specific prejudice to the respondent emanating from the whole period of the delay (for example, the absence of a material witness) was not raised in the opposing affidavit. By contrast the potential prejudice to the appellant is manifest if condonation be refused. Moreover, he expressly offered to “forfeit that part of my claim affected favourably by the delay.” Compare s.194.

14. Reasonable expedition is no doubt laudable in all litigation, and the more so in labour disputes. It is not, however, an end in

itself Circumstances arise where expedition must yield to other considerations, if justice is to be done. In my view the present is such a case.

15. **Mr Lawrence**, who appeared for the respondent , **invoked Kaefer Insulation (Pty) Ltd v President of the Industrial Court and Others [1998] 3 BLLR 230 (LAC), and Darries v Sheriff, Magistrate's Court, Wynberg and Others 1998 (3) SA 34 (SCA) at 41 D-E.** The latter case in particular is authority for the proposition that a stage may be reached when the litigant has to bear the consequences of the dilatoriness, incompetence or lack of diligence displayed by his legal representatives, whatever the prospects of success may be. I am satisfied that the present appeal does not fall in this category.

16. For the reasons set out above, I am satisfied that this is a proper case in which to grant condonation and that no cogent reasons exist, in the exercise of a discretion, for refusing it.

17. It was accepted by both sides that the costs of the appeal should follow the result. As for the costs at first instance, the appellant was well out of time and was seeking an indulgence. The respondent's opposition, although misplaced, was not unreasonable. It appears to me that the appellant should pay the respondent's costs in that regard.

18. The order is as follows :

1 The appeal is upheld with costs.

**2 The order of the court a quo is set aside and replaced
by the following :**

**“The application for condonation is granted. The
applicant is to pay the respondent’s costs
of opposition”.**

R.G. Comrie
Acting Judge of Appeal

I agree

RMM Zondo
Judge President

I agree

K. van Dijkhorst
Acting Judge of Appeal

For the Appellant: Adv M Bingham
Instructed by: Friedman Scheckter, Port Elizabeth
For the Respondent: Mr I.B.Lawrence of Garlicke & Bousfield Inc., Durban.

Date of argument: 12 June 2001
Date of judgment:

For the Appellant:

Mr.Nieuwoudt

For the third to fourth Respondent:

Mr Steenkamp

Date of Hearing:

22 May 2001

Date of Judgement: