

CASE NUMBER: D335/99

DATE: 15 SEPTEMBER 2000

PARTIES: CWIU & JASON FREDRICKS v ROARK RYAN

JUDGMENT

15 SEPTEMBER 2000

PILLAY J

- [1] This matter came before my brother, LYSTER AJ, on 9 February 2000 as an application to review the decision of the second respondent, the Bargaining Council, to refuse condonation of the late referral of a dismissal dispute for conciliation.
- [2] The third respondent, the employer, objected *in limine* to the delay in instituting the review application.
- [3] After lengthy argument, LYSTER AJ said:
- "The ruling of Mr Ryan was handed down on the 18th of November 1998 and the application for review of that decision was served on the respondent on the 8th of June 1999. Now, by any reasonable standards and also having regard to the relevant provisions relating to the filing of Section 145 reviews, I consider that the review application in this matter was not brought within a reasonable time and subject to anything that counsel have to say, I believe that the proper way for this matter to proceed is by way of a substantive application for condonation where the matter can be fully argued and the applicant will have a full opportunity to show good cause in accordance with the principles that have been fully laid down in the *Melane vs Santam* judgment."

[4] The Court then directed the applicants to bring an application for condonation within 14 days and to pay the employer's costs of the day on an attorney and client scale. Hence this application for condonation.

[5] Having now had the benefit of perusing a transcript of the proceedings before LYSTER AJ, it is evident that he was satisfied that an unreasonable period had elapsed which therefore warranted an application for condonation.

[6] This approach was consistent with the two-stage procedure adopted in *Setsokosane Busdiens EDMS Bpk v Voorsitter Nasional Vervoorskommisie en 'n ander* 1986 (2) 57 at 59 (h-j):

"The test which a Court has to apply to ascertain whether a common law application for review in the absence of a specific time limit was brought within a reasonable time is of a dual nature. The Court has to ascertain (a) whether the proceedings were instituted after expiration of a reasonable time and; (b) if so, whether the unreasonable delay should be condoned. As regards (b), the Court exercises a discretion but the enquiry as far as (a) is concerned does not involve the exercise of the Court's discretion. It involves a mere examination of the facts in order to determine whether the period that has elapsed was in the light of all the circumstances reasonable or unreasonable."

[7] It remains now for this Court to determine whether the unreasonable delay should be condoned.

- [8] The background to the dispute is that the employee, the second applicant, was dismissed on 26 August 1998 for dishonesty, victimisation and behaviour unbecoming of a shopsteward after he had lodged a criminal complaint of common assault and *crimen iniuria* with the South African Police Services against the human resources manager whom he accused of manhandling him and defaming his character.
- [9] The Union, the first applicant, referred the dispute to the Commission for Conciliation, Mediation and Arbitration, the CCMA, on 14 September 1998 for conciliation.
- [10] On 29 October 1998, the CCMA ruled that it did not have jurisdiction to hear the matter.
- [11] The next day, the dispute was then referred to the Bargaining Council. That was 35 days after the 30-day period prescribed in section 191(1) of the Labour Relations Act No 66 of 1995 (the “LRA”) had lapsed.
- [12] Three days later the Union applied for condonation for the late referral of the dispute to the Bargaining Council.
- [13] The employer opposed the application for condonation on 10 November 1998. On 18 November 1998 the Bargaining Council refused the condonation.
- [14] An application to review the decision of the Bargaining Council refusing condonation was prepared on the 27th of May 1999, served on 8 June 1999 and filed on 18 June 1999. That is about six and a half months after the Bargaining Council's decision. The pleadings closed in

the review application on 3 August 1999.

[15] The employer's attorneys promptly wrote to the applicant's attorneys on 9 and 17th June 1999, alerting them to the review application being brought late and the fact that it was not supported by an application for condonation which the employer indicated it intended to oppose.

[16] The applicant's attorneys responded that they did not believe that the application was out of time and that an application would be made at the hearing if it was necessary.

[17] The employer's attorneys reiterated their stance that an application for condonation should be made. When delivering his answering affidavit on 15 July 1999, the employer raised *in limine* the issue of condonation of the review application.

[18] In their reply served on 30 July 1999, the applicants acknowledged that a review application had to be brought within a reasonable time but contended that as the application had been brought in a reasonable time, there was no need for condonation.

[19] After it received the employer's heads of argument on 26 January 2000 in which the issue of condonation was raised again, the applicants and their attorneys remained inactive. As it transpired, LYSTER AJ as mentioned above, did not share the applicant's view.

[20] An application for condonation must be made as soon as the need for it ought to have been realised. In *Rennie v Kamby Farms (Pty) Ltd* 1989 (2) SA 124 (A) at 129 (g), the Court said

that:

"When a litigant realises that it has not complied with a rule of Court, it should apply for condonation without delay."

[21] GROSSKOPF JA went further in *Napier v Tsaperas* 1995 (2) SA 665 at 671A to state that a litigant's inaction may also be relevant when he should have realised but did not, that he has not complied with a rule.

[22] The facts in that case are similar to this case in that the attorney responsible for the delay had been reminded about the need for the condonation application. A similar approach was followed by the Labour Appeal Court in *Waverly Blankets Ltd v Ndimma & Others, Waverly Blankets Ltd v Sithukuza & Others* 1999 (20) ILJ 2564 LAC at 2566.

[23] The applicant's attorneys should have realised by about 9 June 1999 at least, if not before, that there might be a need for an application for condonation. There is no evidence that the applicant's attorneys took any steps to research the objection raised by the employer's attorneys in its correspondence and in its answering affidavit. The applicant's attorneys adopted a blasé attitude and did nothing.

[24] Their explanation for the delay was set out in the affidavit of the legal officer employed by the Union as follows:

"At all material times Ntlha and I considered that it would be reasonable to bring the application within a period of approximately six months or even slightly longer based on our

experience of the approach of the High Court in assessing what constitutes reasonable delay in launching review proceedings."

[25] This belief resulted in the applicants and their attorneys prosecuting the review application at a pedestrian pace. The explanation is unreasonable for several reasons.

[26] Firstly, while there are many similarities about the practice in the High Court and the Labour Court, there are some important differences. A significant difference is the acknowledgement by the legislature that labour disputes must be resolved effectively (Section 1(d)(iv).) That is not to suggest that disputes in the High Court are not resolved effectively. What it means is that there are special considerations that apply to labour disputes that may not apply to other disputes. For example, some labour disputes may have a direct and negative impact on the national economy. In many cases the need to resolve disputes expeditiously is driven by the obligation to limit the quantum of claims in the Labour Court.

[27] Secondly, BOOYSEN J in *Radebe v Government of the Republic of South Africa & Other* 1995 (3) SA 787 (NPD), conducted a survey of review applications in various fields of law including the review of a taxation, a decision of a liquor licence board, a judgment of the magistrate's court, a decision of the National Transport Commission and a review of a dismissal in 1933 of an employee of the South African Railways and Harbours (*Stoner v S A Railways & Harbours* TPD 1933 page 265) in which the employee delayed because of insufficient funds. The length of the delay in the cases surveyed varied from 6 to 20 months. BOOYSEN J concluded that a reasonable time must be assessed in each case (at page 798 (J). Referring to the *Setsokosane* case, the court accepted that little can be achieved in

having regard to the circumstances in other cases. If the applicants and their attorneys were relying on the practice in the High Court, they ought to have been aware that the facts in this case would determine what would be a reasonable period. Not only should they have not assumed that a reasonable period would be six months or longer but they should, in the light of section 1(d)(iv) of the LRA, have anticipated that it might be sooner.

[28] Thirdly, in the matter of *Moolman Brothers v Gaylard N.O. & Others* 1998 (19) ILJ 150 LC, which was heard in 1997, Seady AJ found that a period of six weeks was reasonable for bringing a review application under section 158(1)(g) where no time limits were prescribed. In a later reported decision TIP AJ, *Librapac CC v Moletsane NO & Others (1998) 19 ILJ 1159 (LC)*, referred to the six weeks imposed in reviews in terms of section 145 as a guideline for determining what a reasonable time might be for bringing a review application in terms of section 158(1)(g). In passing, it is noted that the period of six weeks referred to in section 145 also appears to be preferred as a reasonable period as the draft amendments to sections 145 and 158 of the Labour Relations Act published on 27 July 2000 in Government Gazette No 21407 have adopted it.

[29] The applicant's attorneys practise frequently in the Labour Court. They can reasonably be expected to know about the judgment of Seady AJ, if not the decision of TIPP AJ referred to above, as the former had been reported by the time the review in this application had to be considered.

[30] Fourthly, the Union and its attorneys had consciously considered the issue of time limits and, without more, concluded that a reasonable period would be six months or more. Their

negligence was compounded when they failed to consider the issue when it was pertinently raised in the correspondence, the affidavit and the heads of argument of the employer. Furthermore, they refused to make an application for condonation when the employer reminded them to do so. All of this occurred against the background that the applicants were already in difficulties about non-compliance with the time limits before the Bargaining Council. The explanation for the delay in bringing the review application must, in the circumstances, be rejected.

[31] The delay in bringing the application for condonation has been overtaken by the ruling of LYSTER AJ when he directed that it must be brought within 14 days.

[32] The delay of about six and a half months in making the application for review is considerable. All the information and requirements to bring the application was readily available. The application could have been brought within two and a half months or less, allowing for the December vacation. However, in the absence of prejudice mere delay is not sufficient to bar a review. (Herbstein & van Vincent in the *Civil Practice of the Supreme Court of SA* 4th edition page 955.)

[33] Finality is a consideration important to both parties, perhaps more so for the unemployed employee than the employer in this case. The employer is not likely to suffer any other prejudice in this application for condonation. Fault for the delay lies squarely between the union and its attorneys. The employee cannot be blamed in any way. However, despite this the Court has to consider whether condonation should be granted in view of the inexcusable conduct of the employee's representatives. (*Waverly Blankets Ltd* above.)

[34] In *Darries v Sheriff, Magistrate's Court Wynberg & Another* 1998 (3) SA 34 (SCA), the Court pointed out at 40(l):

"Condonation of the non-observance of the rules of this Court is not a mere formality. In all cases some acceptable explanation, not only of, for example, the delay in noting an appeal, but also, where this is the case, any delay in seeking condonation, must be given. An appellant should whenever he realises that he has not complied with a Rule of Court apply for condonation as soon as possible. Nor should it simply be assumed that, where non-compliance was due entirely to the neglect of the appellant's attorney, condonation will be granted. Where non-observance of the Rules has been flagrant and gross an application for condonation should not be granted, whatever the prospects of success might be."

[35] In *Salojee & another v Minister of Community Development* 1965 (2) SA 135 (a) at 141 (c), the Court said:

"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 this court."

[36] Of late, proceedings in this court are too frequently prefaced by applications for condonation. Rather than being an exceptional procedure, it is fast becoming a standard practice. More often than not, fault rests with the representatives and not the litigants personally. This is posing an unnecessary burden on the Labour Court and its diminishing resources. The time has come when such representatives should not be allowed to go unscathed for their own sins.

[37] Before deciding whether to bar the employee from proceeding with the review application, consideration must be given to his prospects of success. In order to assess whether the decision of the Bargaining Council to refuse the application for condonation is reviewable, the Court has to consider whether if the test for condonation as enunciated in *Melane v Santam Insurance Company Ltd* 1962 (4) SA 531 (A) were applied in the application before the Bargaining Council, was there a possibility that the application would have been granted.

[38] The application for condonation to the Bargaining Council was 35 days out of time. The applicants acted promptly after the dismissal up to the time when the application for condonation was made to the Bargaining Council. That delay was therefore not excessive. The employee was in no way responsible for that delay. The referrals were made by the Union on his behalf. The explanation for the delay was that the Union referred the dispute to the CCMA for conciliation in the belief that it had jurisdiction. There is a dispute of fact as to whether the CCMA had accepted jurisdiction in other similar disputes. One of the reasons given by the Bargaining Council for refusing the application was that the Union was aware that the Bargaining Council had existed and had referred disputes there previously. In order to refute this allegation, it was incumbent on the Union to substantiate its bald allegation that it had on two previous occasions referred disputes to the CCMA without objection from the employer. The employer categorically denied this. It emphasized in its answering affidavit that the Union was aware that the CCMA did not have jurisdiction as it repeatedly raised this aspect with the Union. While these allegations cry out for a substantive response, the Union elected to dismiss it with a bare denial. This may pose some difficulty for the applicants in the condonation application before the Bargaining Council.

[39] If a dispute which should have been referred to a council is referred to the CCMA, the latter may either refer the dispute to the council having jurisdiction or appoint a commissioner to resolve the dispute. The date on which the dispute was received by the CCMA is deemed to be the date on which the commission referred the dispute to the council. (section 147.) Implicit from section 147 is the requirement that the incorrect referral was made in good faith. For instance, it cannot be open to a party to refer a dispute to the CCMA because it believes it would have better prospects of success there than at the Bargaining Council. The applicants may have to satisfy the Bargaining Council that the referral to the CCMA had been in good faith that an exercise in shopping for the most sympathetic or preferred for forum.

[40] As the Union's reasons for the referral to the CCMA is disputed, the Court is not in a position to assess whether the referral to the CCMA was either *bona fide* or reasonable. Consequently, it cannot be determined whether the Bargaining Council might show any indulgence that might have flowed from an incorrect but reasonable and *bona fide* referral.

[41] On the prospects of success of the application before the Bargaining Council, it was submitted that the applicants had not set out the prospects of success at all or on affidavit. The Bargaining Council was therefore correct in refusing the application. As there were no prospects of success of the application in the Bargaining Council, there would also be no prospects of the review application before this Court succeeding. So the argument went.

[42] The Bargaining Council does not prescribe a procedure for making condonation applications. The fact that the applicant's submissions were not made under oath, should therefore not be

allowed prejudice them.

[43] The applicant's statement of case which was submitted with the application for condonation to the Bargaining Council could make out a *prima facie* case for an unfair dismissal. However, the first respondent, Mr Roark Ryan, who took the decision on behalf of the Bargaining Council appears not to have considered the applicant's statement of case at all. The reasons for his decision to refuse condonation do not manifest any consideration of the applicants' statement of case. Nor does it indicate whether he considered the prospects of success of the unfair dismissal dispute at all. *Prima facie* to dismiss an employee for lodging a complaint with the South African Police Service seem some what extreme. If the applicant could establish at the arbitration that he did not lodge the complaint dishonestly, he may have good prospects of success. Whether he would be able to establish that he was not dishonest is one of the issues that the Bargaining Council could consider in deciding whether to grant the application for condonation.

[44] In the circumstances, there are *prima facie* prospects of success of the review application before the Bargaining Council. Although the prospects of success do not have to be decisive in considering whether to grant an application for condonation, it can compensate when other considerations militate against granting condonation. (*Melane v Santam* and *Darries v Sheriff* above.)

[45] I find that condonation should be granted for the late delivery of the application for review.

[46] There remains the issue of costs. It is generally accepted that the litigants and not their

representatives pay the costs. However, in *Napier v Tsaperas* above, the Court considered whether the negligent attorney in that case should pay the costs despite the fact that the client offered to pay the costs as between attorney and client with the full knowledge of the negligence of the attorney. The Court nevertheless ordered costs against the client and the attorney jointly and severally to be paid on a scale as between attorney and own client.

[47] I grant an order in the following terms: The application for condonation is granted, the applicants and their attorneys to pay the third respondent's costs jointly and severally on an attorney and client scale.

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D. PILLAY

Judge Labour Court of South Africa

Date of Hearing : 13 September 2000.

Date of Judgment: 15 September 2000.

For the Applicants M. Pillemer SC

Instructed By Cheadle Thompson & Haysom Inc

For the Respondents Adv. A. Winchester

Instructed by Shepstone & Wylie.

Revised and Reportable

IN THE LABOUR COURT OF SOUTH AFRICA

SITTING IN DURBAN

CASE NO D335/99

DATE 15 September 2000

In the matter between:

CHEMICAL WORKERS INDUSTRIAL UNION

JASON FREDRICKS

Applicants

and

ROARK RYAN & 2 OTHERS

Respondents

JUDGMENT DELIVERED BY THE HONOURABLE **MS JUSTICE PILLAY**

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