H AFRICA

HELD AT PORT ELIZABETH

CASE NO.

P1022/2001

In the matter between :

ERS OF **1st Applicant**
SOUTH AFRICA

2nd to Further Applicants

and

CA (PTY) LTD **3rd Respondent**

JUDGMENT

NDLOVU AJ

Introduction

[1] The parties herein were cited as in the main action. However, the matter before the Court involved an application for condonation of the late filing of the Statement of Defence by the 3rd Respondent in the main action (the "employer"). Hence, the employer was the applicant in the present matter. The application was opposed by the 1st Applicant and the 2nd to Further Applicants in the main action (the "Union" and the "individual former employees", respectively), who are, therefore, the Respondents in the present application.

[2] The employer was served with the Statement of Case on 22 November 2001. It filed its Statement of Defence on 23 May 2002, together with its condonation application, seeking the Court's indulgence in respect of its late filing thereof. In terms of Rule 6 (3) the filing as such was some 6 months late.

The Factual Background

[3] According to the employer, on the day following upon its receipt of the Statement of Case its aforesaid managing director, Paul Erasmus, addressed a letter (dated 23/11/2002) to the Registrar of this Court, which read as follows :

"We hereby wish to formally advise you that the respondent in this matter, the Company Eberspacher South Africa (Proprietary) Limited, will oppose the action brought against it by the applicant, NUMSA and others"

[4] In his founding affidavit, deposed to on behalf of the employer , Erasmus stated that he and the employer had never been previously involved with a Labour Court matter. He had assumed , incorrectly, that as was the position

with the CCMA procedure, after notifying the Registrar of the employer's intention to oppose the matter, the employer thereafter only needed to wait to receive the trial date from the Registrar. At the same time when he forwarded the letter of 23 November 2001 to the Registrar, Erasmus had delivered a copy thereof together with Statement of Case to the then employer's attorneys Linde Dorrington and Kirchmann, for their records.

[5] Upon receipt of the Statement of Case together with the letter aforesaid, the employer's attorney Mr Kirchman understood the receipt as an instruction by the employer for him to proceed and file opposition papers , namely the Statement of Defence. He then sat upon preparing for the filing of the papers.

[6] According to Mr Kirchmann, in a confirmatory affidavit, he queried the Statement of Case in that whereas paragraph 3.1 thereof referred to in Annexure "A" (being the list of names of the 38 former employees (the Second to further applicants in the main action), such annexure was in actual fact not attached to the Statement of Case.

[7] Kirchmann testified (in his affidavit) that he had initially endeavoured to contact Erasmus about Annexure "A" but in vain, until 10 December when Erasmus informed him that no annexure was attached to the Statement of Case which was served on him on 22 November 2001. Kirchmann then faxed a letter to the Union. The substantive contents of the letter read as follows:

" We have been instructed to file replying papers on behalf of the

Respondent. Unfortunately, it appears as if Annexure "A" was omitted from the statement of case served on our client. Your furnishing us with a copy of Annexure "A" on an urgent basis will be appreciated."

[8] Kirchmann further testified that on 12 December 2001 he received a facsimile from the Union whereby the Union refuted that there was any annexure referred to in its Statement of Case.

[9] Although Kirchman did not submit a copy of the Union's letter he was referring to, the Union itself did so when it filed its answering affidavit, resisting the present application. The Union's letter 12 December 2001 read as follows:

" We are in receipt of your letter dated 11 December 2001.We are unfortunately not sure that the Notice to Attend Disciplinary Hearing is the document that you call Annexure "A" as our Statement of Case does not make mention of annexures."

We are therefore furnishing you with the Notice to Attend Disciplinary Hearing. If this is not the document that you are looking for please inform us and give us the description of the document that you are referring to."

[10] On the same day (12 December 2001) Kirchmann responded and referred the Union to paragraph 3.1 of the Statement of Case. Again he requested the Union to treat the matter as one of urgency.

[11] In its answering affidavit the Union insisted that it furnished the Applicants

with Annexure “A” on 13 December 2001. However, Erasmus denied that he or the employer received any response from the Union in this regard.

[12] According to Erasmus it was only when he was contacted by the Registrar and advised of the set down date for the application for default judgement that he became aware of the need for the employer to have filed the opposing papers. On the other hand, Kirchmann, according to his version , was still awaiting a response from the Union on the issue of Annexure “A”.

[13] Ms Kapa (the Union Official) submitted that Annexure “A” was filed together with the Statement of Case and that the only omission, if anything, was that it was not marked Annexure “A” but simply “Annexure.” She contended that the omission was a mere oversight on the part of the Union.

[14] The Union and the individual former employees alleged in the Statement of Case that the latter’s dismissal by the employer was unfair . However, the employer, on the other hand, contended that the dismissal was fair in that on 18 July 2001 the individual former employees engaged in an unprotected strike or work stoppage for 2 hours.

[15] On 20 July 2001 the individual former employees were served with notices to attend a disciplinary enquiry . In the meantime a 2 hour’s pay was deducted from their wages.

[16] The disciplinary enquiry was presided over by Erasmus, who declined the Union’s request for his recusal. The enquiry finding was eventually made whereby the individual former employees were convicted of misconduct.

On 21 August 2001 they were all dismissed. The employer submitted that there had been some number of occasions previously when its workers, including the individual former employees, or some of them, had engaged on "wild cat strikes", which had then started to have a negative impact on the employer's business operations.

[17] The individual former employee's version was that they never engaged in any strike or work stoppage. It was submitted on their behalf that their original intention had been to hold their meeting during lunch time, between 17h45 -18h45. When it was realised that they were getting beyond the lunch break, they had then sent their shop steward to go and report to the management that they would be late from lunch break. According to them, they took about 45 minutes outside the lunch break . They further submitted that some of them would, in any event, not have had any work to do because their line operations were not functioning during much of the time they were at the meeting.

The Legal position

[18] In terms of section 158 (1)(f) of the Labour Relations Act 66 of 1995 (the "LRA"), the Court "*may, subject to the provisions of (the LRA), condone the late filing of any document with, ... the Court".* Rule 12(2) further provides that, *"[t]he court may, on good cause shown, condone non-compliance with any period prescribed by these rules".*

[19] In *Saraiva Construction (Pty) Ltd vs Zululand Electrical Electrical and Engineering Wholesalers (Pty) Ltd 1974 SALR 612 at 614 H-A* it was held as follows:

he applicant to furnish an explanation of his default, and if it to be of any assistance to the Court in deciding whether "good cause" has been shown the explanation must show how and why the default occurred. If such an explanation is furnished the correct approach, I think, is to consider all of the circumstances of the case, including the explanation, for the purpose of deciding whether it is a proper case for the grant of relief. If it appears that the default was wilful or was due to gross negligence on the part of the applicant the Court may well decline, on that ground alone, to grant the indulgence sought"

[20] The factors which must be taken into account when considering this application are now settled law. In the well-renown case, *Melane v Santam Insurance Co Ltd 1962(4) SA 531(A), at 532C-F,* the Appellate Division held as follows:

"In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective *conspectus* of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the Respondent's interest in finality must not be overlooked. I would add that discursiveness should be discouraged in canvassing the prospects of success in the affidavits".

[21] The granting of condonation is, therefore, clearly a matter within the discretion of the Court, which it must exercise judicially. The mere fact that there was a long delay is not *per se* conclusive and dispositive of the question of whether or not the relief sought ought to be granted. For

instance, in *Cairs Executors vs Gaarn 1912 AD 181, at 186* the Appellate Division observed that:

"Cases might conceivably arise so special in their circumstances that, in spite of abnormal delay , the Court would feel bound to assist the applicant. But on the other hand the length of the delay and its cause must always be important (in many cases the most important) elements to be considered in arriving at that conclusion. It would be quite impossible to frame an exhaustive definition of what would constitute sufficient cause to justify the grant of indulgence. Any attempt to do so would merely hamper the exercise of a discretion which the rules have purposely made very extensive, and which it is highly desirable not to abridge"

[22] Accordingly, a long delay may, in an appropriate instance, nevertheless be condoned, depending on the circumstances of each case. In *Barsky v SA Broadcasting Corporation [1988] 9 ILJ 259(IC), at 294G-J,* it was held that exceptional circumstances existed to justify the condonation of a six months' delay, in respect of an application brought under the former Labour Relations Act 28 of 1956.

[23] The applicant bears the onus to satisfy the Court that sufficient grounds exist for granting the condonation, by furnishing such grounds in support of the application. However, is has been held that the Court "would not be limited to such grounds (but) would be entitled to take all the circumstances into consideration for the purpose of deciding whether relief should be granted" *(Rose and Another v Alpha Secretaries Ltd 1947(4) SA 511(AD), at 518);* including, on the one hand, any prejudice, actual or potential, on the respondent and, on the other, a possible undue infringement of, firstly, the applicant's constitutional right of "access to courts" *(section 34 of the Constitution of the Republic of South Africa Act 108 of 1996)* and, secondly,

the common law *audi alteram partem* rule..

Analysis and Assessment of the Application

[24] I have no doubt in my mind that the employer, through its attorney Kirchmann, was partly to blame for the lateness to file the Statement of Defence. Kirchmann testified that he failed to contact Erasmus from the time he (Kirchmann) received the Statement of Case, which was 23 November 2001, until 10 December 2001. However, he did not explain how his failure in that regard was brought about. He was obliged to explain this shortfall.

[25] Kirchmann further claimed that he did not receive the Union's letter of 13 December 2001 which transmitted Annexure "A". He also submitted that the absence of a response from the Union (in respect of Annexure "A") had disabled the matter being brought to his attention. Indeed, this is yet another lame and simplistic excuse. It was incumbent upon him to organise his office administration in such a way that pending matters were held over for his attention and properly pursued by him.

[26] In any event, as the Union correctly pointed out, the absence of Annexure "A" from the Statement of Case was not a bar precluding Kirchmann to have proceeded and filed the Statement of Defence on behalf of the applicant (the employer). The absence of Annexure "A" could be raised either as a point *in limine,* or the employer could simply have reserved its right to respond further upon its receipt of the annexure. Kirchmann, being

an attorney, ought to have known of these options.

[27] However, in my view, in an application for condonation, fault on the part of the respondent, which had the effect of contributing to the applicant's long delay in filing a response, shall, in an appropriate case, be considered as mitigating and compensating for the long delay. Accordingly, the fault on the part of the employer or its attorney in the present matter was, in my view, mitigated by fault on the part of the Union, as alluded to above, which compensated for the employer's long delay.

[28] The Union vehemently denied that any reference was made of an annexure to the Statement of Case. The Union was clearly wrong . This reference was actually made at paragraph 3.1 of the Statement of Case.

[29] Ms Kapa strenuously argued that Annexure "A" was attached to the Statement of Case and only that it was not marked Annexure "A", but only as "Annexure". This controversy constituted a dispute of fact between the parties . However, I was inclined to find the employer's version on this point more credible. Firstly , I conceived of no probable reason why Kirchmann could say, under oath, that he did not receive Annexure "A" when in fact he had received it, and why Erasmus would also do likewise. Secondly, the probable truthfulness of that version was further strengthened by the fact that even the copy of the Statement of Case in the Court file not did not have Annexure "A", albeit paragraph 3.1 of the Statement of Case making reference thereto.

[30] I further considered that the conduct of the individual former employees on 18 July 2001 appeared to have constituted a *prima facie* unprotected

industrial action on their part. The holding of their meeting, lasting up to an hour or more, during official working hours without prior consultation with, and approval by , the management, was not acceptable. The one thing which every employee and representative trade union, in a collective bargaining set up must know, is that even where these parties are conferred with organisational rights in terms of the Act, these rights must be exercised responsibly and within the ambit of the law. They must not be abused. For instance, no company can reasonably be expected to sit back and do nothing when 38 members of its staff complement or labour force simply retreat to the company's canteen and hold a lengthy meeting during official working hours without the company's knowledge. Therefore, the conferment of organisational rights was no licence permitting the individual former employees to behave and conduct themselves in the manner that they did, whatever their grievances were at the time.

[31] As for the aspect of importance of the matter to either party, I was satisfied that this application was of great importance to the applicant. The fact that Erasmus issued a letter, purporting to be the notice of intention to defend the main action, only a day after he received the Statement of Case, was, to my mind, a manifestation on his part of how seriously and importance he regarded this matter from the onset.

[32] In the light of the above findings, it became unnecessary for me to examine further requirements for condonation . I was satisfied that the importance of the matter to the applicant, coupled with the *prima facie* strong prospects of success in the main action, compensated for what appeared to be a long delay in the filing of the Statement of Defence. As is usually the case, each

instance will be considered on its own merits. Accordingly, in my view, the application ought to be granted.

Order

[33] In the result, the Court made the following order:

31.1 The application for condonation of the late filing of the Respondent's Statement of Defence is granted.

31.2 The parties are directed to hold a pre-trial conference in terms of Rule 6 (4) within 10 (ten) days of this Order.

31.3 There is no order as to costs.

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NDLOVU AJ

f Hearing : 2 April 2003
f Judgment : 2 April 2003
Reasons delivered : 19 June 2003

<u>Appearances</u>

Applicant : Adv RB Wade
ted by : Kirchmann Inc

Respondent : Ms N N Kapa (Union Official)