

**CASE NO : J5081/00**

**IN THE LABOUR COURT OF SOUTH AFRICA**

**Held at Johannesburg**

**In the matter between :**

|                                                       |                                      |
|-------------------------------------------------------|--------------------------------------|
| <b>NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA</b> | <b>First Applicant</b>               |
| <b>AND OTHERS</b>                                     | <b>Second and Further Applicants</b> |

**and**

|                                            |                   |
|--------------------------------------------|-------------------|
| <b>RONG SHIN ENTERPRISES (PTY) LIMITED</b> | <b>Respondent</b> |
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**JUDGEMENT**

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**FULTON AJ**

**1.INTRODUCTION**

This is an application for condonation by the respondent for the late filing of its response to the applicants' statement of claim.

**2.THE FACTS**

2.1 At the outset I wish to point out that the respondent's pleadings were particularly difficult to understand. The founding affidavit to the application for condonation is headed "*Founding Affidavit in Support of Application for Condonation of Late Filing of Application for the Review of Award Granted in Arbitration*". Clearly, this is wrong. The respondent's pleadings contain more of the same language and, with respect, it took me quite some time to decipher the respondent's case.

2.2The deponent to the founding affidavit is Mr A Le Roux, an advocate, who states that he was instructed as the respondent's counsel by the respondent's attorneys of record. In addition, Mr Le Roux states that he holds office in an employer's organisation, Immediate Response Employer's Organisation, of which the respondent is a member. Mr Le Roux also appears to be the managing director of a company called Verbis Legis (Pty) Ltd t/a Necessitas. Necessitas describes their business as "Labour Relations Practitioners". Necessitas appears to have conducted the retrenchment consultations on behalf of the respondent. The applicant's answering affidavit is by Ms M Modimoeng, a local organiser of the first applicant. The deponent to the replying affidavit is Mr Jakobus Cronje, the respondent's attorney of record.

### **2.3The extent of the delay**

2.3.1The respondent's founding affidavit does not set out when the statement of claim was served on the respondent, or when the respondent filed its response. This information, crucial to the respondent's application for condonation, should have been contained in the founding affidavit. All that is set out in the founding affidavit is a concession by Mr Le Roux that the delay was considerable and a contention that although considerable, the delay was not excessive.

2.3.2The individual applicants appear to have been retrenched on 10 August 2000 [more about this later] and referred an unfair dismissal dispute to the bargaining council on 15 August 2000. The dispute was conciliated on 13 September 2000 and remained unresolved. On 7 November 2000 the applicants served a copy of their statement of claim on the respondent and then filed their statement of claim in the labour court on 8 November 2000. The respondent's response was served and filed on 13 July 2001.

2.3.3The respondent's response is thus some 7 and a half months late.

### **2.4The explanation for the delay**

2.4.1From what I can gather the respondent's reasons for the delay in filing their response were as follows:

2.4.1.1The respondent was of the view that the applicants' referral to conciliation at the bargaining council was three days late. Mr Le Roux assumed that the applicants would apply for condonation for their late referral. Mr Le Roux also assumed that the chairperson of the conciliation meeting would *mero moto* have raised the late referral, but he/she did not. Mr Le Roux contends that as the referral to conciliation was late the certificate of outcome was "*contestable and lacking in validity.*" Mr Le Roux goes on to explain that it

was not realised by the representatives advising and assisting the respondent [Mr Le Roux does not explain which representatives] that in line with recent case law the onus was on the respondent to review the certificate of outcome. Mr Le Roux contends that prior to the *“latest [legal] development .....the Respondent would technically have had no particular obligation or duty to serve and/or file its responding documentation.”* Mr Le Roux seems to have been under the mistaken impression that had the recent legal developments, as he calls them, not have taken place, the respondent would simply have to wait until either the applicants or the registrar had taken some further step towards compelling or alerting the respondent to serve and file its opposing documentation.

2.4.1.2 Mr Le Roux states that *“this modification to the currently prevailing case law may with respect, excuse the omission in serving and filing answering documentation at some earlier stage in terms of the Court Rules, particularly since no specific provision in the present Rules appears to deal with pre-emptive questioning of perceived irregular proceedings.”*

2.4.1.3 The respondent's advisers and practitioners acting as consulting representatives for the respondent [Mr Le Roux does not say which representatives] had been inundated with vast amounts of additional work and tasks throughout most of the *“present and previous calendar years.”*

2.4.2 The respondent states in the founding affidavit that the referral to conciliation by the applicants was *“only filed some 33 days after the alleged unfair labour practice complained of”*. The respondent on this basis contends that the referral to conciliation was three days out of time. The applicants in their answering affidavit allege that on 11 July 2000 the individual applicants were given four weeks notice of their dismissals. The individual applicants worked out their notice period and their dismissals accordingly took effect on 10 August 2000. The applicants then referred an unfair retrenchment dispute to the relevant bargaining council on 15 August 2000. The applicants contend that in the circumstances their referral to conciliation was made timeously. In its replying affidavit the respondent does not dispute that the referral to conciliation was made on 15 August 2001 but stands by its allegation that the referral was late.

2.4.3 The first applicant states that it informed the respondent's representative during the pre-trial meeting in August 2001 that an application for condonation was necessary in relation to the respondent's response. This is not disputed by the respondent. The application was only brought some four months later. The founding affidavit was signed by Mr Le Roux on 21 December 2001 and filed in court on 9 January 2002. Mr Cronje in the replying affidavit mentions that during the second half of December 2001 transmission by telefax to this court proved impossible and this contributed to the delay in filing the application for

condonation.

## 2.5 Prospects of success

2.5.1 Mr Le Roux's founding affidavit contains the following single paragraph in relation to prospects of success:

*"It is respectfully submitted that excellent prospects of succeeding exist in favour of the Respondent, as will appear from its Answering Statement of Defence, which reflects that substantial efforts had been made to accommodate the Applicants at all relevant stages and to comply with such requirements as have prevailed by statute and have applied. Any ostensible want of exhaustiveness in that regard seems purely attributable to the obstructive and frequently retarding conduct of the Applicants and/or their chosen representatives, in dealing with the rationalisation, with respect."*

2.5.2 As the first applicant points out, these allegations are wholly deficient. In the circumstances I have considered the allegations contained in the respondent's response to the statement of claim. Suffice to say that a consideration of the pleadings does not evince that the respondent made substantial efforts to accommodate the applicants at all relevant stages or that *"any want of exhaustiveness in that regard seems purely attributable to the obstructive and frequently retarding conduct of the Applicants or their representatives."*

2.5.3 The applicants' case is a simple one. They allege that only one consultation meeting was held on 21 June 2000. At this meeting the first applicant disputed the economic rationale and requested the respondent to provide it with information as regards its financial position. The applicants allege that the information was not supplied. The respondent unilaterally decided to issue letters of termination on 11 July 2000, giving the individual applicants four weeks' notice of their dismissal. The individual applicants worked out their notice periods and were dismissed on 10 August 2000. The individual applicants contend that their dismissals were both substantively and procedurally unfair.

2.5.4 The respondent alleges the following in its response:

- During 1999 and well into 2000 the respondent suffered various financial setbacks and its business prospects steadily declined. This forced the respondent to introduce shortened weekly working hours in 1999. The respondent attaches a copy of a document to its response which it says is its balance sheet for

1999 and 2000. The balance sheet reflects that the respondent suffered losses in 1999 and 2000.

- On 14 June 2000 the respondent informed its workforce of its intention to rationalise its workforce and provided to its workforce the information as required by section 189(3) of the Labour Relations Act (“LRA”). The respondent’s notice informed the employees that a consultation was scheduled for 21 June 2000.
- The respondent sent a letter to the first applicant requesting the presence of the first applicant at the meeting of 21 June 2000. The first applicant responded that it would attend, but requested that the respondent not unilaterally schedule meetings.
- The parties met on 21 June 2000. The respondent does not say much about this meeting other than that it complied with its obligations in terms of section 189 of the LRA.
- The respondent then refers to correspondence between the parties to arrange further consultations [copies are attached to the response] and contends that the first applicant frustrated efforts to extend consultations. The correspondence in my view does not of itself evidence such conduct on the part of the first applicant. On the face of it the correspondence reflects the respondent again unilaterally scheduling a meeting and the first applicant informing the respondent that it was not available on the date scheduled. The first applicant in its response suggested an alternative date [10 July 2000] and time. Then there is a letter from the respondent to the first applicant on the date of the scheduled meeting. This letter provides the first applicant with a *pro forma* minute for consultation meetings. The response does not tell me anything further about the meeting scheduled for 10 July 2000.
- On 11 July the respondent gave the individual applicants notice of the termination of their services. The respondent informed the individual applicants that they were not required to work their notice periods and could leave immediately. The response does

not say whether the individual applicants left immediately or whether they worked their notice periods.

## **2.6 Importance of the matter**

2.6.1 Mr Le Roux in his founding affidavit states that if the applicants were successful the consequences to the respondent would be *“totally devastating and it would be financially crippled, if not destroyed.”*

2.6.2 The applicants contend that these statements are unsubstantiated.

## **2.7 The balance of convenience**

2.7.1 Mr Le Roux reiterates that the respondent has to rely on its right to be heard in the adjudication of this matter, possibly for its very economic survival.

2.7.2 The applicants reiterate that the alleged consequence for the respondent is unsubstantiated.

## **3. THE LAW**

3.1 The affidavits reveal certain disputes of fact. In such a case the general rule as accepted in **Plascon-Evans Paints (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd SA 1984 (3) 623 (AD)** is that relief should only be granted if the facts as stated by the respondent together with the admitted facts in the applicants' affidavit justify the relief sought. Where it is clear that facts, though not formally admitted, cannot be denied, they should be regarded as admitted.

3.2 I turn now to the law in relation to condonation and particularly, condonation where the reason for the delay is the negligence of the applicant's representative.

3.3 This court has the power to condone a late response on good cause shown in terms of Rule 12(3) of the Labour Court Rules. The labour court has followed the exposition of “good cause” set out in **Melane v Santam Insurance Co. Ltd 1962 (4) SA 531 (A)** at 532 C-F:

*“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 therefore, 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 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. I think that all the foregoing clearly emerge from decisions of this Court, and therefore I need not add to the ever-growing burden of annotations by citing the cases.”*

3.4 In **NUM v Council for Mineral Technology [1999] 3 BLLR 209 LAC** at 211 G – I the LAC added the following codicil to the **Melane** test:

*“There is a further principle which is applied and that is that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused.”*

3.5 The *locus classicus* on the law in relation to applications for condonation where the delay has been caused by the negligence of the applicant’s representative is **R v Chetty 1943 AD 321**. In that matter the applicant himself was not responsible for the delays which occurred, save insofar as he continued to allow his case to remain in the hands of an attorney who had shown himself unworthy of his confidence, and the court granted condonation after consideration of that fact and that the nature of the conviction against the applicant was serious and he had been given leave to appeal by the Transvaal Provincial Division. This principle was again adopted by the Appellate Division in **Regal v African Superslate (Pty) Ltd 1962 (3) SA 18 (AD)** where the court at 23 C held that the delay was due entirely to the neglect of the applicant’s attorneys and that that neglect should not in the circumstances of the case debar the applicant, who was in no way himself to blame, from relief.

3.6 Then in **Saloojee and Another NNO v Minister of Community Development (1965) (2) 135 (AD)** the

Honourable Chief Justice Steyn held at 141 C :

*“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. Considerations ad misericordiam should not be allowed to become an invitation to laxity. .... The attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a Rule of Court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are.....A litigant, moreover, who knows, as the applicants did, that the prescribed period has elapsed and that an application for condonation is necessary, is not entitled to hand over the matter to his attorney and then wash his hands of it. If, as here, the stage is reached where it must become obvious also to a layman that there is a protracted delay, he cannot sit passively by, without so much as directing any reminder or enquiry to his attorney.....If he relies on the ineptitude or remissness of his own attorney, he should at least explain that none of it is to be imputed to himself.”*

3.7It is also well established that in these circumstances once the attorney or representative becomes aware that he/she has failed his client he/she should take immediate steps to file an application for condonation and to make full and frank disclosure in their affidavits. See for example **Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein, and Others 1985 (4) SA 773 (AD)** where the court held that a shortcoming in this regard had to be weighed together with all the other relevant circumstances in the case.

3.8This body of law has been accepted both in the labour court and the labour appeal court. It has also been extended to apply to those instances where a litigant is represented by a trade union official and the delay is as a result of the negligence of that trade union official. [See for example **Mokoena v Naik [1997] 12 bllr 1543 (LAC)** and **Waverley Blankets Ltd v Nsima & Others [1999] 11 BBLR 1143 (LAC)**.] I see no reason why this law should not be equally applicable to employer’s organisations.

3.9Lastly, I wish to point out that although the prejudice to the parties does not form part of the original factors as enunciated in **Melane supra**, it appears now to be considered by the courts more frequently than not [See, *inter alia* , the **Swanepoel** case *supra* and **Sibiya & Others v Amalgamated Beverages Ltd & Others (2001) 22 ILJ 961 (LC)**.]

#### 4.THE LAW APPLIED TO THE FACTS



4.1 In **Arnott v Kunene Solutions & Services (Pty) Ltd (2002) 23 ILJ 1367** Francis J stated that in that matter *“The catalogue of events reveals gross recklessness, incompetence and dilatoriness by the applicant’s legal representatives.”* I regret to say that I feel similarly about the events and the conduct of the respondent’s representatives in this matter.

4.2 The only basis on which the referral to conciliation could have been late is if the individual applicants left the employ of the respondent on 11 July 2000. Section 190 of the LRA states that the date of dismissal is the earlier of: the date on which the contract of employment terminated or the date on which the employee left the service of the employer. In paragraph 2 of its answering affidavit the first applicant specifically states that the individual applicants worked their notice period of one month. In the replying affidavit Mr Cronje does not deny this allegation and responds to these allegations as follows:

*“Since the allegedly unfair dismissal had taken place at least 33 days before the date of the referral in question, it is not clear why it is claimed that such referrals had been effected in due time.....The grounds for condonation in casu centres around the reasonable belief of the representatives that the deficiency concerned, would not be deemed to have been cured through the lapse of time (sic)”*

This then was the first error by the respondent’s representatives, i.e. they thought that if notice of termination was given on 11 July 2000 the date of dismissal was 11 July 2000 and the referral to conciliation had to be made within 30 days of that date.

4.3 The respondent’s representatives then appear not to raise their concern about the alleged late referral at conciliation and expect the chairperson to raise it *mero moto*, which he/she does not. A certificate of outcome is issued and the applicants refer their dismissal dispute to the labour court.

4.4 The respondent’s representatives then take the view that because the referral to conciliation is late the applicants’ dispute is not justiciable and does *“not in law require timeous opposition”*. They consequently do not file a response in which their views on the certificate of outcome are expressed. Nor do they launch a review application to set aside the certificate of outcome. I’m not sure how the representatives thought this court would have come to have known about their views on the certificate of outcome, particularly since it is specifically alleged in the statement of claim that the dismissals took effect on 10 August 2000 and that the referral to the bargaining council was made on 15 August 2000. The inference to be drawn from these facts is that the applicants were properly before the council.

4.5 Mr Le Roux explains that it was not realised by the representatives advising and assisting the respondent that in line with recent case law the onus was on the respondent to review the certificate of

outcome. Mr Le Roux does not provide me with the specific case or cases he refers to. I assume that Mr Le Roux is referring to the decision by Zondo JP in **Fidelity Guards Holdings (Pty) Ltd v Epstein NO & Others (2000) 21 ILJ 2382 (LAC)**. This decision, the crux of which is that the certificate of outcome in matters where the referral to conciliation is late and no condonation was sought or granted, must stand unless set aside on review, was handed down on 1 September 2000. Mr Le Roux does not in his founding affidavit tell me when he became aware of the decision. All that Mr Le Roux says is that *“having learnt about such restatement of the prevailing practice as until then perceived, only during the course of the present calendar year, the more active pursuit of the defence against the present case launched in casu, was swiftly precipitated.”* It is apparent, however, from the respondent’s response filed in mid July 2001 that the representatives were not yet aware of the decision. The response, for example, denies that the labour court has the requisite jurisdiction to adjudicate the dispute beyond the issue of condonation for the late referral to conciliation. This sentiment is repeated in various forms in the respondent’s response. It seems to me then that Mr Le Roux became aware of the decision sometime between the filing of the respondent’s response in mid July 2001 and the filing of the respondent’s application for condonation in January 2002.

4.6The further reason for the delay is that the respondent’s advisers and practitioners acting as consulting representatives for the respondent had been inundated with vast amounts of additional work and tasks throughout most of the *“present and previous calendar years.”* Such a bald unsubstantiated allegation is simply not acceptable.

4.7Notably, the applicants launched an application for default judgment in June 2001 and in July 2001 the respondent filed a response to the statement of claim. It therefore seems to me that it was the applicant’s request for a default judgement which led the respondent to file its response.

4.8The respondent’s representatives then, after being alerted to the necessity of an application for condonation at the pre-trial conference in August 2001, take a further five months to bring an application for condonation. The applicants point out that after the pre-trial meeting in August 2001 a pre-trial minute was drawn up and sent to the respondent’s representatives in September 2001. The representatives, however, failed to respond and the applicants were compelled to call for a pre-trial conference before a judge. This was done on 21 November 2001.

4.9The court file and the applicants’ heads of argument also show that the papers in the application for condonation were indexed and paginated by the first applicant and that the matter was originally set down for hearing on 14 November 2003. The respondent’s representatives, however, failed to file their heads of argument prior to that time and the matter was struck from the roll on that day with costs being awarded

against the respondent.

4.10 Most troubling is that there is not a single averment in the respondent's affidavits as to any steps whatsoever taken by the respondent itself that would be consistent with a desire to oppose the applicants' unfair retrenchment claims. I do not, for example, know if the respondent is aware of the course of events to date or if it has made enquiries about the litigation. All that I am told is that at the time that Mr Le Roux deposed to the founding affidavit, the relevant managers of the respondent were not available to themselves depose to an affidavit. Mr Cronje expands upon this in the replying affidavit by stating that the respondent's managers were not available at that time due to the closures during the festive season. The silence from the respondent is deafening.

4.11 As stated by Conradie J in the **Waverley Blankets** case, *supra*, "*Although the employees were not to blame for this state of affairs, it has frequently been emphasised by our courts – including this Court – that an attorney's neglect of his client's affairs may be so inexcusable that condonation may, despite the blamelessness of his client, be refused. In my view, this is precisely such a case. The attorney displayed such gross ineptitude in dealing with the appeal that this court cannot extend any indulgence to the employees.*" I hold similar views in this matter.

4.12 A court is always reluctant to bar a party from being heard, particularly in a case such as this where it is the party's representatives who are at fault and that party may at least be partly successful in the litigation. The respondent's response indicates to me that if substantiated the respondent may successfully show that there was an operational requirement for the retrenchment. I do not, however, hold the same view in relation to procedural fairness. The respondent has also not given any indication that it correctly retrenched the individual applicants vis-à-vis their co-workers and I have no indication that the retrenchments are substantively fair on this basis. Be that as it may, I have scoured the respondent's affidavits in an endeavour to find a reason for the delay that would be reasonable or acceptable. I unfortunately have not been able to find one. I consider myself bound by the decision in the labour appeal court in the **Council for Mineral Technology** case, *supra*, and consequently without a reasonable and acceptable explanation for the delay I cannot consider the prospects of success and the application for condonation must be refused. Even if I am wrong in this regard there is insufficient evidence before me to show that the respondent has a compelling defence to the alleged unfair retrenchments.

4.13 As regards costs, the general rule on costs is that they follow the event. However, as the respondent itself is in no way to blame for the delay in filing its response I do not believe it is appropriate to make an award for costs against the respondent. However, after taking into account all the facts and circumstances

of this matter I am of the view that Mr Cronje and Mr Le Roux should be responsible for the applicants' costs in this matter.

## **5.ORDER**

I, accordingly, make an order in the following terms:

5.1 The application for condonation for the respondent's late response is dismissed.

5.2 Mr Le Roux and Mr Cronje are ordered jointly and severally to pay the applicants' costs, the one paying the other to be absolved.

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**KA FULTON**

**Acting Judge of the Labour Court**

### **Appearances:**

**For the applicant: Norma Craven of NUMSA**

**For the respondent: Kobus Cronje of Kobus Cronje Attorneys**

**Date of hearing: 21 November 2003**

**Date of judgement: 13 February 2004**