166336IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

CASE NO: **J1401/98**

In the matter between:

RUSTENBURG TRANSITIONAL LOCAL COUNCIL	Applicant
And	
M S SIELE NO	First Respondent
THE COMMISSION FOR CONCILIATION, MEDIATION & ARBITRATION	SecondRespondent
INDEPENDENT MUNICIPAL & ALLIED TRADE UNION	Third Respondent

JUDGMENT

STELZNER, AJ

1. The applicant brought an application for the review and setting aside of the arbitration award made by Ms Siele, sitting as a Commissioner of the Commission for Conciliation, Mediation & Arbitration (the CCMA).

2. The applicant brought an application for condonation for the late filing of the review and this application was opposed by the respondent. I dismissed the application for condonation after hearing argument and indicated that I would give reasons in due course. My reasons follow hereunder.

3. The award was made by the Commissioner on 28 January 1998 and the applicant received the award on 4 February 1998.

4. On 18 March 1998 (6 weeks later) applicant wrote a letter to the CCMA in which it indicated that it wished to review the award. The letter reads as follows:

"*The arbitration award in the abovementioned case was received on 4 February 1998*

by means of a fax.

My council has resolved to request a review of the arbitration award in terms of section 145 of the Labour Relations Act, 1995.

Your attention to this request will be appreciated."

5. In the founding affidavit the following is stated in regard to the conduct of the proceedings thereafter:

"At that stage the applicant was unaware that it had to approach this forum. Thereafter, towards the end of April attorneys were approached and the need to launch an application such as this was appreciated."

6. It was common cause that the application before me was only filed with this court on 15 June 1998 and only served on the third respondent on 22 July 1998. The parties were in agreement that this meant that the application had only been made on 22 July 1998. (See *Queenstown Field Distributors CC v Labuschagne NO & others* (1999) 20 ILJ 928 (LC) at 929G and *Pep Stores v Laka* (1998) 19 ILJ 1534 (LC) at 1535H – 1536B.)

7. A period of some 24 weeks thus elapsed from the date on which applicant received the arbitration award until the date that this application was made on 22 July 1998. The application for review was clearly brought outside of the period of 6 weeks required by section 145(1)(a). As the application is being brought under section 145(1)(a), it cannot be proceeded with unless the court grants condonation for the late filing thereof.

8. I am aware that this court has on at least two occasions held that it does not have the

jurisdiction to condone the late filing of an application in terms of s 145 of the Act. (See the *Queenstown Distributors* case and the decision of Jajbhay AJ in *National Union of Mineworkers v CCMA & Others,* unreported, 7 May 1999, case number J1918/98.) There are also decisions which have held that non compliance with the 6 week time limit set out in s 145(1)(a) can be condoned. (See *Dimbaza Foundaries Ltd v CCMA & Others,* unreported, 14 May 1999, case number P216/98, a decision of Gon, AJ, and *Kruger & another v MacGregor NO & another,* unreported, 18 June 1999, case number J123/99, a decision of Marcus, AJ.) The Labour Appeal Court has yet to pronounce on the issue, although alive thereto as is evidenced in the matter of *Librapac CC v Fedcraw & others* (unreported, LAC, 11 March 1999, case number JA49/98).

9. The matter was argued before me on the basis that the parties were *ad idem* that this court does have the power to condone the late filing of an application in terms of s 145 of the Act, under the provisions of s 158(1)(f). I proceeded to hear the matter on that basis. I might add that I am, in any event, persuaded by the reasoning adopted by Marcus AJ in the *Kruger* case referred to above and am of the view that this court does have the power to condone the late filing of an application in terms of s 145 of the Act.

10. An applicant who seeks condonation is required to show good cause why such condonation should be granted. The approach which this court and the Labour Appeal Court have followed in determining whether good cause has been shown, is the one enunciated by Holmes JA in *Melane v Santam Insurance Co Ltd* 1962 (4) SA531 (A) at 532C-F, which is to the following effect:

"*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."

Delay

11. It was common cause that the 6 week period set out in the Act would have started running from 4 February 1998. On this basis the 6 week period would have expired on 18 March 1998. The application was only brought on 22 July 1998, a delay of just under 14 weeks. The delay was thus substantial.

The explanation for the delay

12. It is clear that a party seeking condonation must present a reasonable and acceptable explanation for his default.

13. The explanation for the delay which was tendered in the founding affidavit was

singularly lacking in detail nor did it cover the entire period of the delay. Applicant sought to cure these defects in reply. In reply the deponent to the affidavit says as follows: "*I was aware at the time of the receipt of the award that there was a 6 week period prescribed in the Labour Relations Act as being the time within which a review should be brought*." He then goes on to say that it was in pursuance of this knowledge that he despatched the letter of 18 March 1998 to the CCMA. He also states, however, that the person responsible for rendering legal advice to applicant was an active member of third respondent and therefore, because of a possible conflict of interest, the applicant did not seek legal advice in this matter from him. He then proceeds to confirm the chronology of events as set out in the opposing affidavit of the third respondent.

14. This chronology indicates that after instructing its attorneys on 5 May 1998 the founding affidavit in respect of the application for review was only completed on 29 May 1998. The notice of motion lodging the application was then only completed on 11 June 1998 and the application was only issued out of this court on 15 June 1998 and then served on third respondent on 22 July 1998. Applicant submits that this chronology of events should be seen in the light of the fact that the applicant is situated in Rustenburg and that it briefed correspondents in Pretoria, who in turn consulted a counsel practising in that town. The Labour Court is situated in Johannesburg and logistical problems associated with this dichotomy of legal representation led to the delays referred to. The deponent then simply goes on to submit that these delays were not unreasonable given these particular factors.

15. When this matter came before me on 13 August 1998 applicant sought to hand in a further supplementary affidavit from its attorneys of record in which the delay which occurred between the issuing of the application on 15 June 1998 and the

service thereof on third respondent on 22 July 1998 was sought to be explained. The explanation offered in the supplementary affidavit was that the attorney who had been dealing with the matter had gone on leave and left instructions with a colleague that the application should be sent off to the Sheriff to have it served on first, second and third respondents as a matter of urgency. When he returned from leave at approximately the end of June 1998 he realised that his offices had given instructions to the Sheriff in Johannesburg to serve the application on third respondent and the Sheriff in Johannesburg had sent a return of non-service indicating that third respondent did not fall within his jurisdiction. Thereafter, it is stated, the papers were immediately forwarded to the Sheriff of Pretoria East for service on third respondent as soon as possible. It is clear that service was in fact only effected on 22 July 1998.

16. The explanation which was offered by the applicant in the founding papers falls well short of what could be considered a reasonable and acceptable explanation and, in any event, fails to cover considerable portions of the period of the delay. The bulk of the explanation tendered by the applicant was raised for the first time in reply. Even that explanation, to the extent that it should be regarded at all, was inadequate. In other words applicant sought to have a second bite at the cherry in motivating its case for condonation and nevertheless still fails to come up with an adequate or comprehensive explanation.

17. No explanation whatsoever is tendered in respect of the period 4 February to 18 March 1998, when applicant wrote its letter to the CCMA. By 4 February 1998 the applicant had the award and could have further proceeded with the matter. As per Tip AJ in the case of *Librapac CC v Moletsane NO & others* (1998) 19 ILJ 1159 (LC) at 1163E-F:

"There was no question of it making representations or attempting to negotiate a compromise. There were no documents which it had to obtain from other parties, nor did it need to consult with outside witnesses or to obtain affidavits from such persons. In short, the substance of what the applicant required to place itself in a position to bring review proceedings was in its hands from the very beginning."

18. I am also in agreement with the following remark of Pooe AJ in *Mkhize v First National Bank & another* [1998] 11 BLLR 1141 (LC) at 1144H:

"*The applicant's attorney would have known when he was consulted that the application for review was already out of time. To accept an instruction in these circumstances, knowing that he would not be available to give it his immediate and urgent attention is, in my view, negligent.*"

19. In this case the applicant's attorney was not unavailable when he first received instructions in the matter but it is quite clear that he failed to give the matter his urgent and diligent attention despite the fact that he would have known when he was consulted that the application was already out of time. After taking some time to arrange for the preparation of the founding papers he then proceeded on leave without having ensured that the matter had or would be properly handled further in regard to service and filing. When he returned from leave and discovered the problem regarding service on the third respondent he was once again dilatory in remedying the situation.

20. In the same judgment Pooe AJ confirms that the courts have stressed on many occasions that there is a limit to the extent to which an applicant can rely on the negligence of his representative. (See 1144J of the *Mkhize* judgment as well as the decision of the Labour Appeal Court in *Waverley Blankets Limited v Ndima & others*,

unreported, 3 August 1999, case number PA10/98 and particularly at paragraph 10 of the unreported judgment).

21. In the *Mkhize* judgment Pooe AJ refused to grant condonation where the delay was approximately 7 weeks and in similar circumstances to those before me in this matter. In that judgment, for instance, the applicant sought to rely on the fact that he had received advice from the CCMA that the application only had to be brought within three months. In this matter applicant also sought to divert responsibility to the CCMA for failing to respond to its letter of 18 March 1998 by advising applicant that it was attempting to bring the review proceedings in the wrong forum.

22. In the circumstances I am of the view that the explanation given by the applicant is inadequate and unacceptable. There is, accordingly, no reasonable and acceptable explanation before this court.

Prospects of success

23. As there has been a substantial delay for which no reasonable and acceptable explanation has been advanced, it is unnecessary for me to consider the prospects of success. Without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial. (See the *Mkhize* judgment at 1145D and the case quoted therein, as well as the decision of the Labour Appeal Court in the *Waverley Blankets* decision referred to above and particularly at paragraph 11 of the unreported judgment).

24. In any event, and without being required to do so, I express the view that applicant's prospects of success in this matter are slim. I take this view on the basis of the limited address to me by the parties on the issue of prospects of success

together with a reading of the papers and the heads of argument which were filed.

Importance of the case

25. Neither party addressed me specifically on the importance of the case. Applicants simply submitted that in the context of the matter as a whole there was no prejudice to the third respondent of any significant proportions in that it had taken more than a year after the application was filed for this application to come before court. In this regard I have considered the purpose of the Labour Relations Act and the intention of the legislature in providing for arbitration proceedings which are quick and are designed to achieve the finalisation of disputes at the earliest possible stage. If condonation were to be granted in respect of review applications brought substantially out of time this would operate to undermine these objectives. In the circumstances condonation should only be granted where a good case has been made out. I should also mention that in circumstances where the applicant is seeking an indulgence from this court one would have expected applicant to have launched a far more substantial application in respect of the prayer for condonation than was contained in the two sentences quoted above from the founding affidavit.

26. There appears to be no reason either in law or fairness why costs should not follow the result in this matter. In the circumstances I made the following order:

6.1 The application for condonation is refused and, accordingly, the application in terms of section 145 of the LRA falls to be dismissed.

6.2 The applicant is ordered to pay the third respondent’s costs.

S STELZNER

Acting Judge of the Labour Court of South Africa

DATE OF HEARING:	13 August 1999
DATE OF JUDGMENT:	18 August 1999
APPEARANCE FOR APPLICANT:	Mr R Beaton
INSTRUCTED BY:	Van Zyl Le Roux and Hurter Inc
APPEARANCE FOR THIRD RESPONDENT:	Mr M Van Staden