CASE NO : J4451/00

IN THE LABOUR COURT OF SOUTH AFRICA

Held at Johannesburg

In the matter between :

CORNELIUS VAN WYK **Applicant**

and

AGFA (PTY) LIMITED **Respondent**

JUDGEMENT

FULTON AJ

1.INTRODUCTION

The applicant seeks condonation for the late filing of his statement of claim which was filed some 94 days late. The application is opposed.

2.JURISDICTIONAL POINT

The respondent raised a jurisdictional point in its answering affidavit. The jurisdictional point was that the applicant's referral to conciliation was late and condonation had not been granted for that late referral. However, at the hearing of this matter Mr Fouche who appeared on behalf of the respondent, informed me that the respondent withdrew the jurisdictional point. In light of the decision in **Fidelity Guards Holdings (Pty) Ltd v Epstein NO & Others (2000) 21 ILJ 2382 (LAC)**, this appears to have been wise.

3.THE FACTS

3.1The degree of the delay

3.2The applicant was employed by the respondent as a technician. The applicant was retrenched on 31 December 1999.

3.3On 4 February 2000 the applicant referred an unfair dismissal dispute to the CCMA. On 28 March 2000 the CCMA issued a certificate of outcome that the dispute remained unresolved. The applicant then referred his dispute to this court on 28 September 2000. On 15 November 2000 the applicant brought an application for condonation for his late referral of the dispute to the labour court. It was common cause at the hearing of this matter that the applicant's referral was 94 days late.

3.4The reasons for the delay

3.5The applicant's reasons for the delay were as follows:

- Prior to the referral of the dispute to this court the applicant was represented by Mr Chidi, an official of the South African Chemical Workers' Union ("the union").
- After the conciliation meeting Mr Chidi assured the applicant that he would refer the applicant's dispute to the labour court as soon as possible.
- The applicant phoned Mr Chidi several times after the conciliation meeting and Mr Chidi informed the applicant that he had referred the applicant's dispute to this court.
- Then when the applicant went to the union's offices on 8 September 2000 he discovered that Mr Chidi had been lying to him and that his dispute had not in fact been referred.
- The applicant then demanded to speak to the union's general secretary who expressed shock at the events and referred the applicant to the attorneys Lebea & Associates.
- The applicant then on 15 September 2000 consulted Lebea & Associates who lodged the referral on 28 September 2000.

3.6The respondent was not able to rebut these allegations as it did not have any personal knowledge of them. The respondent did, however, point out that on 16 October 2000, in its statement of defence, it alerted the applicant to the fact that his referral was out of time and the application for condonation was only filed a month later, i.e. some two months after the statement of case had been filed. Furthermore, the applicant did not pursue his dismissal claim until February 2002 when the applicant's attorneys served a notice of a pre-trial conference on the respondent's attorneys.

3.7Prospects of success

3.8The applicant says that on 14 October 1999 he referred an unfair labour practice dispute to the CCMA. He says that this dispute was in relation to a grievance that he had laid against the technical manager of the respondent, Mr Knoetze. This is denied by the respondent in its answering affidavit and Mr Knoetze himself in a confirmatory affidavit to the answering affidavit states that the applicant did not at any relevant time lay a grievance against him and that the dispute referred to the CCMA on 14 October 1999 was in relation to a demand by the applicant that he be promoted. The applicant did not file a replying affidavit and consequently, the applicant did not deal with these allegations made by Mr Knoetze.

3.9The applicant goes on to state that on 3 November 1999 Mr Knoetze approached him and informed him that he was being retrenched with immediate effect. The applicant says that Mr Knoetze further informed him that the months of November and December 1999 would serve as his notice months and that during that period he would be required to work as a storeroom assistant and no longer as a technician. The applicant protested that this amounted to a unilateral change to his terms and conditions of employment. Mr Knoetze responded that his decision was final. The applicant says that he was thereafter advised by one Mr Pietersen that he should vacate the respondent's premises and that he would be paid notice pay in lieu of notice.

3.10The applicant alleges that his dismissal was nothing more than vindictiveness on the part of Mr Knoetze who was victimising him for the grievance that he had lodged against Mr Knoetze.

3.11The respondent denies these allegations and states that Mr Knoetze was in August 1999 instructed to reduce costs. On 31 August 1999 Mr Knoetze met with the respondent's technical staff to explain the need to reduce costs and the process that would be followed to achieve this. The employees were informed that if the respondent was unable to find alternatives the respondent may have to consider retrenchments. At the time Mr Knoetze avoided the retrenchment of employees by transferring and redeploying certain employees. The respondent then says that the cost reduction measures were insufficient and Mr Knoetze again met with the technical staff in the beginning of October 1999 to discuss this with them. The next

consultation meeting took place on 18 October 1999. All of the employees, the union and the union representatives were invited to the meeting, but only the employees and the union representatives were present at the meeting. At this meeting the parties discussed the proposed number of employees to be retrenched and what positions the respondent proposed making redundant. The respondent then invited the employees and the union representatives to submit proposals and to make representations to it on all relevant issues relating to the proposed retrenchments. The employees and the union representatives were given a two-week period within which to do this and informed that a follow up meeting would be held in two weeks time. No representations were received from the employees or the union representatives during this time. Two follow up meetings were held two weeks later on 3 November 1999. The first was with all of the employees and the union representatives. The respondent again requested the union representatives and the employees to make representations to it about the proposed retrenchments. They did not. The respondent consequently informed the union representatives and the employees that the retrenchments would ensue. The second meeting was with the applicant and the union representatives. The respondent informed the applicant that he had been selected for retrenchment based on his skills and his ability to perform his duties in accordance with the required standards. Mr Knoetze then instructed the applicant to assist in the technical stores for the duration of his notice period. The applicant became angry and aggressive and threatened Mr Knoetze that he would “get” him. The applicant refused to comply with Mr Knoetze’s instruction. Mr Knoetze therefore decided to release the applicant for his notice period and to pay him notice pay in lieu of notice.

3.12The respondent alleges that the attitude of the union representatives and the employees during the meetings of 18 October 1999 and 3 November 1999 was one of no concern or interest.

3.13A further meeting took place on 9 November 1999 between the respondent and Mr Chidi from the union to discuss the applicant’s retrenchment. The respondent contends that various issues were discussed, including the selection of the applicant for retrenchment. Mr Chidi was given the opportunity during this meeting to discuss all issues relevant to the applicant’s retrenchment. Mr Chidi requested that the respondent provide him with a letter setting out the information required in terms of section 189(3) of the LRA. This the respondent did on 17 November 1999.

3.14As stated above the applicant did not file a replying affidavit and consequently did not respond to the allegations made by the respondent in this regard.

3.15Importance of the case

3.16The applicant submitted that this case was important because, *inter alia,* every employee has a right to

be fairly dismissed.

3.17The respondent submitted that although this matter was obviously important to the parties the matter did not relate to any matter of public importance or raise any issue of law of particular importance.

3.18Prejudice to the parties

3.19The applicant contended that if I were to grant condonation there would be no prejudice to the respondent.

3.20The respondent contended that in the event that I was to grant condonation the hearing in this matter would take place some 4 years or more after the applicant's retrenchment. That being so, the respondent's witnesses would be required to give evidence on matters that took place a long time ago. This, the respondent contended, would be prejudicial to it.

4.THE LAW

4.1The 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 applicant's affidavit justify the relief sought. Where it is clear that facts, though not formally admitted, cannot be denied, they should be regarded as admitted.

4.2I 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.

4.3This court has the power to condone a late referral to the labour court on good cause shown in terms of section 191(11)(b) of the Labour Relations Act No 66 of 1995. 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 aforegoing clearly emerge from decisions of this Court, and therefore I need not add to the ever-growing burden of annotations by citing the cases."

4.4In **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."

4.5The fair and meaningful resolution of labour disputes ordinarily requires that they be resolved expeditiously. This is in fact one of the primary objects of the LRA. A substantial delay may itself undermine the fairness of this process. A party who alleges unfair treatment by his or her employer, and who claims relief in consequence thereof, must act promptly. If an unreasonable period elapses, the claimant must then show proper grounds why condonation should be granted before the matter may proceed on the merits. [**Mothibeli V Western Vaal Metropolitan Substructure [2000] 1 BLLR 85 (LC)** at 86E to 87B].

4.6The *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.

4.7Then 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."

4.8It 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.

4.9This 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)**.]

4.10The respondent's representative also referred me to **Swanepoel v Albertyn (2000) 21 ILJ 2701 (LC).** In this matter the delay was excessive but the applicant had good prospects of success and the court was of the view that on the facts of the matter there would be more prejudice to the employee than the employer if condonation were to be declined. That being the case the court held that the remaining factor, i.e. the explanation for the delay required careful scrutiny as that factor was likely to swing the scales one way or another. It appeared that the applicant, a layman from a rural environment, had at all times taken trouble to pursue the matter, but that his representative had caused all the delays. The court was in agreement with the authorities and with the general proposition that the labour court should be slow to endorse non-compliance with the time limits and the rules of court, particularly, but not exclusively, by

practitioners. However, the court in that matter was of the view that the case before it was an exceptional one in which a proper and judicial exercise of discretion called for condonation to be granted. Not to do so would result in a failure of justice.

4.11Lastly, 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)**.]

5.THE LAW APPLIED TO THE FACTS

5.1In the present matter, there was a delay of at least 3 months in the referral of the dispute to the labour court. This delay is not trivial, but is also not overly excessive.

5.2The reason for the delay falls squarely on the shoulders of Mr Chidi, the union official representing the applicant. The applicant contends that Mr Chidi had assured him that his case had been referred to the labour court and it was only on 8 September 2000 when the applicant went to the union's offices that he discovered that Mr Chidi had been lying to him. Admittedly, the applicant's allegations in this regard are fairly cursory and it would have been preferable if an affidavit had been obtained from the union explaining what had occurred between March and September 2000, but it is hard to imagine what else the applicant could have done to pursue his claim. What is clear from the applicant's affidavit is that the applicant wanted to pursue his claim and took step to ascertain that that was what occurred. He telephoned Mr Chidi on several occasions after the conciliation meeting and then went to the union's offices in early September 2000. It was at this stage that he ascertained that his dispute had not in fact been referred to the labour court. The applicant then spoke to the union's general secretary who referred the applicant to Lebea & Associates. As the applicant himself took steps to pursue his claim I do not believe that this is one of those matters where the negligence of the applicant's representative should be imputed to the applicant himself.

5.3On the papers, however, the applicant has failed to convince me that he has good prospects of success in relation to his alleged unfair retrenchment. The respondent set out in its answering affidavit the reasons why it believed retrenchments were necessary and the procedure that was followed before the applicant's dismissal. Although the procedure followed does not appear to have been perfect in all respects, the respondent did follow the procedure laid down in section 189 of the LRA. In assessing the respondent's version I have been mindful of the *dictum* in **Johnson & Johnson v CWIU (1999) 20 ILJ 89 (LAC)** that a mechanical checklist approach to the consultation requirements is inappropriate and the correct approach

is to ascertain whether the purpose of the section has been achieved. I have also taken onto account the troubling allegations by the respondent that the union representatives did not seem interested in the consultations and despite being given the opportunity to do so, declined to make representations to the respondent. On the applicant's version the main basis on which he alleges that his retrenchment was unfair is that he had laid a grievance against Mr Knoetze and that his retrenchment was in retaliation to that grievance. Mr Knoetze, in a confirmatory affidavit attached to the answering affidavit, denies that the applicant at any stage laid a grievance against him and states that the applicant's referral to the CCMA alleging an unfair labour practice pertained to a grievance about not being promoted. Also of concern are the respondent's allegations of the applicant threatening Mr Knoetze. These are important allegations that the applicant should have answered. Without any response from the applicant it is difficult for me not to accept the respondent's version on its prospects of success. I am consequently of the view that the applicant's claim of an unfair retrenchment does not have good prospects of success.

5.4Even if I am wrong on the applicant's prospects of success I do not believe that the balance of the factors weigh in the applicant's favour. I agree with the submission made by Mr Fouche, the respondent's attorney, that this matter does not relate to any matter of public importance and does not present any question of law that has not been already been established. The matter is only of importance to the parties. I am also of the view that the already four-year delay in the hearing of this matter [and, of course, the delay will be longer once it is set down for trial] may result in prejudice to the respondent. There are factual disputes on the applicant's retrenchment and the respondent's witnesses will at the trial of this matter be required to remember what occurred some 5 years ago. This in my view is one of those cases where the respondent has a strong interest in finality.

5.5In all the circumstances, I am of the view that this is not one of those matters where this court should exercise its discretion in the applicant's favour and I decline to grant condonation.

5.6Neither party addressed me on the question of costs. The ordinary rule is that costs follow the event. However, taking into account that the delay was not caused by the applicant and that my order should be fair to both parties I consider this an appropriate case in which no order to costs should be made.

6.ORDER

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

6.1The application for condonation for the late referral by the applicant of his dispute is dismissed.

6.2There is no order as to costs.

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KA FULTON

Acting Judge of the Labour Court

Appearances:

For the applicant: Mr B Van Rooyen of Wentzel Swart & Viljoen

For the respondent: Mr PS Fouche of Bell Dewar & Hall Inc

Date of hearing: 20 November 2003

Date of judgement: 13 February 2004