tt.08.08

CASE NO : J1788/00

IN THE LABOUR COURT OF SOUTH AFRICA

Held at Johannesburg

In the matter between :

M MANANA **Applicant**

and

A MUDAU **First Respondent**

CCMA **Second Respondent**

GEC ALSTOM **Third Respondent**

JUDGEMENT

FULTON AJ

1.INTRODUCTION

This is an application for condonation for the late filing of a review application. The application is opposed by the third respondent.

2.THE FACTS

2.1The extent of the delay

2.1.1It is common cause that the applicant's review application was served and filed on 19 June 2000. The parties, however, dispute the extent of the delay.

2.1.2The applicant contends that the first respondent issued hisher award on 30 November 1999. The third respondent points out that the award was dated 23 September 1999 and states that it was faxed to the third respondent on 29 October 1999. The third respondent contends that there is no reason why the first respondent would transmit his award a month later to the applicant than it did to the third respondent.

2.1.3Consequently, on the applicant's version the review application was brought some five months late, whereas the third respondent contends that the review application was more than six months late.

2.2The reasons for the delay

2.2.1The applicant explains that Ms R Morabane, a NUMSA legal officer, represented the applicant at the arbitration. Shortly after the arbitration Morabane resigned from NUMSA. Mr T Ngcana, the deponent to the founding affidavit, was appointed in her place in November 1999. He found Morabane's office in a state of total disorganisation and it took him until the end of December 2002 to organise all the cases that Morabane was handling. Mr Ngcana states that Ms Morabane left NUMSA under a cloud and no proper handover took place between himself and Ms Morabane.

2.2.2Mr Ngcana states that a lot of the cases being handled by Ms Morabane had been severely neglected and in order to obtain a proper understanding of what the cases were about he travelled to the various local offices to meet the members whose cases he was handling. In approximately March 2000 Mr Ngcana visited the Nelspruit office to consult on a matter not related to this case. Once there this matter was brought to Mr Ngcana's attention and he was asked what steps had been taken to review the award. Mr Ngcana says that this was the first time that this matter was brought to his attention. Mr Ngcana asked the local organiser why he had not sent the award to Mr Ngcana. The organiser responded that he thought that as Ms Morabane was dealing with the matter and had all the relevant documents, Ms Morabane would have brought the matter to Mr Ngcana's attention when he took over from her. Mr Ngcana states that in sorting through Ms Morabane's office he found no documents pertaining to this matter.

2.2.3On 1 March 2000 Mr Ngcana sent a letter to NUMSA's national legal officer, Mr D Cartwright, and requested Mr Cartwright to consider whether the award was reviewable. The third respondent points out that in this letter which was attached to the founding affidavit, Mr Ngcana states that the award was brought to his attention on the *"17th instant".* As the letter was written on 1 March 2000 the matter could not have

come to his attention on 17 March 2000 and consequently one assumes that he is referring to February. This conflicts with the statement in Mr Ngcana's affidavit that he travelled to the Nelspruit office in early March 2000.

2.2.4On 9 March 2000 Mr Cartwright wrote back to Mr Ngcana. In this letter, also attached to the founding affidavit in the application for condonation, Mr Cartwright expresses the view that a review has good prospects of success but that *"if there are no good reasons for the lateness it may be futile reviewing the award."* Mr Cartwright then requests Mr Ngcana to arrange a consultation with the local organiser and the applicant as soon as possible.

2.2.5The meeting took place some time in April 2000. [The founding affidavit in the application for condonation states 2002 but this is an obvious error.] The delay in holding the meeting is stated to be that Mr Cartwright was very busy at the time and the meeting took place in Nelspruit, a long distance from Johannesburg where Mr Cartwright is based.

2.2.6After the meeting Mr Cartwright prepared a review application with Ms Morabane as the deponent to the founding affidavit. Mr Ngcana alleges that on 4 May 2000 [once again the founding affidavit in the application for condonation wrongly refers to 2002] Mr Cartwright sent the draft review application to Mr Ngcana and requested that he approach Ms Morabane to sign the affidavit. The relevant letter attached to the founding affidavit was actually addressed to the local Nelspruit organiser and copied to Mr Ngcana. Also the draft founding affidavit attached was by one Mobane Mntebeleng whom I assume is the same person as Ms Morabane.

2.2.7Mr Ngcana then says that he approached Ms Morabane who refused to sign the affidavit in the review application because of the rancorous feelings between her and certain officials at NUMSA. [These allegations conflict with what Mr Ngcana says in the founding affidavit to the review application. There he says that he was unable to locate Ms Morabane and consequently decided to sign the founding affidavit to the review application himself.] Mr Ngcana informed Mr Cartwright of this and Mr Cartwright substituted Mr Ngcana's name for Ms Morabane's name in the founding affidavit in the review application. The amended founding affidavit was sent to Mr Ngcana in May 2000 and he signed it and faxed it back to Mr Cartwright at the end of May 2000. Mr Ngcana returned the original to Mr Cartwright in the middle of June 2000. As we know the review application was served and filed on 19 June 2000.

2.2.8The application for condonation was only brought some two years later in September 2002. This delay is explained by the applicant as follows:

2.2.8.1After the review application was brought Mr Cartwright forgot that the matter was referred late and concentrated his efforts in getting the record from the second respondent who proved to be extremely uncooperative in this regard. In support of this contention the applicant attaches a letter to the second respondent on 25 June 2001, demanding that the tapes be delivered to Sneller Transcriptions failing which NUMSA will bring an application to compel delivery of same. No such application was brought.

2.2.8.2It was only once the review application was set down on the unopposed role that Mr Cartwright realised that the late review application had not been condoned by this court. The fact that Mr Cartwright forgot, it is contended, can to a large degree be explained by the fact that the third respondent had not opposed the review application. As pointed out by the third respondent though, the third respondent was not required to oppose the review application until a notice in terms of rule 7A(8) of this Court had been served and filed.

2.2.9Mr Ngcana submits that the applicant is in no way to blame for the delay. He points out that the applicant has constantly communicated with NUMSA to establish the progress of his case and through severe frustration at the delay also approached attorneys who on his behalf raised his concerns with NUMSA.

2.3Prospects of success

2.3.1Mr Ngcana states the following in relation to the evidence led at the arbitration:

2.3.1.1The applicant was dismissed for theft.

2.3.1.2On 26 February 1999 a customer was observed by the third respondent's Mr Van Blerk, removing three boxes of goods from the third respondent. On being requested where the papers/receipts for the goods were the customer indicated that he had left them inside the shop. After the customer had left, Mr Van Blerk questioned a number of the third respondent's employees, as well as the applicant, as to the whereabouts of the said customer's receipts and none of the employees had knowledge of the receipts or of the business transaction. The applicant's duty was to man the counter for the purposes of ensuring that the customers were assisted and got what they were looking for.

2.3.1.3The applicant testified that on the day in question he was approached by a customer who requested him to assist the customer to carry his purchases to his vehicle and as this was part of the applicant's

duties, he assisted the customer. Mr Van Blerk later requested to know from him if he had the customer's receipts and he indicated that he did not. The applicant further testified that his duty was not to process transactions and issue receipts but to assist customers. The third respondent accused the applicant of conspiring with the customer to steal from the third respondent and subsequently dismissed him on this charge.

2.3.2My difficulty with these allegations is that Mr Ngcana was not at the arbitration and thus these allegations are not within his personal knowledge. Moreover, there is no confirmatory affidavit by the applicant himself. There is a confirmatory affidavit from the local organiser but it is not clear from the papers whether the local organiser was in fact present at the arbitration.

2.3.3I have, however, read the applicant's review application which was in the court file. The grounds for review in the review application are repeated in the founding affidavit in the condonation application and the allegations in the review application are confirmed by the applicant in a confirmatory affidavit attached to that review application.

2.3.4Mr Ngcana then points out that the arbitrator after deliberating the evidence made the following findings:

2.3.4.1The applicant's duty was to attend to customers' needs as well as ensuring that the customer gets the right thing.

2.3.4.2The applicant neglected his duties in relation to the customer as he did not attend to him.

2.3.4.3As the applicant neglected his duties the third respondent was justified in dismissing the applicant.

2.3.5Mr Ngcana submits that it is clear from the above that the arbitrator was wrong and the award is reviewable in terms of the provisions of the LRA.

2.3.6The third respondent denies that the applicant has strong prospects of success on the review application and contends that, in any event, the applicant has failed to make out such a case on the papers. The third respondent denies that the charge put to the applicant was one of theft. The charge was *"Improper performance of duty, resulting in stock losses to the company."*

2.3.7The third respondent contends that the evidence at the arbitration showed that the following is the

prescribed and normal procedure for over the counter sales at the third respondent:

2.3.7.1The counter assistant (the applicant) would assist a customer who wishes to purchase goods over the counter.

2.3.7.2The customer would place his order, and a tax invoice would be raised in quadruple (a copy each for the customer, the store, the credit controller and the counter assistant.)

2.3.7.3The customer will then either pay, or his account will be debited. The fact of payment will be confirmed by the credit controller who sits in the office directly behind the counter assistant, and whose authorisation will be indicated by a stamp affixed to the invoice.

2.3.7.4The stores will then be handed their copy of the tax invoice and will collect the ordered stock from the stores and hand it to the customer.

2.3.7.5The customer's signature in receipt of the goods will complete a cash transaction.

2.3.8The third respondent contended that the applicant's evidence at the arbitration that goods could be released without raising any documents and without accepting any payment was correctly disregarded by the arbitrator as improbable and untrue.

2.3.9The third respondent's witnesses testified that on the day in question, the applicant was the only counter assistant on duty at the time the customer arrived. The customer arrived during lunchtime. It would have been impossible for the customer to leave with the goods, three boxes of light bulbs, which are kept on a mezzanine level of the storeroom, without the assistance of the third respondent's employees on duty, including the applicant. The employees handed the customer the goods with which he left, without raising any paperwork, and without accounting for any compensation received from the customer.

2.3.10The net effect was that the third respondent was out of pocket by the value of the goods taken by the customer, and that the third respondent's employees, including the applicant, were directly responsible for the loss, as a result of their failure to perform their duties. The third respondent has no knowledge of whether its employees benefited from the removal of the stock. This was not, however, its case and the applicant was not charged with, or dismissed for, theft.

2.3.11The applicant did not file a replying affidavit and accordingly did not respond to these allegations.

2.3.12A perusal of the arbitration award shows that the applicant's case at the arbitration was that he was charged *"for not executing his job properly."* The award does, however, reflect that the third respondent in its opening statement submitted that the applicant was dismissed for theft. The commissioner, however, in his findings states that on a balance of probabilities it should be accepted that the applicant neglected his duties.

2.4The importance of the case

Neither party made submissions on the importance of the case.

2.5Prejudice

2.5.1The applicant submits that as the third respondent had not opposed the review application it cannot be argued that if condonation is granted the third respondent will suffer prejudice. The third respondent points out that it is only obliged to respond to the review application after the applicant has filed a notice in terms of rule 7A(8) of the rules of this Court which the applicant has not done.

2.5.2The applicant further submits that if condonation is refused then the applicant will suffer prejudice as he will thereby lose the right to challenge an award which is *"obviously defective."* The third respondent denies this allegation and explains that its prejudice lies in the fact that Mr Van Blerk is no longer in its employ. The third respondent emphasises that labour proceedings are meant to bring about speedy resolution of disputes and that NUMSA has not prosecuted the review application with diligence.

3.THE LAW

3.1The 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.

3.2I 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.

3.3This 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 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."

3.4In **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."

3.5Furthermore, the LAC has held that condonation in the case of disputes over individual dismissals should not be readily granted unless the excuse for non-compliance is compelling, the case for attacking a defect in the proceedings is cogent and of a kind that would result in a miscarriage of justice if it were allowed to stand. [**Queenstown Fuel Distributors CC v Labuschagne NO & Others (2000) 21 ILJ 166 (LAC)** at 174H.]

3.6The *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.

3.7Then 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."

3.8It is also well established that in these circumstances once the attorney or representative becomes aware that he/she has failed his/her 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.

3.9This 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)**.]

3.10Lastly, 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

4.1The delay of 5 or 6 months [depending on whether one accepts the applicant's or the respondent's version] was not trivial, but also not overly excessive.

4.2In my view it cannot be said that the excuse for the delay in this matter is compelling. Firstly, Mr Ngcana's version on trying to obtain the assistance of Ms Morabane in bringing the review application is inconsistent. In the review application he says that he was unable to locate Ms Morabane, whereas in the condonation application he says that he did locate her and she refused to sign the founding affidavit in the review application because of the rancorous feelings between her and certain officials at NUMSA. Secondly, whilst I appreciate that NUMSA did their best to explain the delay it did not, it seems to me, treat the matter as one of urgency. Mr Ngcana was, at best for NUMSA, first aware of the applicant's case and the fact that review proceedings had not been timeously brought, on 1 March 2000. The review application was filed some 4 months later. Even if I accept Mr Ngcana's version in his founding affidavit to the condonation application, it is difficult to understand how it took NUMSA 4 months to meet with the applicant and file a review application. Thirdly, the dilatoriness of NUMSA's conduct is further illustrated by the fact that it took it more than two years to file a condonation application. The reasons for this were Mr Cartwright's busy schedule and the fact that he forgot that a condonation application was required. As I have said, these excuses cannot be said to be compelling.

4.3Moreover, the defect alleged is not particularly cogent and I do not believe it is one of a kind that would result in a miscarriage of justice if it were allowed to stand. Admittedly, the first respondent's award does contain an anomaly. The first respondent states in her award that *"in their opening statement the respondent submitted that the applicant was dismissed for theft."* This aspect of the award is dealt with in detail by the third respondent in its answering affidavit. The third respondent states that its case against the applicant was not, and never has been, one of theft. The applicant was charged with *"improper performance of duty*, *resulting in stock losses to the company."* On the facts presented by the parties the crux of the charge is one of gross negligence. This accords with what the first respondent states in his/her award about the opening statement of NUMSA: *"the union submitted that Mr Manana …..was charged for not executing his job properly."* Nowhere in the first respondent's award is it stated that the applicant or

NUMSA said that the applicant had been dismissed for theft. Nor does the first respondent indicate that the evidence led by the third respondent was that the applicant stole from it. And though not particularly well reasoned, the first respondent accepts the testimony of the third respondent's witnesses that *"the applicant neglected his duties."* Consequently, the first respondent's statement in her award that the third respondent submitted that the applicant was dismissed for theft is somewhat mystifying. I cannot say whether this was an error by the first respondent or the third respondent's representative. But I do not think that that is critical to my decision. The more important question is whether this error makes the award reviewable? I don't think so. The applicant contends that the evidence of the third respondent at the arbitration was that the applicant was dismissed for theft. This is not apparent from the first respondent's award. In my view the award indicates that the evidence led by the third respondent at the arbitration was that the applicant neglected his duties. That being the case the first respondent's decision accords with the evidence led at the arbitration. An error, either by the employer or by the commissioner is not a reviewable ground in terms of section 145 of the LRA. The applicant needs to show that the commissioner committed misconduct in relation to the duties of the commissioner as an arbitrator or that the commissioner committed a gross irregularity in the conduct of the proceedings or exceeded his/her powers. It is now trite that the last ground includes instances where the commissioner's decision is not rational in that it does not accord with the evidence led at the arbitration, but that is not the case here. I consequently am of the view that the applicant does not have good prospects of success on review.

4.4I point out that the tape recording of the arbitration in this matter appears to have gone missing and without a transcript of the proceedings it will be extremely difficult for the applicant to succeed with his review application.

4.5As regards the importance of the case, this matter is not one of public importance and it does not deal with any point of law not already established, though the matter is obviously important to the parties.

4.6In my view the fact that the review application will be heard some 5 years after the dismissal is prejudicial to the third respondent. I appreciate, however, that if condonation is not granted the applicant will not be able to pursue his review application in circumstances where he is not to blame for the delay.

4.7After having carefully considered all of the factors enunciated in the **Melane** case and, taking into account the requirements set out in the **Queenstown Fuel Distributors** case, condonation is declined.

4.8The only remaining issue is costs. The usual rule is that costs follow the event. I do not, however, think that an award for costs against the applicant is appropriate in the circumstances of this matter. NUMSA has

at all times taken responsibility for the delay and in my view costs should be awarded against it.

5.ORDER

I accordingly make the following order:

5.1The application for condonation is dismissed.

5.2NUMSA is ordered to pay the third respondent's costs.

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KA FULTON

Acting Judge of the Labour Court

Appearances:

For the applicant: Adv Naidoo

For the respondent: Retha Calitz of Hofmeyr Herbstein & Gihwala Inc

Date of hearing: 20 November 2003

Date of Judgement: 13 February 2004