IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT BRAAMFONTEIN)

CASE NO. : JS 557/02

In the matter between :

CHEMICAL ENERGY, PAPER, PRINTING
WOOD & ALLIED WORKERS UNION **1st Applicant**
S. MASHIYANE & 14 OTHERS **2nd to 16thApplicants**

And

METAL BOX t/a M. B. GLASS **Respondent**

JUDGMENT

MAYA J.

[1] The applicants seek condonation for the late referral of their dispute with the respondent about the fairness of their dismissal. They also seek costs against the respondent in the event of an opposition. The application is opposed.

[2] I may mention at this stage that at the very end of argument, at reply stage, an attempt had been made to hand in from the bar an affidavit which was said to have been deposed to by a senior partner at the firm of applicants' attorneys in confirmation of the allegations set out in the condonation affidavit. No explanation was proffered for its lateness as, according to the condonation affidavit, it should have been filed when the condonation application was launched. I ruled against its filing.

[3] It was conceded on the applicant's behalf that the delay of about nine months was excessive. It was however argued that their case meets the other requirements which constitute "good cause" for the grant of condonation; namely that their explanation for the delay is good, they have strong prospects of success in the main application, the case is important to them and they stand to suffer irreparable prejudice should condonation be refused.

[4] The reason furnished for the delay is set out in an affidavit deposed to by one of the applicant's attorneys of record. It is alleged that the

applicants had, upon unsuccessful conciliation of the dispute in July 2001, promptly approached them on an undisclosed date to pursue the matter. On 31 October 2001 the attending attorney, a Ms Conco, had resigned from the firm. She did not hand over her files. It is then alleged that it transpired later that, seemingly unbeknown to the other attorneys, she left with certain case files which included that of the applicants. When exactly this discovery was made remains a mystery as will appear hereunder.

[5] According to the affidavit it was during a file audit conducted in May 2002 that it was found that the applicants' file was missing. Counsel had been briefed to prepare a statement of case immediately thereafter. It is this counsel who then reported in a memorandum, which was also filed in support of the application, that he had been briefed in the matter in August 2001 and had actually drawn the statement which was subsequently collected from him. On 16 May the proceedings were launched.

[6] During argument, the applicants' attorney startlingly made various submissions which were either not supported by and others or directly contradicted the allegations made in the condonation affidavit. He firstly gave an explanation that his firm could not and did not know that it had the applicants as clients in the absence of the missing file because the matter had still been at its inception when Ms Conco left. He was however unable to explain how the file audit could have revealed the existence of the matter if there was no other record of the matter in their office. He also could not explain satisfactorily why his office delayed the audit for almost seven months when it appears from the condonation affidavit that they were aware on 31 October 2001 that **"Ms Conco did not hand over the files she was working on".**

[7] In response to a charge that the papers showed that the applicants themselves had remained supine for a period of longer than eight months and did not bother to contact their legal representatives, he stated that they had telephoned his office during December 2001 to enquire about their case. Most significantly, this material averment is not made in the condonation affidavit. Further, it contradicts the allegation made by his colleague in the said affidavit that it is only during the file audit in May 2001 that his office became aware of the applicants. He could not explain

why action was taken only in May 2002 if the applicants had contacted his office in December 2001.

[8] It is abundantly clear from the self-contradictions in the explanation for the delay that the applicants and/ or their attorneys have unfortunately not been candid with this court. It is obvious also on the papers that the applicants have been as lax as their legal representatives

in the prosecution of their claim. Even if I am wrong in this view, it seems to me that they still would not be entitled to escape liability for their attorneys' dilatoriness. It is well settled in our law that there are limits beyond which the court should whose legal representative is to blame for a delay. Restating this principle, **Nicholson AJA** said in **Superb Meat Supplies CC v Maritz (2004) 25 ILJ 96 (LAC)** at **100H** :

"**In this court and the Supreme Court of Appeal there have been frequently repeated judicial warnings that 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. It has never been the law that invariably a litigant will be excused if the blame lies with the attorney. To hold otherwise might have a disastrous effect upon the observance of the rules of this court and set a dangerous precedent. It would invite or encourage laxity on the part of practitioners. The courts have emphasized that 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."** Emphasis added

[9] I am fully mindful of the test laid down in decided cases such as that of **Melane v Santam Insurance Co. Ltd 1962(4) SA 531 (AD),** which a court faced with an application for condonation should apply. At **532C-F** of the judgment in this case, **Holmes JA,** writing for the court, said :

"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 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 help compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects may tend to compensate for a long delay. And the respondent's interest in the finality of the matter must not be overlooked."

[10] It would appear that the applicants may have reasonably good prospects of success in the main application. The respondent's attorney did not strenuously argue otherwise, save to highlight that, contrary to an allegation made in the applicants' statement of case, the respondent had held a number of meetings with them prior to their dismissal. This may of

course have something to do with the fact that the respondent has to yet make its own condonation application for the late filing of its response to the applicants' statement of claim. Be that as it may however, I must bear in mind that even where a party has decidedly strong prospects of success, which is not the case in the present matter, that fact is not of itself sufficient cause to grant condonation. See **Torwood (Pty) Ltd v South African Reserve Bank 1996 SA 215 (W) at 230H.**

[11] Regarding the question of the importance of the matter to the applicant, it seems to me that whilst it may be accepted at face value because it involves their livelihood that it is indeed important, their own conduct belies that possibility. To my mind, had they considered the matter as one of great importance, they surely would have shown more zeal and vigour in pursuing the case and would for one thing, have kept in constant touch with their attorneys.

[12] I accept that they may suffer prejudice upon refusal of condonation. It seems however that the grant thereof would equally expose the respondent, whose interest in the finality of the matter is one of the important factors which I have to take into consideration, to a not inconsiderable degree of prejudice. This is particularly so if due regard is had to the relevant time lapse and the practical implications thereof. See **Liberty Life Association of Africa v Kachelhoff NO & Ors (2001) 22 ILJ 2243** where the court said at **2260-2261** :

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" **The enquiry into whether prejudice is present or not entails comparing the present position of the other parties involved with what it would have been instituted within a reasonable time. Prejudice will be considered to be present if because of the delay the recollections of the parties or the person whose decision is being reviewed have paled; persons who have to depose to affidavits or testify are no longer available; and where documentary or other forms of evidence are no longer available"**

These are some of the concerns raised by the respondent in its opposing affidavit in this matter.

[13] I have carefully and objectively considered the relevant factors. I am nonetheless not persuaded that the applicants have made out a case for condonation. The application is accordingly refused with costs.

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ACTING JUDGE OF THE HIGH COURT

FOR THE APPLICANT : Mr V. Vuza (Sihlali Molefe Inc.)

FOR THE RESPONDENT : Mr S. Hardie (Steven Hardie Attorneys)

Heard and delivered on 19 August 2004