

IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG

CASE NO JR 958/05

In the matter between:

RUSTENBURG PLATINUM MINES LIMITED
(RUSTENBURG SECTION)

APPLICANT

AND

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

FIRST RESPONDENT

RAMOLATJA A .N.O

SECOND RESPONDENT

NATIONAL UNION OF MINEWORKERS

THIRD RESPONDENT

PAULO F

FOURTH RESPONDENT

JUDGEMENT

MOLAHLEHI AJ

INTRODUCTION

[1] This is an application for condonation for the late filing of the third and fourth respondent's opposing affidavit. The application is consequent to

the failure by the respondents to file an opposing affidavit to the review application filed by the applicant. The applicant had filed an application in terms of which it sought to have the arbitration award, issued by the first respondent under case No LP 30565/04 dated 21 March 2004, reviewed and set aside.

- [2] The application which was opposed by the applicant.

BACKGROUND FACTS

- [3] The employee who at the time of his dismissal was employed as a miner by the applicant was charged and dismissed for defrauding the clocking system. The purpose of the clocking system, according to the applicant was to ensure that employees, who clocked in at the commencement of a shift, would have vacated the underground workplace at the end of that shift.
- [4] On 3 April 2004, the employee was reported missing as at the end of the shift as he did not clock out. As a result it was assumed that he was still underground. He was apparently found later outside the underground workplace.

- [5] As stated above the employee was charged with defrauding the clocking system in that he clocked in but did not proceed to his underground workplace. He was found guilty as charged and consequently dismissed.
- [6] The employee referred an unfair dismissal dispute at the CCMA which was arbitrated by the second respondent, a commissioner of the CCMA. After considering the evidence before him, the commissioner upheld the substantive ground for the dismissal but found the procedure to have been unfair and awarded the employee 4 (four) months compensation.
- [7] The applicant challenged the decision of the commissioner and on the 29 April 2005, delivered a notice of motion in terms which, as stated above, it sought to have the arbitration award reviewed and set aside. All the four respondents including the employee failed to oppose the review application by delivering an answering affidavit within the prescribed time frame.
- [8] Some considerable time thereafter, the employee and the third respondent, delivered the opposing affidavit in opposition to the review application. The opposing affidavit was delivered on 7 December 2005, a delay of about 4 (four) months. The opposing affidavit incorporated into it the application for condonation for the late filing of opposing affidavit.

[9] The employee's explanation for the late filing of the opposing affidavit is contained in paragraphs 65 (sixty five) to 68 (sixty eight) of his supplementary affidavit, under the heading: "AD CONDONATION APPLICATION" where it is stated:

"65 I submit that after my dismissal I returned to Lesotho and communication with my representatives was extremely difficult.

66 I only managed to consult with my attorneys, Morebodi-Paul Incorporated on 23 November 2005.

67 I have been advised that my attorney's arranged with applicants (sic) to file this affidavit on 07 December 2005.

68 I further submit that applicant suffered no prejudice out of the late filing of this affidavit"

[10] With regard to contents of paragraph 67 (sixty seven) the employee's attorney argued that an agreement was concluded between him and the applicant's attorneys that the opposing affidavit would be filed on the 7 December 2005. This was disputed by the applicant's attorneys who contended there was never an agreement for the opposing affidavit to be filed on the 7th December 2005. They submitted that their letter dated 05 December 2005, simply confirmed a telephone conversation in terms of which the respondents undertook to file the opposing affidavit on the 7th December 2005.

THE LEGAL PRINCIPLES

- [11] In terms of rule 7A (9) of the Rules of the Labour Court, any person wishing to oppose the granting of an order prayed for in a notice of motion must, within 10 (ten) days after receipt of the amendment or notice that the applicant stands by its notice of motion, deliver an affidavit in answer to the allegations made by the applicant.
- [12] It is common cause that in this case the applicant's supplementary affidavit was served on the 15 July 2005. The employee's opposing affidavit which was delivered on the 7 December 2005, was due on or before 29 July 2005, which is some 4 (four) months late.
- [13] In terms of s158 (1) (f) of the Labour Relations Act 66 of 1995 (the LRA), the court has a discretion to condone the late filing of any document. The court is further given a discretion in terms of rule 12 (3) of the court rules, on good cause shown, to condone non-compliance with any period prescribed by the rules.

[14] For the court to condone non-compliance with the time frames set out in the rules the applicant has to show good cause for the lateness. Good cause entails assessing and evaluating the following; (a) the degree (period) of the lateness, (b) the explanation of lateness and prejudice to both parties, (c) prospects of success; (d) the respondent's interest in the finality of the dispute, (e) the convenience of the court; and (f) avoidance of unnecessary delay in the finality of the dispute. It was held in *Foster v Stewart Scott Inc* (1997) 18 ILJ 367(LAC) that:

“These factors are not individually decisive, but are interrelated and must be weighed one against the other. A slight delay and good explanation for the delay may help to compensate for prospects of success which are not strong. Conversely, very good prospects of success ... may compensate for an otherwise perhaps inadequate explanation and long delay.”

[15] There is a duty upon the applicant who applies for condonation to furnish an explanation for the default sufficiently full to enable the court to have a proper appreciation of how and why the default occurred. See *Silber v Ozen Wholesaler (PTY) Ltd* 1954 (2) SA 352.

[16] Another important principle also related to the above is that condonation is not granted as a mere formality. The applicant has to put forward sufficient cause for excusing him or her from compliance with the rules of the court. In other words the applicant must place before the court facts which will assist it in considering and exercising its judicial discretion whether or not to grant condonation. See *Foster v Steward Scott* (1997) ILJ 367 (LAC).

[17] In *Saraiva Construction (PTY) Ltd v Zulu Electrical and Engineering Wholesalers (PTY) Ltd* 1975 (1) SA 612 (D), the court held that good cause is shown by the applicant giving an explanation that shows how and why the default occurred. It was further held in this case that the court could decline the granting of condonation if it appears that the default was wilful or was due to gross negligence on the part of the indulgence to the applicant

[18] In *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532C-F 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.

EVALUATION

[19] In the present case, the employee's application for condonation fails to comply with the legal principles set out above. It deals very scantily with the factors that need to be considered in an application for condonation. The explanation given by the employee lacks critical details and is totally unconvincing. The reasons for this conclusion are set out below.

[20] In my view, the period of 4 (four) months lateness is excessive and in the absence of a good explanation, the application should be dismissed. The explanation, that it was "extremely difficult" to communicate with his representatives on his return to Lesotho after his dismissal lacks merits and is unconvincing.

[21] It was argued on behalf of the employee that there were no phones in the village in Lesotho where he stayed after his dismissal. It was further argued by his attorney that the court should take judicial notice that:

"A dismissed man who has no means of income will not afford to phone or travel easily between Lesotho and Rustenburg"

[22] The authorities consulted reveal that judicial notice can be taken if a matter is “*so notoriously or clearly established that evidence of the existence is unnecessary*” See *R v Tager* 1944 AD 339. It has also been held that the doctrine of judicial notice was to be confined with narrow limits. See *S v IMENE* 1979 (2) SA 710 (A). I am not convinced that it is obvious or clear that a dismissed person would not be able to afford to phone or travel between Lesotho and Rustenburg. In fact in this instance the employee does not indicate in his application whether he has found employment and if not, how he managed to travel back to consult with his attorneys on the 23rd November 2005.

[23] The employee does not state which of his representatives attempted to make contact with. There is also no explanation as to why the third respondent had not acted sooner or what steps it took to ensure that the matter is processed with the necessary diligence.

[24] As indicated earlier, the answering affidavit was delivered on the 7th December 2005. There is no explanation for the period between the 23 November 2005, when the employee consulted with his attorneys and the 7th December 2005. The question that arises in this regard is why the condonation application was not made on the 23rd November 2005, or immediately thereafter.

[25] An agreement between the parties may go a long way to persuade the court to consider favourably the granting of condonation. However, it is only the court that has the power to extent or excuse the late filing of a document or any non-compliance with the rules. The court will not be bound by an agreement in terms of which the parties extend the period prescribed by the rules. At best the parties may agree that the other party will not oppose an application for condonation, a factor to be considered favourably by the court when considering condonation.

[26] In the present case, there is clearly no agreement to extent the period within which to file the opposing affidavit. The letter of the 5 December 2005, simply confirms an undertaking by the respondents to file the answering affidavit on the 7 December 2007. Even in its application for condonation the employee does not aver to an

agreement but states that an arrangement was made to file the affidavit by 7 December 2005.

[27] In the light of the above, it is not necessary to deal with the issue of prospects of success. Incidentally, the prospects of success were not pleaded by the fourth respondent but raised in the heads of argument.

Order

[28] In the circumstances,

- (1) The application for condonation is dismissed with cost.
- (2) The review application should be set-down on an unopposed roll.

MOLAHLEHI AJ

DATE OF HEARING : 14 DECEMBER 2006

DATE OF JUDGMENT : 26 APRIL 2007

Appearances

For the Applicant : M P YEATES OF LEPPAN BEECH INCORPORATED

For the Respondent: D J MOUTON OF MOREBODI-PAUL INCORPORATED