IN THE LABOUR COURT OF SOUTH AFRICA

(HELD IN JOHANNESBURG)

Case No.: JR732/2005

In the case between:

MINING POWER TRANSFER t/a DRIVELINE TECHNOLOGIES	Applicant
and	
M H MARCUS N.O.	First Respondent
MOTOR INDUSTRIES BARGAINING COUNCIL	Second Respondent
HILTON BERRY	Third Respondent

JUDGMENT

RAMPAI, AJ

[1] This proceedings are dual in nature. In the first place the applicant applies for the review of an arbitration award. In the second place the applicant applies for the condonation of its late filing of the review application. The arbitration award which precipitated these proceedings was issued by the first respondent in the performance of his duties as an arbitrator and as senior commissioner under the auspices of the second respondent. The award was in favour of the third respondent.

[2] The review application was brought in terms of section 145 of the Labour Relations Act, No. 66 of 1995. It was filed on the 31 March 2005. The arbitration award which precipitated these proceedings was attached to the founding affidavit as annexure A and appears on page 14 – 22 of the record. The first and second respondents are not opposing this review application and will abide by the decision of this court. Only the third respondent opposes the application.

[3] The relief sought by the applicant is an order whereby the matter is remitted to the second respondent for reconsideration on the basis that the final written warning which stems from the first disciplinary hearing was perfectly valid at the time his second disciplinary hearing was held.

[4] The applicant also applies for the condonation of its late filing of its review application. The condonation application was filed on the 25 July 2006. It became necessary for the applicant to have its lateness pertaining to the review application condoned because the review application was

served outside the prescribed six week period. Again the first and the second respondents abide. Again only the third respondent opposes the condonation application.

[5] The applicant conducts business in the motor industry. It manufactures repairs and distributes universal joints, prop shafts and their components. Its industrial plant is situated at Spartan.

[6] The third respondent is an erstwhile employee of the applicant. He was employed in the position of stores controller since 1995 until 2004. His duties entailed various functions relating to the stock management and the warehouse of the applicant. He reported directly to a director of the applicant, a certain Mr. Richard Waite. He was 59 years of age at the time the second disciplinary hearing was held.

[7] At all times material to these proceedings two disciplinary hearings were held against the third respondent. The first disciplinary inquiry was held on the 1 September 2003.

The charge against him was "Not following up on the transport to collect the spares." At the end of that inquiry the third respondent was found guilty. The chair of the first disciplinary inquiry issued a final written warning against him.

[8] The second disciplinary inquiry against the third respondent was held on the 11 February 2004. He was charged with gross negligence. It was alleged that he failed to secure goods that had been stolen and in that he failed to carry out the reasonable instruction to prevent such stealing. Once again he was found guilty on this charge. On 11 February 2004 he was dismissed from the employ of the applicant.

[9] The third respondent was aggrieved by his dismissal. On 10 March 2004 he referred the case of unfair dismissal to the dispute resolution centre of the Motor Industries Bargaining Council (MIBCO) under case CA367/04C. Attempts to reconcile the parties, failed. On 28 April 2004 the conciliator issue the certificate of outcome to that effect. The parties then proceeded to have the dispute arbitrated.

[10] The arbitration proceedings were held on the 14 June 2004. The first respondent chaired the proceedings under the auspices of the second respondent. The employer and the employee led evidence before the arbitrator. At the end of the inquiry the arbitrator reserved his decision.

[11] On the 12 July 2004 the arbitration proceedings were finalised. The arbitrator issued the following award in favour of the employee against the employer:

> ¡°1. Applicant's dismissal by respondent was substantively unfair.
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> 2. Applicant is awarded the sum of R80,076, equivalent to six months remuneration, as compensation for his unfair dismissal, which amount respondent is ordered to pay to the applicant within 21 days of this award being issued to respondent."

[12] It is the aforesaid arbitration award which I am now called upon to review and to set aside at the instance of the applicant. Obviously the applicant was aggrieved by the

award. The dispute resolution centre of the aforesaid bargaining council duly served the arbitration award on the parties. The applicant received the arbitration award on the 6 August 2004. From that date the applicant had six weeks within which to bring its application for review without any need to have anything condoned. It was never done. Therefore, the applicant has a hurdle to jump over. The merits of its review application can only be adjudicated provided its lateness is condoned.

[13] I deal with the condonation application first, since my decision in respect of this condonation application will decide whether or not the review application should be entertained. It is common cause between the parties that the review application was brought some seven months or so late. In order to succeed in condonation proceedings the applicant must persuade the court to exercise its discretion in its favour taking into account the following factors: The degree of lateness, the explanation for the delay, the prospects of success, the prejudice and the importance of the case to the applicant. It is trite that the

court has a discretion to condone non-compliance, but such discretion must be exercise judicially upon consideration of all the aforesaid factors, **MELANE v SANTAM INSURANCE CO LTD** 1962 (4) SA 531 (AD), **A HARDRODT (SA) (PTY) LTD v BEHARDIEN & OTHERS** (2002) 23 ILJ 1229 (LAC). I now proceed to examine the facts in this case in order to ascertain whether or not exercise judicial discretion in favour of the applicant.

[14] In the first place I consider the degree of lateness. The applicant received the arbitration award on the 6 August 2004. By law it had six weeks from that day within which to bring its review application. That period expired on the 17 September 2004. By then no review application had been filed. From the 17 September 2004 a further period of 27 weeks lapsed. The review application was only filed on the 31 March 2005. In other words it has taken the application the total of 33 weeks from 6 August 2004 to file the review application. The applicant has effectively taken the permissible maximum period of six weeks times 5.5 to bring its application. This is the equivalent of 231 days.

Even if I try to be generous, the applicant's degree of lateness from the 17 September 2004, is still an inordinately long period of 27 weeks which is the equivalent of the permissible maximum period of 6 weeks times 4.5. Either way the degree of lateness is disturbingly excessive in my view.

[15] In the second place I deal with the explanation for the delay. The applicant did not handle the matter on its own. At all times relevant to the arbitration award it was a member of Small Enterprise Employers of South Africa (SEESA). The organisation acted on behalf of the applicant. It received the arbitration award on the 6 August 2004 and timeously advised the applicant that the arbitration award be taken on review. The applicant's deponent mandated SEESA to do just that. On behalf of the applicant SEESA briefed counsel who drew up the necessary application.

[16] On the 13 September 2004 Mr. W. A. Marais delivered the founding affidavit to the applicant for signing by its

deponent. But Mr. Waite was not satisfied with the founding affidavit. As a result of his dissatisfaction certain alterations had to be effected. The amended copy was then delivered to the applicant on the 15 September 2005. This was two days before the expiry of the six week period. The applicant did not respond, the amended copy was not immediately signed and returned to the applicant's labour representative. Mr. Marais, who knew the urgency of the matter, did not follow the matter up. The review application was not filed on 17 September 2005. At the end of September 2004 he was promoted to the position of a legal advisor, Miss Ursula Botha, a provincial manager of SEESA, took his duties over. The integrated reading of the affidavits indicates that they did not sit down together to identify urgent matters in order to ensure smooth transition.

[17] The applicant's operations director and its main deponent Mr. Richard Waite says the following about the founding affidavit which was sent to him on the 15 September 2004:

> "4.5 However, it seems that the next draft had not been

> received and attended to by the Applicant. This was not due to any disregard for the rules of the above Honourable Court, and was a mere oversight. At all relevant times, the Applicant fully intended to pursue the review application. This remains the case."

[18] The aforegoing averment is not convincing. Both Miss Ursula Botha and Mr W. A. Marais averred that the founding affidavit was sent to the applicant on the 15 September 2004. Now Mr. Richard Waite, in a rather tame tone, suggested that the applicant did not receive the founding affidavit. The terse statement is rather vague. He gives no further information as to why he thinks the applicant did not receive the draft founding affidavit. If indeed the applicant did not receive the amended affidavit the applicant's failure to file the review application before the 17 September 2004 cannot be regarded as a mere oversight. I do not think the omission to file the review application in this instance was an oversight or an inadvertent mistake. In my view it appears to have been negligent disregard of the rules of this court.

[19] The original draft was sent to the applicant on the 13 September 2004. The applicant received it, attended to it, corrected it and returned it to its labour representatives in less than two days. This demonstrates that the applicant was aware of the urgency of the matter. The labour representative was aware of the urgency of the matter which was why he immediately effected the alterations the applicant wanted and had it delivered to the applicant the very next day on the 15 September 2004. Although neither Miss Ursula Botha nor Mr. W. A. Marais say how it was delivered, there is every reason to believe that it was delivered by hand, just as the original was probably delivered. Mr. W. A. Marais did not immediately leave the employ of SEESA, he was still there as a legal advisor on the crucial date, 17 September 2005 and right up to the end of the year. The speed at which he effected the alterations and sent the affidavit back to the applicant, strongly suggested that he was fully aware that time was of the essence and must have advised his client about the urgency of filing the review application.

[20] In the circumstances I cannot believe that the applicant did not receive the amended founding affidavit in good time. I find, therefore, that the non-compliance with the statutory provision was not occasioned by any miscommunication between the applicant's director concerned and the labour representative concerned. The rule was broken through carelessness on the part of the applicant. The first excuse is not excusable.

[21] The applicant's deponent states as follows at paragraph 6 of the founding affidavit:

> "6.1 In the meantime, different woes had befallen the Applicant which affected its ability to deal with the review application.
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> 6.2 During the latter part of 2004, a dispute arose between the shareholders of the Applicant. One of the majority shareholders of the Applicant, who was also the former Sale and Marketing director of the Applicant, had abandoned his dispute."

[22] The aforegoing averments are riddled with vagueness. The deponent does not state exactly when the

shareholding dispute commenced. All he says is that the shareholding dispute arose during the latter part of 2004. But we all know that the earlier part of that year ended on the 30 June 2004. Did the dispute arise on 1 July 2004 or 31 December 2004 or perhaps somewhere in between? The deponent does not say. According to him the shareholder dispute exerted an enormous pressure on the time and resources of the remaining two directors of the applicant.

[23] Apart from attending to the day to day management of the applicant's operations its remaining directors were required to attend numerous, sometimes daily consultations with attorneys and advocates. Yet the legal work originally entrusted to the labour consultants or labour representatives but handed over to the attorneys at the end of 2004 obviously never featured in such countless consultations with the lawyers, as one would have expected.

[24] However, enormous the pressure might have been, I am

not persuaded that having to read and sign a six page document would have made the pressure any worse than it already was. The impression I get is that according to the applicant the review application was treated as an insignificant matter. The applicant had more important and pressing matters to worry about. The review proceedings in the labour court were certainly not seen as one of them.

[25] By the 31 December 2004 the applicant's file had already been transferred from the labour representative to the legal practitioners. A candidate attorney in the law firm Edward Hobbs Attorneys discovered the problem early in February 2005. The applicant was immediately made aware of the problem. However, despite this advice, and on that occasion by attorneys and not labour representatives, the two remaining directors of the applicant travelled to Germany in order to negotiate and to secure a crucial distribution agreement with a chief supplier of the applicant. Again the applicant's deponent is vague. No date for the German trip is specified. I find it hard to accept that neither the labour representative on 15 September 2004 nor the

legal practitioners early before 15 February 2005 advised the applicant about the urgency of the review application. This two incidents create a strong suspicion that the applicant itself was to blame for the inordinate delay.

[26] The applicant does not say when his directors came back from Germany. But it must be borne in mind that the error was discovered early in February 2005. The attorneys discovered it when they were doing a general audit of the files they had inherited from the labour representative, SEESA. The affidavits of Miss Ursula Botha as well as that of Mr. L. A. Smith are both vague as to when it was discovered that the founding affidavit or the review application had not been signed. Equally vague is Miss Ursula Botha's allegation that when she took the file over from Mr. W. A. Marais she believed that the review application had been filed. She makes no attempt to explain what it was that made her to come to that conclusion. Therefore I cannot accept that when she handed over this file to the attorneys she was under the

impression that everything necessary had been done. Her confirmatory affidavit was obviously drafted in December 2005 about seven months before the founding affidavit. In the end the affidavits were signed on 24 July 2006 and 25 July 2006. There is no explanation for this.

[27] In support of Miss Ursula Botha's impression, Mr. Richard Waite puts it strongly as follows:

> ¡°4.6 At the same time, Mr. Marais left the employ of SEESA and was succeeded by Ms Botha. **Ms Botha was under the firm impression,** upon reviewing the Applicant's file **and seeing the unsigned application**, that the review application had been lodged and that SEESA and the Applicant were now only waiting for the Second Respondent to file its record of the proceedings before it."
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> (my own emphasis)

[28] I cannot understand the aforegoing. Firstly, as I have already pointed out, the applicant's deponent is incorrect. Mr. Marais did not leave SEESA immediately. According to

Miss Botha whose affidavit is supported by Mr. Marais himself, Mr Marais was promoted but remained as a functionary of SEESA. To say that Miss Botha reviewed the applicant's file, saw the unsigned review application and formed a firm impression that the review application had been lodged, defies logic. The mere sight of an unsigned founding affidavit or a notice of motion or both with no official endorsement by the Registrar of this court should immediately have rang a warning bell to Miss Botha that there was something wrong with the review application.

[29] I cannot accept the averment of the applicant's deponent that in the mist of the turmoil occasioned by the shareholders dispute it did not occur to him that condonation application was necessary. The review application was served and filed on the 31 March 2005 after an inordinate period of delay. This was done after a long period of 6 more weeks after the attorneys had alerted the applicant to the problem.

[30] Simultaneously with a belated review application a condonation application is usually filed. In this case it was never done. Instead the condonation application was filed as we have seen on the 25 July 2005, well over some 16 more weeks later. And that after the third respondent had objected to the hearing of the extremely belated review application. Only then was the condonation application served and filed. Throughout the entire episode the applicant was represented, either by the labour representatives or legal representatives. Even if it did not occur to the applicant's deponent that it was necessary to seek condonation for its lateness regarding the filing of the review application, it is highly improbable that the attorneys did not advise him accordingly.

[31] It seems to me that the applicant blames everyone, particularly his labour law advisor, Mr. Marais and his co-director and the majority shareholder of the applicant who left the applicant in the lurch. But I am not convinced that they were the main culprits who led to the sorry state of affairs. By the look of things the applicant did not take the

advice given to it by its labour law advisors and its legal representatives seriously. On all these counts I find that the applicant's explanation lacks the necessary particularity because it is riddled with vagueness and abortive attempts to shift the blame elsewhere. The applicant does not give any specific adequately informative account of events and interreactions from the 31 September 2004 to the 31 December 2004 but especially from 1 January 2005 to 24 July 2006. Whatever the seriousness of the shareholding dispute or the alleged departure of Mr. W. A. Marais or both could not have retarded the simple signing of an affidavit for such a prolonged period of 33 weeks and further for another prolonged period of approximately 70 weeks for a consultation to prepare, sign attest and file the affidavit in support of the condonation application.

[32] The second excuse that the applicant was paralysed by a lengthy and complicated internal dispute which adversely affected its operations fails to impress me. In the circumstances I am of the view that no adequate satisfactory and reasonable explanation for the delay has

been given in this case. The condonation application which became absolutely necessary as on the 18 September 2004 was only lodged on the 25 July 2005, over 50 weeks later. It is significant also to bear in mind that it was filed because the third respondent objected to the hearing of the review application which was not accompanied by a formal application for condonation. These are serious acts omissions.

[33] In the third place I now turn to the prospects of success. The grounds on which the applicant relies to have the arbitration reviewed and set aside are set out in paragraph 7.3 of the condonation founding affidavit.

> ¡°7.3 In short, the grounds of review are as follows:
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> 7.3.1 in the course of his award, the First Respondent entered upon an evaluation of the final written warning given to the Third Respondent on 1 September 2003. This warning and its validity was not in issue before the First Respondent;
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> 7.3.2 the First Respondent further incorrectly did not take into account the damage the Applicant had suffered as a

result of the pilferage of, inter alia, the Third Respondent;

the First Respondent also did not take into account the patrimonial damages suffered by the Applicant as a result of the Third Respondent disobeying instructions."

[34] The grounds of review as set out in paragraphs 7.3.2 and 7.3.3. of the condonation application were not included in the review application – vide paragraphs 8.2 and 8.3 on p. 12 of the record. The only ground of review common to both the founding affidavit in support of the review application and the founding affidavit in support of the condonation application relates to the final written warning given by the applicant to the third respondent on the 1 September 2003 – vide paragraph 8.1, review affidavit on p. 11 of the record and paragraph 7.1, condonation affidavit on p. 40 of the record. In my view this is the main ground of the review sought by the applicant. The only grounds of review I will take into consideration are those contained in the review affidavit.

[35] The thrust of the main ground of review is that the first respondent committed misconduct in the execution of his

duties as an arbitrator by reconsidering and evaluating the merits of final written warning issued during the first disciplinary inquiry on the 1 September 2003. On behalf of the applicant it was contended, before me, that such a warning was not before the arbitrator. Accordingly it was submitted that the arbitrator was not entitled to evaluate the pros and cons of such a warning. He was obliged to take it into account as it was. So argued Mr. Joubert.

[36] Having due regard to the facts of the matter and the two distinct disciplinary hearings and the fact that the applicant cannot deny that the first hearing's outcome was indeed used by the applicant as a relevant aggravating factor in the determination of a proper sanctions to be imposed on the third respondent at the second disciplinary inquiry whilst it was undisputed evidence that the charge at the first hearing did not form part of the third respondent's job description or duties justified the first respondent decision to enquire into the merits of the first disciplinary hearing and therefore its relevance and correctness to the second disciplinary inquiry. The applicant itself elated to make the

facts of the first disciplinary inquiry relevant to the second disciplinary inquiry by asking the arbitrator to take those facts into account. This was Mr. Botha's argument on behalf of the third respondent.

[37] In defence of himself the uncontested evidence of the third respondent during the arbitration proceedings was that he was not in charge of transport or the collection of spares outside the plant. The main issue raised by the applicant related to the first respondent's decision to take into account what transpired during the first disciplinary inquiry. The gist of the applicant's contention was that after the final written warning was issued on the 1 September 2003 the third respondent never referred a separate dispute of unfair labour practice against the applicant to the second respondent (MIBCO). Counsel for the third respondent submitted that seeing that the applicant itself elected to use such warning as an aggravating factor in order to secure the third respondent's dismissal, the third respondent was entitled to attack the merit of such a warning and that the first respondent was entitled to assess the merits thereof

afresh.

[38] I am not persuaded by the submission of Mr. Botha. The issue which fell to be determine by the arbitrator was whether the dismissal of the third respondent on 11 February 2005 was procedurally and substantively fair regard been had to the final written warning given to the third respondent on 1 September 2003. In **AGBRO PTY LTD v TEMPI** (1993) 2 LCD 24 (LAC) the court held that it was not entitled to enquire into the question as to whether the final warning (which had never been challenged and reversed) had been justified as this would qualify or derogate from the finality of the warning. I am in respectful agreement. See also **SUBROYEN v TELKOM (SA) LTD** (2001) 22 ILJ 2509 (LC) at 2520 a – 2521d, **XABA v EVERITE LTD** (1992) 1 LCD 265 (LC).

[39] In **PAPER PRINTING WOOD & ALLIED WORKERS UNION & ANOTHER v SAPPI FINE PAPERS (PTY) LTD** (1993) 2 LCD 318 (IC) the court held:

> ¡°The law in respect of the right of an employee to challenge prior

> warnings on the basis that these warnings are used in assessing a proper and fitting sanction is clear. An employee may raise the question of the fairness of these previous warnings at a subsequent tribunal hearing only if he or she challenged the fairness of these warnings at the time, assuming that he or she knew of that right of challenge or appeal."

[40] Therefore it seems to me that the applicant's prospects of successes on review are fairly good. I am persuaded by Mr. Joubert's submission that the arbitrator exceeded the scope of his functions and powers in reconsidering the validity or otherwise of the final warning that was never previously challenged. *Prima facie* it would appear that the first respondent has committed reviewable irregularity. It is so that in the course of his decision the arbitrator ventured into an evaluation of the validity of the final warning issued to the third respondent although this did not form part of the dispute referred to him. The contention of the third respondent is one which, I cannot uphold. Therefore the applicant wins this round. The review application has some good prospects of success.

[41] In the fourth place I proceed to consider the prejudice to the parties. It seems to me that if condonation is granted in the instant case the third respondent will suffer greater prejudice than the applicant will if condonation is not granted. The way in which this entire case, and I mean the review application as well as the condonation application, has been handled demonstrates that the applicant is really not concerned as to how long it takes to have the dispute finalised. The third respondent like any other serious litigant is entitled to finality. The excessive delays both in respect of the review application as well as the condonation application suggest that this case is likely to be bedevilled by further prolonged delays should condonation be granted. Timeous finalisation of dispute is the hallmark of any efficient adjudication process. In the instance case the applicant has seriously undermined this principle.

[42] The applicant avers that any prejudice the third respondent may suffer as a result of the granting of the condonation application would be remedied by interest on the

outstanding amount. This is of little comfort to the third respondent since the arbitration award did not specifically direct the applicant to pay interest on the capital award to the third respondent. The third respondent was awarded compensation on the 12 July 2004 but to date has not yet received it. Whatever prejudice the applicant may suffer the applicant would have nobody but itself to blame. In my view the factor o prejudice favours the third respondent.

[43] As regards the importance of the case the vigour with which the third respondent has pursued the matter underscores the importance of the case to him. The same cannot be said about the applicant. Therefore, I am of the view that, on the facts, the case is more important to the employee than the employer.

[44] The inordinate delays and the poor explanation, the importance of the case as well as the prejudice are all factors which count against the applicant. These factors are interrelated and are not individually decisive. The strength of the one factor may in certain circumstances

redeem the weakness of another. In the instant case, however, the cumulative effect of the majority of the factors has an adverse impact on the one and only factor favourable to the applicant's case. The unfavourable aspects eclipse the favourable aspect.

[45] Although the review has good prospects of success, which is a very important consideration, I cannot find enough compelling substance in this factor alone, to compensate for the extremely excessive degree of lateness, and the exceptionally poor explanation for the inordinate delays. Add the factors of prejudice and importance, then the situation becomes even bleaker for the plight of the applicant.

¡°And the respondent's interest in finality must not be overlooked."

MELANIE v SANTAM INSURANCE CO LTD 1962 (4) SA 531 (AD) at 532E per Holmes JA. Therefore I would decline to exercise my discretion in favour of the applicant. I am not persuaded upon accumulative consideration of all the relevant factors that this is a case where condonation

can be granted. It follows therefore that the review application falls by the way side.

[46] Accordingly I make the following order:

46.1 The condonation application is refused with costs.

46.2 The review application is dismissed with costs.
46.3 The arbitration award by the second respondent issued on the 12 July 2004 in favour of the third respondent by the first respondent acting under the auspices of the second respondent under case number 367/04C stands.

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M.H. RAMPAI, AJ

On behalf of the applicant:	Adv. I. Joubert Instructed by: Edward Hobbs Attorneys PRETORIA
On behalf of the first and second respondents:	No appearance
On behalf of the third respondent:	Adv. J.H. DeV Botha Instructed by: Assenmacher Attorneys JOHANNESBURG

Heard on: 22 FEBRUARY 2007

Delivered on: 5 MARCH 2008

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