REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case No JR 3347/2010

In the matter between:

WILSON MABUDSHA	Applicant
and	
THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	First Respondent
ARBITRATOR – L NOWOSENETZ NO	Second Respondent
LAND BANK	Third Respondent

Heard: **19 December 2013**

Delivered: **10 January 2014**

Summary: **Application for condonation for the late filing of an application for the review of an award. This was principally due to the negligence of the attorney who was ignorant of the time period prescribed in the LRA. Held that the applicant cannot escape the negligence of his attorney. Further held that the prospects of success on review are not promising. Condonation refused.**

JUDGMENT

SEEDAT AJ

Background

[1] The applicant in the main review application seeks condonation for the filing of the notice of motion and the statement of claim in support of his review application outside the statutorily prescribed period.

[2] It was agreed that I would hear arguments in the condonation application in tandem with the review application on the understanding that should I grant condonation I will then consider the application for review. Of course, if I hold otherwise, the application for review will fall away.

[3] The applicant, a manager in financial administration, was dismissed by the third respondent (the employer) on a number of grounds relating to absenteeism, punctuality, claiming for time he did not work and the divulgence of the security settings on his computer to a fellow employee.

[4] The applicant challenged the dismissal as both being without a fair reason and procedurally defective.

[5] The second respondent (the commissioner) concluded that the dismissal was procedurally fair but not for a fair reason and awarded two months' compensation. The applicant is unhappy with the compensatory award and claims that he should have been reinstated.

The condonation application

[6] The applicant received the award from the CCMA on 1 December 2010. The applicant brought the application to review the commissioner's award five days outside of the six weeks prescribed in s 145(1)(a) of the Labour Relations Act, 66 of 1995 (LRA).

[7] The reasons for this delay are set out in paragraph 8 of the affidavit in support of the application for condonation:

> '8.2 The Applicant did not at that time make an application for condonation as they were (sic) of the view that the *dies non* that is applicable to (sic) the High Courts of South Africa was also applicable in the Labour Court.

8.3 Furthermore at the time the Applicant gave the go ahead for Applicants' (sic) attorneys of record to file the review application it was the festive season and Applicants' (sic) attorneys of record's (sic) were closed.'

[8] The applicant's attorneys only became aware of the prescribed time limit for a review application when told by the employer's attorneys some two years later.

[9] This court and the appeal court have restated the broad principles for the determination of condonation as enunciated in *Melane v Santam Insurance Co Ltd*[1]. These principles include the degree of delay, the reasons for the delay, the prospects of success, and the prejudice the parties will suffer if condonation is granted or refused. In *NUM v Council for Mineral Technology*[2] the court said that an objective conspectus of all the facts is needed.[3]

[10] It is common cause that the application was referred five days out of the prescribed period.

[11] The reasons for the delay were

- The erroneous belief by the applicant's attorneys that the computation of days for the service of pleadings in the Labour Court is the same as that which obtains in the High Court; and
- By the time the applicant resolved to review the award, the offices of the attorneys acting for the applicant had closed for the seasonal recess.

[12] There is also mention in the affidavit, almost as an aside, that the 'attorney who previously dealt with this matter has left the employ of the Applicant's attorneys'. This was not pursued in argument.

[13] Molahlehi J in *Sishuba v National Commissioner of the SA Police Service*[4] noted:

'The issue of delays in prosecuting disputes in the Labour Court has become an issue of concern and judges have expressed their concern at a trend that seems to

[1] 1962 (4) SA 531 (A)
[2] [1999] 3 BLLR 209 (LAC) para 10
[3] see too, *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A)
[4] (2007) 28 ILJ 2073 (LC) para 8

have emerged in this regard. The trend seems to be developing into a practice or a norm in cases involving reviews of arbitration awards.'

[14] Conradie JA in *Queenstown Fuel Distributors CC v Labuschagne NO & others*[5] wrote:

'…condonation in the case of disputes of individual dismissals will not be readily granted. The excuse for non-compliance will have to be compelling, the case for the defect would have to be the kind which will result in a miscarriage of justice if it were allowed to stand'.[6]

[15] Waglay DJP (as he then was) remarked in *SA Post Office Ltd v Commission for Conciliation, Mediation & Arbitration & others*:[7]

'Where the matter deals with an individual dismissal, this court must be cautious before exercising a discretion in favour of the indulgence sought, because there is an imperative placed upon the speedy and expeditious resolution of such disputes.'

Reasons for the delay: the first ground

[16] What is of concern here is the admission by the applicant's attorneys that they were not aware of the need to file the review application within the statutory time period. This manifests negligence on the part of the attorneys, a fact admitted by Mr Mndezi, counsel for the applicant.

[17] The period of delay may be minimal but as LaGrange J remarked in *National Education Health & Allied Workers Union & others v Vanderbijlpark Society for the Aged*[8] in a similar context though dealing with the negligence of trade unions, that the LRA has been in existence for more than 15 years and it was 'reasonable to expect that [parties] ought to be well aware of the need to act timeously in the interest of their [clients]…' and Waglay DJP in *SA Post Office*[9] that 'even a short delay may not be excusable unless an explanation is proffered that sets out the reasons for the delay which the court finds acceptable'.

[5] (2000) 21 ILJ 166 (LAC) para 24
[6] see *Moroka v National Bargaining Council for the Chemical Industry & others* (2011) 32 ILJ 667 (LC)
[7] (2011) 32 ILJ 2442 (LAC) para 20
[8] (2011) 32 ILJ 1959 (LC) para 9
[9] Supra note 7 para 18

[18] It is inconceivable that a firm of attorneys who assisted the applicant in completing the CCMA form referring a dispute to the CCMA, lodged the form on his behalf, requested an arbitration after a failed conciliation and represented him at the arbitration hearing was oblivious to the requirement of six weeks stipulated in s 145(1)(a) of the LRA for the launching of a review application. Clearly, the attorneys had been grossly remiss in not filing the review application timeously. To hold otherwise would be to connive at the maladroitness of attorneys, and trade unions for that matter, and perpetuate a cavalier attitude to, and a contemptuous disregard for, legislated time periods.

[19] Can the negligence of the attorneys be imputed to the applicant? It is established law that a party cannot escape the negligence of his representative.[10]

[20] In *SA Post Office*[11] the learned judge confirmed that in an application for condonation, a party cannot use the negligence of its legal representative as a reason for failing to adhere to the statutory time period.

[21] The court in *Superb Meat Supplies CC v Maritz*[12] reminded us that:

> 'It has never been the law that invariably the 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.'

Thus, the applicant cannot even rely on the tardiness of his representatives to justify the delay.

[10] *Saloojee v Minister of Community Development* 1964 (2) SA 135 (AD); *Xayiya v African National Congress* [2000] 4 BLLR 477 (LC); *First National Bank v CCMA* [2000] 12 BLLR 1429 (LC); *A Hardrodt (SA) (Pty) Ltd v Behardien* (2002) 23 ILJ 1229 (LAC); *Superb Meat Supplies CC v Maritz* (2004) 25 ILJ 96 (LAC); *GIWUSA obo Hyeneke v Klein Karoo Korporasie Bpk* (2005) 26 ILJ 1083 (LC

[11] Supra note 7 para 21

[12] (2004) 25 ILJ 96 (LAC) at 100I-101A. See too, *Silplat (Pty) Ltd v Commission for Conciliation Mediation & Arbitration & others* (2011) 32 ILJ 1739 (LC)

Reasons for the delay: the second ground

[22] On the second ground of condonation relating to the seasonal shut down of the attorneys' offices, the applicant makes bald allegations without providing any factual details of when the applicant decided to review the award, when he went away and the date and period for which the attorneys' offices were closed. There is also an apparent inconsistency in the averment made in paragraph 8.3 and paragraph 8.5.2 of the founding affidavit. In the former it is alleged that when the applicant 'gave the go ahead' to proceed on review, the applicants' office were closed. There is no mention of the applicant being 'away'. In paragraph 8.5.2 it is claimed that it was 'not practical for the Applicant to meet with its (sic) attorneys of record owing to the fact that the Applicant was *already away* and the Applicants' attorneys of records' (sic) offices were closed at the time'. (emphasis added)

[23] More importantly, the applicant, in proceedings before the CCMA, gave his contact details as those of his attorneys. Ms Mfenyana, listed as a director on the letterhead of the applicant's attorneys, represented the applicant at the arbitration hearing, was the contact person to whom the arbitration award was sent by, what appears to be, facsimile by the CCMA and was the attorney who signed the notice of motion for the review application. If the award was received on 1 December 2010 there is no explanation as to what happened between then and the closure of the offices.

[24] The explanation for the delay is neither acceptable nor plausible. The ignorance of the applicant's attorneys is egregiously appalling. When a person holds herself out to be an attorney she is representing to the person who engages her services that she is not only competent but also knowledgeable in the essentials of the law. A client reposes absolute trust in an attorney to conduct his case with a degree of diligence, care and professionalism. To simply assume that the time period for a review in the Labour Court is the same as that in the High Court is woefully negligent. Furthermore, the applicant cannot rely on the negligence of his attorneys.

[25] The applicant has not given a satisfactory explanation for the late filing of his statement of claim that would justify the court exercising its judicial discretion in his favour.[13] This should be enough to refuse the application for condonation[14].

[26] However, for the sake of completeness, I will consider the prospects of success and the factor of prejudice.

Prospects of success

[27] The correct enquiry, said the court in *Seatlolo & others v Entertainment Logistics Service (A division of Gallo Africa Ltd)*[15], is 'whether the applicants would succeed in the main action if the facts pleaded by them in their condonation application were established at trial'.

[28] The only aspect of the commissioner's award that the applicant challenges is the awarding of two months' compensation 'in the face of the evidence (sic) before him pointing to reinstatement into the same or similar position for the Applicant'.

[29] The applicant argued that once a dismissal is found to be substantively unfair, the commissioner is obliged to consider the provisions of section 193 and order reinstatement unless the exceptions delineated in section 193(2) are applicable.

[30] Section 193 provides:

(1) If the Labour Court or an arbitrator appointed in terms of tis Act finds that a dismissal is unfair, the Court or the arbitrator may-
(a) order the employer to reinstate the employee from any date not earlier than the date of dismissal;
(b) order the employer to re-employ the employee, either in the work in which the employee was employed before the dismissal or in other reasonably suitable work on any terms and from any date not earlier than the date of dismissal; or
(c) order the employer to pay compensation to the employee.
(2) The Labour Court or the arbitrator must require the employer to reinstate or re-employ the employee unless-

[13] *Balmer & others v Reddam (Bedfordview) (Pty) Ltd* (2011) 32 ILJ 2121 (LC) para 13
[14] *SA Post Office* supra note 7 para 22
[15] (2011) 32 ILJ 2206 (LC) para 24

(a) the employee does not wish to be reinstated or re-employed;
(b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;
(c) it is not reasonably practicable for the employer to reinstate or re-employ the employee; or
(d) the dismissal is unfair only because the employer did not follow a fair procedure.

[31] It will be useful to quote the commissioner's finding in full:

'The primary remedy for substantively unfair dismissal is reinstatement subject however to section 193(2) of the LRA. It is common cause that the Applicant's post was made redundant and therefore it is not reasonably practicable to reinstate him. It is in dispute that the relationship of trust has broken down and I do not rely on this factor. Compensation is the appropriate remedy. The applicant's period of service, clean record and relative seniority are taken into account as well as the fact that he was guilty of misconduct which has an element of dishonesty. Although compensation is a solatium to an employee it should not be a succour to a wrongdoer. Compensation equivalent to 2 months (sic) salary would be just and equitable…'

[32] It would appear that just before the dismissal of the applicant, the employer had started the process relating to dismissals for operational reasons. The post that the applicant occupied was to be made redundant.

[33] In her closing arguments, the applicant's representative had conceded that his position had become redundant but argued, without having elicited this in evidence, that he could have been placed elsewhere. Effectively, the applicant sought a reinstatement.

[34] The Constitutional Court in *Equity Aviation Services (Pty) Ltd v Commission for Conciliation Mediation & Arbitration & others*[16] confirmed that it 'is trite law that the power to grant a remedy in s 193 is by its nature discretionary…'

[35] In *Mediterranean Textile Mills (Pty) Ltd v SA Clothing & Textile Workers Union & others*[17] the Labour Appeal Court said:

[16] (2008) 29 ILJ 2507 (CC) para 48
[17] (2012) 33 ILJ 160 (LAC) para 28

'It is notable that in terms of the earlier decisions, s 193(2) was construed as placing an onus on the employer to establish the existence of any of the non-reinstatable conditions, but since *Equity Aviation* there has been a constitutional paradigm shift in this regard. Rather than departing from the premise of a legal onus, the focal point and overriding consideration in this enquiry should be the underlying notion of fairness between the parties and that "[f]airness ought to be assessed objectively on the facts of each case bearing in mind that the core value of the LRA is security of employment. In further amplification, the Constitutional Court in *Billiton Aluminium SA Ltd t/a Hillside Aluminium & others* [(2010) 31 ILJ 273 (CC)] stated:

> "The remedies awarded in terms of s 193 of the LRA must be made in accordance with the approach set out in *Equity Aviation.* That approach is based on underlying fairness to both employee and employer. It would introduce unwanted and unnecessary rigidity to saddle an enquiry into fairness with notions of legal onus."'

The court then concluded at para 30:

'…at the conclusion of each case it remains the responsibility of the court or the arbitrator to determine whether or not, on the evidentiary material properly presented and in the light of the *Equity Aviation* principle, it can be said that the reinstatement order is justified. In other words, even in a situation such as the present, where no specific evidence was canvassed or submissions made during the trial on the issue of the non-reinstatable conditions, the court or the arbitrator is not only entitled but, in my view, is obliged to take into account any factor which in the opinion of the court or the arbitrator is relevant in the determination of whether or not such conditions exist.'[18]

[36] The court in *Trio Glass t/a The Glass Group v Molapo NO & others*[19] remarked that while reinstatement is a primary remedy for a substantively unfair dismissal, it is not a compulsory remedy.

[37] At the arbitration hearing, the employer relied on two grounds to rebuff any suggestion of the applicant's reinstatement.

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[18] *SBV Services (Pty) Ltd v Commission for Conciliation Mediation & Arbitration & others* (2013) 34 ILJ 996 (LC) para 33

[19] (2013) 34 ILJ 2662 (LC) para 51

[38] The first was that the trust relationship between the applicant and the employer had broken down. This was attested to by Mr McGregor, the witness for the employer, in his evidence-in-chief and repeated at least thrice, in cross-examination. Though the commissioner had ignored this evidence, it was never challenged by the applicant.

[39] The second was that the employer had undertaken an extensive restructuring exercise which rendered the applicant's post redundant. In this respect, a timorous attempt was made by the applicant to equate the restructuring process with his dismissal.

[40] The seriousness of the misconduct also has an impact on what would be an appropriate remedy.[20] In weighing his options, the commissioner noted that the applicant 'was guilty of misconduct which has an element of dishonesty'. It was not controverted by the applicant that his conduct did have 'an element of dishonesty'. Our courts do certainly 'place a high premium on honesty in the workplace'.[21]

[41] The reinstatable conditions did not exist and the commissioner had not acted unfairly in awarding compensation.

Prejudice

[43] In dealing with the factor of prejudice, the applicant argued that a refusal of condonation will deprive him of his constitutional right to access to the court. The failure to adhere to statutorily prescribed time limits must axiomatically inhibit his right to seek justice, especially if the applicant or his representatives are to blame.[22] To hold otherwise would simply subvert the orderly conduct of litigation.

[20] *Transnet Ltd v Commission for Conciliation Mediation & Arbitration & others* (2008) 29 ILJ 12 89 (LC) at 1300F-G

[21] *Miyambo v CCMA & others* (2010) 31 ILJ 2031 (LAC)para 17: *Sappi Novoboard (Pty) Ltd v Bolleurs* (1998) 19 ILJ 784 (LAC); *Theewaterskloof Municipality v SA Local Government Bargaining Council (Western Cape Division) & others* (2010) 31 ILJ 2475 (LC) para 21

[22] *Seatlolo & others v Entertainment Logistics Service (A division of Gallo Africa Ltd)* (2011) supra note 20 para 25

[40] In addition, Molahlehi J in *Balmer & others v Reddam (Bedfordview) (Pty) Ltd*[23] said that in deciding prejudice, a party seeking condonation must show in what way the other party would not suffer prejudice if condonation were granted'. The applicant has not shown what impact the granting of condonation would have on the employer.

[41] Condonation is an indulgence to be granted by a court exercising its discretion premised on the facts and the law. There is neither an acceptable reason for the delay nor any prospects of success. In these circumstances, the application for condonation must be refused.

[42] Neither party asked for costs in this application. Accordingly no such order is made.

Order

1. The application for condonation is dismissed.

2. There is no order as to costs.

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Seedat AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	Advocate M Ndziba
Instructed by:	KNT Attorneys
RESPONDENT:	Attorney D Mer
Instructed by:	Fluxmans Attorneys

[23] Supra note 18 para 10