Reportable
Of interest to other judges

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

Case no: C 965/2008

In the matter between:

ABOOBAKER NAZIR KHAN **Applicant**

and

CADBURY SOUTH AFRICA (PTY) LTD **Respondent**

JUDGMENT

STEENKAMP J:

INTRODUCTION

[1] The applicant has applied for condonation for the late filing of his statement of case. It was filed more than a year after his dismissal. He lays the blame squarely at the door of his former attorneys, Africa & Associates, whose handling of his case has been characterised by gross ineptitude and negligence.

THE APPLICABLE PRINCIPLES

[2] The most succinct exposition of the principles applicable to condonation remains that of the then Appellate Division in *Melane v Santam Insurance Co Ltd.*[1] The court summarised the principles as follows:

> "In deciding whether sufficient cause has been shown, the basic principle is that the court has a discretion, to be exercised judicially upon 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, but that would be a piecemeal approach incompatible with a true discretion, save of course that 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 that 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."

[3] These principles have consistently been applied by this court in dealing with condonation applications.[2]

[4] In *NUM v Council for Mineral Technology*[3] the Labour Appeal Court restated the principle that:

> "… Without a reasonable and acceptable explanation for the delay the prospects of success are immaterial…"

[5] If you applicant's explanation is unsatisfactory and unacceptable it is unnecessary to consider the arguments relating to the applicant's prospects of success.[4]

---

[1] 1962 (4) SA 531 (A) 532 B-F

[2] As some of the many reported examples of the daily applications for condonation that clog the rolls of this court, see *Rustenburg Platinum Mines Ltd v CCMA & others* (1998) 19 *ILJ* 327 (LC) 333A-B; *Mashegoane v University of the North* [1998] 1 BLLR 73 (LC); *Kotze v Mathlaba & others* [1999] 6 BLLR 552 (LC); *NUM v Council for Mineral Technology* [1999] 3 BLLR 209 (LAC) para [10].

[3] [1999] 2 BLLR 209 (LAC)

Extent of the delay

[6] The applicant was dismissed for operational requirements on 31 December 2007. He referred an unfair dismissal dispute to the CCMA on 7 January 2008. It was conciliated without success and the commissioner issued a certificate of outcome on 30 January 2008. In terms of s 191(11)(a) of the Labour Relations Act[5] the applicant had to refer the dispute to this court within 90 days. Instead, he did so almost one year later, on 8 January 2009. The referral is thus more than eight months out of time. To say that it is an excessive delay is to state the obvious.

[7] An excessive delay requires an extraordinarily good explanation.

Explanation for the delay

[8] The applicant blames the delay exclusively on the incompetence, ineptitude and gross negligence of his former attorneys, Africa and associates, and more specifically attorney Heleine Potgieter.

[9] The applicant had a legal insurance policy with a company known as LegalWise. Shortly after the CCMA had issued a certificate of non resolution, on 5 February 2008, he contacted LegalWise to obtain legal representation. He was told that his policy had lapsed and that he would have to renew his membership before they could assist him. He did so, and his policy was reinstituted with effect from 27 February 2008.

[10] On 21 March 2008 LegalWise referred the applicant to Africa & associates. He consulted with Heleine Potgieter on 8 April 2008 – still well within the 90 day referral period – and instructed her to refer this matter to the Labour Court. Unfortunately for the applicant, Ms Potgieter seemed to have no commitment to adhering to the provisions of the LRA or the rules of this court.

---

[4] *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) 768 B-C; *Superb Meat Supplies cc v Maritz* (2003) 25 *ILJ* 96 (LAC)

[5] Act 66 of 1995 (the LRA)

[11] Almost two months later, "on or about" 30 May 2008, Potgieter phoned him and told him that she was "unwell". Remarkably, almost two months after he had instructed her, she was "still busy drafting my statement of case". On 30 May 2008[6], after he had received her phone call, the applicant also sent Potgieter an e-mail stating the following:

> "How's the flu, hope you get better soon. We need to get stuck into Cadbury and give them a hard time. I look forward to the application and will definitely keep in touch. Please call me if you need any other info documents which might not be in this sect that you are already."

[12] It is perhaps noteworthy that the applicant refers to "the application". His referral to court was on the grounds of an unfair dismissal based on operational requirements, and thus not an "application". It is tempting to surmise that he already knew by 30 May 2008 that "an application" for condonation was in the offing. But there is no such direct evidence before me.

[13] In July 2008 the applicant fell ill and was "bedridden on numerous occasions". He did not hear from Potgieter in the period from 30 May to 14 October 2008 – a period of some four and a half months. According to the applicant, he telephoned the offices of Africa & associates during August and September 2008 but he could not get hold of Potgieter. He gives no further details, nor did he – or Africa & associates – follow anything up in writing over this extensive period.

[14] On 13 October 2008, inexplicably and seemingly out of the blue, Potgieter sent the applicant a text message (sms) in the following terms: "Dear mr Khan. i will not be in office 2day.i have a matter in Bellville 2morrow at 3.can we meet at 5 2morrow in Boston somewhere?"[7] They consulted at the applicant's home the next day, 14 October 2008. At that stage, Potgieter told him that she had not yet referred his matter to the Labour Court and as a result "a condonation application needed to be launched"

---

[6] The applicant says in his affidavit that he sent the email "on or about" 30 May 2008. It is clear from the email itself that he sent it on 30 May 2008.

[7] Spelling and punctuation as in the original.

as the time period for referring the matter to the Labour Court had lapsed. He instructed her to “do the necessary”.

[15] Potgieter, however, did no such thing. Inexplicably, there is no written follow-up by the applicant. I pause to note that the applicant is not an uneducated man. He was employed in a middle management position. He holds a National Diploma in Chemical Engineering from ML Sultan Technikon. (For some reason he also notes on his *curriculum vitae* that he had enrolled for a B Sc degree but did not complete it). He used email to correspond with his attorneys, the CCMA and LegalWise. It beggars belief that he would not see any need to chase his attorneys up in writing over the course of the previous seven months – bar the one email on 30 May 2008 - or the subsequent months after the eventual consultation with Potgieter on 14 October 2008, by which time he was well aware that he was out of time and that he needed to apply for condonation. He alleges that he followed up telephonically. Eventually, after another two months had passed, he requested LegalWise on 11 December 2008 to appoint another attorney to assist him. This they did on 12 December 2008 by referring him to his current attorneys, Parker attorneys.

[16] The applicant consulted with Parker attorneys on 15 December 2008. In his affidavit, he says that this was “the first time” that he was made aware of the relevant time periods for the filing of a referral. This does not tally with his earlier averment that Potgieter had told him two months earlier, on 14 October 2008, that he would have to apply for condonation.

[17] Despite the fact that the applicant and Parker attorneys must by now have known that he was hopelessly out of time, they waited another two weeks before delivering the application for condonation on 2 January 2009.[8]

[8] In this regard it must be borne in mind that there are no *dies non* in the Labour Court.

Attorneys' negligence: the legal principles

[18] Our courts have repeatedly held that there is a limit beyond which a litigant cannot escape the result of his or her attorney's lack of diligence.

[19] This court deals with applications for condonation on an almost daily basis. In some instances, the delays are occasioned by unrepresented litigants. But all too often, their attorneys are to blame. It may be necessary to remind litigants and their attorneys of the words of Steyn CJ in *Saloojee & another v Minister of Community Development*[9] more than 45 years ago:

> "In *Regal v African Superslate (Pty) Ltd* 1962 (3) SA 18 (AD) ... this court came to the conclusion that the delay was due entirely to neglect of the applicant's attorney, and held that the attorney's neglect should not, in the circumstances of the case, debar the applicant, who was himself in no way to blame, from relief. I should point out, however, that it has not at any time been held that condonation will not in any circumstances be withheld if the blame lies with the attorney. There is a limit beyond which a litigant cannot escape the result is 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. In fact this court has lately been burdened with an undue and increasing number of applications for condonation in which the failure to comply with the rules of this court was due to neglect on the part of the attorney. The attorney, after all, is the representative 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… and expect to be exonerated of all blame; and if, as here, the explanation offered to this court is patently insufficient, he cannot be heard to claim that the insufficiency should be overlooked merely because he has left the matter entirely in the hands of his attorney. If he relies upon the ineptitude or remissness of his attorney, he should at least explain that none of it is to be imputed to himself. That has not been done in this case. In

[9] 1965 (2) SA 135 (A) 141 B-H

these circumstances I would find it difficult to justify condonation unless there are strong prospects of success."

[20] Unfortunately this court is still being burdened with an undue number of applications for condonation in which the failure to comply with the rules of this court was due to neglect on the part of the attorney.

[21] The Labour Appeal Court had the following to say in *Superb Meat Supplies cc v Maritz:*[10]

"It has never been the law that invariably a litigant will be excused if the blame lies with the attorney. To hold otherwise I have a disastrous effect on the observance of the rules of this court and set a dangerous precedent. It would invite or encourage laxity on the part of practitioners."

[22] And in *A Hardrodt (SA) (Pty) Ltd v Behardien & others*[11] the Labour Appeal Court reinforced this view in circumstances in which an applicant sought to explain the delay of some four and a half months by determining that:

"The catalogue of events reveals negligence, incompetence and gross dilatoriness by the appellant's legal representatives. It is difficult to see how that constitutes a good cause condonation with convincing reasons as laid down in the *Queenstown Fuel Distributors CC* case."

[23] It will serve little purpose to list all the cases in which this court has followed these principles. But it is significant that the court has accepted the judgments which hold that if the attorney displays ‘gross ineptitude’ the court ‘cannot extend any indulgence’ to the applicant.[12] In *Van Dyk v Autonet (a division of Transnet Ltd)*[13] Waglay J[14], in applying that principle, ordered the applicant's erstwhile attorneys to pay the respondent’s costs *de bonis propriis* even though they were no longer acting for the applicant.

---

[10] (2004) 25 *ILJ* 96 (LAC)

[11] (2002) 23 *ILJ* 1229 (LAC) para [14] (per Nicholson JA); followed in *Arnott v Kunene Solutions & Services (Pty) Ltd* (2002) 23 *ILJ* 1367 (LC).

[12] *Waverley Blankets Ltd v Ndima & others* (1999) 20 *ILJ* 2564 (LAC).

[13] (2000) 21 *ILJ* 2489 (LC)

[14] As he then was (now Waglay DJP)

[24] Finally, in *Queenstown Fuel Distributors cc v Labuschagne NO*[15], Conradie JA noted the following about condonation in individual dismissal disputes:

> "By adopting a policy of strict scrutiny of condonation applications in individual dismissal cases I think that the Labour Court could give effect to the intention of the legislator to swiftly resolve individual dismissal disputes by means of a restricted procedure…"

[25] Applying these principles to the current case, it is clear that the applicant's erstwhile attorneys were not only grossly negligent but also grossly inept. The applicant was also less than diligent in pursuing his case. This is one of those cases where the limit has been reached beyond which the applicant cannot escape the results of his attorneys' lack of diligence or the insufficiency of the explanation tendered.

Prospects of success

[26] Coupled with the extent of the delay and the unacceptable explanation therefor, the prospects of success are largely immaterial.[16] I will nevertheless consider it briefly.

[27] The applicant was dismissed for operational requirements. The respondent has explained the commercial rationale for the dismissal. Although the applicant has complained about certain alleged shortcomings in the consultation process, the respondent has, at least on the papers before me, set out sufficient details of a consultation process in terms of section 189 of the LRA to made out a case that it has reasonable prospects of success in defending a case on the merits at trial stage.

[28] In the absence of oral argument, it is not possible to come to an entirely satisfactory conclusion on the relative prospects of success. However, weighed against the extensive delay and the applicant's entirely

---

[15] 2000 (21) *ILJ* 166 (LAC) 174 H-I

[16] *NUM v Council for Mineral Technology* [1999] 3 BLLR 209 (LAC) of

inadequate explanation therefor, the applicant's prospects of success at trial are not sufficient for him to be granted condonation.

COSTS

[29] The applicant has been badly served by his erstwhile attorneys. In law and fairness, I do not consider it fair to saddle him with further costs. Had he still been represented by Africa and associates, I would have considered a costs order *de bonis propriis* against them. However, since they are no longer on record, I am hesitant to do so. The applicant is not entirely without a remedy. He has a cause of action against his erstwhile attorneys who have displayed gross ineptitude and gross negligence in their failure to pursue this matter timeously.

ORDER

[30] The application for condonation is dismissed.

[31] There is no order as to costs.

_____

STEENKAMP J

Date of hearing:	16 November 2010
Date of judgment:	17 November 2010
For the applicants:	Adv Michael Garces
Instructed by:	Parker attorneys
For the respondent:	Mr Grant Marinus
Instructed by:	Werksmans incorporating Jan S de Villiers