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IN THE LABOUR COURT OF SOUTH AFRICA

(SITTING AT CAPE TOWN)

CASE NO: **C307/2000**

In the matter between:

JAN SWANEPOEL Applicant

And

GERT ALBERTYN (ALBERTYN BROTHERS) Respondent

JUDGMENT

STELZNER AJ

1. This is an application for condonation for the late referral of a dispute to this Court, arising from the alleged automatically unfair dismissal of the applicant by the respondent in and during August 1998.

2. It is common cause that the applicant was employed in and during 1992 by the respondent on the farm Nooitgedacht in the Bredasdorp district. As a term and condition of his employment applicant was afforded accommodation on the farm, together with his family. It is also common cause that the applicant has an adult son who was, during 1997, declared unfit for work and was committed to the applicant's care by reason of certain psychiatric problems. On 1 August 1998 the aforesaid son, Niklaas Swanepoel, suffered some kind of an attack and caused certain damage to the family home on the farm, more specifically, a number of glass windowpanes were broken. Although the applicant at his own cost caused the damage to be repaired he alleges that he was dismissed by the respondent arising out of this incident. He was told that his son was no longer welcome on the farm and that he, the applicant, would not be permitted to remain there and his services would no longer be required unless and until his son was removed. It is further

common cause that the respondent wrote a letter to the applicant on 20 August 1998 in which an ultimatum along the aforementioned lines was put to him. In short he was told that he could return to work provided he complied with the stipulated terms and conditions of employment which, according to the letter, included a provision that he was only permitted to have school going children with him in the house which he occupied. The applicant denies that this restriction had ever been a term and condition of his occupation of the house or part of his terms and conditions of employment.

3. Subsequent to his dismissal applicant referred a dispute to the Commission for Conciliation, Mediation and Arbitration ("the CCMA"). Conciliation failed and a Certificate of Outcome was issued on 27 October 1998 stipulating that the dispute remained unresolved. It is also common cause that applicant only referred his dispute to this Court in and during May 2000. It appears that a case number was applied for on or about 2 May 2000, was allocated on 3 May 2000 and that the statement of claim was then filed, by way of the standard Form 2, on 15 May 2000. The statement of claim was accompanied by an application for condonation in respect of the late referral thereof, signed by the applicant on or about 8 May 2000.

4. The application for condonation is supported by an affidavit signed by the applicant before a Commissioner of Oaths, together with a confirmatory affidavit from Hilda edwards (of the Advice Office referred to hereunder). For reasons which are apparent from the facts and correspondence in the matter (as dealt with hereunder) there is no supporting affidavit from applicant's erstwhile legal representative (Advocate Murtz). Most of the reasons in support of the application for condonation, however, are contained in a document purporting to be the application rather than the affidavit and which, although signed by the applicant, is not deposed to before a Commissioner of Oaths. The facts contained therein, therefore, as well as the annexures referred to and attached, are not strictly speaking properly before me by way of evidence. However, this point was not raised by the respondent’s representative when the matter was argued before me, the respondent being represented by Counsel on the day of the hearing, nor has the respondent placed any of the facts set out therein in dispute. The applicant represented himself and has brought these proceedings himself, apparently with limited assistance from the Advice Office in Bredasdorp, in the form of a paralegal

by the name of Hilda Edwards. In the circumstances I have had regard to all of the facts put before me by way of the application for condonation whether contained formally in the affidavit or not.

5. It is apparent that the application is exceedingly, indeed, inordinately late. It is common cause that at the time that this dispute arose it would have been necessary for the applicant to refer his dispute to this Court within a reasonable time. The amendment to the Labour Relations Act, 66 of 1995 ("the Act") introduced by Act 127 of 1998 which inserted section 191(11) into the Act had, at that stage, not yet come into operation. Had the amendment been in operation the applicant would have had to refer his dispute within 90 days of 27 October 1998, being the date on which the Certificate of Outcome was issued.

6. It is also common cause that this Court is entitled to condone non-observance of the applicable time frames, on good cause shown, and that the factors to be taken into account in that regard are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case, as set out and elaborated upon by Holmes JA in *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at, in particular, 532C-F.

"*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 is a matter if fairness to both sides. … Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true 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 which 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 interests in finality must not be overlooked."*

7. As is already apparent, the degree of lateness in this case is extreme. This, however, needs to be weighed in the balance with the other relevant factors.

8. I have alluded briefly above to the applicant's case on the merits. In opposing this application for condonation, the respondent saw fit to file a brief affidavit consisting of some one and a half pages. No

opposing statement has been filed in respect of the statement of claim. Moreover, in the affidavit opposing the application for condonation the respondent fails to deal in any manner whatsoever with the merits of the matter or the factor of the prospects of success. In the circumstances I can only have regard to the case as made out by the applicant in regard to prospects of success. On that basis I am satisfied that he has strong prospects of success. The respondent appears to have instructed the applicant to remove his son from the farm failing which his services would no longer be required and he would be required to vacate the house in which he was residing on the farm. On the case made out by the applicant before me there was no attempt to discuss the issues with the applicant before respondent issued the aforesaid ultimatum. I am satisfied therefore that *prima facie* the conduct of the respondent was such that the applicant was either unfairly dismissed, alternatively, unfairly constructively dismissed. It would appear further that the dismissal may well have been automatically unfair, arising from discrimination on the basis of family responsibilities. No procedure whatsoever was followed and the applicant has established therefore a *prima facie* case of both procedural and substantive unfairness.

9. As far as the importance of the case and prejudice to the respective parties are concerned the case is obviously of extreme importance to the applicant who has not only lost his job but has, in the interim, been evicted from the house which he and his family were occupying on the farm. As far as prejudice to the respondent is concerned, once again I am faced, in the form of the cursory opposing affidavit filed by the respondent, simply with bald unsubstantiated allegations dealing with this factor. The averment is made that it will be more difficult for respondent to defend the matter because of the fact that memories fade and that witnesses can no longer be traced. However, there is no specific reference to the identity of such witnesses as might be relevant to the facts which would in all likelihood be in dispute nor any specific allegation that any particular witness is or may no longer be available. It is also apparent that the respondent has managed, in the meantime, to secure applicant's eviction from the farm and there is thus no prejudice arising by virtue of eviction proceedings being stayed or held up by virtue of the late launching of these proceedings. In regard to this factor also, therefore, I am inclined to view the prejudice to the applicant should I not grant condonation as outweighing the potential or possible prejudice to the respondent

were I to grant condonation.

10. The remaining factor to be dealt with, therefore, is the explanation for the delay. Given an excessive delay on the one hand and good prospects of success and more prejudice to the applicant than to the respondent on the other, in my view the issue of the explanation for the delay requires careful scrutiny. In the circumstances described above and in the exercise of my discretion in this matter this factor appears likely to swing the scales one way or the other. I am also mindful of the fact that this Court has tended to grant condonation for non-compliance with time limits only in exceptional circumstances and to require a full and proper explanation for the entire period of the delay in question.

11. It is clear that the applicant was seeking advice at an early stage in the proceedings. A summary of the advice and assistance which he received during the months that followed can, however, be described as a litany of error, inattention and incompetence. Although it is apparent that applicant's advisors were not unaware that there was a need to consider the issue of time in referring the applicant's dispute to this court, there appears to have been some degree of confusion in the minds of the representatives as to exactly what time limits were applicable as well as how to go about effecting the referral. The ball, so to speak, was also from time to time kicked back and forth between the different representatives.

12. Initially, and within days of the incident, the applicant consulted an Advice Office in Bredasdorp. A paralegal there in turn referred the applicant to one Advocate Murtz who was apparently in the process of setting up her own practice in Bredasdorp. In a letter dated 4 January 1999 to Advocate Murtz the Advice Office stated that the matter had to be referred "*spoedig moontlik*". At that stage, had the referral been made forthwith or shortly thereafter it is clear that the referral would have been made within a reasonable time.

13. It appears that in and during January 1999 Advocate Murtz accepted a mandate to act on the applicant's behalf. It is also apparent from what is before me that she represented applicant in regard to the eviction proceedings which were subsequently (and ultimately successfully) instituted against him. At more or less the same time applicant applied for Legal Aid which was granted, subject to the Legal Aid Board receiving

a report on the merits, but apparently only in respect of a civil claim. The Legal Aid instruction was issued to Advocate Murtz. Advocate Murtz appears to have submitted the aforesaid report on the merits only on or about 11 May 1999. In her report on the merits Advocate Murtz exhibits an awareness of the fact that the dispute had to be referred to the Labour Court and, further, indicates that she has addressed a letter to the Registrar of the Court applying for a date for the matter to be enrolled for hearing. There is no reason to believe that she was not aware at that stage of the existence of time limits in regard to such a referral. She in fact wrote to the Registrar of the Labour Court on 23 March 1999 asking for the matter to be "*enrolled for hearing*". A subsequent letter from the Advice Office indicates that when nothing transpired for a considerable period of time (and in response to applicant's regular queries as to what was happening to his matter) the Advice Office telephoned the Labour Court to enquire about the matter and was advised that while the Court had received Advocate Murtz's letter, that had not been a proper referral of the dispute to the Court. It appears that someone in the Registrar's office at the Labour Court told the Advice Office that Advocate Murtz had been informed of the correct procedure to follow and had been referred to the standard Form 1 and Form 2 and the requirement, in the circumstances, that an application for condonation be brought.

14. It is correct, as Counsel who appeared for respondent pointed out to me in argument, that the respondent's attorneys had written to the Advice Office on 8 January 1999 in regard to the proposed eviction proceedings, enquiring whether it was the applicant's intention to refer his dispute to the Labour Court. The fact of such a referral would obviously have been relevant to the eviction proceedings by virtue of the provisions of the *Extension of Security of Tenure Act,* 62 of 1997. Counsel argued that in the absence of receiving a positive response or proof that the matter had been referred, respondent was entitled to proceed on the basis that it could regard the applicant as having abandoned his right to proceed with his claim for alleged unfair dismissal. However, what was also before me was a letter of 18 January 1999, written by the Advice Office to the respondent's attorneys in response to the letter of 8 January 1999 in which the Advice Office pointed out that the applicant indeed intended pursuing the claim for an alleged unfair dismissal and that Advocate Murtz was in the process of referring the matter to the Labour Court.

15. Applicant's case also was that he attended on a number of occasions at the Advice Office or at Advocate Murtz to enquire in regard to the progress of his case. For a considerable period of time he was simply advised by Advocate Murtz that she was awaiting a court date. At that stage applicant was therefore under the impression that his dispute had been referred. In September 1999, however, when he had still heard nothing further in regard to his application to this Court and becoming concerned as to the lack of action, the applicant took up an opportunity for a lift to Riviersonderend where he attended at another Advice Office (having heard that the paralegal there had some experience with Labour Court matters). His intention was to clarify whether it ought indeed to be taking that long for his matter to come to Court. This visit and an intervention from the Riviersonderend Advice Office with the Bredasdorp Advice Office resulted in further correspondence between the Bredasdorp Advice Office and Advocate Murtz. It transpired from this correspondence, which all took place during September 1999, that Advocate Murtz had indeed not referred the dispute properly to the Labour Court and, furthermore, that she disavowed responsibility in connection therewith. She maintained that the Advice Office ought to have dealt therewith. She also referred to the fact that she had not been given a mandate by the Legal Aid Board to proceed with the labour matter despite her report on the merits. At that point she also indicated that she was withdrawing as the applicant's representative. The letter in response thereto written by the Advice Office on 22 September 1999 makes it abundantly clear that at that stage the Advice Office had been in contact with the Labour Court and established that no proper referral had been made. Furthermore, the Advice Office was at that stage also made aware of the proper way in which to refer a dispute, namely, by the completion of Form 1 and Form 2 and the serving and filing of Form 2. The aforesaid correspondence also dealt with the eviction proceedings and concerns raised in regard to the fact that such proceedings had been successful, but details of these issues are not relevant to the issue which I am required to decide.

16. Subsequent to this exchange of correspondence and despite her initial indication that she was withdrawing as applicant's representative, however, applicant goes on to state that Advocate Murtz again offered to represent him. It appears that the applicant and the Advice office then (again) left the matter of the referral of the dispute to this Court in the hands of Advocate Murtz who (once again) did nothing about the matter.

17. During February 2000 applicant approached the Advice Office again to find out what was happening with his matter and was, as before, referred to Advocate Murtz. Applicant, who says that he is less than comfortable with using the telephone as a means of communication, then asked his brother-in-law to contact Advocate Murtz to find out what was happening about his case. On 28 February 2000 applicant says that Advocate Murtz for the second time advised that she was not prepared to carry on with his matter and that she was withdrawing as his representative. The following day he therefore attended again at the Advice Office and the Advice Office, in the person of Hilda Edwards, contacted Advocate Murtz in an attempt to establish the state of play. It appears from a letter sent to Advocate Murtz on 30 March 2000 that on or about 13 March 2000 Advocate Murtz advised Ms Edwards that she had indeed sent the relevant forms. The purpose of the letter of 30 March 2000 was, inter alia, to obtain confirmation that that had happened as well as copies of the referral documents. On receiving no response to the aforesaid letter Ms Edwards personally attended on 11 April 2000 at Advocate Murtz's residence, where she was now carrying on business, to enquire about the matter whereupon, later that day, applicant's file was delivered by Advocate Murtz to the Advice Office. From the file it would have been apparent that the matter had, as before, not been referred.

18. Thereafter applicant, apparently with some assistance from the Advice Office (who in turn received help and assistance from the Registrar's office at the Labour Court in Cape Town) prepared his statement of claim and the application for condonation which is before me today. I might add that even though it is apparent that applicant had to travel from Bredasdorp to deal with his matter and to appear before me, he timeously filed Heads of Argument and, moreover, attended (also timeously) to the proper indexing and pagination of the court file.

19. I have already alluded to being aware that this Court has on many previous occasions held that condonation for non-compliance with time-limits (and Rules) is not to be given lightly or as a matter of course. The Labour Appeal Court has held (in circumstances different to the present) that the neglect by an attorney of his client's affairs may be so inexcusable that condonation may, despite the blamelessness of the client, be

refused. (See *Waverley Blankets Ltd v Ndima & others* [1999] 11 BLLR 1143 (LAC) at 1145J-1146A.) In that case an appeal was not properly prepared for the date on which it was set down. Similar comments were made by Tip AJ in the unreported decision of *Ntsieni v CCMA & others,* case number J630/99, 26 November 1999. (See in particular paragraph 8 at page 4 of the judgment, where reference is made also to the decision of the Labour Appeal Court in *Queenstown Fuel Distributors CC v Labuschagne NO & others.*) In the *Ntsieni* case the delay was inordinate and the applicant was unable to produce a satisfactory account of the delay. The Court also commented that that the applicant had not been able to show "*ultimate prospects of success that might come to the assistance … to such an extent as to negate his failure to meet formal requirement.*" (At paragraph 9 page 5 of the judgment). Revelas J was similarly faced with an inordinate delay by an applicant in *Mokgotho v Rustenburg Platinum Mines & others*, unreported decision of the Labour Court, case number J1301/98, 26 June 2000. Judge Revelas found that although much of the delay was caused by the manner in which the CCMA's officials dealt with the matter, the applicant was nevertheless to be blamed for the delay, nor was there a proper explanation by the applicant for the initial lengthy delay in referring the matter to the CCMA. (At paragraph 23 page 7 of the judgment).

20. I am in agreement with the dicta referred to above and with the general proposition that this Court should be slow to endorse non-compliance with time limits and the Rules of Court, particularly, but not exclusively, by practitioners. For the reasons set out hereunder, however, I am of the view that the facts of the matter before me are distinguishable and render this one of the "exceptional" cases in which a proper and judicial exercise of this Court's discretion calls for condonation to be granted. I record the factors which I regard as distinguishing hereunder.

20.1 The applicant is a layman from a rural environment with limited access to (competent) legal advice.

20.2 The applicant evidenced a desire to refer his dispute to this Court from the outset and consulted the Advice Office within days of the dispute arising. Indeed this action on his part caused the first stage of the process (the referral to conciliation) to be effected timeously.

20.3 At no stage from the time he first sought advice to the time when this dispute was (eventually) referred properly to this Court did the applicant simply leave the matter in the hands of his representatives without making regular attempts not only to enquire as to the progress therein but to take steps to prompt progress. At times he went to unusual lengths (for instance the trip he made to Riviersonderend).

20.4 While it is true that the applicant was alerted to the fact that there was a need to adhere to a time limit some considerable time before the dispute was ultimately referred, he was misled by the representative who had accepted a mandate to act on his behalf into thinking that the dispute had been referred. Although he (somewhat foolishly perhaps in the circumstances) gave his matter into the hands of the same representative a second time, when he discovered subsequently (after further intervention on his part) that she had not done so, he then with some assistance from the Advice Office expeditiously set about referring the dispute himself, with a full and proper application for condonation.

20.5 As I have mentioned before, the applicant took the trouble, despite having to travel some distance, to ensure that his matter was properly before the Court on the day of the hearing. Indeed, this Court all too frequently these days is hampered from being able to deal efficiently (or at all) with matters on the roll because qualified practitioners fail to effect the timeous lodging of heads and the proper pagination and indexing of the Court file.

20.6 I am further influenced in my decision by the apparently lackadaisical fashion in which the respondent has approached its opposition to this condonation application as well as applicant's main claim. As mentioned already, no opposing statement has been filed to date. Moreover, the cursory opposing affidavit to the condonation application could not have been filed before 12 July 2000 (which is when it was signed). As the application was made on 15 May 2000 it is apparent that respondent's opposing affidavit was itself very much late (and no condonation was sought in respect of that lateness). Nor did the respondent in its affidavit see fit to deal in any detail, or at all in some

instances, with the relevant issues.

20.7 It is, further, apparent from the papers before me (as alluded to previously in this judgment) that the respondent successfully managed to evict the applicant from the premises he occupied on the farm during the course of 1999. Had that matter and the dispute concerning the applicant's alleged unfair dismissal been dealt with properly it would appear to me that, by virtue of the provisions of the *Extension of Security of Tenure Act*, the applicant ought to have been protected against eviction until such time as his claim for unfair dismissal had been finally adjudicated. If anything, therefore, the respondent has (albeit indirectly) benefited from the lengthy delay which transpired in this matter.

20.8 This matter is further distinguishable from certain of those mentioned above because of the applicant's strong prospects of success (as dealt with earlier in this judgment).

21. In all the circumstances and applying the dictum of the Appellate Division in the *Melane* case *(supra)*, I am of the view that I should exercise my discretion in this matter in favour of the applicant, in granting condonation. This Court has been established to administer and further the interests of justice in the labour arena. Not to exercise my discretion in the manner in which I have seen fit to do in this matter would, it seems to me, result in a failure of justice.

22. Because the applicant is seeking an indulgence from this Court and, in any event, is not legally represented, and taking into account that my order should be fair to both parties, I consider this an appropriate case in which no order as to costs should be made.

23. I, accordingly, make an order in the following terms:

23.1 The application for condonation for the late referral by the applicant of his dispute to this Court is granted.

23.2 The respondent is ordered to file its opposing statement within ten (10) court days of date hereof, failing which this matter is to be forthwith enrolled for default judgment.

23.3 There is no order as to costs.

S STELZNER

Acting Judge of the Labour Court of South Africa

DATE OF HEARING: 12 September 2000

DATE OF JUDGMENT: 15 September 2000

APPEARANCE FOR APPLICANT: The applicant in person

APPEARANCE FOR RESPONDENT: