1**IN THE LABOUR COURT OF SOUTH AFRICA**

HELD AT POTRT ELIZABETH

CASE NUMBER: P 180/04

In the matter between:

THE NATIONAL UNION OF
METAL WORKERS OF SA

APP
LICA
NT

M NEFU AND 8 OTHERS **SECOND AND**
FURTHER
APPLICANTS

AND

CRISBURD (PTY) LTD RESPONDENT

JUDGMENT

MOLAHLEHI J

Introduction

1] This is an application for the condonation of the late referral of the statement of case in terms of section 191 (11) (b) of the Labour Relations Act 66 of 1995 (the LRA), by the applicants.

2] The respondent also applied for condonation of the late filing of its heads of argument. This application was not opposed by the applicants and condonation was accordingly granted, having regard also to the period of the delay.

Background

3] After their dismissal during November 2003, the applicants referred their dispute to the Bargaining Council for conciliation. The conciliation process having failed, the matter was referred to arbitration. The arbitrator, who considered the matter, found that the Bargaining Council did not have jurisdiction to arbitrate over the matter as it concerned an issue related to industrial action. The ruling on jurisdiction was issued on the 26th March 2004.

4] The statement of case was filed by the applicants on 1st September 2004, a delay of about five months. The application for condonation for the late filing of

the statement of case was filed during October, 2006.

Principles governing condonation

5] It is trite that when considering a condonation application the court has to exercise a discretion whether or not to grant such an indulgence. The factors which the court takes into consideration in assessing whether or not to grant condonation are (a) the degree of lateness or non-compliance with the prescribed time frame, (b) the explanation for the lateness or the failure to comply with time frames, (c) bona fide defense or prospects of success in the main case; (d) the importance of the case, (e) the respondent's interest in the finality of the judgment, (f) the convenience of the court; and (g) avoidance of unnecessary delay in the administration of justice. See *Foster v Stewart Scott Inc* (1997) 18 ILJ 367 (LAC).

6] It is also trite that these factors are not individually decisive but are interrelated and must be weighed against each other. In weighing these factors for instance, a good explanation for the lateness may assist the applicant in compensating for weak prospects of success. Similarly, strong prospects of success may compensate an inadequate explanation and a long delay.

7] In an application for condonation, good cause is shown by the applicant giving an explanation that shows how and why the default occurred. There is authority that the court could decline granting of condonation if it appears that the default was willful or was due

to gross negligence on the part of the applicant. In fact the court could on this ground alone decline to grant an indulgence to the applicant.

8] Prospects of success or a bona fide defense on the other hand mean that all that needs to be determined is the likelihood or chance of success when the main case is heard. See *Saraiva Construction (Pty) Ltd v Zulu Electrical & Engineering Wholesalers* (Pty) Ltd 1975 (1) SA 612 (D) and *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 765A-C.

9] Depending on the circumstances of a given case, absence of a reasonable and acceptable explanation for the delay renders even excellent prospects of success immaterial, and similarly absence of prospects of success will not assist even in the face of the most persuasive and good explanation for the delay. In those circumstances the accepted approach is that an application for condonation should be refused. In this regard see *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532C-F, It has also been held by the courts that the applicant should bring the application for condonation as soon as it becomes aware of the lateness of its case.

Explanation for lateness

10] The first part of the delay in terms of the explanation given by the applicants was due to the incorrect categorization of the dispute as unfair labour practice when in fact it was not. By the time the jurisdictional ruling was issued by the arbitrator the period for filing a statement of case had already expired.

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11] A further delay after issuing of the ruling regarding jurisdiction was, according to the applicants, due to the workload of the national legal officer who could not coup because of the staff turn over at the first applicant's national office. The other contributing factor in this regard relate to the bureaucratic process within the first applicant's operations when dealing with having to obtain a mandate to litigate.

12] I do accept that there are difficulties with the explanation by the applicants but do no belief that it is so unreasonable that fairness would require that the matter be determined and concluded on that basis alone. The other point to be noted is that even if the national legal officer can be criticized for the explanation given, it is however an explanation that is above reproach in relation to taking the court into her

confidence. Its simplicity reveals the honesty behind it.

13] Refusing to grant condonation would amount to punishing the further applicants for the poor management and inefficiencies within the administrative process of the first applicant. The circumstances of this case are such that it would be unfair to criticize the further applicants for not following up and enquiring about progress in the prosecution of their case. Their hopes and confidence in the system must have been confirmed when the matter went to arbitration. There seems to be no reason why they would have suspected that the first applicant was not doing what it was supposed to do. The first applicant had referred the dispute to conciliation, in the first instance, and thereafter to arbitration. After the first applicant had processed the matter through conciliation and to the arbitration stage, there seem to me to be no reason why the further applicants would have had doubts that their matter was not properly attended to. It is for this reason that I do not belief that they can be criticized for not enquiring or making a follow up on the matter.

14] I now proceed to consider the prospects of success with the view to assessing whether they compensate for the shortcomings of the explanation.

15] It is common cause that the further applicants demanded a meeting with the respondent to discuss the issue of wages which were still to be aligned with those of the bargaining council. Initially Mr Attwood, the director of the respondent refused to attend the meeting as in his view a meeting was already scheduled for Friday which was two days away.

16] The respondent contended that the further applicants still refused to resume their duties even after meeting with Mr Attwood and indicated that they would not resume their duties until their grievances were addressed. Thereafter at about 14H00, Mr Attwood approached individual applicants and handed letters of dismissal as soon as they indicated that they were not willing to resume their duties the resolution of their grieviences.

17] The respondent further contended that even the commissioner found that the further applicants were on strike and that is why he found that he did not have jurisdiction. It was in this regard that the respondent raised *res judicata* as one of the points *in limine*.

18] The applicants on the other hand contended that they were not on strike but demanded a meeting during their lunch break with management of the respondent. The applicants also contended that the respondent did not issue them with ultimatums or in the alternative he did not afford them an opportunity to consider any such ultimatums.

19] I do not agree that the issue of *res judicata* is competent at this level for the simple reason that the commissioner did not determine the merits of the dispute but what he did was to canvas the facts in his award in relation to determining whether or not he had jurisdiction to hear the matter. In

essence the commissioner in ruling on jurisdiction determined the nature of the dispute rather than issuing an outcome based on the determination of the merits of the dispute.

20] In cases of dismissal the onus is on the employer to show that the dismissal was fair. It would seem, taking into account the time of arrival at the meeting by Mr Atwood and the issuing of the letters of dismissals, there is a strong chance that the respondent may not be able to proof that the dismissal was procedurally fair. It would also seem, from the reading of the applicant's papers that, they would be able to put a prima facie defence or explanation for their conduct. I am accordingly of the opinion that the explanation of the delay has significantly been compensated by the prospects of success. It can also not be said that the applicants had abandoned their interest in prosecuting their dispute.

21] I do not belief that it would be fair in the circumstances of this case to allow costs to follow the result.

22] In the premises the late filing of the statement of case of the applicant is condoned.

23] There is no order as to costs.

MOLAHLEHI J

DATE OF **HEARING** **: 06 JUNE 2007**

DATE OF THE ORDER : **21 SEPTEMBER 2007**
DATE OF TYPED JUDGMENT: **17 OCTOBER 2007**

APPEARANCES

FOR THE APPLICANT : ADV T M G EUIJEN

INSTRUCTED BY : GRAY MOODLIAR

FOR THE RESPONDENT: ADV G GOOSEN SC

INSTRUCTED BY : KIRCHMANNS INC.