IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT CAPE TOWN

CASE NO: C177/2006

In the matter between:

NATIONAL UNION OF METAL WORKERS OF SOUTH AFRICA	First Applicant
MICHAEL EDWARD DIEDRICH	Second Applicant

and

COMMISSIONER PIET VAN STADEN N.O.	First Respondent
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	Second Respondent
ESKOM HOLDINGS LIMITED	Third Respondent

JUDGMENT

TIP AJ:

[1] This application concerns a review of an award made by the first respondent, a CCMA commissioner, which upheld the dismissal of the second applicant ("Diedrich") by the third respondent ("Eskom"). The review was however instituted well outside the prescribed period and, in consequence, there is a preliminary application for condonation. Both applications are opposed and it is appropriate first to examine the issue of condonation.

[2] The award in this matter is dated 17 January 2005 and was apparently received by the Cape Town Regional Office of NUMSA on 24 January

2005. NUMSA has acted on behalf of Diedrich at all material times. The review application should therefore have been brought by 7 March 2005, but this was done only on 26 March 2006, which amounts to a delay of over one year.

[3] The following account has been given as the reason for this delay:

[3.1] A decision by NUMSA about bringing a review has to be taken at head office l evel after submission to it of a motivation from the local office. On 14 February 2005 Diedrich had a meeting with, among others, his representative at the arbitration, being a NUMSA regional legal officer ("Ryklief"). A motivation was prepared during this meeting and left with Ryklief for finalisation and sending on to head office.

[3.2] Thereafter, Diedrich is said to have been out of town looking for work over a period of four weeks and could not be contacted. It is further averred that Ryklief was then overwhelmed with law studies, after which he prepared for exams, whereafter he went on sabbatical leave for eighteen months. Because of this he gave no more attention to the motivation and did not send it to head office.

[3.3] There were other movements of staff in the regional legal department, resulting in it being *"somewhat dysfunctional"* during the period January to July 2005. Diedrich in the meantime returned to Cape Town in early June 2005, made enquiries about the review, resulting in it being sent to head office only on 8 June 2005.

[3.4] A second set of problems then allegedly presented themselves, being that the head office legal department was understaffed. This resulted in nobody reacting to the motivation. No file was opened for this matter and it simply lay around at NUMSA's head office, unattended. It was only in November 2005, after further enquiry from Diedrich, that the matter received

consideration and a decision was taken that a review should be brought. An instruction was then placed with Sihlali Molefe Inc, a law firm in Johannesburg, to conduct the matter.

[3.5] At this point a third set of problems arose. That firm was in the process of moving office and, although not known to NUMSA at the time, was experiencing severe financial difficulties, so much so that it closed down towards the end of 2006. Because of these dislocations in that firm, the review application was filed only on 26 March 2006.

[3.6] The applicants' present attorneys of record were instructed in August 2006. However, that firm was provided with all the necessary documents only at the end of 2007.

[4] Eskom contests the adequacy of these reasons for the delay in bringing this application timeously. It joins issue with a number of aspects concerning such reasons:

[4.1] It contends firstly that no acceptable reason has been given as to why Ryklief could not have completed the motivation and transmitted it to head office before he went on sabbatical leave. Moreover, nothing has been stated about what was or was not done in respect of the handing over of any incomplete work at the time that Ryklief went on leave. Although the founding affidavit refers to difficulties in respect of various members of staff at the regional office *"during the period between January and at least July 2005"*, no precise dates are given in respect of any of these difficulties or when the work of the office became dislocated in respect of the present matter. In particular, nothing definite has been said by the applicants about the position in that office as at mid-February 2005 and the period immediately thereafter, which might serve as an account for the nearly four months that went by before the motivation was at last sent on to head office.

[4.2] It is also to be noted that the whereabouts of Diedrich himself during this period is given vague and conflicting treatment. On the one hand, it is said that he was out of town for four weeks and, on the other, that he was out of town until the beginning of June 2005, which is a substantially longer period of time. In any event, no details are provided as to where he was or why he could not have remained in contact with Ryklief (or a successor) in respect of his matter.

[4.3] An additional and unsatisfactory feature that emerges around the level of interest taken by Diedrich in his case is the apparent incompatibility of these two aspects. The first is that Diedrich is said to have been under the assumption that the review application had already been launched by the time that he came to make enquiries early in June 2005. Although no particulars are given about what was said by or to him, one assumes that he thereupon understood that there had been an unacceptable delay and that this could compromise his review. Notwithstanding that, there appears after that to have been a surprising lack of follow up on his part after the belated despatch of the motivation to NUMSA's head office, where a decision about his case had to be taken. It is apparent from the founding affidavit that Diedrich made no enquiries at all until early in November 2005, after the lapse of about five full months.

[4.4] Eskom points out also that no sufficient or cogent reasons have been given in respect of the delay from 8 June 2005 to 26 March 2006. The first portion of this relates to the period 8 June 2005 to early November 2005. This concerns the many months when the motivation apparently received no attention whatsoever in head office. The reason advanced for this by the applicants is that there were a number of staff members who resigned *"during the latter part of 2005"*. Although a set of

names has been furnished in the founding affidavit, that hardly amounts to an explanation for the failure even to open a file when the motivation was received on or about 8 June 2005, that date being a good deal earlier than the latter part of 2005. Again, although the papers are silent on this, one would have expected the regional office to have forwarded the motivation with an indication that it had already been gravely delayed and that it required urgent attention.

[4.5] The second portion of the period in question is the one between early November 2005 and 26 March 2006. Other than for the rather vague statements that the firm Sihlali Molefe Inc was in difficulties, it is a striking aspect of the papers that there is no mention whatsoever of any follow up on the part of the union in respect of the processing of the urgent instruction which it had given to that firm. Again, the papers are silent in respect of precisely what was conveyed at the time of this instruction, but it must have been evidence to all concerned that the position had already become very grave in respect of the delay. There is no indication that either the union or Diedrich himself made any attempt to hasten the lodging of the review application and, of course, an accompanying condonation application.

[4.6] Eskom has referred to the trite proposition that an application for condonation should be filed simultaneously with the deficient process to which it relates. The first applicant is a union with considerable experience in labour related litigation. Some explanation should have been set out in its papers concerning the fact that it apparently made no enquiry in relation to the filing of a condonation application. The current attorneys of record ought also to have noted that no such application had been filed when this matter was transferred to them in August 2006. Clearly, no attention of this sort was

given to the matter. It was only after an order made by this Court on 18 July 2008 that attention was first given to the need for condonation, resulting in the filing of the present application on 8 August 2008.

[4.7] Eskom further draws attention to the unsatisfactory state of the record which has been filed in support of the review application. The first 235 pages of the transcript are absent. Concerning this, there is no more than a bland statement in an affidavit that it appeared that a tape had been over-recorded. What is entirely absent is any suggestion that an attempt was made to reconstruct the missing portion, either from the arbitrator's notes or, as would customarily be expected, in conjunction with the legal representatives of Eskom. That does not end the shortcomings in the record. It is also so that an entire bundle relating to documents that were placed before the arbitrator is absent from the record which has been placed before this Court. This is no explanation concerning this and there has been no attempt to seek condonation for that omission. To the extent that central documents are before me at all, this is largely the result of them having been put up as annexures to Eskom's answering affidavit.

[4.8] Eskom also contests the allegation advanced by the applicants that there is no prospect of prejudice to it in respect of the lateness of the review application. It points out that Diedrich was dismissed on 11 June 2003. That is a long time ago. Eskom states that his position was filled very shortly thereafter and goes on to allege, pertinently, that the relevant managers were greatly perturbed by the late arrival of this review application. In that context, it refers also to the high degree of competence required from employees who conduct the work which Diedrich was required to perform.

[5] It is convenient at this stage to set out some general considerations

relating to applications for condonation. The general principles are well known. See for instance *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532C-F and *Queenstown Fuel Distributors CC v CCMA & others* (2000) 21 ILJ 1197 (LC) at 1198D-I. The following passage in *NUM v Council for Mineral Technology* [1999] 3 BLLR 209 (LAC) at para [10] is pertinent:

> "*It is accepted by the Industrial Court and the Labour Appeal Court that in considering whether good cause has been shown in an application of this kind, the approach in Melane v Santam Insurance Co Ltd 1962 (4) SA 531 (A) at 532C–F should be adopted ... . The approach is that the court has a discretion, to be exercised judicially upon a 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 therefore, the prospects of success and the importance of the case. These facts are interrelated; they are not individually decisive. What is needed is an objective conspectus of all the facts. A slight delay and a good explanation may help to compensate for prospects of success which are not strong. The importance of the issue and strong prospects of success may tend to compensate for a long delay. There is a further principle which is applied and that is that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused (cf Chetty v Law Society, Transvaal 1985 (2) 756 (A) at 765A–C; National Union of Mineworkers & others v Western Holdings Gold Mine (1994) 15 ILJ 610 (LAC) at 613E). The courts have traditionally demonstrated their reluctance to penalise a litigant on account of the conduct of his representative but have emphasised that there is a limit beyond which a litigant cannot escape the results of his representative's lack of diligence or the insufficiency of the explanation tendered (Saloojee and another NNO v Minister of Community Development 1965 (2) SA 135 (A) at 140H–141D; Buthelezi & others v Eclipse Foundries Ltd (1997) 18 ILJ 633 (A) at 638I–639A). Mr Pretorius, who appeared for the appellants, submitted that the Melane approach required adaptation in the light of the value that the Act accords to the proper ventilation of disputes. However, the Act also accords emphasis to the speedy resolution of such disputes. Accordingly, there is no justification for deviating from the Melane principles.*"

[6] In my view the present case is one that falls within the parameters of there

having been no satisfactory explanation for the delay. It is a long delay and a proper and full account in respect of it was required. I have detailed the relevant allegations above and it is apparent from them that large portions of time are sought to be explained by vague and general statements. Cryptic explanations of that sort do not serve to span the periods of time here in question.

[7] To some extent, Diedrich has indicated that the fault lay with his union representatives. I have considered this aspect of the matter above. All that the papers identify are two moments of enquiry on his part. As indicated previously, the first of these should have alerted him to the fact that there was a real problem in respect of the delay, despite which there was no resultant concerted effort on his part to see to it that the necessary action was taken. I pause here to observe that Diedrich does not fall into the category of lay litigants for whom the requirements of legal procedures would be utterly obscure. In any event, even lay litigants of that sort are required to give attention to the course of their litigation and they cannot merely sit back for lengthy periods with the expectation that such litigation is proceeding in an acceptable fashion. That consideration certainly forms part of the case before me, where Diedrich was himself well aware that there was a problem by, at the latest, early June 2005. See in this regard, in addition to the passage from *NUM v Council for Mineral Technology* cited above, *Universal Product Network (Pty) Ltd v Mabaso & others* (2006) 27 ILJ 991 (LAC) at para [18]:

> "*As has often been stated the court is hesitant to debar a litigant from relief, particularly where it is his attorney who has been at fault: Meintjies's case at 264A; Saloojee's case at 140H-141A; Reinecke v IGI Ltd 1974 (2) SA 84 (A) at 92F-H. There are limits, however, even where the attorney is largely to blame for the delay, beyond which the courts are not prepared to assist an appellant. The remarks made in Saloojee & another v Minister of Community Development at 141C-E by Steyn CJ bear repeating again:*
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> > *'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 results 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 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."*

[8] When evaluating an application for condonation, regard must be had not only to the position of the applicants for relief, but also to the position of the respondents. That includes, among other matters, the interest that parties have in finality concerning disputes. The LRA prescribes periods within which steps are to be taken. In general, parties are entitled to assume that such periods will be taken seriously and that their stipulations will not be overlooked without good cause. In the present case it is my conclusion that the applicants have failed to establish a satisfactory explanation in respect of the delay here at issue. It is my view further that this is a matter that falls within the parameters of the *dictum* quoted above in the *Council for Mineral Technology* case, being that where there is no reasonable and acceptable explanation for the delay, the prospects of success are immaterial.

[9] Nonetheless, in the event that I might be wrong in my conclusion that the applicants have failed satisfactorily to explain the delay, I propose to consider whether there are prospects of success of such an order that condonation should nevertheless be granted. The applicants' submissions in this connection depend upon two principal contentions, as advanced at the hearing of this matter. The first is that the arbitrator should, at the very least, have found that the dismissal of Diedrich was procedurally unfair in that no proper hearing was conducted. The second contention is that the arbitrator failed to consider that the person who wrote the letter of termination had but one month earlier undertaken that Diedrich should attend a further Performance Enhancement Program ("PEP"). On that basis it was further contended that Diedrich was entitled

to have had a reasonable expectation that such course of action would be followed, rather than that his employment should be terminated.

[10] I am not persuaded that these amount to good or sufficient grounds in order for the arbitrator's conclusion to be reviewed and set aside. This view follows from a survey of the essential history concerning Diedrich's employment. Such history places the events at the time of his dismissal in context. By way of general background it is necessary to bear in mind that Eskom has in place a well developed set of measures which are calculated to ensure ongoing competence amongst its staff. The need for such measures is underlined by the technical requirements that are essential for the proper functioning of a nuclear power plant. Precision, diligence and application are prerequisites and, I might add, it would be a matter for grave public concern if that were not the position. Against that background, the following appear from the record and documentation:

[10.1] On 22 August 2000 Diedrich was given a written notice by the Instrumentation Maintenance Services Manager that his performance had significantly deteriorated in the course of the previous year. A particular aspect referred to in this letter concerned the Job Output Model ("JOM") which amounts to an agreed performance standard for the employee in question. The letter also raised concerns about the behaviour and attitude on the part of Diedrich towards his supervisor and, more particularly, recorded that the management had had difficulty discussing the JOM with him and that he had made no effort to enter into such discussions, despite numerous requests that he should do so.

[10.2] At the request of Diedrich, it was agreed on or about 26 April 2001 that his rating would be reviewed, pursuant to which he was put on a PEP in order to assist him in improving his performance.

[10.3] On 14 May 2001 it was recorded that Diedrich had failed to

attend the meeting that had been arranged in order to discuss his PEP. A program was then furnished to him which he was required to follow during the period 14 May 2001 to 10 August 2001.

[10.4] On 21 June 2001 Diedrich was informed in writing that there were concerns about his approach, including his non-attendance at the PEP meeting and his aggressive and confrontational manner towards supervisors and colleagues. On 7 August 2001 Diedrich was informed that certain areas and outputs had not been met.

[10.5] On 10 September 2001 Diedrich was informed that he had now met his performance targets. It was noted in positive and encouraging terms that Eskom was *"extremely pleased and encouraged by the fact that he had achieved this"* and it was further noted that it demonstrated that he was capable of performing at the required level. At the same time, it was also recorded that:

> *"Finally it should also be clearly emphasized that should your performance again be rated as unacceptable during the next twelve months, you will not necessarily again be placed on a PEP but a decision may be made to address the poor performance in terms of the Performance Management Policy."*

[10.6] The next development was that Diedrich was provided with a JOM for the period January to December 2002. Despite numerous requests that he should sign it, he failed to do so.

[10.7] By 26 July 2002 Diedrich's poor performance over the previous months again surfaced as a concern and he was informed of this in writing on that day. Three major issues were highlighted, including his lack of commitment towards training, his refusal to accept or sign the JOM and his behaviour and attitude towards his superiors.

[10.8] A full performance review and planning assessment was done in respect of the 2002 year. This found that Diedrich was *"not meet"*, meaning that he had not met the required targets. It observed that there was a need for him to work on his key targets and his projects, as well as his attitude, in order to meet his JOM requirements.

[10.9] At the request of Diedrich, a consequential performance appraisal had been postponed, which was then conducted on 21 January 2003. Pursuant to this Diedrich was informed in a letter dated 5 February 2003 that he had indeed been assessed as a *"not meet"* for the 2002 performance period. The reasons and ratings for particular targets were detailed. This letter further stated:

> *"You are welcome to discuss any aspect of your performance or the content of this letter with me at any time. Should you be unwilling to accept this assessment please note that you are entitled to appeal against my decision in terms of the Performance Management Policy. In terms of this policy we will be required shortly to discuss and compile an appropriate performance enhancement program ("PEP")."*

[10.10] After this Diedrich and his union representative had a meeting on 19 February 2003 with Eskom's Human Resources Practitioner, at which various concerns arising from the letter of 5 February 2003 were identified and addressed. This followed upon the lodging of an appeal against the finding of *"not meet".* Subsequently, on 24 February 2003, the appeal was turned down and the "*not meet*" assessment was confirmed.

[10.11] At the 19 February meeting, Diedrich requested that the Maintenance Execution Manager should do another performance appraisal, in the presence of his supervisor and human resources. Although there was no provision in the standing policy for a step of this kind, the Human Resources

Practitioner nevertheless recommended that this should be done in order to *"remove any possible perception on behalf of the employee that the manager may have been biased due to previous issues in their working relationship"*.

[10.12] The Maintenance Execution Manager then conducted an independent review of Diedrich's 2002 performance assessment. He came to the same conclusion, namely that Diedrich was a *"not meet"*. The outcome of this independent performance appraisal is dated 16 May 2003. It reports that the assessment is *"final"* and that the parties are to follow the correct procedures thereafter. I should add that these events clearly overtook the indication in the letter of 5 February 2003 and its suggestion that a further PEP should be arranged.

[10.13] On 21 May 2003 Diedrich was informed that his position now had to be considered in the light of Eskom's documented Performance Management Process. He was required to attend a meeting on 23 May 2003 at which the alternatives had to be examined arising from Diedrich's non-performance. In terms of the Performance Management Process, such alternatives would include transfer, demotion or termination of service.

[10.14] The meeting in fact took place on 2 June 2003. Diedrich was assisted by his union representative. It resulted in a notification dated 11 June 2003 that his services had been terminated. It is apparent from that letter that the principal contentions raised on behalf of Diedrich were noted and considered. Moreover, factors in favour of Diedrich, as well as those counting against him were evaluated. Careful consideration was given to the alternatives of another PEP, demotion or transfer. Ultimately, the conclusion was that Diedrich had failed to meet the standards that had been set for him and had also failed to avail himself of support mechanisms which had been put in place by Eskom.

[11] The arbitrator considered all these events and the relevant correspondence in his award. In addition to the documentation, he had the advantage of a very full hearing in respect of all these issues. The hearing extended over thirteen days and produced a correspondingly lengthy transcript. I have seen nothing and my attention has been drawn to nothing to suggest that the arbitrator misdirected himself in respect of any of that body of evidence.

[12] To revert to the two main contentions advanced on Diedrich's behalf, it is my view that neither of them can be sustained. The procedure that led to the termination of Diedrich's service with Eskom was conducted in accordance with standing policy. None of it generates a sense that the ordinary rules of justice were in any way affronted. In the second place, I have already noted that the suggestion that Diedrich was still entitled as at the end of May 2003 to another round of PEP is not a well founded reflection of what took place. If Diedrich entertained any expectation in that regard, it was not a reasonable one.

[13] In the circumstances, I am satisfied that there is no good reason for the arbitrator's conclusions to be disturbed. *A fortiori*, there is no good reason to consider that there is such a preponderance of probability in favour of Diedrich in respect of prospects of success, that the difficulties arising in respect of his condonation application could be cured. To the contrary, it is my view that the condonation application must fail on all the grounds raised in opposition to it.

[14] As is apparent from the reasons set out above, both applicants are at fault in respect of the late filing of the review. It is appropriate that they should both be liable for the costs thereof. Those costs will include the extent to which it was necessary to deal with the merits of the review application for the purpose of determining the condonation application.

[15] I accordingly make the following order:

[1] The application for condonation in respect of the late filing of the application for review is dismissed.

[2] The applicants are ordered jointly and severally to pay the third respondent's costs in respect of the condonation application.

[3] The application for the review of the arbitrator's award dated 17 January 2005 in respect of case number WE6865-03 is removed from the roll.

[4] The second applicant is ordered to pay such of the third respondent's costs in respect of the review application as are not included in the costs order made in paragraph [2] of this order read with paragraph [14] of this judgment.

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KS TIP
ACTING JUDGE OF THE LABOUR COURT

DATE OF HEARING: 27 January 2010

DATE OF JUDGMENT: 12 March 2010

FOR APPLICANTS: Advocate K Lengane
instructed by Ranamane Phungo Inc

FOR THIRD RESPONDENT: Mr J Ramages
of J Ramages Attorneys