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IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

Case no: C 206 / 2006

In the matter between:

SILPLAT (PTY) LTD	**Applicant**
and	
CCMA	**First respondent**
Mr VUYISA MAZWI N.O.	**Second respondent**
STEPHEN MARINE	**Third respondent**

JUDGMENT

STEENKAMP J:

INTRODUCTION

1] This review application came before me more than five and a half years after the dismissal of the third respondent, Mr Stephen Marine ("the employee"). The main reason for this extraordinary delay is wrong legal advice, gross negligence, incompetence and extreme dilatoriness by the

applicant's erstwhile attorneys.

2] The applicant, Silplat (Pty) Ltd ("the company"), seeks to review a rescission ruling made by the second respondent, Mr Vuyisa Mazwi ("the arbitrator") under the auspices of the first respondent, the CCMA, on 2 March 2006.

3] In the alternative, the applicant seeks to review the award of the arbitrator on 3 December 2005. The arbitrator found the employee's dismissal to be substantively and procedurally unfair and ordered the employer to pay him the maximum allowable compensation equivalent to 12 months' remuneration, which amounted to R1 080 000 (ie R1,08 million). The review application with regard to this award is itself out of time and the applicant seeks condonation for its late delivery. The applicant only seeks to review the ruling on procedural unfairness.

4] In the further alternative, the applicant seeks an order reviewing the amount of compensation and replacing it with "an award of compensation deemed appropriate by the above Honourable Court".

5] In order to deal with the application for condonation, it is necessary to set out the tortuous and unfortunate history of the matter.

THE BACKGROUND

6] The employee was the managing director of the company's Gold division. The company dismissed the employee in June 2005. He referred an unfair dismissal dispute to the CCMA.

7] At the arbitration on 17 October 2005, the employee, represented by Mr Wayne Field of Bernadt Vukic Potash & Getz, applied for legal representation.[1] The company's attorney, Mr Deon Visagie of Mallinicks[2],

1 Mr Field was also the instructing attorney for the employee in these proceedings before the Labour Court.
2 Now Webber Wentzel (incorporating Mallinicks)

opposed the application. The arbitrator granted the application for legal representation after taking into account the complexity of the matter, involving "the interplay of Company Law and Labour Law". He took into account that the employee was the managing director of the company's Gold division and that he was "voted out of work" by a resolution in a board meeting.

8] Shortly after this ruling granting legal representation, the CCMA served a notice of set-down on the parties' attorneys, informing them that the arbitration would proceed on 23 November 2005. The company's then attorneys, Mallinicks, applied to review the ruling on legal representation.

9] According to Smit, Mr Visagie wrongly advised the company that the application for review would stay the arbitration proceedings. How an experienced labour law practitioner could have rendered this advice, is inexplicable. There is no confirmatory affidavit by Visagie. On 17 November 2005, Visagie wrote to the CCMA. Smit says that "it is clear from the above letter that Mallinicks *bona fide* believed that the filing of the review application would stay the arbitration proceedings. But the letter states that "...the writer [*sic*] has indicated to you that the arbitration is to proceed on 23 November 2005" and seeks confirmation of the *in limine* ruling on legal representation for the purposes of filing the review application.

10] Be that as it may, the CCMA responded on 21 November 2005. It confirmed the *in limine* ruling and stated:

> "Commissioner Mazwi has further confirmed that he advised the parties that he would provide full reasons for his ruling in his final award. To this end the Commissioner proposes that your client should stay review proceedings in the Labour Court pending the completion of the case and the issuing of the award."

11] Despite this clear indication from the CCMA, neither the company nor its attorneys attended the arbitration two days later, on 23 November 2005. Mallinicks filed the review application the previous day, on 22 November 2005. Smit says that Mallinicks "...held the *bona fide* belief that the filing of

the review application would stay the arbitration proceedings". He says that the company "relied on this advice" and did not attend the arbitration. He does not attach a confirmatory affidavit by Visagie or any other Mallinicks attorney and no-one explains how the attorneys could have held such a belief, which is clearly wrong in law.

12] The arbitration continued in the company's absence, as both the company and its attorneys had been properly notified of the arbitration date. The arbitrator found the employee's dismissal to have been substantively and procedurally unfair and ordered the company to pay him the equivalent of 12 months' remuneration as compensation. He justified the granting of maximum compensation as follows:

> "The applicant requested maximum compensation and I believe that there are reasonable grounds why such an award should be made. The applicant is still unemployed and has been unsuccessfully looking for employment. The applicant also testified that he is a man of specialised skill and in view of the provisions of the restraint of trade he finds it hard to secure alternative employment. The operation of the restraint has been triggered by the applicant's unfair dismissal and to that extent the respondent must shoulder the blame. The applicant also claimed that he has been severely prejudiced by the loss of income."

13] On 20 December 2005, the company launched an application to rescind the arbitration award in terms of section 144(a) of the Labour Relations Act. The arbitrator heard the rescission application on 9 February 2006. On 2 March 2006 he dismissed the application for rescission with costs.

14] The company now seeks to review the rescission ruling; alternatively, the arbitration award and the amount of compensation awarded to the employee.

CONDONATION

15] The company filed this application for review on 31 March 2006. Insofar as it seeks to review the arbitration award of 3 December 2005, the review application is about 2 ½ months out of time. It seeks condonation for the late filing of the review application.

16] But the delay does not end there. Having delivered the application for review, the company did not file the record within the requisite time period, nor did it file the notice in terms of rule 7A(8), indicating that it was standing by the relief sought in its original notice of motion or that it wished to amend it. Eventually, on 19 November 2008, the employee brought an application to this court for an order directing the company to deliver a complete record of proceedings, together with an accompanying supplementary affidavit and/or amendment of its notice of motion.

17] Instead of immediately taking steps to file the record and the relevant rule 7A(8) notice, the company filed a notice of intention to oppose the relief sought by the employee. However, when the time came for it to file an opposing affidavit, it did not do so.

18] In accordance with a directive of the registrar of this court, the employee's attorneys filed their heads of argument on 13 February 2009. The matter was set down for hearing on 26 May 2009. In default of the court's directive, the company's attorneys did not file any heads of argument. Neither the company nor its attorneys appeared at the hearing of the matter on 26 May 2009. Basson J made an order directing the company to file a complete record and any relevant amendments to its notice of motion, together with a supplementary affidavit and the relevant rule 7A (8) notices, within five days.

19] The company failed to comply with that order of this court. The company or its attorneys did not communicate with the employee's attorneys until it was threatened with execution of the award.

20] Eventually, on 26 June 2009 – one month after the order of Basson J and more than three years after it had launched the review application -- the company delivered what purported to be a record of the arbitration proceedings. At this stage, the company had terminated the mandate of Mallinicks and was now represented by Biccari Bollo Mariano Inc. ("BBM")[3]. Sadly, it would be no more competently represented than before. Instead, it appears to have jumped from the frying pan of one set of incompetent attorneys into the fire of another. By the company's own admission, the conduct of Mr Claudio Bollo, who is not only a director of BBM, but also a director and the company secretary of the applicant company, equates to gross negligence surpassing even that of its previous attorneys.

21] At the hearing of this matter on 11 November 2010, the company had made no attempt to explain its failure to comply with the order that this court issued on 26 May 2009, and no application for condonation in this regard had been filed. The company was, by now, represented by its third set of attorneys.

22] At the hearing on 11 November 2010, I directed the company to file an affidavit by 25 November 2010 in support of an application for condonation for the late filing of the record of proceedings before the CCMA as well as the late filing of the notice in terms of rule 7A (8). I directed the employee to file his answering affidavit by 2 December 2010. The company had to file its replying affidavit by 9 December 2010. The parties complied with these time periods.[4]

23] I will deal with the condonation of, firstly, the late filing of the review application; and secondly, the late filing of the rule 7A(8) notice, at the hand of the affidavits filed of record and the well-known principles set out

3 It appears that Biccaro Bollo Mariano Inc came on record for the company in March 2006. Their mandate was, in turn, terminated in or about August 2009.
4 Mr Claudio Bollo, the company's second attorney, resigned as director of the company on 25 November 2010, ie on the same day that it filed its affidavit in support of the application for condonation.

in *Melane v Santam Insurance Co Ltd.*[5]

Degree of lateness

24] The review application in respect of the arbitration award of 3 December 2005 was filed on 31 March 2006. It had to be filed within six weeks of the award. It is, therefore, about 2 ½ months out of time. It was filed almost four months after the award had been issued, i.e. almost three times the time period envisaged by s 145(1)(a).

25] The notice in terms of rule 7A(8) was filed more than three years later. That is an extraordinary delay. In terms of rule 7A(2)(b), the CCMA should have filed the record within 10 days of the review application having been launched. If it fails to comply, an applicant cannot simply let sleeping dogs lie. In terms of rule 7A(4):

> "If the person or body fails to comply with the direction or fails to apply for an extension of time to do so, any interested party may apply, on notice, for an order compelling compliance with the direction."

26] The applicant did no such thing. And in terms of rule 7A(8), it had to file a notice amending or supplementing its notice of motion, or a notice that it stands by it, within 10 days of the CCMA making the record available. Instead, the company took no steps to file the record or a rule 7A notice until it was compelled to do so by a court order on 26 May 2009. And even then, it did not comply with the court order to file the record and the notice within five days. It only did so a month later, on 26 June 2009. And even then, it did not file an application for condonation.

Reasons for lateness

Review application

27] In its founding affidavit, the company's CEO, Mr Johan Smit, blithely states

5 1962 (4) SA 531 (A)

that it has demonstrated good cause for the late filing of the review application. He says that: “Applicant has sought to challenge the award made by [the arbitrator] by applying for rescission of the award. Once that application failed, applicant has taken steps without delay to launch these review proceedings.”

28] But Smit does not explain why the company did not file its review application timeously, other than to blame its first set of attorneys for their wrong advice, leading to the application for rescission. He says the following:

> “Once [the arbitrator] made his award on 3 December 2005, I was advised by my erstwhile attorneys [Mallinicks] that the most expeditious and cost-effective means of challenging the award was to apply for the rescission thereof. This application was prepared within weeks of [the] award being made. Had the rescission application being successful, there would have been no need to review the award. As this was a more speedy and cost-effective method of challenging the award, applicant pursued this course. The alternative, namely the immediate launch at the time of the review of the award before the above Honourable Court, would have been inconsistent with the launching of the rescission in a separate forum, namely [the CCMA], at the same time. It was only after receiving the rescission ruling on 2 March 2006 that it became clear that applicant would be required to bring this review application."

29] However, even after the rescission ruling was made on 2 March 2006, the company took almost a month to bring the review application. The initial review of the ruling allowing legal representation was not made as a matter of urgency and was not accompanied by an order seeking interim, urgent relief of any kind. In the meantime, the company and its attorneys simply ignored the provisions of the act compelling it to file its review application within six weeks. The explanation for the delay is unsatisfactory.

Rule 7A notice

30] As set out above, the record and the rule 7A notice were filed more than three years late, and a month after this court had ordered the company to do so within five days.

31] In attempting to explain this extraordinary delay, the applicant seeks to blame its second set of attorneys, Biccaro Bollo Mariano Inc (“BBM”).

32] In its supplementary affidavit filed in accordance with my directive of 11 November 2010, the company creates the impression that it only pursued the review application after it had received the rescission award in March 2006. It explains that, on 19 April 2006, BBM – who were by then representing the company – sent a letter to the employee’s attorneys of record, Bernadt Vukic Potash & Getz (“Bernadt”). They included a fax from Sneller Transcriptions (Pty) Ltd stating that Snellers were unable to provide a transcription as the audio recordings done by the CCMA were of poor quality. What Smit omitted to mention in his affidavit, is that the fax from Snellers was dated 30 January 2006. That fax also refers to a fax from Mallinicks dated 30 January 2006 and its "request that we transcribe the above mentioned matter." The inference is inescapable that the applicant’s attorneys were in possession of the CCMA record by the end of January 2006 and did nothing to pursue the review application timeously.

33] On 20 June 2006, Bernadt sent a letter to BBM reminding it that its client was not complying with the rules of court. The company says that the reason was that there were "without prejudice" discussions between the parties. But as Mr Field rightly pointed out, that did not relieve the company or its attorneys from its obligations. It is worth quoting Field's letter in full:

> “As you are aware, the fact that the parties may be exploring settlement on a without prejudice basis does not in any way relieve your client of its obligations in terms of the rules of the Labour Court when it comes to expeditiously progressing its review application. In this regard, we wish to place on record that your client has apparently taken no steps whatsoever since it launched its first review (in relation to its challenge to the Commissioner's decision to allow legal representation at arbitration proceedings), nor in relation to its second review (primarily in relation to the question of the failure of your client's rescission application). In the circumstances, your client is not in compliance with the provisions of the rules of court, and unless we receive your client's notices and record of the proceedings in relation to both review application is by no later than close of business on Friday 30 June 2006, we will be obliged to take the

necessary steps on behalf of our client in this regard."

34] BBM replied on 26 June 2006. It reiterated its difficulties in preparing the record and suggested that the record would have to be reconstructed from the arbitrator's notes. It then stated the following:

> "Mr C Bollo of our firm who is handling this matter as well as our counsel are away on their mid-year vacation and will only be returning to office in and during [*sic*] the second week of July. We suggest that a meeting of all parties concerned be held as soon thereafter as possible, in order that the record of the proceedings may be finalised. In the circumstances, we are certain that you would appreciate that we cannot possibly comply with the time limit provided in your letter of 30 [*sic*] June 2006. Naturally, and in due course and should it be required, we shall apply for condonation in respect of any failure to comply with the Labour Court rules."

35] However, more than four years later, neither the company nor its attorneys have applied for condonation in respect of a failure to comply with the Labour Court rules.

36] On 28 June 2006, the CCMA filed the contents of its file as well as three audiotapes at the Labour Court. On 7 August 2006, BBM called for a meeting with Bernadt to finalise the record. On 10. August 2006, the arbitrator filed a copy of his notes made at the arbitration proceedings, together with a draft transcript. On 14 August 2006, Bernadt advised BBM that the draft transcript of the arbitrator's notes had been referred to the employee for his consideration. On 19 April 2007, Bernadt sent a letter to BBM's Mr Bollo with three pages of corrections and amendments to the draft transcript. On 22 May 2007 BBM wrote back to Bernadt, attaching a letter from "Busy Hands Transcriptions" stating that it was not prepared "to insert statements that do not appear in the handwritten notes of the Commissioner".

37] On 25 May 2007 Bernadt wrote to BBM. Field reminded Bollo that it was the duty of the parties to agree and reconstruct the record and that it was not for a transcriber to advise the parties what should or should not be in the record, particularly if they were in agreement on this aspect. He also advised BBM that "Busy Hands Transcriptions" were not accredited and

suggested that BBM make use of the same accredited transcribers that are used by the Labour Court, the High Court and the CCMA. Field included the contact details for those transcribers. BBM did not respond.

38] Field wrote to BBM again on 5 June 2007. The letter was sent to both its Johannesburg and Cape Town offices. It recorded the following:

> "Our letter of 25 May 2007, to which we have not received the courtesy of a reply, refers. For your ease of reference we attach a copy of our above-mentioned letter and enquire what progress has been made with the finalisation of the record. As you will appreciate, our client is becoming ever more anxious to resolve this matter."

39] On 5 September 2007 Bernadt advised BBM that the employee had instructed them to uplift the tape-recording and to attempt to have sound experts transcribe it. However, the sound engineers were unable to do so and on 19 November 2007 Bernadt sent BBM another fax advising them accordingly.

40] Inexplicably, Smit says in his affidavit that the letter of 19 November 2007 was "inadvertently sent to BBM's Johannesburg office and only came to the attention of Mr Cornelissen at its Cape Town office on 14 December 2007." This is despite the fact that the partner in charge of the matter at BBM was at all times Mr Claudio Bollo, who is based in Johannesburg and to whom all previous correspondence had been addressed. It beggars belief that, had it been necessary, Bollo would not have redirected the letter to Cornelissen in Cape Town – especially given that Bollo was not only the company's attorney, but also its director and company secretary.

41] In any event, Bernadts re-sent the letter to Cornelissen on 14 December 2007. They concluded by stating: "We look forward to receiving your response as a matter of urgency so that we can progress this matter to finality without any further delay."

42] Despite this note of urgency, BBM's Cornelissen only responded almost a month later, on 10 January 2008. He said that some of the suggested

amendments did not appear in the arbitrator's handwritten notes and therefore could not form part of the record; but that "the typographical errors you have pointed out have been amended by the transcriber."

43] Bernadt's Field responded on 29 January 2008 in these terms:

> "Our client has instructed us that for purposes of progressing your client's much delayed review application in this matter, that he has no option but to advise that the matter should proceed on the basis of the transcription of the Commissioner's handwritten notes subject to the amendments which your client has agreed to. In the circumstances, our client has furthermore instructed us to demand as we hereby do, that you immediately comply with your client's obligations in terms of the rules of court, more particularly in relation to the filing of the complete record, and your clients rule 7A(8)(a) or (b) notice."

44] Once again, there was no response from BBM.

45] On 18 February 2008, Field wrote to BBM once again, enclosing a copy of his letter of 29 January 2008. He stated:

> "Unfortunately, we have not received any reply from yourselves [*sic*] in relation to the contents of this letter. In the circumstances our client has instructed us to advise you, as we hereby do, that if your client does not comply with the rules of court in relation to its review application by no later than close of business on 20 February 2008, that we are to bring an application to the Labour Court to dismiss your client's application for review. We wish to place on record again, that your client has taken no steps in compliance of the rules of court since the parties have agreed that portion of the record consisting of the arbitrator's notes."

46] The next day, BBM advised Bernadt that they had served a copy of the Commissioner's notes and a transcript thereof on the CCMA and have requested the Commissioner to initial the transcript.

47] On 4 March 2008, Field wrote to BBM once again, and reminded them that they had still not filed the rule 7A(8) notice. He added: "As you are aware, our client is of the view that your client is not progressing the review expeditiously, and all his rights remain reserved."

48] Smit alleges in his affidavit that "there is no further correspondence in the file which I received from BBM after terminating their mandate in relation

to the period until the [employee] launched an application to compel the applicant to file the record, which application was served on 19 November 2008 on BBM".

49] This period appears to refer to the period 4 March to 19 November 2008. Smit terminated BBM's mandate in August 2009 only. BBM filed a notice of withdrawal on 24 August 2009. But on 7 May 2008, Field sent a letter to BBM. The employee has attached the proof of transmission to his affidavit, showing that the letter was successfully transmitted by fax to BBM's Cape Town offices. It was marked for the attention of Cornelissen. In the letter, Field refers to his earlier letter of 4 March 2008. He confirms that, on 28 June 2006, the CCMA had filed its file and three audiotapes at the Labour Court. He also confirms that, on 19 February 2008, BBM had served the Commissioner's handwritten notes and a transcript thereof on Bernadt. He goes on to say:

> "In terms of Labour Court Rule 7A (8): '*The applicant must within 10 days after the registrar has made the record available – (a) by delivery of a notice and accompanying affidavit, amend, add to or vary the terms of the notice of motion and supplement the supporting affidavit; or (b) deliver a notice that the applicant stands by its notice of motion.'* To date, notwithstanding demand, we have not received your client's rule 7A (8) notice.
>
> In the circumstances, our client has instructed us to demand that your client is to deliver its rule 7A(8) notice by no later than close of business on Friday, 9 May 2008, failing which we are further instructed to approach the Labour Court, Cape Town for an order in terms of rule 12 (2) of the Labour Court rules."

50] Once again, BBM did not respond. The company does not dispute that the letter was received by BBM. Smit says: "I trusted that the matter was in the capable hands of my attorneys, but ... certain events occurred of which my attorneys had not advised me. I have no recollection or record of any reports received from my attorneys during this time, but as I heard nothing from my attorneys at the time, I trusted matters were proceeding apace." Clearly, Smit's trust in his attorneys was misplaced. They were far from capable. The company cannot simply blame its attorneys, though. Bollo, the partner in charge of the matter, was Smit's co-director and the

company secretary. What is more, the offices of BBM are at the same address as the company's head office in Johannesburg. It beggars belief that Bollo would not have kept his fellow directors apprised of any developments, or that Smit and his fellow directors would not have made inquiries. Smit does not explain how he could have "trusted matters were proceeding apace" when, on the contrary, his attorneys were doing nothing.

51] Eventually, on 19 November 2008, the employee launched the application to compel the company to file a complete record and the relevant notices in terms of rule 7A(8). BBM delivered a "notice of intention to oppose" on 25 November 2008. However, it did not file an answering affidavit and did nothing more to oppose the application. Because of the filing of that notice, the matter was placed on the opposed roll for hearing, with the result that it could only be heard on 26 May 2009. When the day came, neither the company nor its attorneys bothered to attend the hearing. This course of behaviour is consistent with an intention to delay the matter and to frustrate the process, rather than the actions of a litigant who intends to prosecute a bona fide review application timeously and expeditiously. Smit says in the company's replying affidavit that he "cannot exclude the possibility that the attitude of the applicant's attorneys was a cynical one". He alleges, though, that he was "not part of such cynical approach to the litigation". His difficulty is that he never disclosed to this court that the attorney appointed by the company, Bollo, was his co-director and the company secretary. It was only when the employee alerted the court to that fact in his answering affidavit that Smit was forced to admit to it in reply. This, in itself, points to the company being complicit in a cynical approach to this drawn-out and expensive litigation.

52] As pointed out before, and as a further example of the approach the company and its attorneys have taken to this litigation, this court and its rules, the company simply ignored the court order granted by Basson J on 26 May 2009. In his replying affidavit concerning the condonation application, Smit now disavows any knowledge of that court order. Yet the

employee pertinently addressed the company's failure to comply with the court order in his answering affidavit the main application, filed in July 2009. Neither Smit, nor any other person authorised by the company replied to that affidavit.

53] It is only when the employee took steps to execute the arbitration award that the applicant's attorneys were prompted into action. On 26 June 2009, they wrote to Bernadt to say that they had finalised the amended record and drafted the client's notice in terms of rule 7A(8)(b), which would be delivered on the same day. They added: "We will proceed to draft the necessary application for condonation in this regard, which will be served on your offices in due course." But that never happened.

54] The company cannot blame only its attorneys for the delay. I have recently had occasion[6] to remind litigants and their attorneys of the words of Steyn CJ in *Saloojee & another v Minister of Community Development*[7] 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 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 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

6 See *Khan v Cadbury South Africa (Pty) Ltd* [2010] ZALC 175 (C 965/2008, 17 November 2010)
7 1965 (2) SA 135 (A) 141B-H

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

55] Unfortunately, as I remarked in *Khan v Cadbury,* 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.

56] The Labour Appeal Court had the following to say in *Superb Meat Supplies cc v Maritz:*[8]

"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."

57] And in *A Hardrodt (SA) (Pty) Ltd v Behardien & others*[9] 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."

58] 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.[10]

59] In the present case, it is not only the company's attorneys whose conduct

8 (2004) 25 *ILJ* 96 (LAC)
9 (2002) 23 *ILJ* 1229 (LAC) para [14] (per Nicholson JA); followed in *Arnott v Kunene Solutions & Services (Pty) Ltd* (2002) 23 *ILJ* 1367 (LC).
10 *Waverley Blankets Ltd v Ndima & others* (1999) 20 *ILJ* 2564 (LAC).

was characterised by gross negligence, incompetence and gross dilatoriness. The company itself was complicit. In circumstances where Bollo was a director of both BBM and the company, as well as the company secretary, the company cannot hide behind the incompetence and negligence of Bollo and BBM.

60] The explanation for the delay of more than three years is entirely unsatisfactory.

Prospects of success

Review of December 2005 arbitration award

61] In considering the late filing of the review application, I have to consider the company's prospects of success in reviewing the arbitration award of 3 December 2005 in which the dismissal of the employee was found to be substantively and procedurally unfair.

62] The company has not attacked the finding on substantive fairness. For that reason alone, it is difficult to see on what basis it could have any prospects of persuading a court that the compensation award is unreasonable.

63] Nevertheless, I have to consider its prospects of success in reviewing the finding on procedural unfairness. In this regard, it must be borne in mind that the arbitrator had only the evidence of the employee before him. On the evidence, the employee was taken by surprise when he was confronted with a number of allegations leading to his dismissal at the board meeting of 13 June 2005. He attended the meeting pursuant to a letter dated 10th of June 2005. At worst, as the arbitrator commented, the letter intimates that he could be placed in an alternative position to that of managing director. There is no indication that he could be dismissed. The finding of the arbitrator, given the evidence before him, was not unreasonable. The company has no prospects of success on this ground.

Review of rescission ruling

64] In order to decide on condonation for the late filing of the rule 7A notice, I also have to consider the company's prospects of success in its application for review of the rescission ruling of 2 March 2006.

65] In order to do so, I have to consider the merits of that application. The company did not file a supplementary affidavit with its rule 7A notice. Even if I come to the conclusion that its application for condonation for the late filing of that notice should not be granted, therefore, I still have to consider the merits of the review application of the rescission ruling. I will therefore deal with the prospects of success in that application when I consider the merits of the application in full.

66] Before I do that, and in order to complete the consideration of the two applications for condonation, I will deal with the prejudice to the respective parties.

Prejudice

67] With regard to the late filing of the review application of the December 2005 award, as well as the late filing of the rule 7A notice, the prejudice to the employee outweighs the prejudice to the company. The employee has been armed with a substantial monetary award in his favour for the last five years; but it has been cold comfort to him. The company failed to launch this application for the review of that award in time. Instead, it sought to rescind the award. Having failed to do that, the company and its attorneys dragged out the review of the rescission ruling for years.

Conclusion on condonation

68] I have come to the conclusion that both applications for condonation should be dismissed. Therefore, I need not consider the alternative relief sought, i.e. the application for review of the December 2005 arbitration

award. However, I still need to consider the merits of the main application for review, i.e. that of the rescission ruling of March 2006.

REVIEW OF RESCISSION RULING: THE MERITS

69] The arbitrator heard oral argument on the rescission application on 9 February 2006. Both parties were represented by senior counsel, instructed by Mallinicks and Bernadt respectively.

70] The arbitrator set out the background to the arbitration on the merits having been heard by default. He noted that the employee's unfair dismissal dispute was initially set down for arbitration on 17 October 2005. On that day, the arbitrator granted the application for legal representation. The employer's attorney (after taking instructions from his client) expressed his client's desire to take the ruling to the Labour Court on review. The arbitrator says that his response to those sentiments are well covered in the arbitration award. Those sentiments were, in short, that he had indicated that the ruling was on an interlocutory application and that it would be more appropriate to challenge it once the matter was finally disposed of. That would avoid piecemeal proceedings and an undue delay of an arbitration hearing. As matters turned out, the company thought otherwise. The arbitrator also pointed out that there was no provision in the LRA which prevented him from proceeding with the matter on the basis that there was a review application of a ruling determining an interlocutory issue. In his view, the emphasis placed on the effective resolution of labour disputes would be defeated if the party could take every ruling on an interlocutory matter on review. He said: "Then if a ruling on one or more of these issues has to be taken on review at every turn that may defeat the purpose of the LRA as disputes may drag on for many years." Those turned out to be prophetic words.

71] The arbitrator added that he "even discussed with the parties the possibility of enrolling the matter for two days but Mr Visagie was noncommittal in that respect." The matter was rescheduled for arbitration

on 23 November 2005 and notice to that effect was faxed to the parties on 19 October 2005. On 17 November 2005 Mr Visagie addressed a letter to the CCMA seeking written confirmation of the arbitrator's ruling on legal representation. Mr Visagie sought a reply by no later than 21 November 2005. The CCMA responded on 21 November 2005 "clearly conveying that I [the arbitrator] intended to have the arbitration hearing proceed on 23 November." The arbitrator pointed out that the letter does not send any other message than that the arbitration hearing would proceed on the scheduled date.

72] The arbitrator records that, on 23 November 2005, the company defaulted and he waited an hour before commencing with the hearing. He further records: "It is correct that a receptionist … alerted me about the employer's call midway the proceedings and I advised her to convey the message that the arbitration hearing was in progress."

73] In considering the rescission application in terms of section 144(a) of the LRA, the arbitrator had regard to case law setting out what he termed the "narrow approach" and "broad approach" respectively. In terms of the narrow approach, it is not necessary for a party to show good cause in order for an award to be rescinded in terms of the provision. In terms of the broad approach, the parties seeking rescission must show good cause at prospects of success. The arbitrator preferred the narrow approach; nevertheless, he said that he would not constrain himself to the narrow approach.

74] In considering the question whether the arbitrator's ruling on rescission is open to review, I will consider that the test on rescission has subsequently been clarified in *Shoprite Checkers (Pty) Ltd v CCMA & others*.[11] In that case, the Labour Appeal Court held that: "section 144 must be interpreted so as to also include good cause as a ground for the rescission of a default arbitration award. Accordingly, a Commissioner may rescind the arbitration award under section 144 where a party shows good cause for

11 (2007) 28 *ILJ* 2246 (LAC); [2007] 10 BLLR 917 (LAC)

its default."

Has the company shown good cause for its default?

75] In *Shoprite Checkers*[12] the LAC explained the requirements to show good cause in a rescission application:

> " [35] The test for good cause in an application for rescission normally involves the consideration of at least two factors. Firstly, the explanation for the default and secondly whether the applicant has a prima facie defence. In *Northern Province Local Government Association v CCMA & others* [2001] 5 BLLR 539 (LC) at 545, paragraph [16], it was stated:
>
> 'An applicant for the rescission of a default judgment must show good cause and prove that he at no time denounced his defence, and that he has a serious intention of proceeding with the case. In order to show good cause an applicant must give a reasonable explanation for his default, his explanation must be made bona fide and he must show that he has a bona fide defence to the plaintiff's claims."
>
> [36] In *MM Steel Construction CC v Steel Engineering & Allied Workers Union of SA & others* (1994) 15 ILJ 1310 (LAC) at 1311J–1312A, Nugent J had this to say:
>
> "Those two essential elements ought nevertheless not to be assessed mechanistically and in isolation. While the absence of one of them would usually be fatal, where they are present they are to be weighed together with relevant factors in determining whether it should be fair and just to grant the indulgence."

76] At the time of the hearing of the rescission application in February 2006, the Labour Appeal Court had not clarified the legal position pertaining to the CCMA in considering applications for rescission in terms of section 144 of the LRA. Therefore, the arbitrator did not explicitly approach the application in terms of the 'good cause' test. Was his conclusion nevertheless so unreasonable that no reasonable decision maker could have come to the same conclusion?[13]

12 *Supra* paras [34] – [36]
13 *Sidumo v Rustenburg Platinum Mines Ltd* 2008 (2) SA 24 (CC) para [110]

Explanation for the default

77] The company lays the blame for its default on 23 November 2005 squarely at the door of his then attorneys, Mallinicks.

78] The company does not dispute that it was properly notified of the arbitration hearing on 23 November 2005. It says, though, that Mr Visagie of Mallinicks advised it that the delivery of the review application of the ruling on legal representation, filed the previous day – on 22 November 2005 – would stay the arbitration proceedings. It is for this reason that the company did not attend.

79] The company firstly relies on the letter from Visagie to the CCMA on 17 November 2005 to say that "it is clear from the above letter that Mallinicks *bone fide* believed that the filing of the review application stay the arbitration proceedings". But that letter explicitly states that "the arbitration is to proceed on 23 November 2005". It does not set out the attorney's wrongly held belief that the launching of a review application would stay the arbitration proceedings.

80] In the rescission application before the CCMA itself, Smit stated that he was advised by his attorney that the arbitration would be "postponed". And Visagie himself stated in a supporting affidavit in the application for rescission that he believed the arbitration "would be postponed" pending the outcome of the review. He did not state in his affidavit that he advised the company that the arbitration would be stayed.

81] Notwithstanding the provisions of CCMA rule 23, neither the company nor its attorneys took any steps to effect a postponement, either by agreement, or by way of a formal application to the CCMA beforehand, or on the morning of the hearing itself.

82] The conduct of the company and its attorneys on the day of the arbitration hearing itself is difficult to comprehend. Lynn February, another director of

Mallinicks, stated in her affidavit in support of the rescission application that Smit phoned their offices on the day of the hearing "in order to confirm that the arbitration had been postponed". It appears that Visagie was on leave at the time. Smit says that he telephoned Mallinicks to "make doubly sure" that the arbitration had indeed been postponed. Although February initially thought that this was the case, she telephoned the CCMA at approximately 10:45, when she was advised that the arbitration was proceeding in the absence of the company. Inexplicably, she did not go to the CCMA to ask for a postponement or to attend at the arbitration; neither did she ask any other colleagues to do so; neither did she addressing the urgent correspondence to the CCMA; and, most alarmingly, neither did she contact her client (Smit) to tell him that he had been wrongly advised and that the arbitration was continuing. She only did so some time later. Smit himself did not go to the CCMA or send anyone else from the company to represent it.

83] The company has not given a reasonable explanation for its delay. Even though it had been badly advised by its attorneys, it should have made sure that the arbitration was not proceeding in its absence.

84] It is so that Smit "double checked" with Mallinicks on the day of the hearing. It is inexplicable that they did not alert him to the true state of affairs timeously. But this is one of those cases where, in the words of Steyn CJ in *Saloojee*[14], "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."

85] If there is no satisfactory explanation for the default, it is fatal for the rescission application. It was therefore not necessary for the arbitrator to the question of a bona fide defence.[15] He nevertheless did so, and found that, even though it had reasonable prospects of success on the merits, its "grossly unreasonable grounds for default disentitles the employer from

14 *supra*
15 *MM Steel Construction CC v Steel Engineering & Allied Workers Union of SA & others* (1994) 15 *ILJ* 1310 (LAC) at 1311J–1312A

the relief sought". And in any event, the company does not challenge the arbitrator's finding on substantive unfairness in these proceedings. It is therefore difficult to discern on what basis it could have a *bona fide* defence to the claim of unfair dismissal.

86] As Nugent JA remarked in *MM Steel Construction*[16]:

> "In my view the failure to provide any explanation for [the labour consultant's] failure to file the papers necessary to defend the claim is in itself sufficient reason to dismiss the application (*Chetty's* case).
>
> "I might add that it has been held that negligence on the part of an attorney... will not necessarily constitute an acceptable explanation. An applicant who relies on the ineptitude or remissness of his attorney should at least satisfy a court that none of it is to be imputed to himself (*Saloojee & another v Minister of Community Development* 1965 (2) SA 135 (A) at 141B-H)."

87] The arbitrator did consider the company's explanation for its default. He noted that it was common cause that proper service was effected to the employer and it defaulted. He then considered the explanation for the default. He reasoned as follows:

> "The employer then contends that it believed that the review application it made in the Labour Court would result to [*sic*] the postponement of the case. This appears to have been the advice the employer received from Mr Visagie. Whatever the source of this advice might have been, I was unable to obtain any authority for the view that a review of an interlocutory order stays the arbitration proceedings. At any rate, the fact that the party has received incorrect advice from its attorneys does not constitute a procedural irregularity contemplated under section 144 … This is a typical case where the employer seeks to rely on its negligence or that of its attorneys to have the award rescinded and that is not acceptable."

88] The arbitrator came to the conclusion that the employer had not provided a satisfactory and acceptable explanation for its default. In this regard, he referred to the *dictum* of Miller JA in *Chetty v Law Society, Transvaal*[17]:

> "An unsatisfactory and unacceptable explanation remains so, whatever the

16 *Supra* 1314 C-D
17 1985 (2) SA 531 (A) at 767J-769D

prospects of success on the merits. In the light of the finding that the appellant's explanation is unsatisfactory and unacceptable it is therefore, strictly speaking, unnecessary to make findings or to consider the arguments relating to the appellant's prospects of success."

89] The arbitrator came to the conclusion that the grossly unreasonable grounds for default disentitled the company from the relief sought.

90] This conclusion was not unreasonable. As I have set out above, the explanation for the company's default was unsatisfactory. Its attorneys were not only grossly negligent, but grossly inept. This is one of those cases where the employer cannot hide behind the negligence of its attorneys. Even if another arbitrator could have come to a different conclusion, the decision of the second respondent was not so unreasonable that no reasonable decision maker could have come to the same conclusion.

COSTS

91] The employee has had to wait for more than five years to make the arbitration award in his favour a reality. In the process, he has had to incur significant legal costs. The company, no doubt, has incurred significant legal costs as well. It has been badly served by two sets of attorneys. But it has recourse against those attorneys for their negligent conduct. The employee does not. There is no reason in law or fairness why costs should not follow the result.

ORDER

92] In conclusion, I order as follows:

92.1 The application for condonation for the late filing of the review application pertaining to the award of 3 December 2005 is dismissed.

92.2 The application for condonation for the late filing of the rule 7A notice is dismissed.

92.3 The application for review of the rescission ruling dated 2 March 2006 is dismissed.

92.4 The applicant is ordered to pay the third respondent's costs.

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ANTON STEENKAMP

JUDGE OF THE LABOUR COURT

CAPE TOWN

Date of hearing:	11 November 2010
Date of judgment:	21 January 2011
For the applicants:	Adv Frans Rautenbach
Instructed by	Ward Ward & Pienaar
For the respondent:	Adv ML Sher
Instructed by	Bernadt Vukic Potash & Getz