IN THE LABOUR COURT OF SOUTH AFRICA

Case No. D 678/09

In the matter between:

SECURICOR (PTY) LTD Applicant

And

COMMISIONER J NGWANE First Respondent

CCMA Second Respondent

RAJENDRAN PILLAY Third Respondent

JUDGMENT

GUSH, J.

1. In this matter the applicant applies for condonation for the late filing of its application to review and set aside the award of the first respondent that the Applicant's decision to dismiss the Third Respondent was unfair.

2. The Applicant's application is some 13 months out of time. The Award is dated the 19th July 2005 and the Applicant admits having received the award on the 17th August 2005 and accordingly the review should have been filed on the 28th September 2205. The Applicant's review was filed on the 30th November 2006. This is a substantial delay.

3. Whilst it might be so that the award of the first respondent is startling in that the misconduct of the third respondent was serious it is necessary to

firstly consider the Applicant's reasons for the delay.

4. It has been held that if an Applicant has no prospects of success condonation will fail even in the face of a reasonable and convincing explanation for the delay. However it is also so that if a party can offer no reasonable explanation for the delay the presence of reasonable prospects of success will not avail that party. It is therefore necessary to first consider the Applicants reasons for having waited thirteen months to file its review.

5. The applicant's application is some 13 months late but for reasons best known to the Applicant the founding affidavit refers to a delay of thirteen days which Mr Hutchinson indicated was a typographical error. However inexplicably this error is repeated in his heads.

6. In dealing with the explanation for the delay the Applicant does not take the Court into its confidence by setting out in its founding affidavit the extent of the various delays and in fact only refers to one date and that is the date of the award. The Applicant does not deal with the dates on which the third Respondent served his applications for the variation of the award or its certification and the Applicant's response thereto, nor does it record the date on which the contempt application was enrolled. All the Applicant says is that having learnt of the application it sought to have the matter adjourned in order to bring this application. The Applicant however not only fails to mention that this application was only filed ten weeks later but gives no explanation whatsoever as to this delay.

7. The founding affidavit offers a variety of reasons for not timeously proceeding with the review including that the Applicant had not carried out the instruction to its branch office and that as a result of that not being carried out the third respondent became disgruntled and sought a

contempt order; that the Applicant believed that the Third Respondent had found other employment and that the Third Respondent had abandoned portion of his award; that the Third Respondent wasn't seeking reinstatement and that it was uneconomical to pursue the review if the Third Respondent was not seeking reinstatement.

8. Unfortunately much of this is not borne out by the facts.

9. In his replying affidavit the third Respondent points out that subsequent to the award being received by the Applicant on 17 August 2005, he sought a variation of that award on the 22 December 2005 in order to correct the amount of the salary which was recorded in the award. This application was served on the applicant. A fact not mentioned in the Applicants papers. This issue is not dealt with at all by the Applicant.

10. On 30 January the Third Respondent applied for the arbitration award to be certified. A copy of this application was served on the applicant. A fact not mentioned in the Applicants papers.

11. On 5 May 2006, as the Applicant had not complied with the award, a contempt application was served on the Applicant. On 20 September 2006 the application for contempt was in fact set down and was adjourned *sine die* on the basis that the applicant intended bringing a review application.

12. Finally on 30 November 2006 some ten weeks after the contempt application had been adjourned *sine die* the applicant deigned to file its review application.

13. All these dates are set out in the answering affidavit. The Applicant elected not to file a replying affidavit dealing with any of these averments or details. The Applicant does not deal with the specific delays nor what

specifically caused the Applicant to delay the filing of the review particularly in the light of the various applications brought by the Third Respondent which applications were served on the Applicant.

14. In the matter of **MOILA v SHAI NO & OTHERS (2007) 28 ILJ (LAC)** the court held the following:

"I do not have the slightest hesitation in concluding that this is a case where the period of delay is excessive and the applicant's purported explanation for the delay is no explanation at all. I accept that the case is very important to the appellant, however the weight to be attached to this factor is too limited to count for anything where the period of delay is as excessive as is the case in this matter, and the explanation advanced is no explanation at all. If ever there was a case in which one could conclude that good cause has not been shown for condonation without even considering the prospects of success, then this is it. Where, in an application for condonation, the delay is excessive and no explanation has been given for that delay or an 'explanation' has been given but such 'explanation' amounts to no 'explanation' at all, I do not think that it is necessary to consider the prospects of success."

15. It is my view that in this matter the explanation for the delay given by the Applicant in this matter *"amounts to no explanation at all".* Specifically the failure of the Applicant to account for or even attempt to explain the delay between the adjournment of the contempt application on the 20th September and the filing of the review on the 30th November, some ten weeks later is tantamount to *"a disdain of the rules".*

16. In **CHETTY V LAW SOCIETY TRANSVAAL 1962 (2) 756 (A)** the court held that:

"An ordered judicial process would be negated if, … a party who could offer no explanation of his default other than his disdain of the Rules

was nevertheless permitted to have a judgement against him rescinded on the ground that he had reasonable prospects of success on the merits" (at page 765 D-E)

17. Accordingly in the absence of a reasonable explanation for the delay which amounts to no explanation at all the application it is not necessary to consider the prospects of success, no matter how good they might be.
18. In the circumstances I make the following order:
    The application is DISMISSED WITH COSTS.

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Gush J

DATE OF HEARING : 25 MARCH 2010
DATE OF JUDGMENT : 25 MARCH 2010

APPEARANCES

FOR APPLICANT	:	Adv W J HUTCHINSON
Instructed by	:	MOODIE & ROBERTSON ATTORNEYS
FOR RESPONDENT	:	JAYSHREE MOODLEY of JAYSHREE MOODLEY & ASSOCIATES