REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NUMBER: A970/2005

In the matter between

CAPE COBRA (PTY) LTD Appellant

and

ANN LANDMAN Respondent

JUDGMENT DELIVERED ON 25 OCTOBER 2007

SAMELA, AJ

[1] INTRODUCTION

This is an appeal against the judgment of a Magistrate for the district of Cape Town, handed down on 30 April 2004. The appellant was sued by the respondent for damages arising from breach of contract. On 31 August 2005, the appellant noted an appeal against the judgment of the court *a quo*. Notice of appeal was served on the respondent's attorneys on the same day, that is, 31 August 2005. An application for a date on which the appeal was to be heard was filed with the Registrar on 15 March 2006, served on the respondent's attorneys on the same day.

Mr H Rademeyer appeared for the appellant.
Mr A Kantor appeared for the respondent.

[2] Rule 50 (1) of the Uniform Rules of Court provides that:

> "*An appeal to the court against the decision of a magistrate in a civil matter shall be prosecuted within sixty (60) days after the noting of such appeal, and unless so prosecuted it shall be deemed to have lapsed.*"

Furthermore, in terms of Rule 50 (4):

"(a) *The appellant shall, within forty (40) days after noting the appeal, apply to the registrar in writing and with notice to all other parties for the assignment of a date for hearing of the appeal and shall at the same time make available to the registrar in writing his full residential and postal addresses and the address of his attorney if he is represented.*

(b) In the absence of such an application by the appellant, the respondent may at any time before the expiry of the period of sixty (60) days referred to in sub-rule (1) apply for a date of hearing in like manner.

(c) Upon receipt of such application from appellant or respondent, the appeal shall be deemed to have been duly prosecuted."

[3] This court is required to exercise its discretion to grant or refuse condonation for non-compliance with its rules. Dealing with a similar problem in **Melane v Santam Insurance Co Ltd** 1962 (4) SA 531 (A) the Appellate Division (as it then was) at 532 C to D stated (per Holmes, J A,) as follows:

> "*In deciding whether sufficient cause has been shown, the basic principle is that the court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case.*
>
> *Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion.*"

The learned judge of appeal added that:

> "*What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay.*"(532 D-E).

The aforementioned Appeal Court judgment provides a proper guidance of how the court should exercise its discretion to grant or refuse condonation. **Van**

Winsen et al The Civil Practice of the Supreme Court of South Africa (Juta 1997) at 898 succinctly summarized some of the important factors the Court should consider. The learned authors emphasize what the Court in **Melane's** said:

> "*the Court will not fetter its discretion, but will consider all the circumstances of the case, there are certain facts that are usually relevant to the decision whether to grant relief, the reason for default, the nature of the case, the probability of success on the merits, the time that has elapsed, the benefit to the applicant and the nature of the default.*"

See also **Finbro Furnishers v Registrar of Deeds** 1985 (4) 773 (A) at 789 C – D and **S A Allied Workers' Union (in Liq) v De Klerk N O & Another** 1992 (3) SA (A) 1 at 4 B-C.

[4] Mr Kantor argued that the appellant delayed unduly in prosecuting this appeal. Such delay, he argued, was extraordinarily long and that the court in the exercise of its discretion, should not condone the late prosecution of the appeal. Furthermore he argued that the explanation therefor was neither valid nor convincing. The period of three and a half years, according to Mr Kantor, was too excessive delay and should not be condoned by this court in the exercise of its discretion. Mr Kantor furthermore argued that , where there has been a flagrant breach of the Rules and there is a lack of explanation therefor, condonation will not be granted, no matter what the prospects of success might be. See **P E Bosman Transport v Piet Bosman Transport** 1980 (4) SA 794 (A) at 799 DE, and also **Ferreira v Ntshingila** 1990 (4) SA 271 (A) at 281-282A. Mr Kantor did not explain the failure on the part of the respondent to act in terms of Rule 50 (4) (b) of the rules, as the appellant had failed to observe the rules of court.

Mr Rademeyer who appeared for the appellant argued that on 4 January 2006 an application for condonation, as well as request for late prosecution of appeal and for re-instatement of appeal before us was lodged. He added that no opposing

papers from the respondent were likewise filed.

[5] In this matter, one would sympathize with the propositions that the delay was unusually long and the explanation for such delay was not very convincing. However, one must also consider fairness to both parties in the interest of justice. The Court's inherent discretion in such circumstances becomes important. For fairness to both parties, the Court is called upon to exercise its discretion judicially. In exercising its discretion, the court is expected not to look at one factor exclusively, but to consider all the aforementioned factors collectively. According to Holmes JA's test, other factors have also to be considered, amongst others, the importance of the case and the prospects of success, which may compensate long delay. I am of the view that this matter is important to the appellant. It involves personal income. In this matter, appellant was ordered to pay R40 856.82 being six months' commission to the respondent. In my judgment the argument against condonation is not persuasive. There are indications that there are reasonably strong prospects of success on appeal. I am of the view that condonation should therefore be granted. We shall now turn to the merits of this appeal.

[6] EVALUATION OF EVIDENCE

The respondent entered into a verbal agreement with the appellant approximately in March 1994. The respondent worked as a freelance commission agent for the appellant. The respondent earned commission on direct sales, indirect sales and on consignment sales. By mutual agreement between appellant and respondent, commission on consignment sales was terminated in 2000. Appellant had three designated signatories, but only two signatures were required on a cheque for payment purposes. In May 2002, the respondent's commission cheque was not paid by the 7th day of the month. It

was only paid on the 17 May 2002, after the respondent's attorneys had demanded same from the appellant. The employment relationship between appellant and respondent deteriorated in such a way that the respondent terminated the employment with appellant in May 2002. The respondent sued appellant for damages suffered as a result of the termination of the employment.

The commission was initially paid on an *ad hoc* basis. The appellant denied that there was an agreement that the said commission would be paid on the 7th day of the month following that in which the commission became due. The Respondent, however, insisted that there was an agreement. The appellant alleged that there was a discussion between them in terms of which the appellant would endeavour to pay the respondent on or about the 7th day of every month.
Evidence was led that the respondent was, during the currency of the agreement, paid her commission cheque on the 22nd day of the month. Although she was unhappy, there is no evidence that she was never paid and she continued her job. Evidence was also led that the late payment was on account of "chronic cash flow problems" on the part of the appellant.

[7] Against the aforesaid, the court must decide whether the late payment of the commission constitute a breach of the agreement between parties. Mr Rademeyer argued that the appellant had had discussions with the respondent regarding payment. The discussions were that the appellant would endeavour to pay the respondent on or about the 7th day of each and every month. On four occasions during the running of the agreement, Mr Rademeyer argued the respondent was paid her commission by the 22nd day of the month. Even though she was unhappy, she knew that eventually she would get paid, and therefore continued with her work. It was common cause that the delay was due to chronic cash flow problems on appellant's part. The working relationship between appellant and respondent deteriorated such that the appellant refused to sign the respondent's commission cheque on the 7th May 2002. The appellant referred the respondent to the other two authorized signatories for

signatures. On approaching the other two authorized signatories, the respondent failed to request their signatures for the cheque. Mr Kantor argued that there was an agreement between the appellant and the respondent, that payment had to be made by the 7th day of the month following that in which the commission became due. The failure to pay on the 7th May 2002 by the appellant was on account of the appellant remarks that "the respondent did not deserve the commission and therefore told her to approach the other directors for signature."

[8] The following are common cause:

a) the respondent's cheque was ready on 7 May 2002 waiting only for the two signatories to sign;

b) the appellant refused to sign as one of the signatories to the respondent's cheque; instead he referred the respondent to other two signatories to sign;

c) despite contacting the other two signatories, the respondent did not request the two unwilling signatories to sign the respondent's cheque.

Mr Rademeyer argued that this indicates that the appellant did not fail to perform in terms of the contract. He argued further that an ordinary breach of an agreement takes place when a party without lawful excuse fails to do what he or she has contracted to do. Mr Rademeyer did not explain what the lawful excuse the appellant had in mind in not signing the respondent's cheque. Whereas Mr Kantor argued that the failure of the appellant to sign the cheque because he thought that the respondent did not deserve the commission and he therefore told her to approach the other directors for signatures, constitutes a material breach of the agreement between the parties.

I am of the view that there was a breach by the appellant in failing to sign the respondent's cheque on the 7 May 2002. However I regard the breach as minor and therefore not material. I am of the view that the breach does not go to the root of the contract and therefore the respondent was not entitled to cancel the contract. It is not every breach of contract which is material. Even if the breach of contract is material, that, however, does not necessarily mean the contract will be cancelled in every case. The innocent party has an option even in the event of a material breach of contract.

[9] Can late payment of the commission justify cancellation of the agreement between the parties? On 15 May 2002 the appellant received a letter of demand from the respondent's attorneys. The letter firstly indicated that the non-payment was a breach of contract and secondly, demanded that the appellant pay the outstanding amount within three days. The appellant complied. In my view payment (though late) is an indication of a specific performance. Mr Rademeyer correctly argued that the payment by the appellant effectively remedied the situation, as both parties had performed. See **Custom Credit Corporation (Pty) Ltd v Shembe** 1972 (3) SA 462 (A) at 469H. In the latter case the court emphasized that the innocent party cannot keep on changing the minds. Once the innocent party has made the choice that election is binding. (Compare to **SA Wood Turning Mills (Pty) Ltd v Price Brothers (Pty) Ltd** 1962 (4) SA 263 (T), where the court held that once the innocent party elect to stand by the contract, it cannot cancel for the breach). The late payment of commission did not justify the cancellation of agreement. On the contrary the respondent demanded specific performance and claimed for damages. This clearly indicates that the innocent party had made her choice which was binding on her.

[10] Lastly, can it be said that the respondent was entitled to six months' worth of commission as damages. What formula was used to calculate the said damages? Mr Rademeyer argued that a period of six months' worth of

commission, as damages, is excessive. Mr Rademeyer had suggested that should this court accept that the breach was material and respondent validly cancelled the agreement, four months' worth of commission as damages should be awarded. As for the formula used in calculating such damages, he suggested the following: The respondent's earnings in the previous six month period, the agreement being reviewed every six months. He submitted that the total average earnings over six months would be equal to R4 687,95. Mr Kantor argued that, the respondent had explained the problems faced by her in the period from May to December 2002 and the efforts which she had made to obtain replacement income without success. Secondly, the respondent calculated her monthly damages on the basis of her average monthly commission income over the twenty months prior to the termination of the agreement. Mr Kantor argued that the assessment of the respondent's damages by the court *a quo* cannot be faulted. I am of the view that as the innocent party had made its election, it could not cancel for the breach. Consequently the selection of six months by the court *a quo* hardly gives one a meaningful direction in this matter. The formula used to arithmetically calculate the damages is also not convincing. In my judgment the innocent party was not entitled to the aforesaid commission.

[11] APPLICABLE LAW

Looking at the difficulty in the interpretation of an oral contract, **Christie,** The Law of Contract in South Africa, 5th edition, 2006 at page 192 writes that:

> "*Theoretically, difficulties of interpretation can arise as frequently with oral as with written contracts, since spoken words are no more and no less capable of conveying an unequivocal message than written words, but in practice this is not found to be so, and disputes on interpretation arise almost exclusively from written contracts. The reason, no doubt, is that witnesses giving evidence about the terms of an oral contract consciously or unconsciously inject into their evidence something more than a straight*

> *recollection of the words used, so that what they tell the court tends to be their understanding of the words of the contract rather than the plain unvarnished words themselves."*

I am of the view that every contract has to be interpreted holistically when determining whether there is a minor or material breach thereof. Where there is a material breach of contract, **Kerr** Principles of the Law of Contract 6th edition at page 602 argues that:

> *"a breach is a major one if it 'goes to the root of the contract', or affects a 'vital part' of the obligations or means that there is no 'substantial performance'."*

In this matter by conduct, the innocent party made a choice. The aggrieved party elected not to cancel the contract but to demand specific performance. The choice clearly is an indication that the innocent party regarded the breach of contract as minor.

[12] In conclusion, I am of the view that in this matter there is no material breach justifying any legitimate claim for cancellation of the contract. Importantly both parties apparently are in agreement that there was never any breach of any serious nature. This is illustrated by the fact that, the innocent party elected not to cancel the contract but to demand specific performance.

It follows therefore, that the appeal must be upheld. I would therefore propose the following order:

The appeal succeeds. Judgment in the court *a quo* is hereby set aside, and the appeal be upheld with costs.

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SAMELA, AJ

I agree and it is so ordered.

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HLOPHE, JP