IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT CAPE TOWN)

CASE NO: C6/98

DATE: 21-9-1999

In the matter between:

FOOD AND ALLIED WORKERS UNION Applicant

and

FOODTOWN INCORPORATED (PTY) LIMITED Respondent

J U D G M E N T

BRASSEY, AJ:

1. This an application for the condonation of the late filing of an application for leave to appeal to the Labour Appeal Court against a judgment of mine which was given orally on 27 August 1998.

2. At the outset of the application, Mr Dhlamini notified me of a point in limine relating to the status and validity of the opposing affidavit. I indicated to him that I would seek argument on that question insofar as I considered that the answering affidavit took the matter further, but my concern was whether a proper case had been made out in the founding papers. I shall deal with the matter by reference to the founding papers exclusively. By doing so I do not

mean to suggest that the answering affidavit was unnecessarily filed.

3. In order for condonation to be granted, it is necessary for me to conclude that there has been a proper explanation for the delay in filing the application for leave to appeal has been placed before me. Secondly, that there are reasonable prospects of success on the application for leave to appeal. Insofar as the latter is concerned that requires me to consider to what extent there are reasonable

4.59 prospects /...

prospects of success in the appeal.

4. The question was, to an extent, debated before me as to when the DA(?) commenced to run in circumstances where a judgment is given ex tempore, as mine was in this case, and the written version of that judgment is subsequently handed down. In my view, the time begins to run from the moment that the oral judgment is given. The fact that the prospective appellants have no writing with which to work is a factor that can properly be taken into account either in considering whether it is permissible for the appellants to amend

their notice of application for leave to appeal, or insofar as a subsequent application, such as this one for condonation, is brought. As I say, the operative date appears to me to be the date when the oral reasons are given.

5. For the purposes of this judgment, however, I will assume that the concession on behalf of the respondent is rightly made and that the operative date is in fact the date when the oral reasons are reduced to writing and made available to the parties.

6. That date was 19 October 1998. No application was launched until 23 March 1999 when the application for leave to appeal was filed and simultaneously the application for condonation of the late filing thereof was made. The explanation, such as it is, in the founding affidavit relies essentially on three factors. Firstly, that there are a parality(?) of individual applicants in this matter, some 67 in all. That is certainly a factor to be taken into account. There is no doubt that there are practical difficulties in marshalling 67 applicants to join in an appeal and to join in the application that is attendant

thereon. Decisions have to be made, not only by the individuals, but also by the individuals within their collective sphere. That does take time and it is a factor to be taken into account in favour of the applicants in this matter.

7. The second point to note is that the applicants had to have dealings with the trade union whom they expected to act on their behalf in the bringing of the appeal. The trade union in turn had to consider to what extent it would be willing and financially able to continue to act on their behalf. For the purpose it was necessary for the trade union to consult with its attorneys and take their views. Those matters take time and exacerbating the delay is the difficulty of communicating as between a trade union and so many individuals. That factor too must be taken into account in favour of the applicants.
8. The third factor that must be taken into account, and it was much pressed before me, was the fact that the applicants are lay people in a poor financial position. The extent to which their ignorance or otherwise of the law can be taken into account is not explored on the papers and, it seems to me, that it would be improper for me to assume in the absence of allegations pertinently directed at that fact, that they have no knowledge of the law whatever. In fact, the objective indications are somewhat the other way. It is clear for instance that the individual applicants certainly communicated at the time of this dispute a set of legal attitudes and subsequently, were alive to the kinds of challenges to the handling of the matter by the union that they in fact surmounted.
9. However, that, it seems to me, the question of their

knowledge or otherwise of the law is properly a matter

that

I should leave out of account, save to conclude that they are indeed lay people.
10. Insofar as the financial position is concerned, there are some suggestions on the papers that the applicants have had to - as it is put - "fundraise" in order to finance the litigation. There is nothing on the papers to suggest that they approached the Legal Aid authorities, or that had they done so, their application for Legal Aid would have been turned down.

I do not make much of that fact, it does seem to me that if they wish to act autonomously, it was entirely proper and legitimate to seek to raise the money from their own resources in order to pay for their lawyers. 11. The fact that they are indigent is a further fact that I consider should be taken into account in their favour. 12. Nevertheless there are periods on the papers in which a delay goes unexplained. It is necessary, and the Courts have repeatedly stressed this, to set down in the founding affidavit a proper chronicle with the requisite explanation, presenting excuses where necessary, of precisely what happened at each stage in the proceedings. The founding papers do not do that with sufficient clarity to enable me to be confident as to why the delays which were identifiable, occurred. There is no point in my considering each of the delays in turn and the extent to which they have been the subject of explanation. Suffice it to say that at the very least from the period some time during January to the time when the application was launched, there is an hiatus of some - at best for the applicants - some seven weeks that goes completely unexplained and that should have been explained, in the
4.331 circumstances /...

circumstances.

13. The Courts repeatedly stress that the question of the explanation for the delay must be weighed in the balance with the prospects of success on the merits; the stronger the prospects of success the weaker can be the explanation for the delay and the more the culpability of the parties in relation to the delay, will be excused.
14. In the present matter had the prospects of success been strong, I would have been inclined to grant condonation, but I cannot conclude that they are strong. If there is little point in my rehearsing the reasons that I gave in my initial judgment, it is always invidious for a Judge sitting in this position to come to the conclusion that he is confident that he was right the first time round. It is equally invidious for a Judge to abrogate his responsibilities by leaning over and saying that it is proper to allow

another Court to decide the matter in circumstances where he is satisfied that his original judgment is unlikely to be upset on appeal. That is the attitude that I have in the present matter.
15. The facts very briefly are that an agreement was concluded between the respondent and the trade union at the Commission for Conciliation Mediation and Arbitration (CCMA) relating to the rehiring of the individual applicants and their wages for the ensuing year. No sooner had that agreement been concluded than correspondences ensued which ran completely counter to both the spirit and the letter of that agreement. The agreement was premised on the notion that there was an acceptance of the fact of the dismissal and the need for re-engagement of the workers, yet the correspondence set up that dark things had happened at the
4.425 (CCMA) /...

(CCMA) and that in fact the concession that there had indeed been a dismissal, was improperly and unjustifiably made.

16. There was, furthermore, an understanding as to the manner in which the wages would be increased over the coming year. An option was delineated by the agreement and it was understood that the individual applicants and the trade union could choose between the two, and yet if one looks at the correspondence, one sees that it sets out demands for financial information such as would indicate to a person reading the correspondence an indication to go behind the terms relating to that option. In both respects there was, at very best for the individual applicants, objectively speaking an indication of an intent to quarrel with the terms of the agreement. In those circumstances, as I found previously, it was permissible for the respondent to seek an affirmation of the agreement from the individual applicants who, one must recall, had not been party to its conclusion in their own name.
17. They refused to give that affirmation, either by signing the agreement itself, or by signing an

undertaking in lieu of that signature. In consequence the respondent was entitled, as I found previously, to conclude that the individual applicants had no intention to be bound by the agreement concluded on their behalf by the trade union.

18. In respect of that finding I asked Mr Dhlamini to point out in what respects my judgment might be found to be wrong; to what extent could there be any quarrel with the fact of the repudiation. Nothing that he placed before me suggested to me that my original evaluation of the facts had been in any respect misdirected.

19. In the circumstances I conclude that there are few, if

any, prospects of success on the merits on appeal and certainly no reasonable prospects of success.

20. As a result I decline to condone the late filing of the application for leave to appeal.

21. Mr Wessels, appearing on behalf of the respondent, pressed for costs against the applicants in this application. I can see no reason why the applicants should not pay the costs of the application, as Mr Wessels has said his clients were brought here by them in circumstances where a judgment had already been given. They had been given an opinion by their

original attorneys on the merits and the substance of that opinion is recited in the correspondence that is attached to the application for condonation. They were alert to and aware of their rights and the difficulties that they faced. Then nonetheless proceeded with this application. It seems to me that they must pay the costs

occasioned by the application.

22. In the circumstances I make the following order:

1. The application for condonation of the late filing of the application for leave to appeal is dismissed.

2. The applicants must pay the respondent's costs.

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BRASSEY, AJ