IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT DURBAN

CASE NO: D656/99

In the matter between:

MN SIBIYTA	First Applicant
BV GAZU	Second Applicant
AZ NENE	Third Applicant
AM ZONDO	Fourth Applicant
MI NDWANDWE	Fifth Applicant

and

AMALGAMATED BEVERAGES INDUSTRIES LIMITED	First respondent
COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION	Second Respondent
MR I MOODLEY	Third Respondent

MASERUMULE AJ:

1. The applicants seeks to review an award handed down by the third

respondent ("the commissioner") on 7 August 1999, in terms of section 145 of the Labour Relations Act, 66 of 1995, as amended, ("the Act").

2. The applicants had referred an alleged unfair dismissal dispute to the CCMA for arbitration and the commissioner was appointed to arbitrate the dispute. It appears from the commissioner's award that the applicants and the first respondent had agreed that the applicants would lead evidence to establish the existence of a dismissal and that the commissioner would first make a ruling on this point. The parties had also agreed that in the event that the commissioner found that the applicants had been dismissed, the matter would then proceed further for a determination of the fairness or otherwise of the dismissals. The commissioner's award is therefore, limited to a determination of the existence or otherwise of the dismissal of the applicants.

3. The application was not brought within the six-week period prescribed in section 145 of the Act. I must therefore, first consider applicant's application for condonation for their non-compliance with the six-week time limit imposed by section 145 of the Act.

4. The following material facts can be gleaned from the affidavits and annexures filed in support of and in opposition to the application for condonation:

4.1 the applicants received the award, which is dated 20 July 1998, through the offices of their attorneys on 7 August 1998. The first

respondent received it on 28 July 1998;

4.2 the applicants instructed their attorneys to institute review proceedings but they did not have sufficient money to pay their attorneys;

4.3 on 3 September 1998, applicants' attorneys filed the notice of motion to review the commissioner's award with the Labour Court but without any supporting affidavits. This was because the applicants did not t the time have sufficient money to cover the attorneys' legal costs for drawing complete papers;

4.4 the application was sent by telefax to the respondent, which did not receive it because two digits in the fax number used were incorrect;

4.5 the applicants only served the supporting affidavits on the first respondent on 27 November 1998 and filed same on 3 December 1998. The first respondent filed an opposing affidavit on 14 December 1998, in which it, inter alia, pointed out that it had not received the notice of motion and it therefore, considered the application to be defective; and

4.6 the applicants only served the notice of motion on the first respondent on 17 February 1999, together with their replying affidavit, which was also out of time. The applicants have applied for condonation for the late service and filing of the replying affidavit.

5. In view of the fact that even the first respondent did not receive the award on 20 July 1998, I accept the applicants' allegation that their

attorneys only received it on 7 August 1998. It follows that the applicants were required to bring their application for review on or before 21 September 1998.

6. The applicants filed their notice of application on 3 September 1998 and the supporting affidavits on 3 December 1998. An application is only made when served on all respondents and filed with the court. It follows that the application was only made on 17 February 1999, some four months out of time.

7. The approach which the court is required to adopt in condonation applications has been exhaustively dealt with in a number of Labour Court and Labour Appeal Court decisions. It suffices to refer to the following passage from the Labour Appeal Court's decision in **Mziya v Putco Limited** [1999] 3 BLLR 103 (LAC) at 106:

"10) The approach which the industrial court should have taken in considering an application for condonation of this kind has been recently re-stated on a number of occasions. It is sufficient for present purposes to refer to the following statement in the case of National Union of Mineworkers v Council for Mineral Technology (unreported judgment of the Labour Appeal Court case number JA94l97) at paragraph 10: "lt 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 Santam Insurance 1962 (4) SA 531 (A) at 532C-F should be adopted. Radebe v Protea Funishers (1994) 15 ILJ 323 (LAC) at 325G-326G; MM Steel Construcion v Steel Engineering Union of SA (1994) 15 lLJ 1310 (LAC) at 1311I-1321A; Oldfield v Roth (1995) 16 ILJ 76 (LAC) at 791J; Fundaro vMclachlan & Lazar (1996) 17 ILJ 1183 (LAC) at 1187I-J an 1192J; PPAWU v Dryer LAC case number JA35I97 at page 7. 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: c.f. Chetty v Law ciety 1985 (2) SA 756 (A) at 765A-C; NUM 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 representatives lack of diligence or the insufficiency of the explanation tendered. Saloojee v Minister of Community Development 1965 (2) SA 135 (A) at 140H-141 D; Buthelezi v Eclipse Foundries (1997) 18 ILJ 633 (A) at 638I-639A .”

8. In the present matter, there was a delay of at least four months in bringing the application for review. This is a fairly long delay, and can only be excused if the other requirements for condonation are tilted in favour of the applicants.

9. This delay must, however, be seen in the light of applicants’ attempt to comply with the provisions of the Act by filing a notice of motion

within the prescribed time limit, though admittedly, it did not reach the respondent due to an incorrect fax number being used. The supporting affidavits were filed approximately two months out of time. Nonetheless, the attempt to comply with the Act appears to have been genuine. Coupled to this is their explanation that they did not have sufficient funds to pay their attorneys. While this explanation is not entirely satisfactory, the fact is that litigation requires substantial financial outlay. The applicants say since they were out of work, they did not have sufficient funds at hand to enable their attorneys to proceed with the matter.

10. There is in my view, no real prejudice to the first respondent that was occasioned by the delay in bringing the application. In its answering affidavit, the first respondent does not allege any prejudice but merely takes issue with the period of delay, the explanation therefore and the prospects of success.

11. As regards prospects of success, I am of the view, for the reasons set hereunder, that the applicants have very strong prospects of success on the merits.

12. The commissioner was required to determine whether or not the applicants had been dismissed. In so doing, he considered whether they were employees and the meaning of dismissal in section 186 of the Act.

13. In summary, the facts were that the applicants worked for the first respondent on a casual basis for a number of years. For example, the first applicant worked for the first respondent from 1987 until April 1997, sometimes working for three days in a week and at times, five

days in a week. The second applicant had worked for the first respondent from 1989 until 1997 when the alleged dismissal took place, either fro five days in a week or three days in a week. The third applicant worked for the first respondent from 1990 until April 1997.

14. What was common to all three applicants was the fact that they went to the first respondent's gate each day and would then be called in to work. They regularly worked on this basis until they were informed that the first respondent would no longer make use of casual labour in 1997, leading to their referral of their alleged unfair dismissal dispute to the CCMA.

15. The evidence before the commissioner indicated that the first respondent regarded the applicants as employees, albeit casual employees.

16. The commissioner's fundamental error is reflected in his characterization of what he was required to decide. At page 22 of his award, he states as follows:

"The central dispute of fact that I am required to resolve on the evidence is whether the applicants who testified were employed continuously for five days or whether they were employed as casual employees for no more than three days in any week."

17. This characterization of what the central dispute was all about is misconceived. The question the commissioner was required to answer was whether the applicants had been dismissed. This required a determination of whether or nor they were employees as defined

section 213 of the Act and the existence of a dismissal in terms of section 186 of the Act. The question of whether they worked for three or five days in a week was irrelevant, particularly because it was not being asked so as to determine the status of the applicants as employees or the existence of a dismissal. Rather, it was being asked to determine whether the applicants were “permanent” or temporary (casual) employees, a consideration which was of no relevance nor consequence to the issue before the commissioner.

18. The commissioner then proceeded to analyse the evidence, from which he concluded that the applicants were employed for not more than three days in a week and were therefore, casual employees. In this regard, he concludes as follows:

“I find that the employment relationship with the applicants as contemplated by the company, is on a balance of probabilities, casual work as defined in the Basic Conditions of Employment Act…

For the aforegoing reasons I have come to the conclusion that there has been no dismissal of the Applicants within the meaning of section 186 of the Act. What has happened is that the employer has failed to continue to offer employment to the applicants, as it is entitled to do, given the nature of the relationship which is sui generis. The species of employment that is particular to this kind of relationship affords the flexibility to suit an employer according to the needs of the business. The only condition that relates to this kind of employment is that the employment relationship endure for no longer than three days in any week. The relationship ends when the employer refuses to offer further employment.”

19. The commissioner’s pre-occupation with whether or not the applicants

were casual or permanent employees, and his reference to the Basic conditions of Employment Act (3 of 1983), led him to a conclusion that is completely unjustifiable, is legally incorrect and is clearly a result of the commissioner's failure to understand and appreciate his jurisdiction and powers.

20. It was not necessary for the commissioner to embark on an enquiry of whether or not the applicants were permanent or temporary employees. Having accepted, as he indeed did in his award, that the applicants were employed by the first respondent, albeit for three days in a week, the enquiry should have been whether or not the first respondent terminated their employment, for whatever reason. The evidence before him was that the first respondent indeed terminated such employment on the basis that it no longer required temporary employees as it had reinstated some other employees that it had previously dismissed.

21. Section 213 of the Act defines an employee in broad terms as any person who works for another and receives or is entitled to receive remuneration. There is no distinction in the Act between those who work for three, or four or five days a week or for that matter, those who are "casual" employees. The primary issue with which the Act is concerned is whether a person is an employee and not an independent contractor.

22. To label the relationship between the applicants and the first respondent, which he describes as an employment relationship, as *sui generis*, is to completely miss the point. The fact that it suited the first respondent's operational requirements to employ persons on a casual

basis is irrelevant to a consideration of whether or not they have been dismissed. It matters not that in terms of the now repealed basic Conditions of Employment Act, 3 of 1983, the applicants were casual employees and therefore, not entitled to certain rights and protection under that legislation. It is the definition of an employee in the Act, read with the meaning of dismissal in section 186, that the commissioner was required to consider. He clearly failed to do so and instead, gave consideration to irrelevant matters.

23. The commissioner, in considering whether or not there had been a dismissal in terms of section 186 of the Act, moves from the premise that such dismissal can only occur if you are a “permanent” employee. He states as follows:

“The applicability of section 186(a) remains to be considered. Reference is made to in this provision to termination with notice. Clearly this provision contemplates the common law rule that an indefinite contract requires termination upon reasonable notice. In casu, there was no suggestion that any of the applicants received individual notices of termination.

The question remains, however, as to whether the employment relationship between the Applicants and the employer can be described as one bearing upon an indefinite contract, on a daily basis, in which notice of termination was due. Are the facts susceptible to a finding that an indefinite contract came into being?”

24. Once more, the commissioner asks the wrong questions. Section 186(a) provides that a dismissal takes place when an employer terminates a contract of employment with or without notice. It matters not whether the contract of employment involved is a permanent one

or casual or for that matter, a fixed term one. In the present matter, the first respondent terminated the employment of the applicants without notice. The applicants were thus dismissed.

25. I am satisfied that the commissioner's award is riddled with such gross misapplication of the law and a misconception of the issues that he was required to decide that it cannot be allowed to stand. It is my conclusion that the award stands to be reviewed and set aside.

26. Taking into account the period of the delay, the fairly reasonable though not completely full and satisfactory explanation, the absence of prejudice to the first respondent and an unassailable case on the merits, I am of the view that the late filing of the application should be and is hereby condoned.

27. In view of my conclusions regarding the prospects of success, it follows that the award rendered by the commissioner must be reviewed and set aside, on the basis that the commissioner exceeded his powers and rendered an award that is entirely not justifiable, having regard to the facts before him and the legal principles that he was required to apply.

28. It will serve no purpose to refer the issue dealt with in the award to the CCMA, given its nature and the observations that I have made. The CCMA still has to consider whether the dismissal of the applicants was fair and the matter will be referred to it for that purpose.

29. I accordingly make the following orders:

29.1 Condonation is hereby granted for the late service and filing of this

application;

29.2 The award handed down by the third respondent dated 20 July 1998, is hereby reviewed and set aside and is substituted with the following:

“The applicants were dismissed by their Employer, Amalgamated Beverages Industries Limited.”

29.3 The matter is referred back to the CCMA for a determination of whether or not the dismissal of the applicants was fair;

29.4 The first respondent is to pay applicants’ costs.

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MASERUMULE AJ

DATE OF HEARING: 1 September 2000

DATE OF JUDGEMENT: 8 January 2001

MR JAFTA of JAFTA & CO, DURBAN

DENT: MR J FORSTER of BARKERS ATTORNEYS, DURBAN