IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NOS: J1480/98 AND J773/00

In the matter between:

ROYAL AUTO SPARES CC Applicant

and

NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA First Respondent

PHENIAS LEBEPE Second Respondent

ALEX THABANA Third Respondent

MOHALE LEBEA NO Fourth Respondent

JUDGMENT

JAMMY AJ

The issues for determination by this court are sourced in three applications which, for reasons of expedition and convenience, have been consolidated. They are applications by the Applicant herein for the review and setting aside of an award made by the Fourth Respondent in favour of the Second and Third Respondents, an application for the condonation of the late filing of that review application and an application in terms of section 158(1)(c) of the Labour Relations Act No 66 of 1995 ("the Act") to have the

arbitration award in question made an order of court. Each of those applications is opposed.

Logic dictates that the application for condonation must first be dealt with. If condonation is granted, the application for the review of the arbitration award must be determined. The fate of the application under section 158(1)(c) of the Act, will hinge on that determination.

THE CONDONATION APPLICATION

The dispute regarding the alleged unfairness of the dismissal of the Second and Third Respondents by the Applicant was referred by the First Respondent on their behalf to the Motor Industry Bargaining Council for the Northern Transvaal Region, where it remained unresolved following attempted conciliation. Pursuant thereto the dispute was referred for arbitration under the auspices of the Commission for Conciliation Mediation and Arbitration ("the CCMA"). The arbitration hearing, in which the Fourth Responded presided, was held on 4 November 1997 in the absence of the Applicant. The Fourth Respondent handed down his arbitration award on 22 December 1997 and in terms thereof the dismissal of the Second and Third Respondents was held to have been procedurally and substantively unfair and each of them was awarded compensation.

Some seven months later, on 8 June 1998, the Applicant served and filed an application for the review and setting aside of that award. It is common cause that in terms of section 145(1) of the Act, this application should have been made within six weeks of service of the award on the parties. It was accordingly some four months late.

On the 2nd March 2000, in the absence at that stage of any apparent remedial action on the part of the Applicant regarding its delayed review application, the First Respondent, on behalf of the Second and Third Respondents filed an application under section 158(1)(c) of the Act to have the arbitration award in question made an order of court. The

effect of this application appears to have been to alert the Applicant to its tenuous position in relation to the review proceedings and to galvanize it into the service and filing of an application for condonation in that regard on 14 April 2000. This, it should be noted, was almost two years after the initial filing of the application for review and some two and a half years from the date of the award. The suspension of the application under section 158(1)(c), pending the determination of the condonation and review applications, was simultaneously sought.

Simply stated, the grounds for condonation were sought to be laid by the Applicant squarely at the feet of its representatives. Immediately after receipt of the arbitration award in January 1998, it contends, it sought legal advice from a labour law practitioner, a certain Mr Gey von Pittius, by whom it was advised to take the award on review.

Mr Von Pittius appears, in turn, then to have retained the services of a firm of attorneys, Dewald Myburgh for that purpose. Those attorneys in turn, having, it should be stated, presumably received those instructions in or about January 1998 did nothing further until, on 8 April 1998 they engaged the services of counsel to draft the application for review. A further two months elapsed before the review application was launched in the first week of June 1998.

That application, as has been indicated, was at that stage already four months out of time, both the applicant and its advisers being apparently oblivious of the necessity to seek condonation from this court for that state of affairs. All that is submitted in that regard is that the Applicant telephoned Mr Gey von Pittius “on several occasions” in order to ascertain the state of play. Neither the Respondents nor this court are informed when it did so or what it was informed in that regard.

What is even more remarkable, in that context, is the unexplained delay of a further one year and ten months, in the launching of the application for condonation, the necessity for which had been brought expressly to the attention of the Applicant’s advisers on 30 June 1998, almost two years earlier.

. This court has regularly been urged, in condonation applications of this nature, not to visit the derelictions of their representatives upon lay Applicants.

See for example: Zululand Anthracite Colliery v Commission for Conciliation Mediation and Arbitration and Another (2001) 22ILJ 1213(LC)

The Applicant in this matter, it is submitted, relied on its legal representatives to follow timeously the proper procedures prescribed by law. It does not, it is contended, operate in a legal environment and cannot be blamed for the delay.

. There is however a well established counteracting principle in that context. The Appellate Division, as it then was, in

Saloojee and Another, N.N.O. the Minister of Community Development 1965(2) SA 135

held, as is stated in the head note, that -

"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 the Appellate Division. Considerations *ad misericordiam* should not be allowed to become an invitation to laxity.

. I have already indicated that, in this matter, not only is the initial four month delay in the filing of the review application inadequately explained, but there is no explanation whatsoever for the further delay of almost two years in the launching of the application for condonation. The bold allegations, made without elaboration or augmentation in any respect, that the Applicant enquired "on several occasions" as to progress of the matter and that it ultimately terminated the mandate of its then legal representatives, cannot, in my view, assist it in the instant circumstances. The delay which occurred is unacceptable and unconscionable and is not indicative of any concern, either by the Applicant or its

advisers, for the basic procedural rules prevailing in this Court. In the face of what I consider to be these exacerbating factors, the issue of the Applicant's prospects of success in the review application, can carry no significant weight. These are in any event open to serious question on the papers before this Court but it is unnecessary in my opinion, for me to review them. Cited in that regard by the Applicant are the principles established in

Melane v Santam Insurance Company Limited 1962(4) SA531(A)

Quite apart from the fact that that case concerned a late application for leave to appeal, as opposed to review, the factors defined therein by the Appeal Court, negate the entitlement of the Applicant in this matter to the relief which it seeks. The "discretion to be exercised judicially upon a consideration of all the facts" and to be applied in the context of "fairness to both sides" must be so exercised holistically. At page 532 of the report, Holmes J. A. said this

"Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of an issue and strong prospect of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked".

I reiterate that the delay in these proceedings is so long and the explanation therefor so inadequate and unsatisfactory, that, in my view, when all other considerations are taken into account, condonation cannot be countenanced. That being the case, it is unnecessary for me to consider the concomitant application for the review and setting aside of the arbitration award in question and, in these circumstances, the application for that award to be made an order of court in terms of section 158(1)(c) of the Act, is a sound one.

. For all of these reasons, the order which I make is the following:

The application for condonation of the late filing of the Applicant's review application is

dismissed.

The arbitration award of the Fourth Respondent in favour of the Second and Third Respondents and dated 22 December 1997 is made an order of court.

The Applicant is ordered to pay the Respondents' costs of the consolidated applications.

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B M JAMMY
Acting Judge of the Labour Court

8 August 2001

Representation:

Advocate R Grundlingh instructed by Schurmann Joubert Attorneys

ndents: Mr K Mayet: Cheadle Thompson and Haysom Inc