IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case No. J5110/99

In the matter between:

South African Food & Allied Workers Union **1st APPLICANT**

D Mnisi and 22 Others **2nd to 23rd APPLICANTS**

and

Albany Bakery (Germiston) **RESPONDENT**

JUDGEMENT

PIENAAR, A J

INTRODUCTION

1. This is an opposed application for condonation of the Applicants' late referral of their Statement of Claim to the Labour Court.

FACTS

2. The Individual Applicants were dismissed on 27 September 1999 and the matter was referred to the CCMA within the 30-day time period.

3. A conciliation meeting was held on 22 November 1999 and a certificate was issued by the CCMA on the same day.

4. The 90-day period stipulated in terms of section 191(11) of the Act expired on 22 February 2000.

5. Mr Mtshali, the Gauteng Provincial Official of the First Applicant, applied for a case number on behalf of the Applicants on 3 December 1999.

6. The Statement of Claim was filed at the Court on 9 March 2000 and sent to the Respondents per registered mail on the same date. According to the Respondents they only received the Statement of Claim on 29 March 2000, which was not disputed.

7. In terms of the Court Rules it is presumed that service was effected on the 7th day following the day on which a document was sent by registered post, unless the contrary is proved.

8. The Applicants were not represented when the matter was argued. Mr Mtshali, a union official, who was present during the motion proceedings in the morning, failed to appear before the Court when the matter was called in the afternoon. According to the legal representative of the Respondent, Mr Mtshali attended to a matter at the CCMA at the time.

9. The Application for Condonation was signed by Mr Mtshali and no supporting affidavits of any of

the Individual Applicants or their attorney, Mr Legodi, were filed. The Respondent filed an opposing affidavit and the Applicants did not reply thereto. Insofar as there is a dispute on facts, I therefore have to accept the version put forward by the Respondent.

CONDONATION

10. In dealing with the Application for Condonation, the Court follows the guidelines as set out in the matter of *Melanie v Santam Insurance Company Limited (1962) (4) SA 531 (A*).

11. The Applicants bear the onus to show that sufficient cause exists for condoning non-compliance with the provisions of the Act.

12. Condoning of non-observance of the Rules is by no means a mere formality – see *Meintjies v H D Combrinck (Edms) Beperk (1961) 1 SA 262 A at 264(a).*

13. In the absence of an acceptable explanation for non-compliance with the Rules of the Court, condonation will not be granted. See *Glansbeek v J D T Trading (Pty) Limited (1998) 3 BLLR 223 (LAC*) and *All Round Tooling (Pty) Limited v NUMSA (1998) 8 BLLR 847 (LAC).*

14. To determine what constitutes "good cause", the following guidelines were given by Holmes JA in the Melanie case *supra* at 432:

> "*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 therefore, the prospects of success and the importance of the case. Ordinarily*

these facts are inter-related: they are not individually decisive, for what 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. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation maybe held 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. And the respondent's interest in finality must not be overlooked".

DEGREE OF DELAY AND EXPLANATION THEREOF

14.1. According to Mr Mtshali, he informed trade union office bearers on 30 November 1999 to appoint an attorney to handle the matter and to refer same to Court. Mr Mtshali was on leave from 24 December 1999 and resumed duties on 24 January 2000.

14.2. The office bearers of the First Applicant had two meetings on 11 and 17 January 2000 to consider the matter. On 17 January 2000 a decision was taken use the services of Attorney Legodi.

14.3. According to Mr Mtshali the matter in his mind was then already urgent and about to prescribe.

14.4. On Mr Mtshali's return from leave on 24 January 2000, he made enquiries with regard to the progress in the matter.

14.5. On 26 January 2000 Mr Mtshali discussed the matter telephonically with Mr Legodi who requested the instructions in writing. The Provincial Secretary, however, informed Mr Mtshali

that the instructions could not be given without the approval of the national office bearers of the First Applicant.

14.6. The national office bearers only gave such written instruction for Mr Legodi to refer the matter to the Labour Court on 9 February 2000.

14.7. On 11 February 2000 Mr Mtshali communicated with Mr Legodi and an appointment was scheduled for 26 February 2000.

14.8. On 26 February 2000, Mr Legodi informed Mr Mtshali that the matter was about 90 days outside the prescribed time limit (which is factually incorrect). Mr Legodi then requested a statement from Mr Mtshali which he gave to Mr Legodi on 1 March 2000.

14.9. I have, however, noted that the application for condonation before the Court was indeed only signed on 9 March 2000.

14.10. According to Mr Mtshali, their application is approximately 120 days late, which is factually incorrect.

14.11. It appears from the above that the application for condonation is based on the following:

14.11.1. The First Applicant intended to instruct Mr Legodi to refer the matter to the Labour Court.

14.11.2. The First Applicant had difficulty in obtaining the relevant approval from within the union structures, which caused a delay.

14.11.3.Despite Mr Mtshali's perception that the matter was urgent and already about to prescribe during January 2000, the matter was still referred to Court outside the prescribed time period.

14.11.4.Although the First Applicant was advised by its attorney on 26 February 2000, that the matter was outside the required time limits, a further 12 days lapsed prior to the filing of the Statement of Claim. No explanation was tendered for this further delay.

14.11.5.Although the application is essentially based on the First Applicant's inability to timeously instruct its attorney, the attorney did not refer the matter to the Labour Court – the First Applicant did.

14.11.6.Lastly it is noted that there is no affidavit before this Court of the Applicants' attorney, Mr Legodi, or any of the Individual Applicants.

15. The First Applicant submitted no explanation for their ignorance of the provisions of the Act. It is trite law that the union's ignorance of the law does not constitute a defence in this Court. See *PPWAWU & Others v A F Dreyer and Company (Pty) Limited (1997) 9 BLLR 1141 (LAC*).

16. Although I do not regard the delay as too excessive, there is still no reasonable explanation before this Court for the delay and more specifically the periods referred to above.

PROSPECTS OF SUCCESS

17. According to Mr Mtshali, he was first informed of the Individual Applicants' retrenchments on 22 September 1999 and that he only had one meeting with the Respondents after the retrenchment.

18. According to the Applicants, the Respondent employed 24 replacements after their retrenchments and did not consider LIFO as a selection criteria.

19. According to the Respondent, the particular department of its business had been operating at a loss which amounted to millions of rands. The Respondent also experienced damage caused to products by the actions of employees during the packaging and wrapping phase of production.

20. The Respondent furthermore experienced problems with its employees to work on Saturdays, which constituted an operational requirement of the business.

21. The Respondent commenced consultations with the Food and Allied Workers Union (FAWU), who was the recognised representative trade union at the particular bakery of the Respondent. The shop stewards of the First Applicant, who was in the process of recruiting members, were also invited and attended all meetings.

22. Further meetings were held between the Respondent and the parties referred to above on 27 August 1999, 17, 21 and 22 September 1999.

23. FAWU, however, refused to consult on behalf of the selected retrenchees and a meeting was convened with the First Applicant on 23 September 1999.

24. According to the Respondent, Mr Mtshali attended such meeting and did not deny that retrenchments were necessary and, in fact, accepted this.

25. Mr Mtshali's main concern was the selection criteria as proposed by the Respondent, i.e. LIFO with the retention of skills. The application of this criteria meant that the majority of employees who

were to be retrenched, would be members of the First Applicant. The parties were in dispute with regard to the selection criteria.

26. Further correspondence took place and meetings were convened on 30 September and 13 October 1999, during which the Respondent consulted with the First Applicant with regard to the retrenchment.

27. Various minutes of meetings between the relevant parties were submitted by the Respondent to substantiate and corroborate the above.

28. The First Applicant chose not to reply to the allegations and submissions made by the Respondent and I have no option, but to accept the Respondent's version in this regard.

29. There were also no affidavits of any of the Individual Applicants or shop stewards, who acted on their behalf, before this Court to deal with the merits of the Applicants' case and as such with the prospects of success.

30. In the absence thereof I have to accept the allegations made by the Respondent in respect of the prospects of success.

31. Based on the above, I find that the prospects of success in this matter favour the Respondent.

PREJUDICE

32. Insofar as prejudice is a factor which I cannot ignore, the late referral of a matter can be addressed by the Court when and if awarding compensation.

33. I, however, bear in mind that the Individual Applicants may have a claim against the First Applicant, for their failure to properly attend to this matter.

IMPORTANCE OF THE CASE

34. There is no evidence or grounds before me, to sway my decision either way, with regard to the importance of this matter.

CONCLUSION

35. Although the delay in bringing the Application is not excessive, the Applicants still have to show sufficient cause and explain the delay. No proper explanation has been placed before this Court for the delays referred to above.

36. I furthermore find that there is no evidence before this Court to show that the Applicants have a good prospect of success, given the unsatisfactory affidavit put before the Court.

37. The factors referred to above are not individually decisive and one has to take into consideration the object of conspectus of all the facts.

38. In light of the above, I am satisfied that the Applicants, who bore the onus, could not show good cause why the Application for Condonation should be granted.

JUDGEMENT

39. The Application for Condonation is dismissed with costs. In awarding costs, the Court has furthermore taken into consideration Mr Mtshali's failure to appear in Court, when the matter stood down to be heard later in the day.

ACTING JUDGE PIENAAR
17 April 2001

PARTIES APPEARING BEFORE THE COURT:

APPLICANT

RESPONDENT REPRESENTED BY:

Mr M Schöttler
Brink Cohen Le Roux & Roodt Inc