IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NUMBER: JS1364/01

In the matter between:

First Applicant

Second Applicant

HY **Third Applicant**

and

CH COUNCIL

Respondent

J U D G M E N T

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1 The three Applicants were retrenched by the Respondent. They filed a statement

of claim on the 5th of December 2001. According to the Rules of Court within ten days thereof, that is to say on the 20th of December 2001 the Respondent was obliged to serve a statement of defence. It did not. It filed its statement of defence on the 25th of March 2002. This application seeks condonation of that late filing. The Applicants oppose such relief.

2 In an application such as this, the practice of this Court is clear. The principles as set out in the decision **Melane v Santam Insurance Company Limited 1962 (4) SA 531 (AD)** govern the exercise of a judicial discretion whether or not to grant such relief. The two pillars of the **Melane** approach consist of a consideration of whether or not a reasonable explanation is offered for the delay and whether or not the defaulting party has reasonable prospects of advancing its case if the matter goes to trial. In this application the Applicants oppose the Respondent's prayer for relief on the basis that neither of these two elements have been demonstrated. There is also reference to the prejudice which the respective parties will suffer if the order for condonation is or is not allowed.

3 The bare facts of the sequence of events are not materially in dispute. It is useful to set them out before dealing with their import.

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4 On 5 December 2001 the three Applicants filed their statement of case. The substantive averments run to sixteen pages. Reference is made therein to the

course of a considerable restructuring exercise which took place within the Respondent employer and how ultimately each of the three Applicants were selected for retrenchment. The fairness of such selection, the criteria upon which the selection was based and related matters are in issue. Reinstatement is sought as a remedy. Annexed to the statement of case is a schedule of 46 documents, including several minutes of meetings.

5 The Respondent appointed attorneys Bell Dewar and Hall to deal with the litigation on its behalf. The member of that firm who was to take charge of it, was Nigel Carman. He apparently had been the legal advisor of the Respondent throughout the restructuring exercise.

6 On the 7th of December, that is to say two days after the filing of the statement of case, a telephone conversation took place in which Carman requested an extension until the 18th of January in order to prepare and file a statement of defence. That same day a telefax was sent to Carman in which the following statement appears:

"*We have consulted with our clients who have indicated that they are willing to allow an extension until 11 January 2002 for the filing of the HSRC's responding papers in the above matter.*"

The telefax was transmitted at 13h40 on the 7th of December 2001.

7 It is not apparent from the papers whether or not Carman had his attention drawn to that reply before or after, as it is stated in the papers, he left for his annual holiday on the 8th of December.

8 However, on 10 January 2002 Carman responded to the Applicants' attorneys letter granting an extension until the 11th of January. It states as follows:

1 "*We acknowledge receipt of your telefax dated 7 December 2001 and refer also to our various telephone conversations with Mr Kaapu and Ms Husemeyer on 7 December 2001 and on 9 and 10 January 2002.*

During these telephone conversations, we asked for an extension of time for the filing of the Respondent's response for ten days after 8 January 2002, that is, until 18 January 2002. We explained that:

(1) Your clients' statement of case had been served on our client on 5 December 2001;

(2) Our client intended to oppose the application and had instructed us to act on its behalf in doing so;

(3) The writer who had knowledge of the dispute, was going on holiday from 8

December 2001 and would only be returning to the office on 8 January 2002;

(4) Our client's chief executive officer, the person from whom it is necessary to take instructions would only returning to his office on 14 January 2002; and

(5) We would, in the circumstances, not be able to prepare the response before 18 January 2002.

Since your clients have refused to consent to the extension sought, we attach notice of intention to oppose and give notice that we will, in due course, apply for an extension of the time limit and condonation. Since it considers your clients' attitude to be unreasonable in the circumstances, it intends to ask that the costs of that application be paid by your clients."

9 In the affidavit of Dr Mark Orkin, the chief executive officer of Respondent, it is stated that after his return to his office on the 14th of January 2002, he again went abroad on the 21st of January 2002 on business. He states that it was for that reason that not until the first week of February was he was able to participate in the preparation of the statement of defence. In that week a first draft of the Respondent's statement of defence was prepared. Counsel was briefed to settle the draft.

10 On the 15th of March 2002 the statement of defence was filed. The statement of defence runs to some 23 pages of substantive averments in relation to the merits of

the matter, and annexed thereto is a schedule listing 130 documents, including several minutes of meetings.

11 An affidavit was deposed to by the First Applicant, to which the Second and Third Applicants made common cause setting out the perspective they have of the conduct of the Respondent. In the affidavit the First Applicant refers to having been informed by his attorneys for the request for an extension to the 18th of January, and states the following:

"*Mr Holtzhausen, Mr Padayachy and I were prepared to grant an extension until 11 January 2002, as we believed Mr Carman will have a reasonable period, i.e three days to prepare the Respondent's response.*"

The First Applicant refers once again to having been informed by his attorneys of the conversations which took place on the 9th and 10th of January requesting an extension to the 18th of January and states as follows:

"*We were only prepared to grant a further extension until the 14th of January 2002. This was conveyed telephonically to Mr Carman by Ms Husemeyer."*

The First Applicant thereupon goes on to point out, usefully, that by the 25th of March 2002, the statement of defence was 63 court days out of time. Emphasis is

given to the point that had the statement of defence indeed been filed by the 18th of January, as initially intimated by Carman, there would not have been opposition to the application for condonation.

12 The First Applicant's affidavit goes on to give voice to various criticisms of Carman's conduct. It makes the point that it is inappropriate to rely on the non-availability of a particular attorney in order to justify a delay in complying with the Rules of Court. He states further that he and the other Applicants "*were willing to grant an extension until 11 January 2002, being three days after Mr Carman was due to return from his holiday. Had Mr Carman been actively involved and had given advice in accordance with the retrenchment exercise, giving rise to this cause of action, this time was more than sufficient to prepare his client's response, as detailed consultation should not have been necessary.*" He expresses an inability to grasp why, as the request had been made for an extension to the 18th of January and Orkin was available between the 14th and the 21st of January, that the statement of defence could not have been finalised during that time. Lastly, he points to the elapse of time from the 18th of January until the 25th of March contending that the delay is substantial and whilst being prepared to allow that the issues of fact and law "*may be complicated*" is it wholly inappropriate that the Respondent "*was entitled to blatantly disregard the rules of this Honourable Court by taking more than three and a half months to deliver its response.*" The First Applicant takes the trouble to point out, that in his opinion,

the conduct of the Respondent's attorneys in relation to the delay was "*solely due to its negligence and gross and unjustifiable disrespect for the rules of this Honourable Court.*"

13 In argument, in support of these averments, Mr Wesley who appears for the Applicants in resisting the condonation application points correctly to the value which rightly is to be attributed to expedition in labour relations litigation. There can be no question that in the labour relations environment, where litigation is resorted to, practitioners who engage therein must adhere to an ethic of expeditiousness throughout. It is an open secret that delay in litigation can unfairly change the balance of advantage between the parties. Particularly where relief in the form of a restoration of the *status quo ante* is being sought, as a general rule it may be assumed that a delay in the conclusion of the litigation confers on the employer in a dismissal dispute an advantage which can in many cases result in an injustice. Whatever the practical difficulties may be of achieving expedition, the pursuit of a speedy conclusion remains a clear beacon to guide both the Court and practitioners as to an appropriate ethos which, in turn, informs the rigour with which the rules of court ought to be enforced.

14 Mr Wesley urged on me to take seriously the injunctions mentioned in **A Hardrodt (South Africa) (Pty) Limited v Behardien and Others (unreported) LAC; CA 6/2001 of 30 May 2002**. In that matter Nicolson JA had occasion to

consider the considerations pertinent to the granting of condonation in respect of the late bringing of a review to set aside an award of a commissioner of the CCMA. He referred with approval to the decision in **Queenstown Fuel Distributors CC v Labuschagne N.O and Others (2000) 21 ILJ 166 (LAC)**, in which Conradie JA had considered the principles which should prevail. In that decision Conradie JA pointed out that the principles of condonation should be much stricter than those which were applied "*in normal circumstances*". This remark I understand to be an endeavour to distinguish the considerations pertinent to challenging an award granted by a commissioner of the CCMA, in relation to other litigious issues, such as for example an application for condonation of the late referral of a statement of Case or of Defence. The policy reasons for that distinction are clear. Once a party has an award in his or her favour, the failure to respond within the six week period to challenge that award give rise to considerations which are absent at the outset of litigation, where the table is being set for debate. I am not of the view that the decision in the **Hardrodt** case or for that matter the **Queenstown Fuel Distributors** case assists the Applicant in its resistence to the relief sought by the Respondents in this matter, where non - compliance with a rule of court is the controversy. I prefer to draw inspiration for the approach to be adopted in a case such as the present, from **Melane v Santam** (supra) where is was held at p532 C-D that:

'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 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 piecemealapproach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation.'

15 Lastly, in respect of the importance of expedition in labour litigation, it is useful to weigh the remarks of Comrie AJA in

RADEMAN v CONTAINERLINK (UNREPORTED) PA 5/2000; 29 June 2001, at **para 14,** where he observes:

"*Reasonable expedition is no doubt laudable in all litigation, and the more so in labour disputes. It is not however an end in itself. Circumstances arise where expedition must yield to other considerations, if justice is to be done. ...*"

16 The truthfulness of the account furnished on behalf of the Respondent in support of its prayer for relief is not in dispute. What is in dispute is its adequacy and reasonableness.

17 In my view the explanation given for the failure of the Respondent to file its statement of defence within the period prescribed by the Rules, and for the time

taken until it was filed on 25 March 2002 is reasonable.

18 The fact that the Rules of Court furnish ten days to a respondent in which time to file a statement of defence does no more than create a *prima facie* reasonable time within which that task is to be completed. Some time period must be laid down, and the policy choice is that ten days will be that period. This establishes no more than a default period by which the other party can expect a reply. However, it is a matter of practical experience in litigation that from time to time matters are of such complexity that a practitioner cannot prudently perform his professional duties within the time periods prescribed, or particular circumstances arise which it make unreasonably difficult to comply. When that occurs in practice practitioners liaise with one another and arrange on a common sense basis extensions and indulgences in relation to the Rules, in order for them to attend to their professional responsibilities with the appropriate degree of diligence and prudence. Independently of such practical arrangements which take place, a party who is unable for good cause to comply with the ten day period, is left with the option to seek condonation upon proper explanation of its reasonable incapability of complying with the ten day period.

19 A distinction of importance is that whereas the Labour Relations Act prescribes a period within which a statement of case must be filed, and failure to do so requires formal condonation, the time period for the filing of a statement of defence is

regulated solely by the rules. The act regulates the initial referral because the referral is a jurisdictional event. The rules exist to facilitate disciplined litigation and their role as servant of that process is the point of departure for any examination of non - compliance.

20 In this particular matter it is self-evident from a reading of both the statement of case and of the statement of defence that the matter is one of complexity. I have taken the trouble to read both these documents to determine whether or not it is apparent that the volume of space used to set out the issues was the result of an undue loquaciousness on the part of the pleaders. In my view that conclusion cannot be reached of either the attorneys of the Applicants or of the Respondent. The very fact that the issues are pleaded in such detail, and that it is apparent that there is voluminous documentation relevant to the dispute, is all key evidence pointing in the direction that it was not imprudent of the Respondent to take more than ten Court days in order to prepare an appropriate statement of defence.

21 According to the correspondence which was exchanged between the attorneys and later verified under oath by the First Applicant, I am to believe that it was the Applicants themselves, who having been consulted by their attorneys on the request for indulgences, took the view, (with or without advice we are not told), that a matter of three days was sufficient for Carman to do his job properly. In my view the contents of the pleadings show convincingly that this attitude was wholly unreasonable and farfetched.

22 It is further contended that the Respondent's attorney manifested a highhanded manner in stating to the Applicants' attorneys when the indulgence he sought had been refused, that is to say an indulgence until the 18th of January, that he would seek condonation and file in due course and thereupon took a further two months to conclude that exercise. I do not agree. The reply of Carman in the letter of the 10th of January was wholly appropriate to the obdurate and unreasonable stance adopted, as I am made to understand, at the express instructions of the Applicants themselves.

23 The criticism of the further time consumed by the respondent between 18 January and 25 March when the the statement of defence was filed, is in my view inapposite. It is never possible, even *ex post facto*, to determine whether a week less or even a fortnight less time could have been taken up in doing the work which has been performed. In this particular case it is clear from the explanation furnished by the Respondent that they did not spend two months working solidly on the preparation of the statement of defence.The elapse of time was in part attributable to the collection of documents which had to be collated and then examined by attorney and counsel, and their implications considered in relation to preparing an appropriate statement of defence. In determining whether or not the time taken is reasonably explained, it is neither possible nor necessary for a court to try to guess how it could be done. All that is necessary is to determine on a

common sense basis whether there is any evidence of conduct on the part of the attorney in question which can be described as dilatory. On the explanation before me I find no evidence of such conduct.

24 Mr Wesley contends that a generous indulgence had already been granted to the Respondent in respect of the period from the 20th of December 2001 to the 14th of January 2002. This period accommodated the month during which Mr Carman was out of his office on holiday. When I invited Mr Wesley to consider that traditionally South African culture resulted in the entire country virtually coming to a standstill during the December/January holiday period, he reminded me that the Rules of this Court do not provide for *dies non* as is the case in the High Court. In my view the omission of such an institution in the Rules of this Court is a lamentable. It is not necessary for one to approve of the near complete collapse of national enterprise during the traditional year end holiday period, but is seems to me to manifestly obvious and sensible that any legal practitioner who institutes an action in the first week of December must appreciate that there will be considerable hardship, done unnecessarily, if individuals who are required to respond have, at the last moment, to rearrange their family and other commitments. An attorney who in December seeks an indulgence until he returns from holiday in the new year, is not acting unreasonably and should not be left to believe that his request for such an indulgence is in the least degree unprofessional. No case is made out in this matter that the relief sought by the

Applicants is required on a genuinely urgent basis that would require personal sacrifice from not only the practitioners involved, but also from other individuals on the other side.

25 It is apparent that the initial anticipated time for the filing of the statement of case, estimated by Carman to require until the 18th of January 2002 was incorrect. It is not improbable that had a collegial interaction been possible between him and the attorneys for the Applicants he would have explained his further difficulties and requirements to do his job diligently and sought and motivated a further extension. However, in the face of the obduracy which, I am led to believe was of the instance of the Applicants themselves, Carman did not act inappropriately by not seeking any further indulgences and preferring to rely wholly on an approach to this Court to seek condonation in the application which is now before me.

26 In my view the explanation for the delay in filing the statement of defence was wholly reasonable and has been properly explained. By contrast, the attitude of the Applicants at the outset was wholly inappropriate. Doubtless every litigant is keen to get on with the case. However, attorneys who act for plaintiffs and applicants should take care not to be bullied by impatient clients and thereby make themselves complicit in uncollegial conduct which vainly consumes effort and time from not of themselves but also of the court and ultimately, selfishly

consumes resources contributed by the taxpayer.

27 The Applicants advance a case that the Respondent's statement of defence raises a case so weak that it is wholly without merit. That conclusion is not one which I am able to reach on a reading of the material before me. It seems plainly evident that there is a substantial case to be tried and, more particularly, in the context of terminations of employment for operational reasons, it must be seldom that a controversy truly is determined on a single element of the case. It cannot therefore be said that the Respondent's case is one that is without merit. It is useful to be reminded by the further remarks of Comrie AJA in **Rademan v Containerlink (supra)** in which he observes:

1 "*The prospects of success were addressed in the statements of case and response and also in the affidavits. They were in dispute. It is not possible on the papers to resolve that dispute or to hold that the appellant's prospects are excellent. Equally however it is not possible to hold that the appellant's prospects are poor or slender. It is not that the appellant's case on the merits disclosed a glaring weakness or that the respondent adduced deadly piece of evidence. It is accordingly fair to conclude on the papers the appellant's prospects are reasonable.*"

28 In my view, that common sense dictum appropriately articulates the threshold for the evaluation of circumstances in this class of case.

29 As to the arguments relating to the importance of the case and to the relevance of prejudice, it is plain that if the retrenchments of the Applicants are undone the impact on the restructured organisation of the Respondent will be prejudicial to it, no less than the denial of an appropriate remedy for any material shortcomings in the restructuring exercise would be prejudicial to the Applicants. In these factors lies the manifest importance of the case.

30 In respect of the costs of this application, I am guided by my finding that the opposition of the Applicants was unreasonable. Even if it can be said in their favour that it was appropriate to require the Respondent to file an affidavit for them to consider before deciding whether or not to oppose, upon a reading of the affidavit, and a consideration of the statement of defence, it seems to me that it would have been appropriate for them to have consented to the application for condonation. That would have obviated a need for a full blown debate before court. In the circumstances it is in my view appropriate that the Applicants bear the Respondent's costs. Mr Wesley has contended that the costs should not include the costs of two counsel. I agree.

31 Accordingly I make an order as follows:

31.1 Condonation is granted in respect of the late filing of Respondent's statement of defence.

31.2 The Applicants shall pay the costs of this application, including the costs of one

counsel.

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ROLAND SUTHERLAND
ACTING JUDGE OF THE
LABOUR COURT OF
SOUTH AFRICA
2 July 2002