REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA
SITTING IN JOHANNESBURG

CASE NO **J3492/1999**

In the matter between:

J J HOLTZHAUSEN	Applicant
and	
NKOSINATHI MASEKO N.O.	First Respondent
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	Second Respondent
DURA PILING (PROPRIETARY) LIMITED	Third Respondent

ON BEHALF OF APPLICANT	MR M. A. KRUGER
ON BEHALF OF RESPONDENT	MR M. C. J. VAN RENSBURG

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J U D G M E N T

GERING AJ

[1] This is an application for the review and setting aside of a decision made by the first respondent, a commissioner under the auspices of the CCMA [the second respondent] whereby the applicant's application for condonation was refused.

[2] I shall refer to the first respondent as the commissioner.

[3] There is a paginated bundle which I refer to as "B" and page references in the bundle will be denoted by the capital "B" followed by the relevant page reference.

[4] The commissioner's ruling on condonation appears in B42. On B44 the application for condonation was dismissed.

[5] The commissioner's ruling was not an award and accordingly the relevant provision of the Labour Relations Act 66 of 1995 [the Act] is not section 145 but is section 158(1)(g).

[6] The applicant wrongly states that what took place was a conciliation. See B48, para 2.1, where he states that the first respondent presided in a conciliation hearing. The true position is that this was not a conciliation hearing but was an application for condonation of the late referral to conciliation. Accordingly it was perfectly legitimate for there to be legal representation, which would have been excluded had this been a conciliation.

[7] The applicant was retrenched on 20 March 1998, the dismissal being based on the operational requirements of third respondent [the employer].

[8] In terms of section 191(1) of the Act the employee had thirty days from the date of the dismissal to refer the matter in terms of the Act. Section 191(2) permits the employee to refer the dispute after the thirty day period has expired, provided that the Court grants condonation.

[9] More than one year later, on 8 April 1999, the dispute was referred to the CCMA. [See B42]

[10] It is clear that this was an inordinate delay and the question arises whether, in the exercise at my discretion, the long delay should be condoned. It is not necessary to set out the well-known statements from the *Melane v Santam Insurance Company* Ltd 1962(4) SA 531 at 532 or the more recent Appellate Division case of *United Plant Hire (Pty) Ltd v Hills* 1976(1) SA 717 at 720. Both these are judgments of HOLMES JA, which make it clear that the question is one where the Court has a discretion to be exercised judicially upon a consideration of all the facts. See also *Mziya v PUTCO Ltd* [1999] 2 BLLR 103 (LAC) at 106-7.

[11] In the case of *Saloojee v Minister of Community Development* 1965(2) SA 135(A) the Court stated 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 this

Court."

[12] In *Queenstown Fuel Distributors CC v Labuschagne N.O.* [2000] 21 ILJ 166 at page 174, (see paras.24 and 25 of the judgment), the Labour Court of Appeal stated that:

"Condonation in the case of disputes over individual dismissals will not readily be granted. The excuse for non-compliance would have to be compelling. The case for attacking a defect in the proceedings would have to be cogent and the defect would have to be of a kind which would result in a miscarriage of justice if it were allowed to stand. By adopting a policy of strict scrutiny of condonation applications in individual dismissal cases, I think that the Labour Court would give effect to the intention of the Legislature to swiftly resolve individual dismissal disputes by means of a restricted procedure and to the desirable goal of making a successful contender after the lapse of six weeks feel secure in his award."

[13] That was a case where the six weeks period applied and it was a case where there had already been an award, but *mutatis mutandis* these principles apply to the situation here. The purpose of the Labour Relations Act is to try to ensure the swift resolution of individual dismissal disputes. Here we have

the case of an individual dismissal dispute. It seems to me that I cannot say that the excuse for non-compliance in the present case is "compellng" or that there is a reasonable and acceptable explanation for the delay of more than one year beyond the normal time limit.

[14] In the case of *Allround Tooling (Pty) Ltd v NUMSA* [1998] 8 BLLR 847 at 850 the Labour Appeal Court stated:

"In the absence of an acceptable explanation for non-compliance with the rules of Court, condonation will not be granted."

[15] In the case of *CWIU v Ryan* [2001] 3 BLLR 337 at 340, PILLAY J stated:

"While there are many similarities about the practice of the High Court and the Labour Court, there are some important differences. A significant difference is the acknowledgment by the Legislature that labour disputes must be resolved effectively. That is not to suggest that disputes in the High Court are not resolved effectively. What it means is that there are special considerations that apply to labour disputes that may not apply to other disputes."

And on page 342 she went on to state:

"Of late, proceedings in this court are too frequently prefaced by applications for condonation. Rather than being an exceptional procedure it is fast becoming a standard practice. More often than not fault rests with the representatives and not with litigants personally. This is posing an unnecessary burden on the Labour Court and its diminishing resources. The time has come when such representatives should not be allowed to go unscathed for their own sins."

[16] In the case of *Classiclean (Pty) Ltd v CWIU* [1999] 4 BLLR 291 at 293, the Labour Appeal Court stated that:

"In the recent past this Court has had to deal with a depressing and monotonous number of matters where the failure of practitioners and the parties to adhere to the rules have come to the fore. In my view the rules are drafted in simple, understandable language. They provide procedures to deal simply and inexpensively with problems such as those that arose in this matter. Failure to adhere to them will be viewed with an increasingly jaundiced eye in future."

[17] In the present case it is clear that the applicant for condonation

has a remedy in claiming damages from his original attorney *Mr Levin* who has made an affidavit appearing in the bundle of papers (see B34/35), in which he admits that it is clearly his fault, and I was informed when the matter was argued before me that *litis contestatio* has already been reached in the proceedings brought in the High Court by the applicant against his former attorney.

[18] Furthermore, it is clear from the papers that the applicant became aware on 5 March 1999 that no referral had been made to the CCMA. Nevertheless a further period of more than thirty days lapsed until the application for referral, which was made on 8 April 1999. There is no explanation at all for this further delay.

[19] It is clear also from the papers (see B8 para.29) that the applicant's daughter was an attorney in the firm of Smith Tabata & Company and it would have been a simple matter for the applicant to inquire from his daughter as to what the relevant provisions of the Labour Relations Act were.

[20] On a consideration of the matter it seems to me that there is no

clear indication that there were prospects of success in favour of the applicant.

[21] In my judgment the ruling on condonation in which the application for condonation was dismissed by the second respondent should be confirmed and, accordingly, the application for condonation is refused with costs.

[***Sgd**] GERING AJ
31/7/2002
ACTING JUDGE LABOUR COURT