REPORTABLE
IN THE LABOUR COURT OF SOUTH AFRICA
SITTING IN DURBAN

CASE NO **D119/2001**

In the matter between:

CHEMICAL ENERGY PAPER PRINTING
WOOD AND ALLIED WORKERS UNION First Applicant

BEATRICE MBEWANE AND OTHERS Second Applicant

and

R & B TIMBERS CC
t/a HARDING TREATED TIMBERS
Respondent

JUDGMENT

P

ILLAY D, J

On 19 April 2002 I delivered judgment with brief reasons. Herewith that judgment revised and with full reasons.

[1] This is an application in terms of section 191(11)(a) of the Labour Relations Act 66 of 1995 ("LRA") for condonation for the late delivery of the

Applicants' Statement of Case filed on 1 February 2001.

[2] The Respondent claims that the period of delay in filing the statement is 108 days. The Applicants allege that the delay is about three weeks. The reason for this difference is that the CCMA had originally issued a certificate on 18 July 2000 which incorrectly referred the dispute to arbitration. The Applicants' representatives attempted, over a lengthy period, to obtain a corrected certificate which happened on 3 October 2000. Hence the difference in the periods referred to by each of the parties. The period from the date on which the Commissioner certified the dispute to have been conciliated is the date from which the 90-day period for delivery of the Statement of Case should be calculated. Whichever period is taken into account, it is a lengthy delay having regard to the circumstances discussed hereafter.

[3] The explanation for the delay, as I indicated, was that the Applicants believed that a corrected certificate had to be obtained. The CCMA faxed the corrected certificate to the Applicants on 3 October 2000. That was before the 90 days had expired. The Applicants had about 11 days thereafter to deliver their Statement of Case. For some unexplained reason the Applicants' representative Mr Dlamalala, only received the certificate in the second week of October. Even then he was aware that he had "a few days" left to launch the application. To avoid applying for condonation he attempted to have the date on the certificate changed. He did not succeed.

[4] The requirement of a certificate is not prescribed as a prerequisite for filing the

Statement of Case. There was no need for the Applicants to embark on that expedition. They could have filed their case without the certificate. Even if the Applicants believed the certificate was necessary there is no reason why they could not have had their documents in readiness for filing in the meantime. They had access to attorneys and could have verified the position as to what the requirements were. Furthermore, the first Applicant is an established trade union. It is not the first dispute, and it is certainly not the first dispute of this magnitude to be referred to this Court.

[5] Only on an undisclosed date in November 2000 did the Applicants complete preparation of the Statement of Case. The individual Applicants were resident in a rural area in Harding and access to them was difficult. On an undisclosed date in December Mr Dlamalala received documents and consulted with the Applicants' attorneys. He was unable to give the attorneys a list of the Applicants as the list that he had, had been given to the CCMA. The CCMA was closed for the December holidays and Mr Dlamalala was on leave until 16 January 2001. The attorneys had in the meantime obtained a list of the Applicants.

[6] In all the circumstances the Applicants hold the "administrative and legal inefficiency of the CCMA" principally responsible for the delay. In reply, Mr Dlamalala concedes that his misdirection about the certificate being a prerequisite contributed to the delay.

[7] There is no explanation for the delay from 16 January 2001 to 1 February 2001.

[8] From the aforegoing it is quite clear that the Applicants did not prosecute their claims with any sense of urgency or seriousness whatsoever. By October 2000 they would have been unemployed for about 6 months since 23 May 2000. After the conciliation on 18 July 2001 nothing further was done until an undisclosed date in August when preparations to engage attorneys were made.

[9] In the circumstances the period of delay is excessive and the explanation therefor is unacceptable.

[10] The dispute that was referred to this Court is one for unfair dismissal in terms of section 187(1)(a) of the Labour Relations Act. The Applicants allege that they were dismissed for having participated in a protected strike. Various alternative allegations are pleaded under this principle claim. The Applicants submit that there are good prospects of success.

[11] The Respondent had relied on the allegation that there had not been a proper referral for conciliation to the CCMA prior to the strike in support of its claim that the strike was unprotected.

[12] In reply, the Applicants attached a fax transmission receipt as proof of the referral to the CCMA which, they allege, rendered the strike “protected”. However, it does not assist the Applicants now as the fax transmission receipt ought to have been produced in defence of the interdict application. The interdict application proceeded unopposed.

[13] Section 187(1)(a) provides

> "A *dismissal* is automatically unfair if the employer, in dismissing the *employee*, acts contrary to section 5 or, if the reason for the *dismissal* is that the employee participated in or supported, or indicated an intention to participate in or support, a *strike* or *protest action* that complies with the provisions of Chapter IV;"(my underlining).

A dismissal will be unfair therefore if the strike complies with Chapter IV. The Labour Court has, through the interdict pronounced that the strike was not protected. There had not been compliance with Chapter IV. What the Applicants seek to do if this application for condonation is granted is to re-open that debate again in the Labour Court but in a different context. That does not seem to me to be permissible in terms of our law and practice. The issue has been adjudicated at this level. Only the Labour Appeal Court may revisit the issue. I say so because notwithstanding the fact that the interdict was unopposed, it was a final order in both form and substance. That the matter is *res judicata* is not a point pleaded either in this application or in the Statement of Claim. I may be wrong in this regard and proceed to deal with the status of the strike as an issue affecting the prospects of success at the trial.

[14] The only basis on which the Applicants allege that the strike was protected is that they served the referral on the CCMA. All the Applicants have to prove the referral to the CCMA is a fax transmission sheet. As it was produced in replication, the Respondent did not have an opportunity to respond to it. If the Applicants were convinced of the strength of this leg of their case they would have pleaded it in their founding affidavit. In any event that is the proper way to have raised the issue.

[15] The Respondent attached a confirmatory affidavit from the Senior Case Management Officer, Nzimande, confirming that the dispute had not been referred to the CCMA. In their reply, the Applicants denied that Nzimande could be certain that every dispute received is captured on the CCMA's computer system.

[16] This dispute of fact must be resolved in favour of the Respondent. The Respondent's version is independently corroborated. In the circumstances the prospects of success are weak.

[17] In addition to alleging that they were entitled to engage in industrial action, the Applicants submit that the ultimatums were not properly communicated, if at all, and the First Applicant did not have a meaningful opportunity to address the Respondent on sanction pre or post dismissal.

[18] The Respondent denies that this was a "strike dismissal" in terms of section 187(1)(a). It alleges that the dismissal was for participating in an unprotected industrial action and serous acts of unlawful conduct involving intimidation and harassment and violence. Furthermore, the Applicants failed to comply with ultimatums issued to them and with the interdict granted by the Labour Court on 19 May 2000. The order was served on 22 May 2000 by the Sheriff on the Applicants. This is evident from the returns of service which I allowed to be handed in from the bar as it was in response to material which should have been raised in the founding affidavit and not in reply for the first time.

[19] The Respondent issued an ultimatum (page 66 of the record) for the individual Applicants to return to work by 7h00 on 23 May 2000. At the same time it informed the Applicants that a disciplinary enquiry had found that they had been participating in unprotected industrial action and serious acts of misconduct, that they had failed to abide by previous ultimatums and the interdict, and that shop stewards had failed to provide any mitigating circumstances to show why they should not be dismissed.

[20] The Applicants did not plead specifically to this ultimatum and its contents. They deny that ultimatums were issued, that a final warning was given or communicated to the individual Applicants and that they were served with the interdict before the collective disciplinary hearing. Hence, it is submitted, there was no intentional violation of the Court order. Finally, they deny any unlawful conduct.

[21] The Applicants have not taken the Court into their confidence as to why they allege that the ultimatums were not properly conciliated or why they allege that they were not given a meaningful opportunity to address the Respondent on sanction. They are also vague as to the dates on which various steps were taken to prosecute their claims.

[22] Mr Dlamalala's denials, especially about the communication of the ultimatums and the interdict to the individual Applicants, is also not supported by confirmatory affidavits.

[23] Whether the Applicants were served with the interdict before or after the disciplinary enquiry is also not the question to determine whether there

was a violation of the interdict. The proper enquiry is whether the Applicants persisted with the strike after they became aware of the interdict. They do not tell the Court when they became aware of the interdict or what they did upon being notified of it. The Respondent's version that the strike persisted despite the Applicants being aware of the interdict must be accepted.

[24] The Applicants were therefore in violation of not only the provisions of section 64 but also of a valid order of this Court. The likelihood of a trial judge in the Labour Court condoning such conduct is remote. The Applicants' principle and alternative grounds of unfairness of the grounds of unfairness of the dismissal must also fail.

[25] The most compelling feature of this case which favours the granting of the application is the fact that some 218 Applicants are involved. However if, as a matter of law, this application cannot be granted, then merely because there is a large number of Applicants who may be disadvantaged by the refusal of this application, is not a sufficient basis on its own to grant the application.

[26] The order that I make is as follows:

The application for condonation is dismissed with costs.

PILLAY D, J

DATE OF HEARING:	19th April 2002
DATE OF JUDGMENT:	19th April 2002
DATE OF REVISION:	7th 2002

NTS ADV P SCHUMANN

ON BEHALF OF RESPONDENT	ADV A ANNANDALE