IN THE LABOUR COURT OF SOUTH AFRICA

CASE NO: C422/2000

In the matter between:

Applicant

and

Respondent

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JUDGMENT

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FRANCIS J

Introduction

1. The applicant is seeking condonation for the late filing of his statement of claim which was filed one year and two week's late. The application is unopposed.

Background facts

2. The applicant was employed by the respondent as a systems engineer on 6 October 1997.

3. In and during August 1999, the South African Police Services investigated a complaint against the applicant for alleged theft of information that belonged to a client of the respondent. The applicant was arrested by the South African Police Services.

4. Pursuant to his arrest, the applicant was suspended by the respondent on full pay

during August 1999.

5. On 14 September 1999, the respondent brought disciplinary proceedings against the applicant on charges of abuse of company assets and his alleged involvement of theft of information. The applicant was found not guilty.

6. On 22 December 1999 the applicant was advised by the respondent that his services could be terminated. On 23 December 1999 the applicant was advised in writing by the respondent that further to their telephonic conversation on 22 December 1999, and their subsequent consultations during the months of September and October 1999, regarding the contemplation of making his position redundant, as well as considering alternatives, the letter served to confirm that due to operational requirements it has become necessary to make his position as a systems engineer redundant with effect from 1 January 2000.

7. In December 1999, the applicant referred his dispute to the Commission for Conciliation, Mediation and Arbitration ("the CCMA"). On 4 April 2000 a certificate of an outcome was issued by the CCMA.

8. The applicant approached his attorneys of record shortly after the conciliation meeting for assistance with his labour dispute with the respondent.

9. On 29 May 2000 the applicant was acquitted of the criminal charges.

10. The applicant's statement of claim was filed with this Court on 17 July 2001. An application for condonation was filed with this Court on 22 January 2002.

The law applicable to condonation applications

11. The law relating to condonations is reasonably well settled. The negligence on the part of representatives is a factor that must also be taken into account when determining an application for condonation.

12. The leading case on condonation applications is that of *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 AD. The following was said at page 532 B-E about the factors that will be taken into account when considering a condonation application:

"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 interrelated, they are not individually decisive, 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 may help to compensate prospects 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 interests in finality must not be overlooked."

13. It is clear from the aforementioned case that the Court's power to grant condonation in the ordinary course is a discretionary one and that discretion is not fettered, for the Court will consider all the circumstances of each case. See also *Liquidators Myburgh Krone & Co Ltd v Standard Bank of SA Ltd and Another* 1924 AD at 231. Generally, however, the Court will consider among the facts usually relevant the degree of lateness, the explanation therefore, the prospects of success on the merits, the importance of the case and other considerations. These facts are interrelated. The onus is on the applicant to satisfy the Court that condonation should be granted.

Analysis of the facts and arguments raised

14. The applicant approached his attorneys for assistance sometime in April 2000 which was well within the requisite ninety-day period within which a matter has to be referred to this Court for adjudication. His statement of claim had to be filed with this Court on 3 July 2000. An application for a case number was made on 7 June 2000. The statement of claim was filed with this Court only on 17 July 2001. An application for condonation was filed with this Court on 22 January 2002 which was six months after the statement of claim had been filed.

15. The explanation for the delay was tendered by the applicant's attorney Richard Leslie Brown and certain other deponents. There is no confirmatory affidavit by Garon

Nortje who was an attorney at the applicant's attorneys of record. He was the first person that the applicant had first consulted with. He played a central role in this matter yet no affidavit was obtained from him. No proper reasons were furnished why no such an affidavit was obtained from him except that he was no longer employed by the applicant. I will revert to this in the judgement.

16. Brown stated in his affidavit that the applicant called at their offices after conciliation had failed at the CCMA. The applicant consulted with Nortje at the applicant's attorneys of record's premises. At the end of the consultation, the applicant told Nortje that he could contact attorneys, Christo de Villiers and Herholdt, who had represented him at the criminal proceedings for information relating to the criminal matter and they could meet should they so wish. Nortje told the applicant that he was going to review what the applicant had presented and would inform the applicant whether his case was well worth pursuing. The applicant contacted attorneys de Villiers and Herholdt and told them of his discussions with Nortje.

17. The applicant later received a letter from Brown stating that he was willing to represent him in the labour matter but that the applicant was required to pay a deposit, but as he was unemployed he could arrange to make monthly payments to settle the amount.

18. The applicant was acquitted in the criminal matter on 29 May 2000. Shortly

thereafter he called at his attorneys offices where he met Brown at the reception area. He told Brown that he had been acquitted. He paid the deposit in full. Brown states in his affidavit that he does not recall that the applicant told him this but recalls that they met. He stated further in his affidavit that given the tumultuous upheaval in his personal life at the time even if the applicant told him this he would not have been able to comprehend the detail or importance thereof. His professional work suffered tremendously during the period of upheaval in his personal life.

19. On 7 June 2000 Brown completed and filed an application for a case number. He also completed a draft but incomplete statement of claim. He stated that he could not finalise the statement of claim until he was aware of what had occurred in the criminal case and until he had received the relevant documentation from the applicant's attorneys who had represented him in the criminal proceedings. He was also aware of how protracted criminal proceedings could be, which often were accompanied by lengthy remands. Brown stated that he diarised the file for a period pending the conclusion of the criminal case.

20. Brown stated that the applicant called the firm several times to enquire about the progress made in his matter. One such telephone call was made on 18 July 2000. Brown wrote to the applicant on 28 July 2000 and advised him that he was going to notify him once a date had been obtained from the Court.

21. During November and December 2000 after Brown had failed to advise the applicant of any progress in the matter, the applicant attempted to make contact with Brown telephonically on a number of occasions but could not get Brown. He left several messages for Brown to call him. The applicant also sent Brown an e-mail that was not responded to. Brown stated that he blames his tumultuous divorce and his personal life as a reason for not responding to the applicant. The applicant contacted Brown in December and enquired again about his matter. Brown told the applicant that everything was all right and that he was going to send him a report. Brown enquired from the applicant how the criminal case was proceeding. The applicant told him that he had been acquitted on 29 May 2000.

22. Brown stated that he did not provide the applicant with a progress report on his matter. This prompted the applicant to contact Brown in January 2001. Brown was on leave. On 11 January 2001 Brown wrote to the applicant enquiring about the criminal case. The applicant telephoned Brown and told him that the criminal case had long been finalised. The applicant then enquired whether the documentation had been forwarded by his erstwhile attorneys to him. Brown told him that they had not. Brown did no tell the applicant about his personal problems. He had left the applicant under the impression that everything was in order.

23. Brown stated that the matter slipped through the cracks of his diary system, and therefore did not cross his desk. The situation according to Brown was compounded

by the emotional trauma that he was going through, exacerbated further by the ongoing intense pressure of work - these factors, and the fact that the file had fallen out of his diarisation system, led to the matter escaping from his consciousness and thus to him overlooking it and not following it up during that period.

24. The applicant did not receive the report that Brown had promised him in January 2001. He called Brown in April 2001. He left several messages and eventually got hold of Brown on 24 May 2001. Brown apologised for not returning his calls sooner and advised the applicant that he had passed the case to Nortje who was getting up to date on the matter. A meeting was arranged for the following Tuesday with the applicant and Nortje. Brown stated that he did not contact the applicant to confirm that the meeting would still take place since he did not complete the statement of claim and decided to contact the applicant after he had finalised the statement of claim. Brown requested Nortje to draft a statement of claim. He was unable to do so due to lack of sufficient details concerning *inter alia* the criminal case and instructions pertinent thereto.

25. The applicant sent Brown a letter dated 4 June 2001 in which he requested the case number of the Labour Court case and whether a date of hearing had been allocated and whether Herholdt had given the information to Nortje. The applicant requested that he deal with the matter as a matter of urgency. Brown did not respond to the letter. The applicant directed a further letter dated 25 June 2001 for the attention of

the senior partner, Mr Whittacker and requested that he urgently look into his matter.

26. Brown stated further that the matter revived in his office after the file had slipped through the cracks of his system, after the applicant's call on 24 May 2001. He thereafter retrieved the file from Nortje and reacquainted himself with the facts. Brown had not received the documentation from Herholdt and was then constrained to finalise the statement of claim without the documents. The applicant's statement of claim was then filed on 17 July 2001.

27.

28. Brown stated that the delay between 4 June 2001 to 17 July 2001 can be attributed to the time it took for him to re-familiarise himself with the facts of the matter and to finalise the statement of claim albeit without full information and documentation. As Nortje was closer to the facts than he was, he liaised with him in that regard. Further delays took place as Nortje was in the process of leaving the firm and winding up his practice.

29. Whittacker advised the applicant in a letter dated 9 July 2001, that a Mr MacRobert, who was in charge of their labour department, would oversee the matter henceforth. MacRobert then commenced a process of becoming acquainted with the file and the matter and he kept the applicant apprised of the progress.

30. Brown stated that the application for condonation was filed expeditiously in the light of these facts and circumstances. It was only after the intervention of Mr MacRobert

that it became apparent that he needed to make an application for condonation for the late filing of the statement of claim. He stated that this was a lengthy process.

31. Mr MacRobert who appeared for the applicant, submitted that none of the fault for the late filing of the papers could be laid at the door of the applicant. The applicant he submitted should not be punished for the ills of his attorneys. I agree. The applicant does have a remedy against his attorneys which is for professional negligence.

32. The Court is hesitant to bar a litigant from relief; particularly where it is his attorney who has been at fault: See *Meintjies v H D Combrinck (Edms) Bpk* 1961 (1) SA at 263 H - 264 A; *Saloojee and Another NNO v Minister of Community Development* 1965 (2) SA at 140 H - 141 A. *Reinecke v IGI Ltd* 1974 (2) SA at 92 F - H. There are limits, however, even where the attorney is largely to blame for the delay, beyond which the courts are not prepared to assist the applicant. However, this case is different in that the attorney is entirely to be blamed for the delay.

33. In *Saloojee and Another v Minister of Community Development* (supra at 141C) Steyn CJ said:

> *"I should point out, however, that it has not at any time been held that condonation will not in any circumstances be witheld if the blame lies with his attorney. 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. Considerations ad misericordiam should not be allowed to become an invitation to laxity. In fact this Court has lately been burdened with an undue increasing number of applications for condonation in which the failure to comply with the Rules of this Court was due to neglect on the part of the attorney. The attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a Rule of Court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are."

34. See also *Fibro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein and Others* 1985 (4) SA 773 (A) at 787 G-H, where Hoexter JA referred to the

"oft-repeated judicial warning 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."

35. In *Commissioner for Inland Revenue v Burger* 19565 (4) SA 446 (A) at 449 G Centlivres CJ said:

"Whenever an appellant realizes that he has not complied with a Rule of court he should, without delay, apply for condonation."

36. The catalogue of events reveals gross recklessness, incompetence and dilatoriness by the applicant's legal representatives. It is difficult to see how that constitutes good

cause for condonation with convincing reasons laid down in case law. Nor can it be said that the excuse for non-compliance with the 90-day period is compelling. For certain periods there is no explanation for the delay, for others, there is an explanation but it is not completely convincing. There is no affidavit by Nortje explaining his part in the proceedings. Nortje was not going through a difficult period like Brown and no reasons are given why he did not proceed timeously.

37. Mr MacRobert had emphasised that the prospects of success of the applicant are strong in these proceedings. In the light of my views on the explanation it is not necessary to determine this point. In *Chetty v Law Society, Transvaal,* 1985 (2)SA 756 at 768 B - C, it was pointed out that an unacceptable explanation remains just that, whatever the prospects of success on the merits.

38. Mr MacRobert referred me to a number of cases where this Court has granted condonation. Those cases are clearly distinguishable from the present case.

39. The applicant is not left without a remedy in this matter. He appears to have a cause of action against his attorneys for professional negligence.

40. In the circumstances I make the following order:

41. The application for condonation is dismissed;

42. There is no order as to costs.

FRANCIS J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

PLICANT	:	J M J MACROBERT OF HEROLD GIE AND BROADHEAD INC
SPONDENT	:	NO APPEARANCE
ARING	:	6 JUNE 2002
DGMENT	:	14 JUNE 2002