IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case No. **JS3256/98**

In the matter between:

NATIONAL UNION OF METAL WORKERS OF SA First Applicant

S KHOZA & 9 OTHERS
Second/Further Applicants

and

PIPE SPECIALS CC
Respondent

J U D G M E N T

NTSEBEZA AJ:

1. In its founding affidavit, the deponent representing the First Applicant, David Cartwright, states that the individual Applicants, S Khoza and Nine Others, were retrenched on 23 July 1998. This case therefore is about an alleged dismissal based on operational requirements. The First Applicant declared a dispute and referred the matter for conciliation on 3 July 1998.

A conciliation was conducted, and in a certificate of outcome issued by the CCMA on 27 August 1998, the dispute was recorded as one that remained unresolved as at that date.

2. More than a year later, on 16 September 1999, the dispute was referred to this Court. On 21 September 1999, the Respondent filed its intention to oppose the application and its response to the Applicants' statement of claim. Almost another year went by before the Applicants filed an application for condonation on or about 18 September 2000, an application which was opposed by the Respondent in its answering affidavit filed on 28 September 2000. The Applicants do not seem to have ever filed a replying affidavit. This is therefore an opposed application for condonation of the late referral of the dispute to this Court in which on 18 July 2002, about four years from the date of retrenchment of the individual Applicants, Ms Craven appeared for the Applicants with Ms Anderson opposed the application on behalf of the Respondent. There is no dispute about the fact that this matter has been referred to this Court well beyond the period of 90 days allowed for such referral in terms of section 191(11)(a) of the Labour Relations Act, 66 of 1995 ("the Act").

3. This Court and the Labour Appeal Court have held that an Applicant, in order for condonation to be granted, must show **good cause**. Both Courts

have followed the approach encapsulated in the speech made by Holmes JA in Melanie v Santam Insurance Company Limited 1962 (4) SA 531 (A) at 532C-F, in which the Court held that the facts that the Court usually takes into account in a judicial exercise of its discretion are the degree of lateness, the explanation thereof, the prospects of success, and the importance of the case. Condonation will not be granted if the Applicant has shown wilful or reckless disregard of the requirements of the rules of Court or of a statute. Where an Applicant either does not explain default or does so unsatisfactorily, condonation will not be granted. These Courts have gone so far as to say that in such circumstances, there is not even a need to examine prospects of success. See NUM v Council for Mineral Technology [1999] 3 BLLR 209 (LAC) at para [10]; NUM and Others v Western Holdings Gold Mine (1994) 15 ILJ 610 (LAC) at 613E; NEHAWU v Nyembezi [1999] 5 BLLR 463 (LAC) at 465J-466A; Waverley Blankets Ltd v Ndima and Others, Waverley Blankets Ltd v Sithukuza and Others (1999) 20 ILJ 2564 (LAC), at para [11] and the further authorities cited thereat.

DEGREE OF LATENESS OF REFERRAL

4. Ms Craven did not seek to mislead the Court by endeavouring to argue spurious grounds for contending that the degree of lateness was not

excessive. It is almost a year late when, in terms of section 191(11)(a) the dispute ought to have been referred to this Court before or on 25 November 1998. The application for condonation, as I have stated above, was itself filed more than 12 months after the statement of claim, which therefore makes the application for condonation to have effectively been filed almost two years after the date on which the referral was due. Indeed, Ms Anderson, for the Respondent, argued that even though the matter was postponed *sine die* on 18 June 2001, there is no indication on the Court file that the Applicants requested the Registrar to enrol the matter for hearing. As it is, so argued Ms Anderson, the matter was enrolled for hearing at the instance of the Respondent. Her submission, in this regard, was that since the matter was postponed on 18 June 2001, a further 12 to 13 months have gone by without the Applicants doing anything positive to have the matter heard. As indeed Ms Anderson argued, it is now almost four years since the date of the alleged unfair retrenchment of the employees, and that in itself is an excessively long period to resolve a dispute when it is clear, on the authorities, that in disputes that arise within the framework of labour relations, there is a need for an expeditious resolution thereof. See Queenstown Fuel Distributors CC v Labuschagne N.O. & Other [2000] 1 BLLR 45 (LAC) at para [25].

5. Indeed, this Court in Ntshangane v Speciality Metals CC (1998) 7 LC

1.11.2 BLLR [4], stated that **"… one of the purposes of the Act is the effective dispute resolution of labour disputes. An important facet of this object is finality."** (per Mlambo J)

APPLICANTS' EXPLANATION FOR LATENESS

6. The Applicants' explanation consists of an unsubstantiated claim that after making an application for a case number, no response was forthcoming from the Registrar of this Court which therefore made it impossible for them to refer the matter. The Applicants have provided no proof of their application in the prescribed manner for a case number as contemplated in Rule 3 of the Rules of this Court. In the affidavit filed by David Cartwright, the Unions legal officer, reference is made to one Mrs Jennifer Joni who allegedly applied for the case number in question. No affidavit has been filed by Mrs Joni, neither are there any copies of the letters which Mrs Joni alleged sent to the Registrar requesting a case number and to which she received no response.

7. No explanation is given in Mr Cartwright's affidavit as to what the attempts were that were allegedly made and there is no specific reference to dates on which attempts were allegedly made to obtain the case number from 29 October 1998. In fact, as I indicated above, in argument before me, Ms

Craven took the honourable option of not following the explanation given by Mr Cartwright in his affidavit, such as it was. She conceded that the explanation by the Applicants clearly showed that they were negligent but she contended that there was no wilful negligence on their part. She then went on to implore me to take into account that the Labour Court is a Court of fairness and equity, and that in my endeavour to strike a balance in considering which of the two parties before me would be more prejudiced than the other were the application for condonation to fail, I should come to the conclusion that the balance favours the Applicants and on that account alone I should grant the application for condonation.

8. She passionately made the point that it is important for me to consider that the opportunity for her clients to state their case should not be jeopardised by a procedural step that was unfortunately, if inexplicably, not correctly taken by the Applicants. Indeed, she argued, the Applicants themselves were let down by their representatives

9. If it was by pleas alone, and by passion particularly, that I should be persuaded to decide this issue, I have no doubt that Ms Craven did the best that she could on behalf of her clients. I do not think anybody could have ably represented them to the extent that she did. Unfortunately, I have to give regard to the tests and the approaches of this and the other

Courts when considering an issue such as the present one. Firstly, where there has been no explanation, let alone a reasonable explanation, the authorities referred to hereinabove seem to be clear that no condonation can be granted. Secondly, the Court above has stated that there is a limit to the extent to which the party can rely on the conduct of his or her representatives for failure to comply with the Rules of this Court. See Allround Tooling (Pty) Ltd v NUMSA (1998) 7 BLLR 932 (LAC) at [10]. Indeed, in the Waverley Blankets case, *supra*, the Labour Appeal Court confirmed that gross negligence by a party's attorney/representative cannot be condoned, even when the clients themselves are blameless. I am not even persuaded that in this case the clients themselves are blameless.

10. Not only has there been no explanation as to why it took a year for the condonation application to be filed, there is no replying affidavit on the basis of which I could assess whether there are prospects of success in the main action. As things stand, I can only proceed on the basis of the answering affidavit by the Respondent in which there is very strong resistance to this matter proceeding, it being the Respondent's case that it will be a fruitless exercise precisely because, in its considered view, there are no prospects of success in the action in which, amongst other points made by the Respondent, two shop stewards of the First Applicant had

proceeded to enter into negotiations and consultations with the Respondent because they had become disillusioned with the representation that they were receiving from the First Applicant. This statement, standing uncontradicted, because no affidavit in reply has been filed, already creates a problem for any argument by the Applicants that they have good prospects of success, even if I were to be persuaded that the authorities are wrong that say where no reasonable explanation or none at all is given, it is not even necessary to consider whether or not there are prospects of success. In any event, I am not persuaded that the authorities are wrong.

11. I therefore conclude that the Respondent is entitled to finality and should not be prejudiced as a result of the delay by the Applicants. I also conclude that the objective of a speedy and effective resolution of labour related matters in terms of the Labour Relations Act will be frustrated and compromised if Applicants are allowed the luxury of doing nothing about their matter for a period of almost four years, and almost as a whim, and only in response to the Respondent taking the initiative to set the matter down for hearing, insist that they are entitled to the relief that the present Applicants seek. Whilst this Court is particularly keen, in the interests of justice and fairness, to see that there is fair play, especially with regard to employees who generally are engaged, in my view, in an unequal struggle

with employers, a situation, however, cannot be tolerated where parties, almost with impunity, and almost as an entitlement, appear to wilfully disregard the Rules of this Court, a Court that was primarily set up to be of assistance to many workers who are always at the receiving end of unscrupulous employers. It would not be justice if, for the reason alone that these employees would not have an opportunity to state their case, that they can hope to do so even in circumstances where they disregard the Rules that should get them to the stage where they can have their day in Court. There would be chaos, not only in society, but also in the manner in which these Courts, already sagging under the heavy load of labour disputes, have to dispense with justice and fairness.

12. I am satisfied that the Applicants have not shown a good cause for condonation to be granted and the application is accordingly dismissed with costs.

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D B NTSEBEZA

ACTING JUDGE OF THE
LABOUR COURT

Date of hearing: **18 July 2002**

Date of Judgment: **5 August 2002**

For the Applicants: **MS CRAVEN**

National Legal Officer

NUMSA

For Respondent: **MS ANDERSON**

Instructed by **STEMMETT & COETSEE INC.**