IN THE LABOUR COURT OF SOUTH BAFRICA REPORTBALE
HELD AT JOHANNESBURG

CASE NO: JR125/01

In the matter between:

ATHOL ALISTAIR JAYES	**Applicant**
and	
SIPHO RADEBE	**First respondent**
COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION	**Second Respondent**
THE STANDARD BANK OF SOUTH AFRICA LIMITED	**Third Respondent**

JUDGMENT

MASERUMULE AJ:

1. The Applicant seeks an order reviewing and setting aside a ruling made by the first respondent in terms of which he refused to condone the late referral to conciliation of a dispute involving the alleged unfair dismissal of the applicant. The referral to the CCMA was 947 days late, although in the first respondent's ruling, it is simply sated that the referral is more than 850 days late. The difference is not material, it being common cause between the applicant and the third respondent that the period of delay is long.

2. The applicant's employment terminated on 16 January 1998. It is in dispute whether the termination amounts to a dismissal or was by consent. It appears from the applicant's condonation application that he claims constructive dismissal.

3. The applicant referred an alleged unfair dismissal dispute to the CCMA on 16 October 2000 and applied for condonation for the late referral of the dispute. This application was supported by a fairly lengthy affidavit and annexures. The third

respondent did not file an answering affidavit within the period prescribed by the CCMA rules.

4. On 8 December 2000, the first respondent made a ruling dismissing applicant's application for condonation. The ruling consists of five paragraphs, the material portion of which reads as follows:

"*I have applied my mind to all the issues raised by the Applicant in its (sic) support for the application.*

S191(2) of the Act, requires the Applicant to show good cause for its application to be successful. In addition the purpose of the Act is to have disputes resolved as expeditiously as possible. Having applied my mind to all the issues raised by the Applicant and (sic) I am not persuade that the Applicant has shown good cause for his application to succeed. As a consequence the application stands to fail."

5. The material facts that can be gleaned from the affidavit submitted by the Applicant in support of his application for condonation can be summarized as follows:

5.1 he had been in the employ of the first respondent for some thirty five years at the time that his employment contract terminated, just as his father had been employed by the first respondent for some forty seven years;

5.2 he served as the managing director of the Stanbic Bank Zimbabwe for the period 1995 until September 1997;

5.3 on his return to South Africa, the third respondent offered him the position of Divisional general Manger, Homeloans Division, which required that he should stay in Johannesburg and work out of the third respondent's head office;

5.4 he was reluctant to move from Cape Town, where his wife and children were, because his wife was not keen to move. He informed the third respondent of this fact;

5.5 the third respondent wanted the applicant to move to Johannesburg with is wife to commence his new duties in January 1998 and the applicant kept raising the fact that his wife could not move with him at the same time;

5.6 numerous correspondence passed between the applicant and the third respondent regarding his move to Johannesburg, and centered on third respondents apparent insistence that the applicant should move with his wife and the applicant's indication that this was not possible;

5.7 eventually and in a letter dated 16 January 1998, the third respondent wrote a letter to applicant in which it was stated, inter alia, that

"*..we regrettably have come to the point where unless you are able to meet the Group's requirements for executive performance based at our head offices in Johannesburg, there is no alternative but for you to leave the Group. You indicated an acceptance that we have unfortunately reached this point and I accordingly, with regret, set out the terms of your termination of service, which has immediate effect, as follows:.*"

5.8 The applicant took up employment with BOE as Regional Manager, Cape, on 28 April 1998, where he remained until June 2000 when he left;

6. The applicant offered different explanations for the delay in referring his alleged unfair dismissal dispute to the CCMA for conciliation. The different reasons offered are as follows:

6.1 he was in deep depression as a result of his sojourn in Zimbabwe and the humiliating manner in which he left the service of the third respondent. The applicant had attached a report by a clinical psychologist to his affidavit to support his assertions;

6.2 he was unaware that he could refer a dispute to the CCMA and was consequently not aware of the thirty day time-limit, in part because the CCMA came into existence whist he was in Zimbabwe;

6.3 he consulted with an attorney, Piet Faber, in June 1998 and was informed about the need to complete referral forms. He was also advised that the process would be highly traumatic and stressful and he felt that he would not be able to cope with it;

6.4 he accepted and acted on a suggestion from Piet Faber to seek a meeting with Dr Strauss, the non-executive chairman of the third respondent, to discuss the termination of his employment with him. He subsequently met with Dr Strauss around June 1998 and later received a note form the latter that he could not assist him(the date of the note is not stated nor is the note attached to the affidavit);

6.5 Piet Faber had advised him that is case was a "50/50" one, that he would get one year's salary at most if he pursued it, which he felt was not sufficient to justify going through trauma associated with such litigation;

6.6 He was reluctant to go to court against the third respondent as he hoped that there could be a reconciliation and he could resume employment with the third respondent;

6.7 He consulted with Neil Van Zyl, a labour consultant, "during 1999" who advised him to propose independent mediation to the third respondent. He acted on this advice and sent a letter to the third respondent with such a proposal but never received a reply;

6.8 He communicated with Van Zyl in June 1998 and the latter said he would "apply for condonation and speak to an advocate.' The applicant states that he never heard from Van Zyl again, although he himself does not allege that he made any attempts to get hold of Van Zyl;

6.9 His wife met with a representative of the third respondent on 10 August 2000 and discussed applicant's position, but nothing came of it;

6.10 His wife phoned Andrew Levy and Associates on 11 September 2000 and gave them instructions to pursue the matter. The applicant does not say whether anything was done and if not, what the problem might have been.

7. The above explanation is what was before the first respondent when he considered applicant's application and made his ruling. The question is whether the ruling is irrational or not justifiable, having regard to these facts, see *Shoprite Checkers (Pty) Ltd v Ramdaw NO & Others* (2001) 21 ILJ 1603 (LAC).

8. *Mr Landman*, appearing on behalf of the applicant, submitted that apart from emphasizing the fact that the referral was some 850 days late, the first respondent failed to provide any other reasons for concluding that the applicant failed to show good cause for the late referral. The failure to provide other reasons, so submitted *Mr Landman*, gives rise to an inference that the first respondent did not apply his mind to the facts. He further submitted that first respondent's failure to give reasons for rejecting applicant's explanation and the absence of any comment on the prospects of success, indicate that the first respondent did not understand how to exercise his discretion properly. I pause here to mention that the review application was served on the first and second respondents. The second respondent filed a notice in which it is stated that the "*First Respondent stands by the reasons for his decision as furnished in Condonation Ruling GA118185…and has nothing further to add thereto."*

9. *Mr Landman* further submitted that the first respondent failed to take into account applicant's prospects of success, which he submits are good. In this respect, he submitted that third respondent's insistence that applicant's wife should immediately relocate to Johannesburg with him was not only unreasonable, but also discriminatory. This demand, so he submitted, made continued employment for applicant intolerable and constitutes an unfair dismissal. Had the first respondent applied his mind to applicant's prospects of success, was the further

submission, he would have condoned the late referral, particularly because in the absence of an opposing affidavit from the third respondent, it could not be said that third respondent would suffer any prejudice.

10. *Mr Redding*, appearing on behalf of the third respondent, submitted that not only is the first respondent's ruling a rational one, but also correct. He submitted that the facts before the first respondent indicated that the delay was inordinately long, the explanation was woeful, and based on applicant's alleged depression, in fact bordered on the dishonest, given that the applicant had in fact consulted an attorney in June 1998 and was employed in a senior position from April 1998 until June 2000. As regards prospects of success, Mr Redding submitted that the termination of applicant's employment was consensual and that the prospects of success are thus very slim. Mr Redding submitted that given the long delay, an inadequate and unacceptable explanation, coupled with weak prospects of success, justified first respondent's refusal to condone the late referral of applicant's dispute to the CCMA.

11. I intend adopting the approach of Seady AJ in Moolman Brothers v Gaylard NO & Others (1998) 19 ILJ 150 (LC). Her remarks at 156A-D are apposite:

"*This is not an appeal from the decision of the commissioner. It is an application to review and set aside her decision on the grounds that grossly unreasonable or seriously irregular. I doubt that this court, on the facts before the first respondent would have granted condonation. However, this does not make first respondent's decision reviewable."*

12. Admittedly, first respondent's reasons are to say the least, cursory. He simply states that he applied his mind to all the issues raised by the applicant, without specifying them. Neither does he make any specific reference to the factors set out in *Melane v Santam Insurance Company Limited* 1962 (4) SA 531 (A), perhaps save for the period of delay. Having decided not to add anything to the reasons that he had already given, it is fair to infer therefrom that the first respondent has no other reasons to offer for his decision.

13. Accepting the submission made on behalf of the applicant that first respondent put too much emphasis, if not the only emphasis, on the period of delay, does such an approach justify an interference with his decision, bearing in mind that he was exercising a discretion? I do not believe so.

14. There is no doubt that the period of delay is excessive. A delay of more than two and a half years is excessive, or as Seady AJ prefers to call it, egregious, particularly having regard to the fact that the referral was required to have been made within thirty days. As the first respondent correctly pointed out in his ruling, the Labour Relations Act requires that disputes be expeditiously resolved. A delay

such as the one here does nothing to achieve that objective.

15. There is yet another consideration that militates against interference with first respondent's ruling, and that relates to the explanations tendered by the applicant for the delay. Whilst the first respondent does not directly refer to these explanations, he does state that he considered all the issues. One of the issues dealt with at length by the applicant is why he did not refer the dispute within the prescribed period. In this regard, I agree with Mr Redding's submission that the explanations offered are woeful. I would go as far as to say that they are also contradictory and inconsistent. The applicant relies heavily on the fact that he was depressed as a result of what he considered to have been unfair treatment by the third respondent. It is not difficult to sympathise with the applicant in this regard, having regard to his long and apparently exemplary service with the third respondent. What is difficult to understand is how the applicant could be so depressed as to be unable to refer his dispute for conciliation, and yet simultaneously be able to occupy such a senior position as a Regional Manager of a financial services company for two years, obtain advice from an attorney regarding his dispute with the third respondent and act on such advise. I refer in this regard to hi meeting with Dr Strauss.

16. It is clear from applicant's own affidavit that one of the reasons that he decided against pursuing the dispute was because of what he considered to be insufficient compensation that he could get, which is inconsistent with the heavy emphasis that he has placed on his depression as the explanation for the delay. It also appears that the applicant, out of some sense of loyalty, (it is open to question whether same was misguided), did not want to litigate against the third respondent and chose to rather explore the possibilities of an amicable solution, which is confirmed by his meeting with Dr Strauss in June 1998, the letter that he sent the third respondent proposing independent mediation and the meeting between his wife and a representative of the third respondent on 10 August 2000.

17. There are also unexplained periods of delay, such as the year 1999. In his affidavit, the applicant refers to being advised b Van Zyl to refer an unfair discrimination dispute to the CCMA (which does not appear to have been done as the third respondent is unaware of such a referral) and to propose independent mediation. The latter proposal is contained in a letter dated 14 January 2000, suggesting that it was made in late 1999. For the whole of 1999, there is no other indication of what the applicant did to pursue the matter.

18. In the light of the inadequate and in my view, unacceptable contradictory and inconsistent explanations offered by the applicant, I cannot find that first respondent's ruling is irrational, having regard to his statement, terse as it is , that

he applied his mind to all the issues raised by the applicant. First respondent's ruling is fully justified, having regard to all the facts that were before him. This is a case where the long period of delay, coupled with an unacceptable explanation far outweighed whatever prospects of success the applicant may have, *cf NUM v Council for Mineral Technology* [1999] 3 BLLR 209 (LAC) at 211G-I.

19. It needs to be said that in any event, applicant's prospects of success cannot be said to be so strong as to outweigh the long deal and weak explanation. The applicant relies on alleged constructive dismissal. There is an indication from the letter of termination quoted above that there may well have been consensual termination. It cannot, in the circumstances, be said that applicant's prospects are more than average.

20. This is a case where even if the court were to consider applicant's application for condonation afresh, based on the same set of facts that were before the first respondent when he made his ruling, the outcome would not be any different. In the circumstances, applicant's review application must fail. Both parties sought costs if successful and in any event, there is no reason why costs should not follow the result, having regard to the requirements of the law and fairness.

21. The application for review is accordingly dismissed and applicant is ordered to pay third respondent's costs.

On behalf of the Applicant: Adv A Landman, instructed by Joubert Attorneys

On behalf of Third Respondent: Adv A Redding, instructed by Deneys Reitz Inc.

Date of hearing: 2 August 2002

Date of judgment: 7 August 2002.

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MASERUMULE AJ