REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT DURBAN

CASE NO: **D 967/02**

In the matter between:

ROSHNI LUTCHMAN Applicant

and

PEP STORES First Respondent
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION (COMMISSIONER MR BLOSE) Second Respondent

JUDGMENT

NTSEBEZA, AJ:

INTRODUCTION

- In their seminal work, ***South African Labour Law*** (Juta 2002, AA 1-4), Thomson and Benjamin make the point that pride of place in the post 1995 order goes to the Commission (CCMA), whose primary role, they argue, is conciliation. Its ability to intervene at an early stage in the dispute resolution process is what gives it its ability to have been able, as the learned authors submit, to have achieved, by 1999, since November 1997, a settlement rate of arguably 70% of mostly unfair dismissal cases in conciliation, a record for which the CCMA (Second Respondent herein) can be proud of.

- This case nearly was one of those cases which on the 8th November 2001, had the

potential of being added to that proud statistic of cases that are resolved, at conciliation stage, because the parties have utilised the process to their mutual benefit.

It was not to be.

By the end of that day, the Applicant, Roshni Lutchman ("Roshni") had ostensibly signed a settlement agreement with the First Respondent ("Pep Stores") in which both purported to agree that she had not been unfairly dismissed. A Certificate of Outcome of the same date was issued, pretty much to the same effect. Everything had the appearance of final resolution – except that a week later, Roshni went to see M K James & Associates.

- M K James & Associates are imprecisely defined in the papers. Their filed documents reveal them merely as "Applicants Representatives". The letterhead on which they wrote a letter to the CCMA on 16 November 2001 (about which later) reveals that they are "Industrial Relations Practitioners". It appears Mr Michael Kenneth James **is** Messrs M K James & Associates. At any rate, on 16 November 2001, M K James & Associates dispatched a letter to the CCMA in which he, principally, requested the CCMA to investigate allegations that suggested that Roshni had been subjected to undue influence and pressure (on the 8th November 2001 by the CCMA's Commissioner, Mr Michael Blose), into signing the settlement agreement.

- On the 27th November 2001, the CCMA responded to the letter from M K James & Associates, stating that the allegations by Roshni did not correspond with Blose's version of events of the 8th November 2001, his version being that the settlement agreement "*was signed by both parties*" and that "*the matter has been resolved*", with a Certificate of Outcome to that effect having been issued. The CCMA advised that if Roshni was not happy with the result, her remedy lay "*in an application to*

the Labour Court to have the settlement agreement and the certificate set aside".

It took M K James & Associates some eight months to do so.

BACKGROUND

- Roshni Pillay was employed by Pep Stores at Pep Stores' Hulletts Street branch in Stanger. At the time of her dismissal, she had been with Pep stores for 11 years. She was dismissed on the 21st September 20001, and her appeal to the Regional Manager in Jacobs was denied on the 27th September 2001, with Pep Stores Regional Manager, Roy Jenkinson, advising her that she had the right to approach the CCMA within 30 days of her dismissal – which she apparently did.

- The offence with which Roshni was charged in terms of the Pep Stores Disciplinary Code, which she was accused of having violated, was gross negligence, which is a dismissal offence. She is alleged to have broken a serious procedure regarding banking insofar as she failed "*to bank the cash takings on 11 and 12 September 2002*" which led to the money being taken in an armed robbery at her workplace, occasioning a loss to Pep Stores in an amount of R4 995,04.

- At the disciplinary hearing, she pleaded guilty, and was found guilty on her plea. The management at Pep Stores also took the attitude that she had not been entirely honest "*during the procedures*" by "*your own admission*". Because the company had incurred financial loss due to her gross negligence, she was dismissed.

- As already stated, Roshni approached the CCMA and her matter was scheduled for conciliation on the 8th November 2001. In her application to me, she wants me to

set aside the settlement agreement that she signed on that day and the Certificate of Outcome of that date. She wants me to also impose costs on any Respondent who opposes the application.

❁ One of the curious facts of this application – and I do not seek to cast aspersions on M K James & Associates – is that despite a fairly comprehensive affidavit in answer to the Applicant's founding affidavit, and an affidavit in explanation by Michael Blose, the Commissioner, all of which emphatically dispute most of the allegations made in the founding affidavit, Roshni has not filed a replying affidavit. Further, in one allegation, Roshni seeks to submit that her dismissal was unfair because of a "*historical inconsistency on the part of the employer*". She alleges that one Patricia Zulu, who had also failed to bank the daily takings, was never disciplined for that. Despite this hearsay allegation, Roshni did not file a confirmatory affidavit from Patricia Zulu even as she was claiming, under oath, that she was doing so on the 4th June 2002, when she deposed to her founding affidavit.

❁ Pep Stores, through its Regional Manager, Gavin Stone, replied to this, firstly, denying, correctly, that any confirmatory affidavit had been filed evenly with Roshni's, and secondly, stating firmly that in fact action **was** taken against Patricia Zulu who had "*also been dismissed for gross negligence in failing to bank the cash takings, as required in terms of the first respondent's rules and regulations*". Despite this, no replying affidavit was filed. There was a lame and belated endeavour, two days before I heard argument, to file a "confirmatory affidavit" which, floating around in the file and un-indexed and un-paginated, and which the Respondents barely had had notice of, could not seriously be taken into account. It in fact was an irregular proceeding. In any event, it was **not** a replying affidavit to Gavin Stone's comprehensive affidavit.

❁ Even if I were inclined to have had regard to Patricia Zulu's affidavit, the

Applicant's failure to comprehensively deal in a replying affidavit with disputes of fact raised by the Respondents seriously undermines its case which cannot be saved by Zulu's affidavit who merely denies having been dismissed for failing to bank on a daily basis. That does not assist Roshni! The rule in ***Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*** 1984(3) SA 623 (A) is compelling to me, and I am constrained to state that in a case like the present, ***a fortiori***, will I base my decision on those facts averred by the Applicant, which are admitted by the Respondent, together with those facts that are averred by the Respondent.

❁I mention this because I was rather alarmed by the fervour with which Mr Rorick argued the Applicant's case, such as it is, on various bases (dealt with hereafter), including the so-called Pep Store's historical inconsistency. Indeed, my own sense is that this Court has been overburdened by a hopelessly merit-less case, litigated in a woefully incompetent and almost vexatious manner by M K James & Associates, with scant regard to the Rules of this Court, and the law generally. The arguments on misrepresentation, undue influence, and mistake, are as unconvincing as they are annoying, and actually border on contempt. They clearly are an insult to any adult of average intelligence. Let us examine them.

POINT *IN LIMINE*

❁As indicated above, this review application was brought eight (8) months after the conciliation date. Mr Rorick argued, in his heads of argument, that this application is not one of those that have to be brought "*in a reasonable time or within a prescribed time limit*".

Incredible.

He even referred me to ***Macyusuf v Northwest Communication Services*** (1999) 20 ILJ

1061 (LC). He did not say exactly where this case is authority for his breathtaking submission. He further argued that if at all, the only limitation upon bringing an application such as the present one would be rules and the law of prescription. He further argued that in any event, the onus was on the Respondent to establish what a reasonable period is. According to him, Pep Stores has failed to do so. He referred me to ***Pillay v Krishna*** 1946 AD 946 at 952 and to ***South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd*** 1977 (3) SA 534 (A) at 548.

- I find this sort of reference to case law totally unhelpful, particularly when neither in the heads nor in argument, there is any development of the argument in a way that shows the nexus between the argument and the authority relied upon. For example, I have, with respect, been unable to find anywhere in the ***Macyusuf*** (**supra**) case anything that appears to be remotely resembling a conclusion by Grogan AJ that deals with either condonation or a basis for the proposition that this application would "*not [be] that of a review application or a rescission of a judgment where such applications have to be brought in (sic!) a reasonable time or within a prescribed time limit*". The ***Macyusuf*** case seems to have decided, in the main, the question of powers of the Commissioner at conciliation proceedings.

- Grogan AJ held that at such proceedings, a Commissioner can assist in drafting settlement agreements when once parties have reached an agreement, and is obliged to issue a Certificate in terms of Section 135(5) of the Labour Relations Act, 66 of 1995 ("LRA"); that the Commissioner is not required to pass judgment on the legality of the agreement or the desirability of the terms; that when once he has issued a certificate, the Commissioner becomes ***functus officio***. I do not see in the judgment anywhere where Grogan AJ had to deal with whether or not an application such as the present one had to be brought within a reasonable period or not. It seems to me trite, in any event, that there can be no credible and fair procedural system where applications for review can be brought at any time, however

unreasonable a period of delay.

❁In her affidavit Roshni tells me that at the conciliation proceedings, she did not read the paper that was put before her, nor was she informed of the content thereof. She was not given an opportunity to read it, nor were the contents thereof read to her. It was only after she reached her home that her son read the contents of the document to her. It was only then that it became apparent that she had signed a settlement agreement.

❁One has to be extremely gullible to believe this, particularly when her subsequent conduct is taken into account. For one, it is unbelievable that a person who had been with Pep Stores for 11 years, rising to the level of Manager, could have been so pressured to sign a "*piece of paper*" that she only discovers what it actually is at her home when her son tells her what she has signed. (the son did not file a confirmatory affidavit, nor is it clear whether he is of age). Secondly, she only goes to M K James & Associates eight (8) days later to complain about a remarkable incident like this, and then it takes them eight (8) months to bring this review application. No explanation is given for the delay at all. I find this unreasonable. In the absence of an explanation, let alone a reasonable one, and in the absence of a condonation application, I find myself in respectful agreement with Mr Alexander, for Pep Stores, that on this ground alone, this application ought to be dismissed.

❁The application, being one brought in terms of Section 158(1)(g) insofar as it seeks to set aside the agreement and the Certificate – "*performance of a function provided for in this Act*" - ought to be brought within a reasonable time. Where it has not been brought within a reasonable time, an application for condonation ought to be filed alongside the application. Without a condonation application, the application cannot stand.

[See: ***Mavundla and Others v Vulpine Investments Limited t/a Keg and Thistle and Others*** (2000) 21 ILJ 2280 (LC); ***CWIU and Another v Ryan and Others*** (2001) 4 BLLR 337 (LC); ***Fidelity Guards Holdings (Pty) Limited v Epstein N.O. and Others*** (2000) 21 ILJ 2382 (LAC).]

In the circumstances, the Respondent's point ***in limine*** is upheld and the application is dismissed on the ground that it was not brought within a reasonable time in the circumstances of this case.

MERITS

- Even if I am wrong, the application should be dismissed in any event on its own showing. On the allegation of undue influence, allegedly, by both Blose and Stone, both, under oath have denied it. Their affidavits are not mutually exclusive and are in fact corroboratory of each other. Both deny undue influence was exerted over Roshni, nor do I believe there was any. Although Blose seems to have participated in the process over which he was presiding, and that there was "*much discussion and advice,*" I am satisfied that these discussions fell within the ***dictum*** of Grogan AJ in the ***Macyusuf*** case.

- I am satisfied that Blose did no more than facilitate the reaching of an agreement by Roshni and Pep Stores. I have no evidence that Blose showed any partiality in the way he presided over the conciliation proceedings. I accept his explanation that at no stage was Roshni under pressure to sign the agreement and that after discussion, "*both parties proceeded to jointly sign a settlement agreement that confirmed their view that there was no evidence of unfair dismissal*."

- Given that it is not in dispute that in the disciplinary hearing, as well as in the appeal, Roshni had pleaded guilty to gross negligence, and that gross negligence

was sanctionable by dismissal, it becomes difficult for me to appreciate the merit of the claims by Roshni that there was undue influence exerted over her at the conciliation proceedings, or that there was misrepresentation, the latter arguments making no sense as not to merit any analysis.

❁I feel equally disinclined to deal with the non-persuasive submission that Stone ought reasonably to have known that Roshni was making a mistake in entering into the settlement agreement. Throughout, Roshni acknowledged her guilt. She was not making a mistake. To her knowledge, at Pep Stores, gross negligence was a dismissible offence. Her very predecessor, Patricia Zulu, had suffered that fate.

❁There could never have been a mistake, on her part, throughout, that she would be, as indeed she was, dismissed. Whether dismissal should have been, or was automatic is something else. It is something else, too, whether the disciplinary hearing – or even the appeal – should not have imposed a far more lenient sanction, given her record in the company.

❁That, however, is not what this application is about, nor do I think I would be appropriate for me to pronounce on the severity or otherwise of the sanction. The one thing I can say with conviction is that Roshni has not persuaded me that there was a mistake on her part when she signed the agreement she now wants me to set aside. Unfortunately, I cannot come to her assistance.

COSTS

❁I have expressed very strong views about whether this Court’s time should have been wasted by it having to entertain what I respectfully consider to have been a frivolous and vexatious application. Courts usually express their displeasure by imposing an appropriate order as to costs – an attorney and client costs order. I am

strongly inclined to show my displeasure by making such an order of costs against Roshni. Having said that, however, it seems to me she was not properly advised. It would be inequitable, I think, for me to visit what may well be the indiscretions of her advisors, on a litigant who was unemployed at the time of the launching of this application.

❁At the same time, it is unfair to the successful party if it cannot recover its costs from vexatious litigants. Employers cannot be expected to endure enormous costs, defending litigation that ought not to have been brought in the first place. A line needs to be drawn somewhere, unfortunately.

❁In the circumstances, reluctant though I am because of Roshni's socio-economic circumstances as I perceive them, I order as follows:

27.1 The application is dismissed;

27.2 The Applicant is ordered to contribute 25% towards the Respondent's costs.

D B NTSEBEZA

Acting Judge of the Labour Court of South Africa

Date of Hearing: **11 FEBRUARY 2003**

Date of Judgment: **10 FEBRUARY 2004**

For the Applicant: **Mr D S Rorick**

Instructed by: **M K James & Associates**

For the First Respondent: **Mr M Alexander**

Of: **Denys Reitz Attorneys**