IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case No: JS 987/05

In the matter between:

NATIONAL UNION OF METAL WORKERS
OF SOUTH AFRICA First applicant
I MORENG & 12 OTHERS 2nd to 14th applicants

and

SA TRUCK BODIES (PTY) LTD Respondent

JUDGMENT

RAMPAI AJ

[1] The matter came to this court by way of an ordinary application. The applicants applied to have the late referral of the dispute to this court condoned. Their condonation application was opposed by the respondent.

[2] The second applicant plus were dismissed by the respondent on 01 June 2005 for allegedly participating in an unprotected strike action. They contended that their dismissals were unfair. On 30 November 2005 they referred the dispute to the labour court.

[3] The respondent's deponent alleged that the second applicants plus embarked on an unprotected strike action on 16 May 2005. They were all charged. The workplace disciplinary hearing was chaired by Fourie. The employees were represented by Hlalele. The hearing of the thirteen cases was scheduled for 20 May 2005. But it was postponed on two occasions for further hearing.

[4] On 31 May 2005 all thirteen employees involved were found guilty of participating in an unprotected strike action. The mitigating factors were then placed before the chair in the workplace disciplinary forum. Having heard the evidence the chair postponed the case to consider the appropriate sanction.

[5] On 01 June 2005 the hearing resumed. All the thirteen employees were dismissed. The employees contend that the dismissal was unfair. The employer contends it was not.

[6] The first applicant acting on behalf of its affected members invoked the dispute settlement machinery created by the labour relations legislations. On 7 June 2005 the employees aided by their union referred the dispute for conciliation under the auspices of the bargaining council.

[7] The conciliation proceedings were held on 15 July 2007. Conciliator S Motloung chaired the proceedings. The union representative JT Hlalele represented the employees. Attorney

Dorkin represented the employer. The dispute remained unresolved. The conciliator then issued the requisite certificate in terms of section 135. In terms of the certificate of outcome the parties were directed to pursue the dispute through the arbitration process.

[8] Before the bargaining council could arbitrate the dispute, the employer addressed a letter to the dispute resolution centre on 20 July 2005 notifying the bargaining council of its intention to object to its competence to arbitrate the dispute. The grounds of the objection was that the bargaining council did not have jurisdiction to arbitrate the dispute since the multiple dismissals complained of stemmed from the employees participation in an unprotected strike. Vide section 191(5)(b)(iii) which confers exclusive jurisdiction on the labour court in respect of illegal strikes

[9] On 22 July 2005 the respondent delivered a formal notice of its objection in terms of section 191 (5A)(c) of the Labour Relations Act No. 66 of 1995. The respondent employer served a notice of setdown dated 17 August 2005 on the employees' union the first respondent. The objections were enrolled for hearing at the dispute resolution centre in Bloemfontein on 16 September 2006.

[10] On 16 September 2005 the employer's point *in limine* was argued by Attorney Dorkin. Mr Hlalele argued on behalf of the employees. The arbitration proceedings were chaired by the same gentleman who had earlier chaired the conciliation proceedings. Having heard

the argument for and against the said preliminary point, the arbitrator reserved judgment.

[11] He later upheld the employer's point *in limine*. He ruled that the dispute should be referred to the labour court for adjudication. Therefore the ruling went against the employees their opposition notwithstanding. The arbitrator handed down his written judgment on 29 September 2005.

[12] The union apparently received the arbitrator's ruling on 13 October 2005. On 30 November 2005, forty eight days later, the employees filed their statement of case in the labour court.

[13] The bargaining council issued the certificate of failure to settle the dispute on 15 July 2005 through the conciliation process. Ordinarily the cause of action, for an aggrieved employee such as the individual applicants in this case, arises on the day on which the conciliator issues such certificate. The lifespan of the employees right is strictly ninety days.

[14] In their initial referral to the bargaining council the employee alleged that their unfair dismissals were based on their participation in an unprotected strike action. Now section 191(5)(b) Labour Relations Act No. 66 of 1995 provides that if a council… has certified that the dispute remains unresolved the employee may refer the dispute to the labour court for adjudication if the

employee has alleged that the reason for his dismissal is his participation in a strike that was not legal.

[15] Section 191(11) Labour Relations Act No.66 of 1995 is equally important. In the first place subsection (a) thereof provides:

"The referral, in terms of subsection (5)(b), of a dispute to the Labour Court for adjudication, must be made within 90 days after the council or (as the case may be) the commissioner has certified that the dispute remains unresolved".

In the second place subsection (b) thereof provides:

"However, the Labour Court may condone non-observance of that timeframe on good cause shown".

[16] As I have already mentioned the requisite conciliation certificate was issued on 15 July 2005. In terms of section 191(11)(a) the employee had to refer the dispute to this court before 13 October 2005. They did not. Their statement of case was referred to this court on 30 November 2005, some forty eight days after the expiry of the ninety day period as contemplated in section subsection (a) of section 191(11). That then is the extent of the employees lateness.

[17] I am satisfied that, on the facts, the conciliation phase of this dispute came to an end on 15 July 2003. Section 191(5) sets out the exact time when the conciliation phase ends or may be deemed to have ended. Therefore the employees' right of recourse to the labour court arose on 15 July 2003.

[18] Since the alleged unfair dismissal was a direct consequence of the participation of the employees in an unprotected strike action, the employees had a direct avenue of access to the labour court- subsection 5(b) section 191. However the employees did not follow the direct route to the labour court. They first followed the indirect avenue to the labour court via the arbitration forum. But the arbitration route was a dead end. Such a detour was not open to them. The indirect route of arbitration is open to employees whose unfair dismissals relate only to the matters as set out in subsection 5(a).

[19] The unfair dismissals complained of in this case are governed by subsection 5(b). Therefore the conciliator misdirected himself on the question of law in directing the employees to pursue the unresolved dispute via the arbitration process as if the alleged unfair dismissals fell within the ambit of subsection 5(a). The employees were required by law to travel down the direct avenue from the conciliation forum to the labour court in ninety days- section 191(11). They did not make it. They were supposed to have arrived here before 14 October 2005. But they arrived here forty eight days later, on 30 November 2005. For these reasons I am satisfied that the employees failed to refer their dispute to this court within the prescribed period. Where they in wilful default?

[20] Mr Mbali appearing for the employees urged me to condone the late referral. He submitted that the employees had given a satisfactory and acceptable explanation for their late referral, which he contended was not excessive in the circumstances.

[21] Mr Snyman appearing for the employer urged me not to condone such excessive lateness. He submitted that the employees had given unsatisfactory and unacceptable explanation for their inordinate delay.

[22] A dispute susceptible for referral to this court for a determination in terms of section 191(5)(b) has to be referred to this court within a period of ninety days- section 191(11)(a). The clock starts ticking from the date the conciliator issues the certificate certifying that the conciliation proceedings were abortive. The period of ninety days may be extended by this court on good cause shown.

[23] The defaulting applicant bears the onus to show god cause in order to have the lateness condoned-vide **Flexware (Pty) Ltd v CCMA & others (1998) 19 ILJ 1149 (LC); SACCAWU v Speciality Stores (1998) 19 ILJ 557 LAC; Zuma-Starker Bop (Pty) Ltd v NUMSA (1999) 20 ILJ 108 LAC on p108-109** and **A Hardrodt SA (Pty) Ltd v Behardien & others (2002) 23 ILJ 1229 LAC.**

[24] The notion of "good cause" and the notion of "sufficient cause" are used interchangeably. They mean the same thing. The principle as to what the concept "good cause" entails was set out in the *locus classicus* decision of **Melane v Santam Insurance Limited 1962 (4) SA 531 (AD)** at 532 C-F per Holmes JA:

"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".

[25] At 532 C-G the learned judge went on to outline the relevant factors which are usually taken into account as well as the proper approach which must be adopted. In **NUM v Western Holdings Gold Mining Co Ltd (1994) 15 ILJ 610 LAC** at 613 B-E the court approved the principle that the customary factors as set out by Holmes JA in **Melane v Santam Insurance Co Ltd** supra, are ordinarily interrelated and not individually decisive. See also **Namsoor v CCMA & others 2000 (1) BLLR 79 LC** at 84 per Revelas J.

[26] I now proceed to examine the facts. I deal first with the degree of lateness. There are two important aspects to consider. The certificate in terms of section 135 was issued on 15 July 2005. The dispute was ordinarily supposed to have been referred to this court before 14 October 2005. The first leg of the enquiry has to focus on this initial ninety day period to ascertain how the applicants used it. The question is what prevented the applicant from referring the dispute to this court before the prescribed period of ninety days expired.

[27] The applicant employees referred a dispute to the Dispute Resolution Centre on 07 June 2005 for conciliation. They alleged that their multiple dismissals were unfair. The conciliation

proceedings were held on 15 July 2005. The employees were represented by a unionist and the employer by an attorney. Since the reason for the dismissal was the employees participation in an unprotected strike action the unresolved dispute was supposed to be referred directly to this court for adjudication. It was never done. Instead the conciliator issued the section 135 certificate. He certified, firstly, that the dispute remained unresolved. Secondly, he directed the employees to refer the unresolved dispute for arbitration.

[28] The employees followed the arbitration route in accordance with the conciliator's direction as set out in section 135 certificate. Five days after the issue of the certificate, on 20 July 2005, the employer intimated that the bargaining council had no jurisdiction to arbitrate the dispute. The point *in limine* was argued on 16 September 2005, some sixty three days since the certificate was issued. I have to mention that it was enrolled by the employer. After hearing argument, the arbitrator reserved his ruling. He made a ruling on 29 September 2005, thirteen days after hearing argument, but some seventy six days since he issued section 135 certificate. Only fourteen days before the ninety day period was due to expire, the employees received the arbitrator's ruling on 13 October 2005. Fourteen days later the ninety day period lapsed. This concludes the first aspect of the enquiry as to the lateness. I shall revert to it.

[29] The second aspect focuses on the actions of the employees subsequent to the ruling. The arbitrator upheld the employer's point *in limine*. His ruling was that "the matter must be referred to the Labour Court for lack of jurisdiction by the Council". As I have already pointed out the arbitrator made this ruling on 29 September 2005. The employers averred in the founding affidavit that the ruling first came to their knowledge, fourteen days later, on 13 October 2005. The averment is not specifically denied by the employer. Forty eight days later, on 30 November, the employees filed their statement of case with the registrar of this court.

[30] Mr Snyman argued on behalf of the employer that the referral of the dispute to this court on 30 November 2005, some forty eight days late, was a material delay which in itself strongly militates against the granting of condonation. He relied on the following decisions: **Nehawu obo Mofokeng & others v Charlotte Theron Children's Home (2003) 24 ILJ 1572 LC**; **Jayes v Radebe & others (2003) 24 ILJ 399 LC** and **Moolman Brothers v Gayland NO & others (1998) 19 ILJ 150 LC.**

Considered in isolation, the delay of forty eight days does appear to be excessive. But the delay in itself, however excessive is not alone a decisive factor. Some balancing act or an objective conspectus, if you will, of all the relevant factors is required- **Melane v Santam** supra.

[31] Another critique which was fairly levelled against the applicants is that they made no attempt to request the respondent's consent not

to strictly hold them to the formal time deadlines. In **Botha v Minister of Foreign Affairs & Another (2000) 21 ILJ 2636 LC** Landman J at par 4 commended such practice as follows:

"The correct procedure, as was done in this case, was to request the consent of the other party to an extension of time. The consent of the other party would not be decisive but is such powerful that the party in default could proceed on the assumption that the court would grant condonation if it was raised. cf **Pilcher SC Conways (Pty) Ltd v Van Heerden 1964 (1) SA 179 (O)** at 181 D-E… However, where the ooposing party declines its consent or, as here, allegedly does not respond, the defaulting party must file a formal application for condonation. **See Kugel v Minister of Police 1981 (1) SA 765 (T)".**

[32] The following labour law decision have also supported the aforesaid principle: **Fundaro v Mclachlan & Lazar (Pty) Ltd t/a M & L Inspection Services (1996) 17 ILJ 1183 LAC**; **Van Schalkwyk v Spoornet (2000) 21 ILJ 1876 LC** and **Hardrodt SA (Pty) Ltd v Behardien & others (2002) 23 ILJ 1229 LAC.**

[33] According to the applicants they mandated the union on 1 November 2005. But they took their own time to engage an attorney and to speedily provide the appointed attorney with the documents he required. They finally filed their statement of case on their own on 30 November 2005. Probably the referral to this court could have been expedited and not delayed for forty eight more days. This then completes the second aspect of the enquiry.

[34] On behalf of the applicants it was contended that the applicants served and filed their statement of case within a reasonable time

after receiving the arbitrator's ruling. Mr Mbali contended that the applicants lost their initial and valuable time of ninety days through no fault of their own. They pursued their dispute on the wrong forum on account of an error of law committed by the conciliator.

[35] There is substance in this contention. I am satisfied that the first aspect of the delay was occasioned by the conciliator as stated in section 135 certificate. It seems perfectly reasonable to me that had it not been for the defective certificate the employees would probably have referred the dispute to this court if not within forty eight days thereof then timeously within ninety days in terms of section 191(11) judging by the time within which they did so subsequently to the arbitrator' correct ruling of 29 September 2005 which they received only fourteen days before the expiry of their statutory period in terms of section 191(11)(b).

[36] The contention by Mr Snyman that the employer alerted the employees as early as 20 July 2005 that the bargaining council did not have jurisdiction and that the employees should then have realised that the bargaining council was not competent to arbitrate the unresolved dispute fails to impress. If the employees had proceeded straight from the conciliation forum to this court, notwithstanding the conciliator's direction that the dispute be referred to the bargaining council for arbitration, the employer would probably have raised a point *in limine* that rightly or wrongly the certificate conferred jurisdiction on the bargaining council and not the Labour Court. In my view the employees were

bound by that certificate. They could only have ignored it at their peril.

[38] I hasten to point out that this is not akin to a case where a defaulting party did nothing during the period of ninety days afforded to him by law. On the contrary, this is a case where the defaulting employees believed, though mistakenly, that they were on the right track whereas they were on the wrong dispute referral avenue. I take no dim view of the stance they took in a bid to defend the certificate which directed them to refer the dispute for arbitration instead of adjudication.

[39] The employer also contended that that an extensively experienced trade union such as the first applicant, that has resources and access to resources that are extremely well versed and qualified in labour law, and that has, in fact, been a party to several precedent settling labour court cases on strikes, must have known or should reasonably have known that the dispute in this instance had to proceed to the labour court and not the bargaining council from the conciliation forum.

[40] I am not persuaded by the aforegoing contention, regard been had to the circumstances of this case. Before the conciliator on 15 July 2005 the employer was represented by a lawyer. But the employees were represented by a branch representative of the union. Neither the employer's lawyer nor the branch unionist who acted for the employees intimated to the conciliator that the dispute was one

susceptible to adjudication by the Labour Court only and not the bargaining council. There are two possibilities here, both the lawyer and the unionist were ignorant of the provisions of section 191(11)(b), or the lawyer took advantage of the situation on purpose in order to ambush the employees.

[41] If the lawyer had raised the preliminary point during the conciliation proceedings on 15 July 2005, the conciliator would probably have given a ruling 13 days later on 28 July 2005. By then the employees would still be having some seventy seven or so days out of the 90 days within which to refer the dispute to the Labour Court. The wrong direction in terms of section 135 certificate would have been corrected in time. The employees would not have embarked on the arbitration route to nowhere. They would not be complaining, as they are currently, that they were led astray by the conciliator.

[42] The conciliator's ruling on 29 September 2005 was a tacit acknowledgement that he issued a misleading and erroneous certificate on 15 July 2005. There is no sound principle as to why the employer should benefit from the conciliator's mistake at the expense of the employees. My understanding of section 191(11)(a) is that it envisages a valid section 135 certificate and that it implicitly requires the ninety day period to be worked out from the date of such valid certificate.

[43] However defective the certificate may be, such defect does not suspend the running of the ninety day period. Such period runs from the end of the conciliation period irrespective of its defect. Where, as in this case, the conciliator's error in the defective certificate, misleads the defaulting party which genuinely believes that the dispute referral procedure it was directed to follow was the correct procedure- then such genuine belief becomes a strong factor which mitigates the delay in the referral to this court.

[44] In the instant case the employees referred their dispute to this court within forty eight days after they became aware that they were on the wrong dispute referral route. On the facts I am of the view they rectified the mistake within a reasonable time after they became aware of the arbitrator's correct ruling.

[45] It is my considered opinion that the applicants have given an adequate and acceptable explanation as regards their delay to refer the dispute to this court within ninety days. In **De Vries v Lionel Schwormstedt Louw (2001) 22 ILJ 1150 LC** at par 29 Waglay J had this to say about a party's own error:

"I may also add that in instances where there is or appears to be ambiguity in respect of when a right vests to institute proceedings, where it is evident that a party's interpretation of that right was erroneous because of the actual or perceived ambiguity then if the error was genuine this court should, as in the present matter, lean in favour of granting the party access to the court, because not to do so would be to go against the spirit of the Act which seeks not only a legal but also an equitable resolution of disputes between the parties".

In the instant case the primary cause of the delay was not an error of the employee's own making. Their only sin was their belief that the conciliator's direction was correct. Now where it is evident that a defaulting party's genuine error was the secondary cause of the delay this court should lean in favour of condoning the lateness occasioned by a third party, particularly if such third party was an arbiter.

[46] In considering whether good cause has been shown to justify condoning the defaulting party's delay the correct approach is that the court has a discretion which has to be judicially exercised upon a balanced consideration of all the facts bearing in mind that the exercise of such judicial discretion in essence entails a matter of fairness to both parties- vide **NUM v Council for Mineral Technology (1999) 3 BLLR 209 LAC** at par 10 per Myburgh JP and the authorities he cited there.

[47] As regards the prospects of success it must be borne in mind that the employees initial inopportune demand for wage increment was illegitimate in view of the collective bargaining agreement. Similarly their subsequent go-on-slow strike was ill conceived. But these were not really the explosive acts of conflict. The moment of the real crunch came on 16 May 2005. The employer decided on that day to transfer two employees without any prior consultation. The employer's unilateral decision, his deliberate marginalisation of the employees shop steward naturally angered the three employees Modise, Thobela and Moreng. Tempers flared up,

disrespectful and hostile exchange of words took place, the meeting was abandoned and the first applicant, Moreng was immediately charged and summarily suspended. More employees downed the tools in sympathy with their shop steward. By and large the employees participation in the admittedly unprotected strike action was precipitated by the employer's management which was somewhat intolerable to the irritations on the part of the union. Moreover, the strike was peaceful and lasted for at most four hours including lunch time. In my view the employees prospects of success are not altogether weak. At worst for them the prospects are evenly balanced.

[48] In **FAWU v Mnandi Meat Products v Wholesalers (1995) 16 ILJ 151 LC** at p162 B-C: per Grogan AM

"Scholtz denial that he was anti-union is difficult to square with his treatment of the first applicant's representative. It may, of course, be so that his conduct on the days in question was due to inexperience with the handling of trade unions. But even so, the members of the first applicant among his workforce can be forgiven for concluding that he was hostile to the idea of accepting a union presence".

I am inclined to think that the same can be said about Bothma in the present case.

[49] In **NUMSA & others v Atlantis Forge (Pty) Ltd (2005) 26 ILJ 1984 LC** at par 118 Murphy AJ:

"Even though I consider the demands of the strikers to have been illegitimate, their conduct during the strike was not unruly or marked by criminal behaviour. Many of the applicants conceded that the mood was high-spirited

and spoke of shouting and the bandying of slogans. But no damage was inflicted on the company or personal property, there were no assaults and when instructed by Mike Louw to return to work, the workers did so immediately without demur. Clearly the union intervened responsibly and assisted appreciably in bringing the matter under control. Albeit irresponsible, the strike, was not timed to inflict maximum damage. It was a responsive strike, in reaction to a perceived grievance, even if impulsive. At most the action endured from 08h15 until 10h00, when normal production would have been restored. There is no evidence quantifying the financial loss caused by the stoppage, if any".

The union representative, Hlalele intervened responsibly and restored sanity. But the employer's management did not appreciate his efforts.

[50] If my cursory assessment is found to be wrong, then I take solace in my firm conviction that a good explanation given by the employees in the instant case strongly compensates for whatever weak prospects of success there may be in the merits of their case. On the facts, the delay was not disturbingly long.

[51] As regards prejudice suffice to say that I am not persuaded that the employer will suffer greater prejudice than the employees if I should condone the late referral. On the contrary great will the employees be prejudiced if I decline to condone their delay.

[52] The current rate of unemployment in our country is very high. Loosing a job is a very serious matter now as it was at the time the employees were dismissed. It is therefore important that the alleged unfairness of their dismissal be adjudicated. Some of them have

probably been struggling to find alternative employment. The importance of this case to them should never be underestimated.

[53] The primary consideration in condonation application is fairness to both sides. This is a value judgment I am called upon to make. The circumstances of this case compel me to exercise my discretion in favour of the applicants. In my view they have shown good cause why the late referral of their statement of case must be condoned. I would therefore grant the relief.

[54] The employer's opposition to this condonation cannot be said to have been one devoid of any substance. Although the employees have been successful, considerations of fairness dictate that it will not be fair and just to saddle the employer with an order of costs. It seems to me fair to direct that there shall be no order as to costs one way or the other.

[55] Accordingly I make the following order:

46.1 The application of the applicants for condonation is granted.
46.2 There is no order as regards costs.

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Rampai AJ

APPEARANCES

On behalf of the applicant:	Mr Mbali
	Instructed by:
	Nomali Tshabalala Attorneys
On behalf of the respondent:	Mr Snyman
	Instructed by:
	Snyman attorneys
Date of hearing:	15 February 2007
Date of judgment:	28 March 2007