IN THE LABOUR COURT OF SOUTH AFRICA HELD IN JOHANNESBURG

Case no: JS100/04

In the matter between:

J & G SERVICE STATION	**First Applicant**
PIET DU TOIT	**Second Applicant**
and	
DAVID MASHEGO MADIBA	**First Respondent**
JOHANNES MATAWENG MAIBELO	**Second Respondent**

JUDGMENT

TLALETSI AJ

Introduction

[1] The Applicants *in casu* are seeking orders, *inter alia*, for Condonation of the late filing of the Application for Rescission of a default order granted by Ms Acting Justice Maya (as she then was) against the First Applicant on 18 August 2004 under case no: *JS100/04*; an order for the rescission of the said judgment granted by the learned Judge against the Applicants, as well as an order for

Condonation of the late filing of the Applicants' response filed on 14 April 2006. They also seek an order of costs against the Respondents.

[2] Only the First Respondent is opposing the application. Service was effected on the Second Respondent by registered post on 13 April 2006. In the absence of any information to the contrary it is presumed that service was effected on the seventh day following the day on which the document was posted. (Rule 4 (1) (a) (vii) of the Rules for the Conduct of Proceedings in the Labour Court). There is also an application by the First Respondent in which he seeks an order for imprisonment of the Applicants for Contempt of Court based on the aforesaid order as well as reinstatement of First Respondent to his former position prior to his dismissal by the Applicants. It is convenient to deal with the Applicants' application at this stage and the other application to be heard at a later stage, if need be.

Brief Factual Background

[3] The Respondents were employees of the Applicants until their dismissal with other co-employees. The dispute was referred to the Dispute Resolution Centre, (a division of the Motor Industry Bargaining Council) for conciliation. A certificate of outcome was issued on 27 November 2003 indicating that the dispute remained unresolved. The Respondents thereafter referred the dispute to this Court for adjudication.

[4] On the Applicants' version they received the Statement of Claim on 18 February 2004. On 15 March 2004 the Second Applicant faxed a notice of Intention to Oppose the Statement of Claim to the Registrar of this court. On 18 August 2004, the court in the absence of the Applicants who had not filed a response to the Statement of Claim, granted an order reinstating the Respondents to their former positions prior to their dismissal and ordered the Applicants to pay the costs.

[5] The First Respondent through the assistance of the University of Pretoria law clinic ("Law Clinic') sought to enforce the order without success. The First Respondent launched Contempt of Court proceedings against the Applicants. This latter application is opposed by the Applicants and it is still pending. In the meantime the Applicants instituted these proceedings on 19 April 2006 which are out of time. It is appropriate and convenient to deal with the Application for Condonation first and the Rescission Application thereafter, if necessary.

AD Condonation

[6] The Applicants have admitted in their papers that they did receive the Statement of Claim and did not file a response to the Statement of Claim. The order that was granted against them which is the subject matter of the Rescission Application was therefore not erroneously made. It is also not the Applicants' case that the

judgment or order was granted in error. It therefore follows, that the Applicants are supposed to bring the Application for Rescission of the Judgment in terms of Rule 16 A (1) (b) read with subrule (2) (b) of the Rules of this Court. The effect of subrule (2) (b) is that the application should have been brought within 15 days after acquiring knowledge of the judgment. This Court may however, condone non compliance with the 15 days period on good cause shown by the Applicants.

[7] In considering whether good cause has been shown the approach of the court in **Melane v Santam Insurance Co Ltd 1962 (4) SA 531 (A)** at **532C—F** provides authoritative guidance. The approach was summarised by the Labour Appeal Court in **NUM v Council for Mineral Technology [1999] 3 BLLR 209 (LAC)** at **211F—I** as follows:

> *"The approach 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. These facts are interrelated; they are not individually decisive. What is needed is an objective conspectus of all the facts. A slight delay and a good explanation may help to compensate for prospects of success which are not strong. The importance of the issue and strong prospects of success may tend to compensate for a long*

delay. There is a further principle which is applied and that is that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without prospects of success, no matter how good the explanation for the delay, an Application for Condonation should be refused…"

The court, in response to the submission that the **Melane** approach required adaptation in the light of the value that the Act (LRA), accords to the proper ventilation disputes, held that the Act accords emphasis to the speedy resolution of such disputes and concluded that there is no justification for deviating from the **Melane** principles (at **p 212B**). See also **SABC v CCMA & OTHERS [2002] 9 BLLR 824 (LAC) at 829D—E; NUMSA & ANOTHER v HILLSIDE ALUMINIUM [2005] 6 BLLR 601 (LC)** at **604A—C,** and generally **ALLROUND TOOLING (Pty) Ltd v NUMSA & OTHERS [1998] 8 BLLR 847 (LAC).**

[8] Although the Applicants are seeking an order for Condonation as one of the prayers in the Notice of Motion, there are no paragraphs and averments in the founding affidavit which are devoted specifically to support this prayer. In fact the founding affidavit is divided in three parts. The first portion which I assume is part (A) deals with the Oath and the averment by the deponent who is the Second Applicant, that the allegations are true and correct, and part 'B' with the description of the parties. Part 'C' deals with a *"Bona Fide defence"* and part 'D' bears the heading *"The First Applicant*

is not in wilful default". It is evident that the entire founding affidavit is devoted to supporting the Application for Rescission of Judgment. It is therefore not surprising that in the Heads of Argument the Applicants have not referred to a single authority dealing with Condonation Applications or set out the requirements relevant to the Condonation Application. Mr Mphahlani who appeared on behalf of the Applicants, urged me to pick from the papers those aspects and evidential material that would be relevant to the Application for Condonation. To assist the Applicants and avoid any further delay I decided to consider the application. I must however, emphasise that the Applicants who have the benefit of legal assistance should have done better. The Respondents should not be prejudiced by being denied the benefit of responding to specific averments relating to Condonation Application in their endeavour to oppose the application.

The Length of Delay and the Explanation thereof

[9] There is a dispute of fact as to the actual date when the Applicants acquired knowledge of the existence of the court judgment against them. It is convenient to set out the parties' respective versions of the events to determine this aspect. The Applicants' version as deposed to by the Second Applicant, is that immediately upon receipt of the Statement of Claim from the Respondents on 15 March 2004, he faxed a Notice of Intention to Oppose to the Registrar's office. Thereafter they phoned Second Respondent and requested him to report at the Applicants' workplace with the First

Respondent to collect the Notice of Intention to Oppose. The two obliged and on arrival they declined to accept service of the Notice of Intention to Oppose and instead they advised the Second Applicant *'not to worry about delivering opposing papers to them as they were also following the suit of the other dismissed striking employees by also abandoning their dispute under case no:* ***JS 100\04*** *acting of their own accord on the basis that they had subsequent found alternative employment with other employers on more favourable terms and with a better—paying package'*. The Second Applicant states further that he then wished them luck in their new jobs and they left. On the strength of this, avers Second Applicant, he did not deliver its response in genuine belief that there was no more a case to defend.

[10] Second Applicant states further that he was taken by surprise when on 16 May 2005 the Sheriff served a Court Order dated 18 August 2004 on him. He immediately phoned the First Respondent on his cellular phone and asked him to report at his premises with Second Respondent as soon as possible to discuss the Court Order. On 17 May 2005, he continues, the First Respondent arrived at his premises alone. He asked him if he had any knowledge of the Court Order dated 18 August 2004. The Respondent replied that he had no knowledge of the said Court Order and once again told him not to worry about such Court Order as they had already abandoned their claim in March 2004 and that he would sort everything with his lawyers, then *Maponya Tlala Attorneys*. These are the attorneys who had instructed the Sheriff to attend to the

service of the order. The Second Applicant avers further that the First Respondent then requested him to offer him a new job as his former employer had dismissed him. He told him that he had no job vacancies available at that time and he undertook to give him priority of consideration for new employment should the need to engage workers arise in the future, and the First Respondent left.

[11] On 30 March 2006, he continues, the Sheriff served the copy of the Application for Contempt of Court on him. He was shocked and surprised by this move as he was under the '*genuine belief*' that the Respondents had abandoned their claim against the Applicants and that there was no more case to defend. It is therefore reasonable to assume, despite a lack of specific averment by the Applicants, that on his own version he became aware of the existence of the judgment against the Applicants on 16 May 2005 when the order was served by the Sheriff. It is also common cause that the Application for Rescission was issued on 19 April 2006. On his own version therefore, if one excludes the 15 days period, the delay is about 228 days.

[12] However, it is also interesting to consider the version of the First Respondent. He states that at no stage was he ever called, either with Second Respondent or alone, to the Applicants' premises to collect the Notice of Intention to Oppose. He obviously denies that he ever attended at those premises on the said dates and that himself or Second Respondent never told him that they had abandoned their claims and that the Applicant should not defend

the action. On the contrary, after their appearance in court on 18 August 2004, they attended at the Applicants' premises for their reinstatement as the court had ordered. The Second Applicant refused to take them back into service and said that he first had to consult with his legal representative. They left empty handed and returned to this Court in September 2004 when they were handed a Court Order bearing the stamp dated 13 September 2004. They then approach *Maponya Tlala Attorneys* to assist them to have the Court Order enforced.

[13] These attorneys forwarded a letter dated 2 June 2005 to the First Applicant. In this letter the attorneys confirm that it is common knowledge that a Court Order has been granted against the Applicants for the reinstatement of the Respondents. They confirm further that having served the order on the Applicants through the Sheriff on 16 May 2005 at 14: 30, they notify as instructed, that the Respondents will report for duty on 8 June 2005 on the same terms and conditions that applied prior to their dismissal. On 8 June 2005, the First Respondent continues, the two returned to work with a copy of the Court Order as well as a copy of the aforesaid letter by the attorneys. The Second Applicant once again refused to reinstate them or to sign for an acknowledgement of receipt of the Court Order. He instead asked them whether they have paid for the letters and told them that they are wasting their money because '*he throws them away'*. The two, he continues, went to the Lyttelton Police Station where they both deposed to an affidavit. In this affidavit, which is attached in the answering affidavit, the First

Respondent states that on 8 June 2005 he went to Second Applicant in connection with reinstatement as per the Court Order and the First Applicant refused to sign. The certificate by the Commissioner of Oaths is attested at 8:45 on 08 June 2005 and it bears two official Police date stamps.

[14] There is indeed a dispute of facts which should be resolved in accordance with the principles set out in **Plascon-Evans Paints Ltd v Van Rebeeck Paints (Pty) ltd 1984 (3) SA 623 (A)** at **634 G—635C**. What is striking, in my view, is the sharp denial by the Second Applicant of the allegations made by the First Respondent even though he is supported by documentary evidence. A clear example may be found at paragraph 1.5 of the founding affidavit where the following is said by Second Applicant:

> *"On **2 June 2005** Respondents' other attorneys, Maponya Tlala Attorneys, never sent a letter (copy whereof is annexed to David Mashigo Madiba's founding affidavit marked "**C**") to the First Applicant saying that the order had been served on its offices and that the Respondents would report for duty on **8 June 2005**. The Applicants never received such a letter on **2 June 2005** or otherwise."*

At paragraph 1. 5. 3 he says:

> *"On **18 August 2005** the University of Pretoria Law Clinic never sent a letter of demand (copy whereof is annexed to David Mashego Madiba's founding affidavit marked "**D**")*

> *to the First Applicant, giving the Applicants **15 days** to reinstate David Mashego Madiba and to pay his alleged outstanding salary in the amount of **R44 000**. The Applicants never received such a letter of demand on **18 August 2005** or otherwise."*

In both these quoted paragraphs reference to the founding affidavit of David Mashego Madiba refers to the founding affidavit in the Application for Contempt of Court.

[15] It defies logic to believe that the two different sets of attorneys would cause letters to be typed and keep them and not dispatch them to the Applicants despite specific instructions by their client to enforce the Court Order. To accept the Applicants' version would suggest a conspiracy between the Respondents and the two sets of attorneys against the Applicants. There is in my view no basis for such a conspiracy, and none could be put forward during argument. The Applicants' version is highly improbable compared to the version of the First Respondent as supported by documentary evidence. It is of course convenient for the Second Applicant to deny receipt of these letters in order to support his improbable version that he was told and he believed that the claims had been abandoned.

[16] I have great difficulty with the submission made on behalf of the Applicants that they dispute the fact that the Respondents attended at the Lyttelton Police Station on 8 June 2005. In fact in the

replying affidavit the Second Respondent states that in the absence of a reasonable explanation why the First Respondent's affidavit made at the Police Station does not have the Labour Court Stamp to indicate that it was later filed with the Registrar of this Court, and the fact that the signature in Madiba's alleged affidavit differs from his signature in his opposing affidavit, they therefore deny that the Respondents went to the Lyttelton Police Station. This denial is again unfortunate and the reasons therefore are spurious. The signature on the affidavit is consistent with the one on the pleadings. Furthermore, Applicants council could not explain what would make the Police to be part of the conspiracy. This affidavit is attested on the very same day when the respondents allege that they attended at the Applicants' premises with a Court Order to render their services. It could also not be explained how official Police date stamps happened to be on the affidavit of First Respondent, if indeed he did not attend at the Police Station.

[17] These bare denials on the face of documentary evidence do not do the Respondents' credibility any good. They can only be intended to show that the Applicant had no knowledge of the existence of the judgment. The version that the Respondents attended at the Applicants' premises on two occasions having been called by the Second Respondent is also too good to be true. Their conduct if true, is inconsistent with that of the employees being aggrieved by their dismissal and have taken steps to challenge the fairness of their dismissal at the Bargaining Council and subsequently at the Labour Court. In my view, the Respondents' version of the events

is more plausible and makes sense. It is illogical for them to tell Second Applicant that they are not proceeding with the Labour Court action and at the same time consistently instruct two sets of attorneys at different times to enforce the Court Order. First Respondent's version of the events is consistent with conduct expected from aggrieved employees. Argument that because the Respondents stayed for a period of nine months from March 2004 without taking any action is confirmation that they in March 2004 abandoned their claim, does not at all assist the Applicants. In the first instance the Respondent does not carry any *onus* of prove, and secondly the order was only made on 18 August 2004. During this period the dispute was still pending before this Court. Furthermore, their attempts to tender their services were thwarted by Second Applicants conduct. The Applicants seem to build their case on what the Respondents allegedly failed or omitted to do and not on what the Applicants themselves did when they acquired knowledge of the judgment. Any omission, if it did occur, cannot be an excuse for the Applicants remissness.

[18] The Applicants do not explain why they did not contact *Maponya Tlala Attorneys* to confirm that the Respondents had indeed abandoned their claim, moreso that they said so on a previous occasion only to find that the matter was still being pursued through *Maponya Tlala attorneys* one would have expected them to have done so. In my view, the denials by the Second Applicant are so far fetched and clearly untenable that they should be rejected on the papers.

[19] The hurdle that the Applicants are facing, on their own version, is that no explanation is given for the delay of 228 days before the Application for Rescission is issued. There is no explanation as to the steps taken. What is clear from the papers and the history of this matter, is that the Applicants only took this matter seriously when the Contempt of Court application was served on them. Before then, the Applicants adopted a defiant attitude and later conjured up such an improbable version for the purpose of avoiding Contempt of Court proceedings. It is only then that the shoe started to pinch. They should therefore not expect leniency from the court. The excessive delay on the Applicants' own version is of such a nature that, without a reasonable explanation, Condonation should not be granted.

[20] It is further not surprising that no averment is made in the founding affidavit, that this matter is important to the Applicants. If it was indeed important, they would have taken the matter seriously from the beginning and also take all steps reasonable and necessary to defend the claim. What seem to be more important to the Applicants is fear of imprisonment for Contempt of Court. As for the First Respondent it is clear that this matter is important to him for the steps he has taken to find justice. Failure by the other Respondent and former co-employees to proceed with their claims should not count against First Respondent. There could be valid reasons why there is inaction by them.

[21] Even if I could be wrong on my findings and conclusions so far, I am still of the view that this application should fail on the basis that there are no prospects of success for the Applicants on the merits. The defence raised by the Applicants is that the First Respondent and his former fellow employees were dismissed for participating in a strike that did not comply with the provisions of Chapter IV of the LRA. Although the Applicants allege that they issued ultimatum to the employees, who were in clear and unambiguous terms and stating what was required of the employees and the sanction that would be imposed if they did not comply, no such ultimatum is produced despite the serious denial by the First Respondent throughout.

[22] The Applicants instead sought to rely, during argument, on a faxed copy of a document purporting to record what is said to be the notes of the Commissioner who conciliated the dispute. This is not proof that a strike took place. If indeed there was a strike, it would not have caused the Applicants any inconvenience, to produce at least a copy of the alleged ultimatum document. On the contrary, the First Respondent's version that the dispute involved the throwing of empty oil cans on a rubbish bin which was close to the petrol pumps, a place which was more convenient to them, is more probable. That the Second Applicant's business partner gave them permission to continue operating that way, contrary to what the Second Applicant wanted them to do. Once again the Second Respondent denies that the Second Respondent and his co-employees had agreed with his business partner, without any

confirmatory affidavit from his business partner. The Second Respondent's version on this aspect should be preferred to that of the Second Applicant.

[23] For the reasons set out above, I am satisfied that the Applicants have not succeeded to show cause why Condonation should be granted. It will not be fair and equitable under the circumstances to allow Condonation for the delay which is excessive and without any explanation therefore provided. Furthermore, I am not satisfied that prospects of success have been shown to exist.

[24] What remains is the issue of costs. This Court is enjoined to consider the issue of costs based not only on the law but also fairness. Given the attitude of the Applicants and the manner in which they conducted this application which I have already alluded to, and the steps taken by the Second Respondent to find justice, I am of the view that it will be fair and equitable that the Applicants should be ordered to pay costs of this application jointly and severally.

Order

In the result I make the following order:

1. The application for Condonation is dismissed.
2. The Applicants are ordered to pay Second Respondents' costs jointly and severally, the one paying the other to be absolved.

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L P TLALETSI

Acting Judge of the Labour Court

Johannesburg.

Appearances

For the applicant's	: Adv Mphahlana
Instructed by	: M M Baloyi Attorneys
For the respondent's	: Adv Lagrange
Instructed by	: University of Pretoria Law Clinic
Date of hearing	: 15\ 02\ 2007
Date of Judgment	: 03\ 04\ 2007