IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case No: JS 878/05

In the matter between:

CAROLINA OLIVIA VAN DER GRIJP Applicant

and

THE CITY OF JOHANNESBURG Respondent

JUDGMENT

RAMPAI AJ

[1] The matter came before me by way of notice of application for condonation. The applicant is a former employee of the respondent. There is a pending labour dispute between the parties which the employee initiated against the employer on 31 October 2005 by way of trial proceedings. In her statement of claim the employee sues the employer for approximately R1.87 million. She alleges that the cause of action is breach of the contract of employment.

[2] The employee's main claim is defended. In its statement of response the employer pointed out that the employees' claim was barred in terms of section 3(2) Institution of Legal Proceedings against Certain Organ of State Act No.40 of 2002. The employer responded that the employee had failed to comply with the provisions of subsection 2(a) thereof in that she did not deliver the requisite notice to the employer prior to her instituting the main claim.

[3] On 13 February 2006 subsequent to the delivery of the employer's statement of response the employee filed her current application. Through this application she wants to have her non-compliance with section 3(2)(a) Act No. 40 of 2002 condoned. The employee's application for condonation is opposed by the employer.

[4] The employee requires the court to condone her failure to comply with section 3(2) read with section 3(1) which requires that before proceedings may be initiated against an organ of state:

> "a) a notice must be served on the organ of state concerned within six months from the date on which the debt became due in accordance with section 4(1); and
>
> b) such notice must briefly set out the facts giving rise to the debt and such particulars of such debt as are within the knowledge of the creditor".

[5] In *casu* the employee terminated her fixed term contract of employment with the employer on 26 November 2004. The six

months period within which she was obliged to have given her employer the requisite notice before she could institute her claim expired on 25 May 2005. However she failed to do so.

[6] Section 3(4) Act No. 40 0f 2002 empowers this court to condone failure to comply with section 3(2) on application by a party in default. The power which this court derives from section 3(4) is discretionary. Before this legislation was enacted in 2002 certain similar legislative time restrictions were found wanting and declared unconstitutional- **Moise v Greater Germiston TLC: Minister of Justice & Constitutional Development Intervening (Women's Legal Centre as amicus curiae) 2001 (4) SA 491 (CC) which case is also reported in 2001 (8) BLLR 765 CC**. In that case the court was concerned with a litigant's failure to give ninety day notice to a local organ of government as section 2(1)(a) Act No. 94 of 1970 required. The court held per Somyalo AJ firstly that, the ninety day notice period was a material limitation of the fundamental right of access to a court of law as embodied in section 34 of the 1996 Republic of South Africa Constitution. Secondly the court also held that such a notice period was so inadequately short that it could not be reasonably justified in terms of section 36 of the Constitution.

[7] In **Air-conditioning Design & Development v Minister of Public Works Gauteng Province 2005 (4) SA 103 (TPD)** Van Rooyen AJ pointed out at paragraph 16 fn2 that section 3(4) Act No. 40 of 2002 seemed to have addressed the constitutional problems of

certain legislative time restrictions raised by the Constitutional Court in Moise's case supra.

[8] The principles governing condonation application were eloquently set out in **Melane v Santam Insurance Co. Ltd 1962 (4) SA 531** at 532 C-F per Holmes JA. Some of the relevant factors which must be taken into account by the court in the exercise of its discretion when considering whether to condone or not to condone non-compliance are: the degree of lateness; the explanation for such delay; the prospects of success and the importance of the case to the parties. See also **Foster v Steward Scott Inc (1997) 18 ILJ 367 LAC and Universal Product Network (Pty) Ltd v Mabaso & others (2006) 27 ILJ 991 LAC** at par 1 per Nicholson JA.

[9] In addition to the aforesaid chief factors the courts also take into account the swiftness at which a party in default brought a formal application to court upon the discovery of the non-compliance – **Van der Riet v Rheeder 1965 (3) SA 712 (OPD)** at 715H-716A; **Boland Kontraksie Maatskaapy v Petlen Properties 1974 (4) SA 291 (CPD)** at 293F-H and **Beira v Raphael-Weimer & others 1997 (4) SA 332 (SCA)** at 287D-E.

[10] The onus rests on the applicant to satisfy a court that there exists sufficient cause for excusing his or her omission to comply. It has been held on more than one occasion, that condonation is by no means a mere formality.

Saloojee & Another v Minister of Community Development 1965 (2) SA 135 AD at 138E-F and **Meintjies v HD Combrick (Edms) Bpk 1961 (1) SA 262 AD** at 264A.

[11] In **National Union of Mineworkers v Council for Mineral Technology (1999) 3 BLLR 209 LAC** at 211G-I the court observed per Myburgh JP that:

> "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. (cf Chetty v Law Society, Transvaal; 1985 (2) 756 (A0 at 765 A-C; National Union of Mineworkers & others v Western Holdings Gold Mine (1994) 15 ILJ 610 (LAC) at 613E)".

See also **PE Bosman Transport Works Committee v Piet Bosman Transport (Pty) Ltd 1980 (4) SA 794 AD** at 799C-E

[12] As regards the degree of lateness it is a matter of common cause between the parties that the employee gave notice of her claim or debt to the employer on 31 October 2005 some five months after the expiry of the original six months period within with such notice was required to be given to her employer as a local organ of the state.

[13] Mr Van As, counsel for the employee, submitted that a delay of five months was not excessive in the circumstances of this case. He relied on the decision in **Motloi v SA Local Government Association (2006) 3 BLLR 264 LAC.**

[14] But counsel for the employer, Mr Moultrie differed. He submitted that the employee took almost double the length of time she was allowed to comply with the law. He relied on the decision in **Daniel v Wynford & Another (1999) 3 BLLR 215 LC.**

[15] In Motloi's case supra the Labour Appeal Court per McCall AJA held that an employee had provided a reasonable explanation for two long periods of delay of more than twenty one months and that she had reasonable prospects of success in the main case and accordingly condoned her late referral of the statement of case.

[16] In Daniels case supra the delay in respect of which condonation was sought was 12 days outside the statutory deadline. The commissioner had earlier refused to condone the employee's late referral on the grounds that on the information available to him the employee's prospects of success were poor. On review the Labour Court declined to interfere with the commissioner's refusal to condone the lateness.

[17] In the instant case the employee's lateness is only about three weeks short double the permissible time in terms of section 3(2). The basis of the employee's contention that such delay is not

excessive is somewhat absurd and vague. In my view such delay was disturbingly excessive.

[18] The applicant advanced four reasons for her delay. She was advised by a doctor to take a break away from Johannesburg in order to recuperate. Following such medical advise she spent more than six weeks recuperating away from her place of residence. Her health and state of mind were in a bad shape when she terminated her contract of employment on 26 November 2004- so she averred.- vide par 4 of the founding affidavit.

[19] In the answering affidavit the employer's deponent PJV Shuping challenged the employee to provide proof of her above allegations- vide par 8.

[20] The applicant's counsel hardly said a word about the employee's first reason for her delay. The respondent's counsel submitted that it appeared that the applicant had abandoned the alleged recuperative holiday as a sound reason for her delay.

[21] Indeed in his heads of argument and in his closing argument in court, counsel for applicant did not pursue the applicant's first reason. It has to be mentioned that notwithstanding the respondent's specific invitation to the applicant to back-up her first reason which in real terms entailed a delay of over six weeks no documentary proof was forthcoming- vide par 3 of the replying affidavit. The applicant gave virtually no meaningful details of her

alleged ailment soon after 26 November 2006, her alleged doctor, her alleged medical diagnosis, her alleged consultation with the doctor, her alleged place of recuperation, or any medication she was advised to take or the precise date on which she returned to her residence in Johannesburg. In view of the vagueness of her version, it came as no surprise when her counsel, a seasoned lawyer I hasten to add, chose to say nothing positive in respect of the first dimension of the applicant's explanation.

[22] Instead she annexed an *ex post facto* letter written on 5 March 2005 by Dr C van Jaarsveld marked annexure CO3. No other letter described as annexure CO4 was in fact annexed. I therefore find that the first dimension was substantially deficient, and that it was correctly abandoned. In practical terms this means that the employee cannot account for about seven weeks, at least, of the twenty four weeks she had to serve the requisite notice on her employer.

[23] The applicant employee further alleged that she was also advised to mitigate her claim against her employer by seeking alternative employment. She started doing so early in 2005. She received a few offers from small municipalities. She did not accept such offers because every such small municipality offered her employment at a salary which was a fraction of her previous salary. Besides she was not keen to move from the city to relocate to a small town. The big municipalities were so preoccupied with the

policy of affirmative action that it seemed to her that none of them wanted to appoint a white middle aged woman.

[24] Tshwane University of Technology (TUT) needed her as a lecturer for a fixed term contract of one year. Although the remuneration for the post in the department of recreational studies was disappointingly low, the acting head of the department informed her that she would be the preferred candidate for a full time permanent post when one of the professors retired at the end of June 2005. However, instead of retiring, the professor concerned indicated that he would be staying on for five more years in the post which was earmarked for her. She became restless. But her insecurity was lulled by the acting head of the department. He promised to create a new post especially for her. She was banking on the head of department's undertaking. However, her hope, was dealt a final blow in August 2005 when the said university announced that restructuring process necessitated by the merger between Soshanguve and Pretoria campuses would lead to inevitable job losses- vide pars 9-13 of the founding affidavit.

[25] The applicant does not indicate precisely when she started seeking alternative employment or precisely when TUT approached her. She does not annex any documents whatsoever in support of her allegations pertaining to the said university, any small municipality or any big municipality. She does not mention any particulars of her advisor. As to when she signed the fixed term contract with TUT does not appear. On her own version she spent six months

from February 2005 to August 2005 looking for a permanent job. All we have about such a long delay of twenty four weeks are scanty and fleshless bones. A document marked annexure AA6, attached to the respondent's answering affidavit shows the policy of TUT is to advertise vacant posts, interview interested candidates and appoint the best of the selected few for the job. It appears from this annexure that the final decision as regards appointment is not a matter entrusted to one person only. It was submitted on behalf of the respondent that such a policy was a common practice and that it was unreasonable for the applicant to hope and expect that a special dispensation might or could be created exclusively for her by the unnamed head of department. There is substance in this submission.

[26] I find it difficult to appreciate the relevance of all the allegations in respect of the second dimension of the employee's explanation. These allegations do not in any way assist her to bolster her explanation for her considerable delay since her discussion with the university or the municipalities big or small in no way prevented her from giving her employer, described as the debtor in section 3, the requisite notice or from launching this condonation application soon after the lapse of the statutory six months period. Such period expired on 25 May 2005. It appears from the applicant's letter to the respondent dated 26 November 2004 that before she resigned she was already aware of her alleged right to claim damages from the respondent- vide last paragraph annexure AA7 of the answering affidavit.

[27] The critique I levelled against the applicant in respect of the first dimension of her explanation applies equally well to the second dimension. I have to mention that the alleged advice to mitigate her damages by seeking alternative employment is the one and only reason given in the applicant's statement of claim for the delay I am now asked to condone. Like the first dimension, the second dimension was not pursued in the applicant's written heads of argument or in her counsel's closing argument in court. Therefore, I find that the applicant's second dimension of her explanation did not really constitute adequate and satisfactory explanation-vide par 12 of the statement of claim, par 5 of the founding affidavit, par 5 of the answering affidavit and par 4 of the replying affidavit.

[28] The applicant further alleged that she was unable to quantify her actual damages timeously. She stated in par 11 of the founding affidavit that at the time she was told that she would be a preferred candidate, on 30 June 2005, she could not determine her actual damages since her temporary fixed term contract was due to expire at the end of the year 2005. She awaited details of her permanent contract of employment so that she could accurately calculate the quantum of her damages with sufficient degree of certainty. During August 2005 it became evident to her that her prospects of a permanent post at TUT were hopelessly slim.

[29] The respondent denied the applicant's allegation that in August 2005 TUT announced the contemplated merger of its two

campuses and alleged that in fact such announcement was made in January 2004, some twenty months before the applicant resigned on 26 November 2004- vide par 11 of the answering affidavit. The confirmatory affidavit of MEM Young annexed to the applicant's replying affidavit rescued the applicant's version in certain respects. The difficulty I have is that the replying affidavit itself was hopelessly belated.

[30] Apart from everything else, what is more telling against the third dimension of the applicant's explanation for the delay is that it is something completely new. It appears nowhere in her statement of claim as the reason for the delay. It must be noted that on her own say-so the decision of TUT to amalgamate its two campuses was made more than three months after the six months period as envisaged in section 3(2)(a) has already expired. At the time of such expiry being 25 May 2005, the applicant's position, on her own version remained no more or no less precarious than it was at the time she terminated the fixed term contract on 26 November 2004.

[31] Hard though I tried, I failed to see any sound basis for the implication suggested by the applicant, to the effect that she would not be able to seek damages on exactly the basis (and for the same amount) as she did in these current claim if she had not waited until various, uncertain and vague future opportunities eventualised.

[32] I am persuaded by the respondent's contention that the delay was actually caused by the applicant herself who took her own time waiting and hoping for a better deal to come along. When it did not materialise she decided to launch the current claim. In the third dimension of her explanation for the delay I cannot find any substance of what resembles sufficient cause for the applicant's failure to give the required notice to the respondent. I am of the opinion that the third dimension cannot justify condoning such failure.

[33] It is the applicant's case that her cause of action is based on a material breach of the fixed term contract of employment. Mr Moultrie's argument was that the quantum of an employee's damages for breach of contract of employment, as opposed to compensation for unfair dismissal would be no more than the remuneration payable during the applicable notice period, which was one month *in casu*. Based on that premise counsel contended the employee could readily have ascertained her damages at the time she terminated her contract of employment on 26 November 2004. This contention is untenable. However, Mr Van As correctly argued that the employee's claim was not restricted to the equivalent of a remuneration for one month notice pay. This contention is correct.

[34] The general principle of labour law is that a fixed term contract may not be unilaterally cancelled during its currency in the absence of a material breach of such contract of employment. **Buthelezi v**

Municipality Demarcation Board (2004) 25 ILJ 2317 LAC at par 12 per Jafta AJA; **Dawson v NUPSAW** unreported decision of Johannesburg Labour Court Case No. JS832/02 p10:21-29 per Kruger J. In the instant case I have some serious reservation as to whether the conduct of the employer can by any stretch of imagination be characterised as a material breach which is tantamount to a repudiation of the fixed term contract.

[35] Where such repudiation is established the measure of damages accorded to such an employee whose services have been terminated is actual loss suffered by an employee which represents the prospective sum of earnings due for the unexpired portion of the contract less the actual sum of earnings the employee has subsequently earned elsewhere or could reasonably have earned during such remaining period in a similar kind of employment. **Dawson v Nupsaw** supra p10:24-27; **Myers v Abramson 1952 (3) SA 121 (CPD)** at 127E per Van Winsen J quoted with approval in **Buthelezi v Municipal Demarcation Board** supra at par 20.

[36] Although I accept that quantifying the applicant's claim was not a simple mathematical exercise, I do not accept the argument that the complexity of such a process was a sound reason for the delay or rather omission to comply with the legislative enactment. She could have estimated her damages with relative ease, gave the requisite notice timeously, determined her damages accurately afterwards and amended her claim accordingly. This is frequently done in practice in order to salvage claims endangered by looming

prescriptive extinction with all its catastrophic repercussions. Therefore the delay of the applicant cannot be condoned for that reason.

[37] But even if the applicant was truly and genuinely unable to determine her damages, her inability would still not serve as a valid excuse for the delay. This is so by virtue of the operations of the "once and for all rule".

In **Jowell v Bramwell-Jones & others 2000 (3) SA 274 SCA** at par 22 Scott JA observed:

"The underlying reason for such an approach is probably the "once and for all" rule which compels a plaintiff who has suffered accrued or past damage to institute action in order to avoid the running of prescription; in other words he is precluded form waiting to see if the prospective loss will occur".

The Labour Appeal Court has approved the "once and for all" rule and held that the rule applies to labour dispute as well. Indeed, as counsel for the respondent submitted, there is no reason why the rule should not apply to a claim such as this, which is fundamentally a common law claim for contractual damages. **BMW (SA) (Pty) Ltd v Van der Walt (2000) 21 ILJ 113 LAC**.

[38] I hasten to remark that, in addition to the aforesaid considerations, on her own version this third reason for the delay only avails the applicant until August 2005. It does not account for the extra delay of two months from 31 August 2005 until 31 October 2005 when she purported to give the belated notice to her employer. There is absolutely no attempt made by the applicant to explain the delay of

eight weeks. By 31 August 2005 she was aware of two things. In the first instance she was aware of her inability to quantify her claim. In the second instance she was aware that the Dawson judgment had been delivered.

[39] The fourth and final dimension of the applicant's explanation was that her counsel was awaiting a judgment of the labour court in a similar matter- vide par 13 of the founding affidavit. She stated that the judgment in Dawson v NUPSAW, was of cardinal importance as it was on par with her case in that it was about an employee's claim against an employer for damages arising from a breach of a fixed term contract. The judgment in question was an unreported decision handed down by my brother Kruger AJ under case number JS 832/02. The case was heard on 05 May 2005 and the judgment delivered on 11 August 2005.

[40] The fourth dimension of the applicant's explanation appears to be entirely spurious for many reasons. There is no sound excuse as to why the applicant could not have complied with the legal enactment prior to the release of the said judgment however important it was expected to be to her. She should have delivered the required notice by no later than 25 May 2005. Had the judgment not been in her favour afterwards she would have been entitled to simply withdraw the notice at any time after the release of such judgment. Had the judgment subsequently been in her favour she would have been entitled to initiate the proceedings at any time after the expiry of the requisite notice.

[41] By the look of things, it now seems there was nothing important for the applicant in the Dawson case in any event. Not only does the applicant's counsel not rely on it, he made no serious attempt during his closing argument to make me see its relevance. In that case unlike in the instant the fixed term contract was unilaterally terminated by the employer. Here the converse holds true.

[42] Counsel for the applicant submitted that insofar as the applicant's failure to institute legal proceedings timeously is attributable to her legal representative, such blame should not be attributed to the applicant herself. He relied on the two decisions of **NUM v Council for Mineral Technologies (1999) 3 BLLR 709 LAC** and **Motloi v SA Local Government Association (2006) 3 BLLR 264 LAC**. The latter case is no authority for the proposition that the tardiness of the applicant's legal representative should not be attributed to her. The allegation of the applicant as regards her counsel who advised her to wait for the Dawson decision is also very vague. The alleged counsel is unidentified both in her founding affidavit and the replying affidavit. There is also a deafening silence about such counsel in her statement of case. The applicant does not state precisely when she consulted the anonymous advisor and precisely when he gave such an advice.

[43] All these unfavourable aspects water down her endeavour to explain her delay. Her attempt to shift the blame fails to impress. "There is a limit beyond which a litigant cannot escape the results of his

attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court. Considerations *ad misericordiam* should not be allowed to become an invitation to laxity. If fact this Court has lately been burdened with an undue and increasing number of applications for condonation in which the failure to comply with the Rules of this Court was due to neglect on the part of the attorney. The attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a Rule of Court, the litigant should be absolved from the normal consequences of such a relationship". Quote vide **Saloojee & Another NNO. v Minister of Community Development 1965 (2) SA 135 (AD)** at 141C-E per Steyn CJ. See also **Motloi v SALGA (2006) 3 BLLR 264 (LAC); (2006) 27 ILJ (LAC); Kgobane & Another v Minister of Justice & Another 1969 (3) SA 365 AD**; **Allround Tooling (Pty) Ltd v NUMSA (1998) 8 BLLR LAC 847** at par 10 and **NEHAWU v Nyembezi (1999) 5 BLLR 463 (LAC).**

[44] It is noteworthy to mention that the applicant was a highly educated litigant. She holds two academic accolades B.A and B.A Hons (RAU). Moreover she is a brilliant person. She passed her honours degree *cum laude*. At all times material to this entire dispute she had a lawyer on her side, Attorney PJB van der Grijp. The Pretoria attorney is the applicant's husband. She earned a handsome salary. She was in a high level of senior managers. The couple owned a holiday home at Plettenberg Bay known as a haven for the wealthy elitists. She is not a sort of an individual described as a poor sometimes illiterate litigant who lacks resources to initiate legal proceedings within a short period of time. By all

standards her profile depicts her as an opulent and sophisticated lady with ample resources and ample time of one hundred and eighty days at her disposal to institute legal proceedings.

[45] In **Moise v Greater Germiston TLC 2001 (4) SA 491 (CC)** at par 14 where Somyalo AJ sympathetically said the following about the profile of a litigant who seeks condonation:

> "Moreover, the condonation opportunity afforded to a prospective claimant by s 4 does not render the impediment immaterial. The obstacle remains regardless of this potential amelioration of its harshness. This is particularly so if one takes into account that many potential litigants (arguably the majority) are poor, sometimes illiterate and lack the resources to initiate legal proceedings within a short period of time. Many are not even aware of their rights and it takes time for them to obtain legal advice. Some come by such advice only fortuitously. For them a mere 90 days from the commission of the delict within which to serve formal notice on the debtor(s) is, in the words of Didcott J in Mohlomi, not a 'real and fair' 'initial opportunity' to approach the courts for relief".

Certainly the same cannot be said about the lady before me in the condonation proceedings.

I have serious reservation as to whether a litigant of the applicant's profile should be treated with such sympathy as a result of the delay allegedly caused by her attorney or counsel whosoever he might have been.

[46] I have considered the four dimensions of the applicant's explanation for the delay. I am of the firm view that all the reasons as alleged in her affidavits and as set out and narrowed in her heads

of argument fall woefully short of the cogent explanation for the excessive delay of over five months. In the circumstances I find it extremely difficult to hold that the delay in notifying the organ of state, involved as the respondent in this matter, and in bringing this condonation application has been explained in a manner which is even remotely satisfactory.

[47] I turn now to the second leg of the enquiry, namely the prospects of success in the main case. In a nutshell the cream of the common cause consists of the following facts: The employer sought to discipline the employee for certain acts of misconduct which, as alleged by the employer, she committed when she was still on the payroll of the employer's permanent employees. Differently put, the alleged acts of misconduct occurred before the conclusion of the fixed term contract of employment between the parties.

The applicant denied the alleged misconduct. She contended that, at any rate, the employer had waived its right to institute such disciplinary action against her, her contention boils down to the submission that by virtue of concluding a fixed term contract with her, the employer gave up its right to discipline her for her past misconduct.

[48] In support of her waiver defence the applicant relies on the decision in the case of **Administrator, Orange Free State & others v Mokeponele & others (1990) 11 ILJ 963 AD** as well as an extract from the work of a labour law writer, **Grogan's: Workplace Law 8th ed** on p206.

Mr Van As submitted that the applicant has reasonable prospects of success in the main case. But Mr Moultrie differed. He submitted that the applicant's prospects of success can only be described as extremely weak.

[49] The law on the doctrine of waiver has been extensively discussed and propounded in numerous decided cases such as Administrator, **Orange Free State & others v Mokopanele & others** supra; **Feinstein v Niggli 1981 (2) SA 684 (AD); Dube & others v Nasionale Sweisware (Pty) Ltd (1998) 19 ILJ 1033 SCA**; **MM Engineering (Pty) Ltd v NUMSA & others (2005) 26 ILJ 1326 (LAC); Hlatswayo v Nare and Deas 1912 AD 242**; **Mngoqi v City of Cape Town & Another; City of Cape Town v Mngoqi & Another 2006 (4) SA 355 (CPD); Maluti Transport Corporation Ltd v MRTAWU & others (1999) 20 ILJ 2531 (LAC); Chamber of Mines of SA v National Union of Mineworkers & Another 1987 (1) SA 688 AD; (1987) 8 ILJ 68 (AD); Eastern Cape Provincial Government & others v Contracprops 25 (Pty) Ltd 2001 (4) SA 142**; **Trust Bank van Afrika Bpk v Eksteen 1964 (3) SA 402 (AD)** on 415-416; **Durban City Council v Glenmore Supermarket & Café 1981 (1) SA 470 (DLD)** on 475-478; **First National Bank of South Africa Ltd v Barclays Bank plc 2003 (4) SA 337 (SCA)** at par 6; **Khanyile & Another v MEC for Education & Culture KZN (unreported judgment) case number 955/02** par 19-21 (NPD) delivered on 13 September 2004; See also the following authors:

Spencer Bower & Turner: The Law relating to Estoppel by Representation 3rd ed (1977) on 313 as well as **Grogan's: The Workplace Law 8th ed on 206**.

The aforesaid caselaw and legal works are authoritative sources for the following four propositions:

[50] Firstly, that a party alleged to have waived its right cannot be held to have done so unless it can be shown by the party claiming waiver to have had full knowledge of the right it is claimed to have waived or surrendered. **Administrator, OFS v Mokopanele & others (1920) 11 ILJ 963 AD** on 968.

In her founding affidavit no allegation was made to the effect that the employer had all the knowledge of its right. The right we are here taking about is the right of the employer to discipline its guilty employee for misconduct. In her supplementary founding affidavit, filed some four months after her replying affidavit, the applicant made an attempt to impute such knowledge to the respondent. However, in its supplementary answering affidavit the employer emphatically denied having such knowledge at the critical moment. An applicant stands or falls by the averments contained in the founding affidavit.

Since there is a dispute on the issue, I am bound to accept the version of the employer, the respondent, as the true version- vide **Plascon Paints (Pty) Ltd v Van Riebecck Paints (Pty) Ltd 1984 (3) SA 674 (AD)**

On the facts it is doubtful that the respondent can be said to have had the requisite knowledge of its right to discipline the applicant at the time of the signing of the new contract in Johannesburg on 25 August 2004.

[51] It must be appreciated that at the time the fixed term contract was concluded region nine of the Sports & Recreational Department was under investigation. The applicant was the manager responsible for this particular region. At that time of the signing, the investigation into the financial irregularities pertaining to the region of the applicant's responsibility was still incomplete. In the circumstance the respondent was by law expected and required to treat the applicant as innocent until proven guilty. I have to stress that the investigation did not concern the applicant in particular rather her region in general. While the investigation was in progress the applicant was still continuing with her normal duties. She was not suspended.

The fact that she was not suspended, suggests that her immediate supervisor Shuping did not have the suspicion that the applicant could be truly implicated in acts of misconduct. Now if Shuping hardly had any suspicion, implicitly she could not have had any knowledge let alone full knowledge of the misconduct. It follows as a matter of logic that because she did not know the employee's past misconduct at the time of signing the fixed term contract she could not have known her right to discipline the employee. It

becomes fallacious to even think that she could have waived her right she was unaware it existed.

[52] A party cannot be said to have "approbated" something in respect of which it was required by law to presume to be untrue. Not only did the respondent lack knowledge of its right, it is arguable that it might even be said that there is a legal presumption that the respondent did not have such knowledge.

"Before a party can be held to have surrendered his right, he must know his right. Here there can be no doubt that Mr Rossouw fully appreciated the administration's right to dismiss striking workers". Per Hoexter JA in **Administrator, Orange Free State v Mokopanele & others (1920) 11 ILJ 963 AD** at p968.

[53] Secondly, that in order to constitute a waiver, the relevant conduct of the party alleged to have waived must be clearly inconsistent with the exercise of the right alleged to have been waived- in other words the behaviour and the exercise must be mutually exclusive. **Feinstein v Niggli 1981 (2) SA 684 (AD)** at 698 G-H

We are here dealing with one continuous period of employment. There was no intervening event which disrupted the employment relationship which endured for some two and a half decades. *cf* **Parry v Astral Operations Ltd (2005) 26 ILJ 1479 LC**. Here we are not dealing with a case where original ties of employment were severed but later repaired and an ex-employee re-employed. Here there was no new beginning. The applicant herself avers that she

gave twenty five years of service to the respondent. This averment fortifies the respondent's contention that the signing of the new contract did not in essence alter the fundamental subsisting bond of employment but merely re-adjusted the selfsame original relationship. In brief the new fixed term contract entailed a mutual deal to change the terms and conditions of the existing contract of employment- nothing more and nothing less. The specific averment by none other than the applicant herself is not only inconsistent but fatal to her case that the conclusion of the new contract constituted the start of an entirely new working relationship.

[54] I hold the firm view that it can hardly be argued that the employer's act of concluding the fixed term contract, while the investigation was still in progress for that matter, was already inconsistent with the employer's right to discipline the employee for misconduct that came to light subsequent to the conclusion but was committed prior to the conclusion. Given the fact that it is well established in our labour law that the relationship between employer and employee is in essence one of trust and confidence, our law would indeed be defective if it did not recognise the employer's right to discipline an employee for misconduct that occurred before the new contract has been concluded. I venture to say that if the law does not recognise it, then good governance demands it.

[55] By the signing of the new contract unaware of the employee's proven past violations of trust the employer did not thereby tacitly

provide the employee with a protective shield in order to absolutely insulate her against future disciplinary steps. The workplace rules are different from the soccer rules where the player's misconducts of one season are not carried forward to the next and a delinquent player is allowed to start on the new slate.

"And election generally involves a waiver: one right is waived by choosing to exercise another right which is inconsistent with the former. Indeed, election and waiver have been equated as being species of the same general legal concept". **Feinstein v Niggli** supra at 698 per Trollip JA

See also **Council for Scientific & Industrial Research v Fijen (1996) 17 ILJ 18 SCA** at 26D-E per Harm JA; **Durksen v Anianti Pipe Systems SA (2003) 24 ILJ 1182 (BCA)** at 1183H – 1185B per Shaer AJ; **Grogan: The Workplace Law 2006** p60, p1560157 as well as the respondent's answering affidavit at par 15

[56] I have to point that the new fixed term contract contains no express clause in term of which the employer undertook to exonerate the employee from any future disciplinary action in connection with her past misconduct. What the applicant now wants is that the court should infer such indemnity or undertaking primarily from the respondent's participation in the signing of the new contract. It was contended on behalf of the applicant that the only reasonable and probable inference which can be deduced from the respondent's conduct- in other words the act of concluding a new contract- is that the respondent waived its right to discipline the applicant.

[57] The two cardinal rules of logic which underpin inferential reasoning were enunciated in **R v Blom 1939 AD 188** especially on 202-203 per Watermeyer JA. The first rule is that the inference sought to be inferred must be consistent with all the proven facts. If it is not, the inference cannot be drawn. The second rule is that the proved facts should be such that they exclude any other reasonable inference from them save the one sought to be drawn. If they do not, then there must be doubt whether the inference sought to be drawn is the correct one. There are critical and proven objective facts which strongly militate against the inference the applicant draws: First, the fixed term contract was signed on 24 August 2004. Second the misconduct was committed before the contract was concluded. Third at the time the applicant was not yet charged. Four, the applicant resigned midstream the enquiry into her alleged misconduct and refused to return.

[58] The Appellate Division, as the Supreme Court of Appeal then was, has applied the above principle of inference in cases where direct evidence is not available and stated that, where the plaintiff cannot conclusively prove his case, in the sense that the conduct of the defendant is not susceptible of other reasonably possible inferences, the court must, on review of all the evidence and circumstances, choose a conclusion which is more probable than any other reasonably conceivable conclusion. **Smit v Arthur 1976 (3) SA 378 AD** on 386.

In the instant case it will be naïve to deduce from the respondent's signing of the fixed term contract that the only conclusion which is most probable than any other reasonably conceivable conclusion is that the respondent waived its right to discipline the applicant. As a matter of fact there is direct averment to the contrary by the respondent's deponent Shuping. The employer's signing of the fixed term contract is in no way clearly inconsistent with its right to discipline the applicant.

[59] Thirdly, that where elementary fairness dictates and where no injustice is caused to the party claiming waiver, there is no reason in a labour law dispute why a party against whom waiver is invoked cannot change its mind so as to revoke such waiver. (**Maluti Transport Corporation Ltd v Manufacturing Retail Transport & Allied Workers Union & others 1999 (20) ILJ 2531 LAC** at par 35)

In the instant case the fixed term contract was signed while the applicant's region was still under investigation. There was, theoretically a possibility that the applicant might be implicated. Notwithstanding the employer's appreciation of such a possibility, it went ahead and concluded the contract. The investigation was completed afterwards. The completed investigation revealed, albeit untested *prima facie* acts of misconduct on the part of the applicant. The revelation of such wrongdoing would have constituted a good reason for the employer's change of mind unless

the employer had irrevocably given the employee an absolute undertaking not to do so.

[60] There is nothing on the papers to suggest that the applicant was prejudiced by the respondent's exercise of its right to discipline her. She initially participated in the workplace disciplinary hearing. She was given due notice of the hearing and the charges against her. She was afforded an opportunity of defending herself. The hearing was postponed. She did not attend the workplace forum again for further hearing. Instead she delivered a letter of her resignation to chair on 26 November 2004. She squandered her golden opportunity to invoke and to prove her defence that the employer had waived its right. For that she only has herself to blame.

In the case of **Maluti Transport Corporation Ltd v MRTAWU & others (1999) 20 ILJ 2531 LAC** at par 35, 36 and 40 the court held by 2-1 majority that there was no absolute prohibition on an employer deciding later to take disciplinary action contrary to an earlier decision where fairness dictates such change of mind provided such change of mind occasions no injustice to an employee.

[61] Fourthly, that it must be recognised that there may be circumstances, especially where the right allegedly waived is in fact a statutory obligation, that a waiver will not be enforced

against a public authority on account of considerations of public policy.

In *casu* it will be readily appreciated that the respondent's is a legal organ of government- a public authority which is required by the statutes to investigate all incidents of misconduct and to take all appropriate disciplinary steps in order to eradicate among others nepotism and financial irregularities which were the core of the investigation of the applicant's region. It is incumbent upon any municipality to do everything in its power to promote values of efficient, accountable and clean government. **Local Government: Municipal Finance Management Act No. 56 of 2003** particularly section 62 (1)(e); section 171(4) and section 172(3)

[62] I have read the applicant's letter dated 26 November 2004 addressed to Mr Pat Lepunya, the chair of the workplace disciplinary hearing. The hearing was held on 25 October 2005. She raised a point in *limine* that the employer was precluded in law from disciplining her for the alleged misconduct because, as she claimed, the employer was aware of the alleged misconduct at the time of concluding the fixed term contract on 24 August 2004 and that the employer could have refrained from concluding such new fixed term contract- see annexure AA7 p44 of the answering affidavit. The applicant's point in *limine* was not upheld. The disciplinary enquiry was postponed to 26 November 2004 to deal further with the merits. She was aggrieved by the chair's ruling. Instead of attending the workplace disciplinary hearing on 26 November 2004 to state her case, to refute the false charges of

misconduct and to clear her name so that she could retain her fixed term contract she chose to stay away. On the same day she wrote: "This high handed treatment has left me (with) no doubt whatsoever that I will not be receiving a fair trial or procedure". The word in brackets is mine.- vide first paragraph on page 3 of annexure AA7 p44 of the answering affidavit.

[63] The applicant's complaint about her perceived fears of an unfair trial was unfounded. It was a calculated ploy to avoid the disciplinary hearing. I get the feeling that she realised when her defence of waiver failed that she simply had no answer to the charge(s) of misconduct. It was never her case that the employer had full knowledge of the misconduct because she had confessed before the fixed term contract was concluded. The mere fact that the financial audit report in what she was implicated was released during February 2004 was of no consequence. The financial audit report simply gave rise to the employer's decision to hold a disciplinary enquiry to ascertain the truth of the allegations contained therein. The employer's right to discipline would only arise legally from the outcome of the disciplinary enquiry- a process which the applicant herself wilfully frustrated. The guilty are afraid- so they say.

[64] It is absurd to contend that the employer waived its right to discipline when in law the employer had not yet acquired such right. When the employer concluded the fixed term contract all it knew was that the financial audit report existed which contained

some unfavourable details pertaining to the finance and nepotism attributed to the applicant. The employer's knowledge of such untested allegations was certainly not tantamount to the requisite full knowledge of the misconduct. Without such knowledge the doctrine of waiver could not have come into operation.

"He must therefore prove that the representee had the requisite knowledge. That is certainly so in regard to waiver. A party alleging waivers of a contractual right retains throughout the proceedings the overall onus of proving that the other party had full knowledge of the right when he allegedly abandoned it." **Feinstein v Niggli 1981 (2) SA 684 (AD)** at 698E-F per Trollip JA. In my view the applicant has failed to discharge the overall onus of proving that the respondent had the requisite knowledge.

[65] For the reasons advanced above I find that the employer never surrendered its right to discipline the employee provided she was found guilty by a workplace disciplinary tribunal following the hearing which was procedurally and substantively fair. The employee withdrew from such a process for flimsy reasons. I am inclined to make adverse deductions against her from her sudden withdrawal from the disciplinary process and her simultaneous resignation from her work as a senior employee of "The City of Johannesburg".

In the circumstances I have come to the conclusion that the contentions of the applicant in support of her claim are insupportable in law. In my view the submission by counsel for the respondent is correct. The applicant's prospects of success as

regards her statement of claim can only be described as extremely weak.

[66] It will be recalled that the Labour Appeal Court has on occasion held that no matter how good the explanation for the delay, an application for condonation should be dismissed if the underlying proceedings it seeks to rescue are without good prospects of success. **National Union of Mineworkers v Council for Mineral Technology** supra at 211 G-I

In **Bookworks (Pty) Ltd v Greater Johannesburg TMC & Another 1999 (4) SA 799 (WLD)** at 803 C-D Cloete J observed: "If there are no prospects of success, there should be no point in granting condonation: *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532D. If therefore it is clear that there are no prospects of success, condonation should be refused on that ground alone".

[67] As regards the third requirement for the grant of a condonation, the court has recognised the interest of the respondent in the finality of the judgment as an important factor in considering condonation applications. The long delay in the prosecuting of this claim is demonstrative of the fact that the applicant does not regard the case as important to her. This kind of an attitude undermines the respondent's right to have the matter finalised without undue delay. **Napier v Tsaperas 1995 (2) SA 665 (AD)** at 671C-D.

[68] As regards the fourth requirement, the applicant is required to show that the respondent will not be adversely affected by the granting of

the condonation application. There are merits on the contention that the respondent will be prejudiced by the grant of this condonation application. Since the resignation of the applicant about twenty seven months ago, the recollection of the employer's ten witnesses has probably gradually been fading away. A certain important witness, Mr Duvenhage has already left the employ of the respondent. The respondent's deponent was on fixed term contract. She might also be gone by the time the main claim goes on trial. All these factors are potentially prejudicial to the respondent.

[69] From the aforegoing I have come to the conclusion that the applicant has not shown good cause why I should exercise my discretion in her favour. I would therefore decline to condone her failure to comply with section 3(2)(a) of Act No. 40 of 2002.

[70] There is no reason why the respondent should be deprived of the fruits of its successful opposition. Therefore the general rule of costs will apply.

[71] Accordingly I make the following order:

68.1 The applicant's application for condonation is refused.

68.2 The costs of this application shall be borne and paid by the applicant.

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Rampai AJ

APPEARANCES

For the applicant: Adv M Van As (SC)
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For the respondent: Adv R Moultrie
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Date of hearing: 2 February 2007

Date of judgment: 18 April 2007