1**IN THE LABOUR COURT OF SOUTH AFRICA**

HELD IN JOHANNESBURG

Reportable

CASE NO JS 2689/ 98

In the matter between:

NATIONAL UNION OF METAL

WORKERS OF SOUTH AFRICA obo

NKUNA & OTHERS **APPLICANTS**

AND

WILSON DRILLS-BORE (PTY.) LTD.

T/A A & G ELECTRICAL **RESPONDENT**

JUDGMENT

MOLAHLEHI AJ

INTRODUCTION

[1] This is an application in terms of which the applicant sought to have the unfair dismissal dispute of its 21 (twenty-one) members re-enrolled for a hearing by this court. The applicants' case had been struck from the roll on two occasions by this

court. In its notice of application the applicant prays for an order in the following terms:

> *"1 condoning the late delivery of the applicants' heads of argument in respect of the application to re-enroll this unfair dismissal dispute;*
>
> *2. To the extent that it is necessary, condoning the delay in prosecuting this re-enrolment, after it had been delivered on the 29 April 2003;*
>
> *3. Granting further and /or alternative relief."*

[2] The case was stuck from the roll on the 28th July 2000, the applicant having failed to attend the pre-trial conference as directed by the Judge of the Labour Court. The application for the re-enrollment of the dispute was filed by the applicant on the 29th April 2003.

BACKGROUND FACTS

[3] The members of the applicant were dismissed by the respondent for allegedly participating in an unprotected industrial action on the 6th August 1997. Arising from the dismissal of 21 (twenty-one of its members, the applicant referred an unfair dismissal dispute to the Bargaining Council for the Electrical Industry (the bargaining council).

[4] The bargaining council having failed to resolve the dispute through conciliation, the applicants referred the dispute to the Labour Court for adjudication during January 1999, which is a period of about a year and three months later.

[5] As required by rule 6 of the rules of this court, the parties held a pre-trial conference on the 7th May 1999. The minutes of the pre-trial conference could not be finalized because the applicant failed to effect the corrections.

[6] On the 20th July 2000, the Registrar of the Labour Court notified the parties that a pre-trial conference would take place on the 28th July 2000 before a Judge. Thereafter, respondent's attorneys of record contacted the applicants' representative telephonically and requested to have the pre-trail conference postponed. It seems the respondent's representative had a problem with the date which was chosen by the Registrar.

[7] The respondent's representative, Mr. Coetsee, spoke to Mr. Motsepe of the applicant who informed him in the first instance that Ms Jennifer Joni who was responsible for dealing with this matter was no longer working for the applicant and secondly, that he would be handling the matter from thereon. Mr. Motsepe failed to respond to the respondent's request despite having undertaken to do so.

[8] On the 27th July 2000, the respondent addressed a letter to the applicant confirming its request for the postponement. As there was no response from the applicant

regarding the request for the postponement, the respondent arranged for its director to attend the pre-trail meeting on the 28th July 2000. The applicant failed to attend the pre-trial conference which resulted in the case being struck from the roll.

[9] Subsequently, an application to re-enroll which was unopposed was made and lodged with the court. The matter then came before the court towards the end of 2000 at which point the applicants requested a postponement. The reason for the request was based on the ground that the applicants were not able to proceed on that day as their representative did not have the necessary experience to conduct the case. The matter was again struck from the roll.

[10] Three years later, after the matter was struck from the roll as indicated above the applicant submitted this application in terms of which it again sought the re-enrollment of the matter.

[11] I now proceed to deal with the late submission of the heads of argument by the applicant.

[12] On the 15 August 2006, the Registrar of this court issued a directive in terms of which the applicant was required to submit its heads of argument within 15 (fifteen) days of the date of the directive. In terms of this directive the heads of argument were due on the 5th September 2006, but was delivered on the 12 September 2006, a period 7 (seven) days delay.

[13] The explanation for the delay in filing the heads of argument according to the applicant is because its attorneys of record had advised that there was a need to obtain an opinion from counsel concerning the prospects of success. Counsel's opinion was obtained on the 1st September 2006 and on the 5th September 2006; attorneys of record were instructed to proceed with briefing counsel to draft the heads of argument. The supporting affidavit does not indicate as to when were the heads of arguments received but state that they were filed on the 12th September 2006.

Evaluation

[15] In *Foster v Stewart Scott Inc* (1997) 18 ILJ 367(LAC) the court held that:

> *"It is well settled that in considering applications for condonation the court has discretion, to be exercised judicially upon a consideration of all the facts. Relevant considerations may include the degree of non-compliance with the rules, the explanation therefore, the prospects of success on appeal, the importance of a case, the respondent's interest in the finality of the judgment, the convenience of the court, and the avoidance of unnecessary delay in the administration of justice, but the list is not exhaustive. These factors are not individually decisive, but are interrelated and must be weighed one against the other. A slight delay and good explanation for the delay may help to compensate for prospects of success which are not strong.*

Conversely, very good prospects of success on appeal may compensate for an otherwise perhaps inadequate explanation and long delay."

[15] The explanation furnished by the applicant for the delay in filing its heads of argument seems to be based on the transitional period of Mr Mashigo, the union official who attested to the supporting affidavit, taking over from Mr. Cartwright who resigned as a legal officer of the applicant. The explanation is unsatisfactory in general but more specifically because it does not provide a specific date on which Mr. Mashego took over the matter. Even though the date would not have changed the reasonableness of the explanation, it would have pointed to the fact that the applicant had taken the court into its confidence. Mr. Mashigo, states in his supporting affidavit that he was employed as a national legal officer during early 2005 and Mr. Cartwright left the employ of the applicant during early 2005. Mr. Mashigo does not indicate as to which specific day he took the responsibility for dealing with the matter. The key question that needed to be answered is; was it before or after the 12th September 2006?

[16] In *Saraiva Construction (PTY.) Ltd v Zulu Electrical and Engineering Wholesalers (PT.) Ltd* 1975 (1) SA 612 (D), the court held that good cause is shown by the applicant giving an explanation that shows how and why the default occurred. It was further held in this case that the court could decline the granting of condonation if it appears that the default was wilful or was due to gross negligence on the part of the

applicant. In fact, the court could on this ground alone decline to grant an indulgence to the applicant.

[17] In *Melane v Santam Insurance Co. Ltd* 1962 (4) SA 531 (A) at 532C-F the court held 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.

[18] In my view the applicant's explanation is unreasonable and unacceptable and its application for condonation for the late filing of the heads of argument stands to be dismissed on this basis alone. In fact the probabilities point towards a wilful disregard of the rules of the court. The case of the applicant is not sustainable even if good grounds existed for the granting condonation. The reasons are set out below.

[19] I now turn to deal with the dilatory manner in which the applicants dealt with their dispute. The explanation by the applicants for the inordinate delay that occurred since the matter was struck from the roll and the time that the second application was lodged is again unreasonable and unsatisfactory.

[20] Firstly in dealing with the refusal by the court to grant a postponement the applicant contended that:

"15. The court inexplicable rejected the postponement and struck the matter from the roll.

16. *It is respectively submitted that the Courts [sic] actions were unreasonable given that the postponement was unopposed and that no party would suffer any prejudice consequent upon the postponement*.

17. *I further sincerely apologies for not attending the pre-trial on the 28 July 2000."*

Secondly in dealing with the delay in general, Mr Mashigo states:

"I am advised that from May 2005 to July 2006, CTH made several unsuccessful attempts to locate the court file. The file was eventually located on or about 17 July 2006."

[21] It has been held in a number of cases that if an applicant party unduly delays prosecuting its claim, and fails to provide acceptable reasons for the delay, the penalty may be that of dismissing the claim. Inordinate delays in litigating protract the disputes, damage the interests of justice and prolong the uncertainty of those affected about their affairs. (See *Mothibi v Western Vaal Metropolitian Substrucutre* (2000) 13 LLR 85 (LC), and *NUMSA and Others v As Transmission and Sterling (Pty) Ltd* (1999) 12 BBLR 1237 (LAC).)

[22] In *Bezuidenhout v Johnston No & Others* (2006) 27 ILJ 2237 (LC), Nel AJ held that if the applicant parties have unduly delayed prosecuting their application, and fail to provide acceptable reasons for the delays, the ultimate penalty of dismissing such

applications should be used in appropriate cases. The purpose for this, the court held, would be to help creating a culture of compliance and ensure that disputes are expeditiously dealt with.

[23] The consequences that may follow if an applicant fails to diligently pursue its claim, are dealt with, in *Bezuidenhout's case* where Stratford AJA in *Pathescope Union of SA Ltd v Mallinik* 1927 AD 292 is quoted in as having said:

> "*That a plaintiff may, in certain circumstances, be debarred from obtaining relief to which he would ordinarily be entitled because of unjustifiable delay in seeking it is a doctrine well recognised in English law and adopted in our own courts. It is an application of the maxim vigilantibus non dormientibus lex subveniunt.*"

The court went further to say:

> "*Where there has been undue delay in seeking relief, the court will not grant it when in its opinion it would be inequitable to do so after the lapse of time constituting the delay .And in forming an opinion as to the justice of granting the relief in face of the delay, the court can rest its refusal upon potential prejudice, and that prejudice need not be to the defendant in the action but to third parties.*"

[24] In *Mohlom*i *v Minister of Defence* 1997 (1) SA 124 (CC), Didcott J in dealing with the consequences of inordinate delay said:

> *"Nor in the end is it always possible to adjudicate satisfactorily on cases that have gone stale. By then witnesses may no longer be available to testify. The memories ones whose testimony can still be obtained may have faded and become unreliable. Documentary evidence may have disappeared."*

[25] There are two principal reasons why the Court should have the power to refuse a claim at the instance of an aggrieved party who has been guilty of unreasonable delay. The two reasons are sated in the case *of Radebe V Government of the Republic of SA & others* 1995 (3) SA 787 (N), as follows:

> *"The first is that unreasonable delay may cause prejudice to the other parties. It is both in Harnaker v Minister of the Interior 1965(1) SA 372 (C) at 380D; Wolgroeiers Afslaers (EDMS) Bpk v Munisipaliteit Kaapstad 1978 (1) SA 13 (A) at 41. The second reason is that it is both desirable and important that finality should be reached within a reasonable time of judicial administrative decisions. Sampson v SA Railways and Habour 1933 CPD 335 at 338; the Wolgroeiers' case at 41D-E; cf Kingsborough Town Council v Thirlwell and Another 1957 (4) SA 533(N) at 538."*

[26] The focal point in considering whether to grant the order to re-enrol the dispute, in this case, is the issue of justice and fairness to both parties. The question that then

arises is whether the interest of justice in this instance dictates that I should order the re-enrolment of the dispute.

[27] A close analysis of this matter reveals lack of interest in finalizing the dispute on the part of the applicants. In my view the failure to attend the pre-trial conference was willful as the applicants were aware of the set-down. If for any reason they did not receive the Registrar's notice, they became aware through the telephone conversation between their Mr. Motsepe and Mr. Coetsee of the respondent when a postponement was negotiated. The matter was struck from the roll on the 28 July 2000 due to the applicants default. An application was made to re-enroll the matter during August 2000. When the matter was called before the judge the applicants applied for a postponement on the basis that their representative was not experienced to can handle the matter. This attitude speaks for itself and is affirmed by the subsequent comment made by the applicants regarding their view about the Court's reason for refusing the postponement. The individual applicants seem not blameless. They failed to take steps to ensure timeous prosecution of their case.

[28] To arrive at an equitable decision I considered the length of the undue delay that has occurred in this matter and the poor explanation that the applicants have given for the delay. I have also taken into account that after filing the second application for re-enrollment, which was opposed, the applicants failed to take any further steps to pursue their dispute and again failed to file their heads of argument within the

prescribed time frame. The impact that the delay has had on the respondent party was also considered.

[29] In the circumstances it is not necessary to deal with the prospects of success in the main case. I see no reason why costs should not follow the cause.

CONCLUSION

[30] In the result I make the following order:

(a) The application to have the dispute in this matter re-enrolled is dismissed.

(b) The applicant is ordered to pay the respondent's costs.

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MOLAHLEHI AJ.

DATE OF HEARING: 13/12/2006

DATE OF JUDGMENT: 16/04/2007

APPEARANCES

FOR THE APPLICANT: Adv Steven Bunn

INSTRUCTED BY : Cheadle Thomson & Haysom

FOR THE RESPONDENT: Mr J J Coetzee of Stemmet & Coetsee Inc