

**IN THE LABOUR COURT OF SOUTH AFRICA  
HELD IN JOHANNESBURG**

**CASE NUMBER: JR 1870/06**

In the matter between:

**MTN HOLDINGS (PTY) LTD**

**APPLICANT**

and

**COMMISSION FOR CONCILIATION,**

**MEDIATION AND ARBITRATION**

**FIRST**

**RESPONDENT**

**SIPHO RADEBE**

**SECOND**

**RESPONDENT**

**HUMPHREY TLHABELA**

**THIRD**

**RESPONDENT**

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**JUDGMENT**

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**MOLAHLEHI J**

**Introduction**

1] This is an application for condonation for the late filing of the

review application by the applicant MTN Holdings (Pty) Ltd. The arbitration award which the applicant seeks to review, if its condonation application is successful was issued under case GA 18595/04 and dated 11 August 2005.

- 2] The arbitration award was issued pursuant the dismissal of the third respondent (the employee) who was dismissed for insubordination. The incident that led to the dismissal of the employee arose from the allegation that he refused to obey a lawful instruction from Mr Chetty, the acting general manager. The employee was instructed to accompany one of the consultants a certain Mr Anthony into the premises of the applicant.
- 3] The instruction was apparently issued through a phone call and to this extent three calls were made to the employee. During the first phone call the employee told Mr Chetty he was not able to carry-out the instruction as he was busy with something else. It was during the third call that Chetty made it clear that the employee was given an instruction which required him to leave everything he was doing and to attend to a certain Anthony.
- 4] Because of failure to comply with the instruction, arrangements had to be made to have someone else to accompany Anthony as

the employee refusal do what Chetty was instructed him to do. The reason for requiring that the employee to accompany Anthony was because the company policy requires service providers to be accompanied whenever they enter the premises of the applicant.

- 5] The Commissioner found that the employee was justified in not carrying out the instructions because he had another task to complete. The commissioner ordered reinstatement of the employee and compensation in the amount of R148 200-00.
- 6] Mr Mashego, the senior manager, employee relations deals very briefly in his funding affidavit with the reasons for the late filing of the review application. He deals with the issue of why the application was late in the three and very short paragraphs. He firstly indicates that he was advised by the attorneys of the employee about the arbitration award on the 17 May 2006. He further to states:

“5.

*The arbitration award dated 11 August 2005 was eventually forwarded to the applicant herein by fax on 20 October 2005. I attaché herein a copy of the facsimile report dated 20 August 2005.*

6.

*Subsequent to the award being forwarded to the applicant, which award never came to my attention, nothing was done since, on grounds that the department I am heading was relocating during the period when the award was received from one wing to another and files were either misplaced or incoming documents delayed to be placed in files and believe that this could have been the reason why it never came to my attention until now.*

7.

*It is my humble submission that I was not out of a wilful or intentional act disobedient to comply with the CCMA award, but for grounds stated above this matter could not receive attention timeously.”*

7] In the replying affidavit, Mr Mashego concedes that the arbitration award was sent to the applicant by the employee’s attorneys on the 21 October 2005. His contention however is that the award was never brought to his attention until 17 May 2006, and it was for this reason that the applicant did not implement the award.

8] He then states:

*“As a Senior Manager, I am fully aware of the time periods within which review applications have to be filed, however, due to the reasons indicated above, I failed to comply with the time*

*period to bring this application. The circumstances of the disorganised office forced me not to comply. The applicant was not in wilful default.”*

9] Mr Mashego further conceded in the replying affidavit that the applicant paid the compensation in the amount of R148 2000 in compliance with the arbitration award.

10] The prospects of success are dealt with in the answering affidavit by reference to the main application for reviews.

11] The grounds of review are set out in the founding affidavit to the review application as follows:

*“19.1 The arbitrator misconducted himself by failing to take into account the evidence of the two witnesses when he made this award;*

*19.2 The arbitrator misconducted himself by failing to properly apply his mind on the seriousness of the Third Respondent’s refusal to follow lawful instructions from his superior;*

*19.3 If the Arbitrator had properly applied his mind and taken proper cognizance of the consequences in 10.2 above, he would have found in favour of the Third Respondent;*

*19.4 The arbitrator misdirected himself by to take into account the relevant policies of the applicant relating to the fact that an outside consultant must always be accompanied by one of the Applicant’s employees whenever they have to attend to the Applicant’s machines; and*

*19.5 The arbitrator committed a gross irregularity in failing,*

*refusing and/or neglecting to take cognisance of the seriousness of the third respondent's failure to obey such orders from his superiors."*

## **The Legal Principles**

12] In considering whether to grant or refuse condonation a Court exercises a judicial discretion and in doing so has to take into account all the facts before it. Some of the factors which the Court takes into consideration in assessing whether or not to grant condonation are: (a) the degree of lateness or non compliance with the prescribed time frame, (b) the explanation for the lateness (c) bona fide defence or prospects of success in the main case; (d) the importance of the case, (e) the respondent's interest in the finality of the case, (f) the convenience of the court; prejudice to the other party and (g) avoidance of unnecessary delay in the administration of justice. See *Foster v Stewart Scott Inc* (1997) 18 ILJ 367 (LAC).

13] In *Bezuidenhout v Commission for Conciliation, Mediation and Arbitration and others* (unreported case number C 746/06) this Court held that the authorities are in agreement with the principle which was enunciated in *Melane v Santam Insurance Co*

*Ltd*, 1962 (4) SA 531 (A) at 532C-F, 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.

- 14] In this regard Myburg JP in the case of *NUM V Council for Mineral Technology* (1999) 3 BLLR 209 (LAC) said:

*“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 (A) at 765A–C; National Union of Mineworkers & others v Western Holdings Gold Mine (1994) 15 ILJ 610 (LAC) at 613E).”*

- 15] In *Queenstown Fuel Distributors CC v Labuschadne NO &* (2000) 21 ILJ 166 the Court emphasised the need not to readily grant condonation in cases of dispute over individual dismissal

unless there are compelling reasons for non compliance. In this regard the Court went further to say:

“By adopting a policy of strict scrutiny of condonation application in individual dismissal cases I think that the Labour Court would give effect to intention of the legislature to swiftly resolve individual dismissal disputes by means of a restricted procedure, and to the desirable goal of making a successful contender, after the lapse of six weeks, feel secure in his award.”

### **Evaluation**

16] In his replying affidavit, Mr Mashego fails to deal with the critical issues raised by the employee in his answering affidavit. The explanation given by Mr Mashego is not only unreasonable but also totally unacceptable. In fact this application is contemptuous to the interests of the employee. In my view this amounts to nothing but a delaying tactic to frustrate the employee.

17] As indicated above for the applicant to succeed in an application for condonation he/she must provide an explanation that is reasonable and acceptable. The explanation need to deal with all aspects related to why there was non-compliance in such a manner that it is clear to the court that the applicant has taken it into his or her confidence.



18] The explanation given by Mr Mashego is unreasonable, unacceptable and borders on contempt. He firstly accepts that the award was issued on the 11 August 2005, and that it was brought to the attention of the applicant on the 20 October 2006. He then say it was brought to his personal attention, it would appear during May 2006. He does not indicate who within the applicant received the award on 20 October 2005, and why the award was not brought to his attention earlier.

19] The major difficulty with Mr Mashego's explanation is its failure to deal with certain basic facts which occurred from the time the award was issued to the time the review application was filed. He does not in his replying affidavit deal with a document titled "*Notice of Intention to review Arbitration Award GA 18595.04*" signed by him on 24 October 2005. In addition to indicating the intention to review the arbitration award, Mr Mashego indicated that all correspondence relating to this matter should be addressed to him and in this regard furnished both the physical address and fax number at which service of documents can be effected.

20] The employee's attorneys acknowledged receipt of the above notice on the 25 October 2005, and also indicated their

willingness to engage in a process of finding an amicable solution to the issue.

- 21] On 6 February 2006, the employee's attorney faxed a letter to the applicant, attention Mr Mashego wherein the following is stated

*"We refer to the above matter and to your letter dated 24<sup>th</sup> October 2005.*

*You undertook to review the arbitration award. On the 1<sup>st</sup> December 2005 in a telephonic conversation between writer hereof and yourself once more advised that your attorneys are attending to the matter, to date we have not received any correspondence from yourselves.*

*We advice that our client is extremely prejudiced by the manner in which you are handling his matter, all he is seeking is that the company must abide by the ruling made by the CCMA.*

*We advice that since we have not received the review application from yourselves we are proceeding with obtaining a writ of attachment against MTN for payment of the arrear salaries and are also going to compel the company to reinstate our client as per CCMA award.*

*Kindly respond as a matter of extreme urgency.*

*Yours Faithfully"*

- 22] Another letter was addressed to the applicant for the attention of Ms Lynn on the 09 March 2006, wherein it was confirmed that Ms Lynn would be meeting with Mr Mashego to discuss, the arbitration award.

- 23] On the 24 April 2006, a writ of execution was issued against the applicant for the attachment of property in execution on 18 May 2006. The sheriff's return which seems to have been issued during July 2006 indicated that the applicant paid an amount of R169 596-93 to the employee.
- 24] The replying affidavit in the condonation application Mr Mashego admits that the applicant compensated the employee for the amount of R148 200, 00, but contended that the dismissal was fair.
- 25] In as far as prospects of success are concerned the applicant contended, it had good prospects of success because the arbitrator misdirected himself or committed a misconduct in attaching no weight to the applicants' evidence that a lawful and reasonable instruction was defied with contempt.
- 26] The Commissioner in his award found that from the facts and on the evidence before him the employee did not deliberately *"ignore the instruction and or challenge to Chetty's authority but simply thought he was justified to finish with other customers first with who on he had already started."*

27] It would seem to me that the Commissioner in arriving at his decision took into account the circumstances and the context within which the instruction was issued. The Commissioner does find that the instruction was not carried out but accept the explanation given by the employee, why it was not carried out at theta particular time.

28] In my view the chances of the employer succeeding in showing that the decision of the Commissioner is unreasonable or is a decision that a reasonable decision maker would not have reached are slim.

29] Thus the Applicant's application stands to be dismissed for the simple reason that the explanation for the delay is unreasonable and unacceptable. The other reason upon which the application stands to be dismissed is the lack of prospects of success.

30] In the circumstances of this case both law and fairness dictates that costs should be awarded.

31] The application to review and set aside the award issued by the Second Respondent is dismissed with costs.

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MOLAHLEHI J

32]      DATE OF HEARING      : 23 November 2007.

DATE OF JUDGMENT      : 06 January 2008

APPEARANCES

For the Applicant      : Adv. D Matsela

Instructed by      : Raphela Incorporated

For the Respondent: Mr CM Leballo

Instructed by      : Leballo Attorneys