IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO JR 299/08

In the Rule 11 application between:

BOBBY FAZI FIHLA	**APPLICANT**
and	
NONKE PETROLEUM (PTY) LTD	**RESPONDENT**

In re the review application between:

NONKE PETROLEUM (PTY) LTD	**APPLICANT**
and	
NATIONAL BRAGAINING COUNCIL	
FOR THE ROAD FREIGH INDUSTRY	**1ST RESPONDENT**
BARRY JAMMY	**2ND RESPONDENT**
BOBBY FAZI FIHLA	**3RD RESPONDENT**

JUDGMENT

AC BASSON, J

[1] On 13 August 2009, this Court gave the following order:

1. The application for condonation for the late filing of the answering affidavit in the Rule 11 Application to dismiss, is dismissed.
2. The respondent's review application under case number JR299/08 is dismissed.
3. The arbitration award under case number D142/jhb/6085/07 is made an order of court in terms of section 158(1)(g) of the Labour Relations Act 66 of 1995.
4. The respondent in this application is ordered to comply with the arbitration award within seven days from the date of this order.
5. The respondent is ordered to pay the applicant's costs in opposing the review application as well as the costs of the present application on an attorney client scale.

[2] This was a Rule 11 application in terms of which Mr. Fihla (the applicant in this application and the respondent in the review application – hereinafter

referred to as "the applicant") applied for the dismissal of the review application that was filed on 19 February 2008.

The rule 11 application to dismiss

[3] The applicant filed the application to dismiss the review application on 6 February 2009 on the grounds of the lack of prospects of success in the review application; the excessive and unreasonable delay by the respondent in prosecuting its review and the (two) condonation applications; and the respondent's failure to attend to the reconstruction of the record of the proceedings. The applicant also sought an order making the award an order of court in terms of section 158(1)(c) of the LRA.

[4] Nonke Petroleum (the respondent in the Rule 11 application and the applicant in the review application – hereinafter referred to as "the respondent") filed an application to review and set aside the award by the second respondent (hereinafter referred to as "the arbitrator") in terms of which it was found that the dismissal of the applicant was substantively unfair. The arbitrator reinstated the respondent retrospectively in his former employment.

[5] The award is dated 16 September 2007. The review application was only filed on 19 February 2008. The review application is therefore almost four months late. The review application contains a very brief and in all respects an extremely unsatisfactory explanation for the delay. The blame for the delay is placed squarely on the attorneys of the respondent. There

is also no explanation for the delay between 19 November and 30 November 2007. (I will return to the condonation application contained in the review application hereinbelow.)

[6] On 26 February 2008 the applicant delivered his Notice of Intention to Oppose. On 10 March 2008 the 1st Respondent in the review application (the Bargaining Council) delivered its Notice of Compliance in terms of the Rules. On 3 April 2008 the applicant's attorneys addressed a letter to the respondent's attorneys enquiring from them whether they had uplifted the record from the Registrar. The respondent delivered an incomplete record of the arbitration proceedings consisting of the award and other documents of the bargaining council relating to the matter. The record did not contain the transcript of the arbitration proceedings sought to be reviewed. On 19 May 2008 the applicant's attorneys wrote to the respondent's attorneys pointing out that the record was incomplete. No response was received. On 2 June 2008 the applicant's attorney phoned the respondent's attorneys. The discussions are recorded in a letter dated 3 June 2008. On 28 June 2008 the applicant's attorneys again wrote a reminder letter to the respondent's attorneys. A period of two months elapsed without any word from the respondent's attorneys. On 4 September 2008 the applicant's attorney's addressed a letter to the respondent's attorneys advising them that the applicant intended to proceed with the present application. On 9 September 2009 a response

was finally received from the respondent's attorneys. The letter merely records that the writer has been out of the office attending to matters of a personal and private nature. The letter also records that the arbitrator has been requested to hand over his written notes. After this letter, until the date of this application (6 February 2009) - which is almost 5 months after the aforementioned letter from the respondent's attorneys - the applicant received no feedback whatsoever, not even a letter from the respondent's attorneys regarding their endeavors to reconstruct the record. It is important also to point out that no attempts have been made by the respondent's attorneys to seek to compel the arbitrator to deliver his handwritten notice.

[7] In the present case various issues must be considered in making a final decision. (i) The first is that the respondent has, for months, failed to take any positive steps in either securing the handwritten notes of the arbitrator or in reconstructing the record. It is patently clear from the facts as set out above that the respondent's attorneys simply ignored the numerous requests from the applicant's attorneys. The last latter from the respondent's attorneys is also silent as to when the bargaining council was approached for the written notes. No follow up letters were written to the applicant's attorneys to update the applicant in respect of any progress made in securing the handwritten notes. For a period of almost five months the respondent's attorneys simply ignored the applicant's

attorneys whilst being fully aware of the urgency of the matter. (ii) The second consideration is the fact that the review application was also filed late. Although it is not strictly necessary in light of my findings to even evaluate the founding affidavit in the review application, it is, in my view, necessary to make a few observations about the condonation application contained in the founding affidavit as it impacts on the prospects of success of the review application. Parties who approach this Court with a condonation application should always be mindful of the fact that they are seeking an indulgence from this Court for their non-compliance with the Rules. As such their application for condonation should address the various factors as set out in *Melane v Santam Insurance Co Ltd, 1962 (4) SA 531 (A) at 532C-F.* In terms of this decision, the Court has a discretion, which is to be exercised judicially after taking into account all the facts before it, to grant or to refuse the application for condonation. The relevant factors that the Court will take into account are: (a) the degree of lateness, (b) the explanation for the lateness, (c) prospects of success or *bona fide* defense 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; and (g) avoidance of unnecessary delays in the administration of justice. See *Foster v Stewart Scott Inc (1997) 18 ILJ 367 (LAC).*The application for condonation should also be made as soon as it becomes aware of the lateness of its case. There are also limits beyond which this

Court will condone the negligence of a party's legal representative. See *Hardrodt (SA) (Pty) Ltd v Behardien & Others* (2002) 23 ILJ 1229 (LAC). The application for condonation contained in the review application only addresses the explanation for the delay very briefly. It does not, as pointed out, explain the delay between 19 – 30 November 2007. Moreover, the condonation application does not even address the degree of lateness, the prospects of success, the importance of the case, the respondent's interest in the finality of the case and the convenience of the court. As far as the condonation application is concerned, I am of the view that the respondent has no prospects of succeeding with that application

[8] As far as the prospects of success of the review are concerned (if the condonation application is granted), I am in agreement with the submission on behalf of the applicant that the respondent also has no prospects of success. The test for review is now firmly established namely whether or not the decision of the arbitrator is one that a reasonable decision maker could not reach (see *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* (2007) 28 ILJ 2405 (CC).)

[9] It appears from the arbitration award that the respondent, during the arbitration of 10 December 2008, did not call any witnesses to discharge the onus resting upon it to prove the substantive fairness of the dismissal of the applicant. The two witnesses who had firsthand knowledge of the alleged misconduct had left the employ of the respondent and were not

prepared to testify on behalf of the respondent. As a result the respondent could not present any evidence on the substantive fairness of the applicant's dismissal. The arbitrator accordingly held that the respondent had presented no evidence and in consequence established no case for the applicant to meet.

[10] It is trite, and was also so pointed out by the arbitrator, that an arbitration is a hearing *de novo* and that the record of the disciplinary hearing cannot be used as evidence against the employee. If the review application is perused, it appears that the only ground for the review is the respondent's argument that the disciplinary hearing "*was also applicable in determining whether the dismissal on 17th January 2007, as written warnings are also applicable in the sentence a person received."* I have already indicated, and it is also clear from the founding affidavit in the review application, that the two witnesses who testified at the disciplinary hearing were not longer willing to testify at the arbitration. The only person who could testify was Mr. De Villiers who was the chairperson of the disciplinary hearing. De Villiers also represented the respondent at the arbitration hearing in his capacity as an official of the Road Freight Employers Association. He could not give direct evidence about the events that lead to the dismissal of the applicant with the result that the respondent was not able to present evidence about the substantive fairness of the dismissal.

[11] Furthermore, the arbitrator was correct in pointing out to the respondent that the record of the disciplinary hearing (except where the parties explicitly agree that it may be used as evidence in the subsequent hearing) cannot be used as evidence against an employee. By failing to call two crucial witnesses the respondent had failed to establish a case before the arbitrator. The conclusion reached by the arbitrator is therefore not one that no reasonable decision-maker could reach.

The application for condonation for the late filing of the answering affidavit in the Rule 11 application

[12] To make matters worse for the respondent, it also failed to deliver its answering affidavit in the Rule 11 application. The Rule 11 application was filed on 6 February 2009. The Notice of Motion clearly states that the respondent must file an answering affidavit within ten days from the date of service of the application. On the first date of the hearing of the Rule 11 application (18 March 2009), my learned brother Van Niekerk J postponed the matter and ordered the respondent to file a condonation application for the late filing of the answering affidavit by 1 April 2009.

[13] At the outset it should be pointed out that the application for condonation makes no attempt to address the pertinent issues that must be addressed in condonation applications (see paragraph [7] supra). The explanation for the delay is also, with respect, disingenuous. The respondent avers that it was not able to answer to the Rule 11 application because it did not have

the transcript of the arbitration proceedings. The respondent then proceeds to explain that it had made 16 telephone calls to the bargaining council to request the handwritten notes and that it was only established on the 2nd of March that the handwritten notes did not exist. I am in agreement with the submission that the handwritten notes of the arbitrator has no bearing on the application to dismiss. The written notes may have a bearing on the review application. No reason whatsoever is tendered to this Court (apart from this flimsy explanation) why the respondent could not file its answering affidavit.

[14] Furthermore, the answering affidavit was due in November 2009 but was only served on 12 March 2009. The answering affidavit was further served without an accompanying application for condonation. I have already indicated that it is trite that a litigant must file an application for condonation as soon as it becomes aware of the fact that such an application is necessary. The respondent does not aver that it was not aware of the fact that it was necessary to file such an application and this Court can only accept that this is but another flagrant disregard of the Rules of this Court. In fact, the respondent was given ample notification that the answering affidavit was overdue. The respondent was also reminded on 2 February 2009 in a letter dated 9 December 2009 that its opposing papers were overdue. The respondent was also advised that the applicant intended approaching this Court on an unopposed basis.

Despite these letters, the respondent again did nothing. The justification that the respondent needed the handwritten notes to answer to the Rule 11 application was also never previously raised or brought to the attention of the applicant's attorneys. It is only in the condonation application that this issue is raised for the first time.

[15] I accordingly have no hesitation to dismiss the application for condonation for the late filing of the answering affidavit in the Rule 11 application.

The application to dismiss

[16] This Court has an inherent discretion to dismiss review proceedings on account of an undue delay in order to prevent an abuse of its own process. This principle is succinctly summarized in *Autopax Passenger Services (Pty) Ltd v Transnet Bargaining Council & Others* [2007] 1 BLLR 39 (LC) and *Pathescope Union of SA Ltd v Mallinik* 1927 AD 292 where the Court held as follows:

> *"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 very nature of the doctrine necessitates its being stated in general terms. I take the following apt extract from the judgment in Lindsay*

Petroleum Company v Hurd (L.R. 5 P.C. 239) quoted in the court below:

"The doctrine of laches in courts of equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has by his conduct done that which might fairly be regarded as equivalent to a waiver of it or where, by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a position in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases lapse of time and delay are most material. But, in every case if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. ***Two circumstances always important in such cases are the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy....*** *From the nature of the inquiry, it must always be a question of more or less depending upon the degree of diligence which might reasonably be required, and the degree of change which has occurred, whether*

the balance of justice or injustice is in favour of granting the remedy or withholding it. The determination of such a question must largely depend on the turn of mind of those who have to decide, and therefore be subject to uncertainty, but that, I think, is inherent in the nature of the enquiry." (Own emphasis)

[17] The first question to be considered in exercising the discretion to dismiss is whether there has been an undue or *unreasonable* delay and secondly whether the delay should be condoned. It will be an important factor to take into consideration whether any steps were taken that may indicate the seriousness or commitment of a litigant in bringing his or her claim to finality. Once it has been found that the delay is unreasonable, the Court will then have to exercise a discretion which must be exercised judicially as to whether or not the unreasonable delay should be condoned. In deciding condonation, the Court will take into account various factors such as the explanation for the delay, prejudice to the parties, prospects of the applicant succeeding in the review application and the prospects or lack of a meaningful consequence of the setting aside of the award. These factors are not individually decisive but must be considered as a whole. Where the delay is excessive and the explanation for the delay is inadequate, the Court may well decide to refuse condonation regardless of the prospects of success (see *Ferreia v Ntshingila* 1990 (4) SA 271 (AD) at 281J – 282A). See also See *Saraiva Construction (Pty) Ltd v Zululand*

Electrical & Engineering Wholesalers (Pty) Ltd 1975 (1) SA 612 (D) at 614H – A:

> *"It is clearly necessary for the applicant to furnish an explanation of his default, and if it to be of any assistance to the Court in deciding whether 'good cause' has been shown the explanation must show how and why the default occurred. If such an explanation is furnished the correct approach, I think is to consider all of the circumstances of the case, including the explanation, for the purpose of deciding whether it is a proper case for the grant of relief. If it appears that the default was willful or was due to gross negligence on the part of the applicant the Court may well decline, on that ground alone, to grant the indulgence sought."*

[18] In deciding whether or not the delay is unreasonable, it must be taken into account that the LRA is premised on the principle of speedy resolution of labour disputes.

[19] There is no explanation for the unreasonable delay in duly prosecuting the review application before this Court. What is before this Court are facts that point to the conclusion that the respondent has adopted an apathetic approach in not only prosecuting the review application but also in defending the application to dismiss. The only conclusion that this Court can reach is that the respondent unapologetically flaunted the Rules of this Court.

[20] As a consequence of the aforegoing the arbitration award under case number D142/jhb/6085/07 is made an order of court in terms of section 158(1)(g) of the Labour Relations Act 66 of 1995. The respondent in this application is ordered to comply with the arbitration award within seven days from the date of this order.

[21] The respondent is ordered to pay the applicant's costs in opposing the review application as well as the costs of the present application on an attorney client scale.

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AC BASSON, J

DATE OF JUDGMENT: 14 April 2010

ON BEHALF OF THE APPLCANT

Ndumiso P Voyi Attonreys

ON BEHALF OF THE RESPONDENT

Saleem Ebrahim Attorneys