

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

NOT REPORTABLE

CASE NUMBER: C81/07

In the matter between:

JAMAFO obo FRANK NERO

Applicant

and

PICK 'N PAY (PTY) LTD LTD

First Respondent

VAN STADEN NO, PIET

Second Respondent

COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION

Third Respondent

JUDGEMENT

NGALWANA AJ

[1] This is an application for leave to appeal against a judgement of this Court dated 5 December 2008 in which the applicant's condonation

application for the late filing of a review application was dismissed on the basis of inadequate explanation for the delay.

- [2] The first respondent abides by this Court's decision.
- [3] On review, the applicant blamed its late application on the late receipt of a rescission ruling. It had chosen to proceed by way of section 144 of the Labour Relations Act, 66 of 1995 (and not by way of review under section 145) to have the award of the second respondent rescinded (in contra-distinction to set aside on review). This was an irrelevant consideration because it was not the rescission ruling that was sought to be set aside on review but rather the arbitration award.
- [4] Now the applicant's legal representative blames the union representative for following a process that he himself says "was doomed to failure as it did not raise any recognised grounds under section 144". This unfavourable post mortem notwithstanding, he then submits that because this was "a step that a reasonable litigant might take", the union representative's procedural indiscretion should not be a basis upon which to punish the litigant.
- [5] Well, quite apart from the post mortem not justifying the conclusion now being advanced, the Appellate Division (as it then was) held a

different view. In *Fehr v Gordon and Rennie NNO and Another* 1988 (1) SA 125 (A) at 138A-D, Corbett JA (as he then was) said an election made on the advice of one's attorney cannot validly be vitiated by claims of a mistake on the part of the litigant. This decision was followed in *IMATU and Others v MEC: Environmental Affairs, Developmental Social Welfare and Health, Northern Cape Province and Others* 1999 (4) SA 267 (NC) at 281G-I where the Court said: "I am afraid, the law is clear that a party is bound by his election even if it is based on wrong legal advice". I am not aware of any subsequent Appeal Court decision that deviates from the *Fehr* decision. The applicant cannot, in failing to bring a review application within the period prescribed by the Labour Relations Act for good reasons that have been documented in numerous reported judgements, validly blame his legal representative for following a process that was, by his own attorney's reckoning, "doomed to failure".

[6] Having considered the applicant's submissions in this application, I am satisfied that troubling the Higher Court with this appeal would be unpardonably churlish.

[7] The application for leave to appeal is dismissed as there are no reasonable prospects of a higher Court reaching a conclusion that is different from that reached by this Court on the submissions made to it.

Ngalwana AJ

Appearances

For the applicant: *Mr J Whyte*
Instructed by: *Cheadle Thompson and Haysom*

For the first respondent: *Mr A Steenkamp*
Instructed by: *Edward Nathan Sonnenberg Inc*

Date of judgment: *05 March 2009*