

**IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT CAPE TOWN)**

CASE NO: C466/2008

In the matter between

A Black CC

1st Appellant

BlackJacsam CC

2nd Appellant

and

The Department of Labour

1st Respondent

LM Copping

2nd Respondent

REASONS FOR ORDER

AC BASSON, J

[1] On 27 May 2009 I gave an order setting aside the compliance order issued by the 1st Respondent on 29 January 2009 under case number N219/0729. Here are my brief reasons for the order.

- [2] This was an appeal to this Court against the whole of the compliance order dated 29 January 2008 which was issued by the 1st Respondent (hereinafter referred to as “the Department”).
- [3] The 1st and 2nd Appellants are closed corporations incorporated in accordance with the laws of South Africa. The 2nd Respondent (Ms. LM Copping – hereinafter referred to as “Copping”) rendered services to the Appellants as from September 2005 – August 2007. It is in dispute whether or not Copping was employed or whether she rendered her services as an independent contractor. I will return to this point hereinbelow. (I will refer to the two respondents jointly as “the respondents”.)

Condonation

- [4] The appeal was filed on 18 July 2008. The opposing papers were filed by the Respondents acting jointly on 9 December 2008. The opposing papers were thus filed approximately 123 days late. Although the respondents ask for condonation in the Notice of Motion, no averments are made in the founding affidavit to substantiate the condonation application. The respondents do not offer any explanation for the delay nor is any attempt made to address the other factors that a court must take into account in considering an application for condonation.
- [5] It is trite that an applicant for condonation must file a proper application for condonation in which the factors that the court must consider are set out.

These considerations have been confirmed in *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (AD)¹ where the Appellate Division sets out at page 532B–E the factors that must be taken into account when considering a condonation application: The court will therefore take into account the degree of lateness; the explanation therefore; the prospects of success on the merits; the importance of the case; and other considerations. It is clear from this quoted dictum in *Melane* that these factors are interrelated and should not be considered separately. The approach in the *Melane's* case has been followed with approval in various decisions of this Court and the Labour Appeal Court. In *NUM v Council for Mineral Technology* [1999] 3 BLLR 209 (LAC) at paragraph [10] the Labour Appeal Court held that the absence of a reasonable and acceptable explanation for the delay was pertinent to the enquiry into whether or not condonation should be granted. Where no such an explanation is forthcoming, no examination of the prospects of success needs to be undertaken (see also *NUM and others v Western Holdings Gold Mine* (1994) 15 ILJ 610 (LAC) at 613E and *Waverley Blankets*

¹ "In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant is the degree of lateness, the explanation therefore, the prospects of success and the importance of the case. Ordinarily these facts are interrelated, they are not individually decisive, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate prospects which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interests in finality must not be overlooked."

Limited v Sithukuza and others (1999) 20 *ILJ* 2564 (LAC) paragraph [11]. If an Applicant for condonation does not explain the default or tender an unsatisfactorily explanation, condonation will not be granted (see *Ferreira v Ntshingila* 1990 (4) SA 271 (A). The mere fact that a party has decidedly strong prospects of success is also not in itself sufficient cause to grant condonation. See *Torwood Properties (Pty) Ltd v SA Reserve Bank* 1996 (1) SA 215 (W) at 230H and *Chemical Energy Paper Printing Wood & Allied Workers Union & Others v Metal Box t/a MB Glass* (2005) 26 *ILJ* 92 (LC)

- [6] As already pointed out, no reasons are advanced by the respondents for the lateness of the opposing papers. I am therefore in agreement that the respondents' opposition of this appeal accordingly stands to be rejected.
- [7] There is a further reason why the opposition stands to be rejected. In the appellants' Notice of Motion, the respondents are called upon to file the record of the proceedings that gave rise to the issuing of the compliance order and the reasons for the decision within 15 days of receipt of the Notice of Motion. No record has been filed. The compliance order is not even attached to the papers of the respondents. The reasons that are attached to the respondent's papers appear to be that of the manager of inspection and enforcement services: Western Cape and the provincial executive manager. They appear to confirm the compliance order dated 29 January 2008. The report is, however, undated.

- [8] I will now turn to the merits of the appeal. In the compliance order the department ordered the two appellants jointly to pay to Copping certain amounts in lieu of notice, leave pay and outstanding remuneration. At the outset it should be pointed out that no distinction is made between the two appellants and no indication is given as to what extent each appellant is deemed to be liable.
- [9] The appellants appealed against the order on the grounds that the department had no jurisdiction to issue such a compliance order and on the basis that the BCEA does not apply to the relationship between the appellants and Copping. It was also submitted that Copping was not employed by the appellants and that no employment relationship between the appellants and Copping was terminated. It was in essence the case of the appellants that Copping was an independent contractor. The appellants set out in their papers that they have submitted a written objection to the order to the department in which the appellants pointed out that the nature of the relationship was that of an independent contractor.
- [10] It was also argued that the compliance order was issued without properly hearing the appellants. I have already pointed out that no record has been filed by the department to show what was considered in coming to the conclusion. No affidavit was even filed by the individual who has made the compliance order. The court is thus left completely in the dark as to what has been taken into account in coming to the conclusion that Copping was

indeed an employee. I am therefore in light of the foregoing persuaded that the appeal should succeed.

Order

[11] The compliance order issued by the 1st Respondent on 29 January 2008 under case number N219/0729 is set aside. I make no order as to costs.

AC BASSON, J

26 JANUARY 2010

For the Appellants

W Jacobs of Jacobs Lotz Inc.

For the Respondents

Ms. Mathe