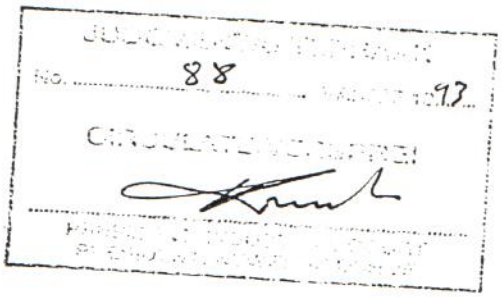
IN THE INDUSTRIAL COURT OF SOUTH AFRICA

CASE NO: NH 11/2/13407

In the matter between:



GODFREY MAHLANGU Applicant

and

AFRICAN OXYGEN LTD Respondent

CONSTITUTION OF THE COURT:

PROF A A LANDMAN

President

ON BEHALF OF:

APPLICANT

MR B MATHESON

instructed by
Webber Shepstone Findlay

RESPONDENT

PROF M MTHOMBENI

instructed by
M R Mthombeni Attorneys

DATE AND PLACE OF PROCEEDINGS:

14 June 1993

PRETORIA

JUDGMENT

The applicant is Godfrey Mahlanga and the respondent is African Oxygen Ltd. The applicant applied in terms of s 46(9) of the Labour Relations Act 28 of 1956 (hereafter the LRA) for a final determination. The present application is brought by the respondent in the main application. I shall for the sake of convenience nevertheless refer to the applicant in the present application as "the respondent" and the respondent in this application as the "applicant". The respondent has applied for an order dismissing the applicant's application for a final determination of an alleged unfair labour practice, namely his dismissal on 25 September 1991.

The basis of the respondent's application is that the applicant's application was brought out of time and no application for condonation has been lodged with the court. The main application simply intimated that an application would be made for condonation in so far as it may be necessary. The applicant opposes the respondent's application and on the day of the hearing of the respondent's application applicant's attorney lodged an affidavit which broaches the matter of condonation.

It is common cause that no industrial council has jurisdiction. The applicant applied for the establishment of a conciliation board. The board was established on 24 March 1992 but was unable to resolve the dispute.

An application was made to the industrial court for an order in terms of s 43 of the LRA. During the hearing on 4 June 1992 the application was withdrawn.

On 11 March 1993 the application in terms of s 46(9) of the LRA was served on the respondent. The application was lodged with the Registrar the following day.

Section 46(9) of the LRA provides that an application for a final determination shall be referred to the industrial court within a fixed time. If however it is out of time the industrial court may, on good cause shown, condone a late referral. Section 46(9) of the LRA provides that:

> (a) The industrial court shall not determine a dispute regarding an alleged unfair labour practice unless such dispute has been referred for conciliation to either an industrial council having jurisdiction or, where no such industrial council exists, to a conciliation board.
>
> (b) If a dispute concerning an alleged unfair labour practice has been referred to-
>
> (i) ...; or

(ii) a conciliation board and that board has failed to settle the dispute within the period of 30 days, or within the further period or periods, referred to in section 36(1)(a), any party to the dispute may as soon as possible after the expiration of the said period, or the said further period or periods, but not later than 90 days from the date on which that period, or that further period or periods, as the case may be, have lapsed, refer the dispute to the industrial court for determination, and the industrial court may only condone the late lodging of such referral on good cause shown.

The Legislature's purpose in providing that a dispute concerning an alleged unfair labour practice should be referred to the court for determination, if this is the wish of one of the parties and more so if it is the wish of the applicant, is because the legislature was aware that good industrial relations practice, good order and the maintenance of labour peace require grievances to be determined ie finalised as soon as practicable. It was considered, realistically in my opinion, that a party to a dispute which had not been resolved at a conciliation board or an industrial council could, with ease, refer such a dispute to the court within a period of ninety days. If he failed to do so good cause for such failure must be shown.

As the applicant was desirous of having the alleged unfair labour practice determined by the industrial court it was incumbent on the applicant to have referred the dispute to the court within 90 days, calculated as from 22 May 1992 being the date of expiration of the extended period. The application should therefore have been referred to the court witin 90 days form that date. This was not done.

The first intimation that the industrial court had of a referral, was the lodging of an application in terms of s 46(9) of the LRA on 12 March 1993.

Annexure LR 54, completed by the Regional Director, Germiston, was received by the Registrar on 22 April 1993 though it was dated 6 July 1992.

In annexure LR 54 the Regional Director states that upon the request of the applicant in terms of regulation 6(10) he reports to the Registrar that a conciliation board was established and that it was unable to settle the dispute. Is this the referral contemplated by s 46(9)(b)(ii) of the LRA?

The subsection permits any party to the dispute to refer the unresolved dispute to the court. It is clear that this may be done through an agent. The Regional director is not the agent of the applicant. Furthermore the report merely informs the court that a conciliation board was held and was unable to resolve a dispute.

Particulars of that dispute and the parties to it are supplied. Annexure LR 54 does not say that the dispute is being referred to the court for determination.

The fact that the parties have not resolved their dispute at the board and have informed the court of this fact does not expressly nor impliedly mean that the party wishes to have the dispute determined by the court. A party could invoke arbitration, abandon the dispute, resort to mediation or industrial action or simply remain inactive.

Annexure LR 54 must be read in conjunction with regulation 6(10). The purpose of the annexure then becomes plain. The regulation provides that:

> Whenever a conciliation board does not succeed in settling a dispute concerning an unfair labour practice within the period or periods contemplated in section 36(1)(a) of the Act and any party to the conciliation board wishes to refer the dispute to the industrial court for determination in terms of section 46(9)(b)(ii) of the Act, the inspector defined by regulation, or any person designated by him, shall, upon written request by the said party complete a report in the form of Annexure LR 54, which report shall accompany the referral to the industrial court, in order to enable the court to establish whether the time limit prescribed by the section concerned has been

complied with.

Annexure LR 54 provides the court with necessary information relating to the calculation of the time limit referred to in s 46(9)(b). Annexure LR 54 does not seem to me to be the sole source of information on which the court may rely. The obligation to file a report in the form of annexure LR 54 would appear to be directory and not peremptory..

Annexure LR 54 is not a referral of the dispute as contemplated in s 46(9)(b)(ii) of the LRA because it must "accompany the referral to the industrial court". It is clearly an ancillary document.

Annexure LR 54, if read against regulation 6(10), does allow one to assume that that report has been filed because the party indicated as the applicant has requested the regional director to forward the report to the court. This however does not convert the report from an ancillary document to a primary document.

The registrar of the court has developed a practice where by a file is opened and a number is assigned whenever a report in the form of annexure LR 54 is filed even if not accompanied by a proper referral. (As to which see **National Union of Printers and Allied Workers Union v Vervoerdienste (Edms) Bpk** (1985) 6 ILJ 496 (IC), **Phook v Atlantis Diesel Engines (Pty) Ltd** (1985) 6 ILJ 539 (IC) and **Maeleletse Isaac Matheba v Tubatse Frrochrome (Pty) Ltd**

Nh 13/2/281 cited in Pooko's case). The registrar then invites the party indicated to be the applicant to deliver papers in order to commence an application for a final determination.

This practice is a convenient one and one which falls within the administrative powers of the Registrar.

The receipt of the application in terms of rule 29 serves in my opinion a dual purpose. It is the referral of the dispute to the court and an application for relief. It would be far too restrictive to insist that the referral must be a separate document.

The applicant, as indicated above, followed an unorthodox procedure which is not strictly in accordance with rule 29 which contemplates that a referral will be made before an application is lodged. I however accept that the dispute was properly referred to the court on 12 March 1993 by lodging the application for a final determination with the court. The dispute was therefore referred to the court some 7 months late.

It appears from the affidavit filed by the applicant in opposition to the respondent's motion for the dismissal of the case, that he consulted with one Ralenala, a legal representative of UPUSA, the trade union to which he belonged, on 12 June 1992. One Luthuli, who had appeared for the applicant at the s 43 application, instructed Ralenala to apply for a final determination.

On 14 August the applicant again consulted with Ralenala who informed him that "he had launched the application and was awaiting a hearing date from the Registrar". The applicant consulted Ralenala from time to time. The last occasion being 30 November 1992. He was told on this occasion that he would be contacted if there was a need to consult further with him.

Ralenala left the employ of UPUSA on 4 December 1992. He died on 1 May 1993. The applicant was not aware of these events. On 19 March 1993 he consulted Luthuli and learned that Ralenala had left UPUSA. It was discovered that no application had been launched.

The applicant says that on 20 March 1993 he and Luthuli consulted his present attorney of record. I doubt whether this date is correct for his attorney of record signed the s 46(9) application on 11 March 1993. It is said that an application for condonation was not brought as an affidavit was required from Ralenala. It was discovered on 4 May 1993 that Ralenala had passed away.

The intervening period between 4 May 1993 and 11 June 1993 is not canvassed. The applicant's attorney of record had been alerted on 23 March 1993 that the point of the late referral of the dispute would be taken.

It was submitted by Mr Matheson, who appeared for the respondent, that no good cause had been shown. Inter alia, Mr Matheson criti-

cizes the applicant for relying on Ralenala. It was submitted that he had been insufficiently diligent in monitoring his case. I am unable to accept this argument. The applicant is an average trade union member. He consulted timeously with his representative and he was entitled to rely on the good offices of his representative to prosecute his application. The applicant followed up his case but was mislead by Ralenala who told him that an application had been launched and that he was awaiting a date for the hearing. I accordingly find that an acceptable explanation has been furnished for part of the excessive delay.

That however is not the end of the matter. Amongst other things I am entitled to have regard to the merits of the application. Mr Mthombeni, who appeared for the applicant did not address me on this score. Mr Matheson submitted that the merits favoured the respondent. He referred me to the papers filed in connection with the s 43 application. I have had careful regard to those papers.

The applicant was charged with theft. At his disciplinary hearing an incriminatory tape recording of a telephone call was handed in. In addition a video tape of the transaction was shown. The applicant made certain admissions at the hearing including an admission that he was not supposed to have been on duty anywhere near the place where the transaction took place. The applicant's assistant gave evidence that he also received money for his part in the unlawful transaction.

It is clear to me that the applicant's chances of success on the merits is extremely weak.

A failure to abide by the time periods laid down by the LRA can cause prejudice to a respondent in the matter. The length of the delay can aggravate the prejudice. Witnesses may go missing or their memories and recollection of events may fade. In addition the fact that the matter has remained unresolved is itself a source of prejudice. In this matter the dismissal took place on 25 September 1991. I accept that the respondent has suffered prejudice although this is mitigated to an extent by the audio tape and the video tape which, I am entitled to presume, remain intact. I believe that it is competent for me to have regard to the entire picture and not only the period of default in referring the dispute to the court. This picture shows that the delay in prosecuting the matter has prejudiced the respondent.

In my opinion the preponderance of the relevant factors leads me, in the exercise of my discretion, to find that good cause has not been shown.

In the premises the application for condonation is dismissed. The application of the respondent succeeds. The applicant is ordered to pay the costs of the application. There is the possibility, raised at the hearing, that the respondent may waive these costs. This however is the respondent's prerogative . The respondent is entitled in my opinion to costs and costs are accordingly

awarded.

SIGNED AND DATED AT PRETORIA THIS 28TH DAY OF JUNE 1993.

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Prof A A Landman

President: Industrial Court of South Africa