IN THE INDUSTRIAL COURT OF SOUTH AFRICA HELD AT PRETORIA

Case No. NH 11/2/10343

In the Matter Between:

JOHN LEDWABA AND 7 OTHERS.....Applicants

and

NISSAN MANUFACTURING (PTY) LTD .....Respondent

CONSTITUTION OF THE COURT

G.D.Maytham. Additional Member

On behalf of the Applicants:

Mr M.F.Motsepe

of National Union of Metalworkers of S.A.

On behalf of the Respondents:

Mr D.Lochner

of Nissan Industrial Relations Department.

DATES OF PROCEEDINGS:

13 January 1994.

18 January 1994

JUDGMENT

The main issue between the parties is an alleged unfair Labour practice. The matter before me is a point taken in limine by the Respondent in regard to the lateness of the referral of the dispute in terms of S 46(9) (b) (ii) of the Labour Relations Act 28 of 1956 and the lateness of the submission of the notice of application in terms of Rule 29(1) of the Rules of this court. The notice of application by the Applicant contains an application for condonation of the late filing of that notice. Mr Motsepe's submission was that it was not necessary for the Applicants to have asked for a condonation. The notice of application was however filed approximately one year and five months after the referral of the matter and Mr Motsepe's office considered that in view of the delay it would be courteous to explain the lateness to court rather than to simply proceed.

Mr Lochner conceded that there was no question of lateness in the original referral of the matter in terms of Section 46(9)(b)(ii). Mr Lochner's main submission was that an application for condonation was indeed necessary to validate the extreme lateness of the submission of the notice of application in terms of Rule 29(1). His further submission was that on various grounds the application for condonation was defective and inadequate and that its granting would lead to

incurable prejudice to the Respondent.

In view of the fact that the point taken in limine and the application for condonation related to the same general issues it was decided that argument on both the application and the objection should be heard simultaneously.

There are two main points of contention, i.e. whether an application for the condonation of the late filing of the notice of application under Rule 29(1) is necessary and in the event of it being necessary whether an adequate case for condonation has been made out. I will deal with the former issue first.

Rule 29(1) contains a provision which directs the registrar, upon receipt of a referral to:-

> "...request the party ('the applicant') that referred the dispute to the industrial council or that applied for the establishment of the conciliation board, as the case may be, to deliver, within 14 days, a notice of application...".

The directive contained in the rule is couched in imperative terms and the Registrar, seemingly, has no discretion in the matter but to make the request. There is nothing in the Rule which limits the time within which the Registrar must make his request except that he is enjoined to do so "Upon receipt of a reference". Similarly the Afrikaans text of the rules uses the terminology "Na ontvangs van 'n verwysing". Neither of these terms imply that action should be taken immediately or within a

limited period of time.

When once the registrar has made his request the applicant is free to choose whether he will comply or not. There is no directive to comply and no penalty for non-compliance. Rule 29(4) provides for the delivery of a notice of bar by the Respondent in the event of non-compliance with a request. The notice procedure resembles the procedure in the Supreme Court and in Magistrates' Courts and it bars the applicant from filing his notice of application after the expiry of a further 7 days after delivery of the notice.

The obligation to file a notice of application and the right to serve a notice of bar clearly arise as a result of the Registrar's request made under Rule 29(1). If the Registrar makes no request in terms of Rule 29(1) then the Applicant has not been provided with a date within which to comply and the service of a notice of bar under Rule 29(4) is not competent.

In this matter there was a letter from the Registrar which was directed to the applicant on 26 March 1992. The letter was sent to the applicant by certified mail to the address he subsequently used in his papers filed in this court. A copy of the letter was sent to the Respondent also by certified mail and also to the address which the Respondent subsequently used in his papers filed in this court.

The contents of this letter require examination as this is the

only letter on the case file which could possibly be interpreted as a request in terms of Rule 29(1). The letter reads:-

> "LABOUR RELATIONS ACT , 1956.
>
> NUMSA OBO N LEDWABA AND 7 OTHERS
> vs
> NISSAN MANUFACTURING
>
> Case number NH 11/2/10343 has been allocated in respect of the above-mentioned matter which should be used in all future communications.
>
> The enclosed Annexure B contains a list of documents which must be submitted by the Applicant. The documents marked with an X have been received. The remaining documents are required before the matter could be enrolled for a hearing.
>
> A copy of Rule 29 of the Rules of the Court, which applies to this matter is enclosed. The Respondent cited below should take note of the provisions of subrules (1) and (2)."

The Annexure mentioned in the second paragraph to the letter contains a list of documents. "X" marks in the Annexure indicate that an LR54 form had been received by the registrar and that the matter had been referred to court in terms of Section 46(9) of the Act. The annexure indicates, however, that the following had not been received:-

> "An application which sets forth the matters referred to in rule 29(1) of the Rules of Court - copy enclosed. A copy of this document must be furnished simultaneously to all other parties to the dispute."

However informative the registrar's letter of 26 March 1992 may have been, it still did not contain a positive request to the applicant to deliver his notice of application within 14 days. If the letter is read in conjunction with the annexure mentioned above, it is capable, in my view, of only one

interpretation. It informs the recipient that he has not submitted a notice of application and it informs him that before the matter is enrolled for hearing he must submit the notice. By implication it then informs him of the fact that in terms of Rule 29(1), the Registrar is required to request him to "deliver within 14 days, a notice of application" but nowhere is he actually requested to do this. There has in consequence been no request to the applicants to file a notice of application within 14 days as is contemplated by the rule.

In *Hlongwane and others v. Nu-World Industries (Pty) Ltd* Case 11/2/9623 heard on 3 September 1993 (as yet unreported) the acceptability of a similar letter from the Registrar to an applicant was considered. I quote from page 26 of that judgment (the antepenultimate and penultimate paragraphs):-

> "Applying all of the reasoning above to facts of this case, I am precluded from finding that this court has no jurisdiction to hear and determine the dispute because the letter from the Registrar to the Applicants (and to the Respondent) which has been set out in paragraph 5 at the beginning of these reasons was not the same as that described in the cases of *Holpro Lovasz and Monyane (supra).*
>
> In all the circumstances of this case i.e. there being no request from the Registrar to file within 14 days and no Notice of Bar by the Respondent, I am forced, with great reluctance I may say, to hold (a) that the Applicants are not required to seek condonation for the filing of the Application and (b) accordingly, this court has jurisdiction to determine the dispute."

The letter from the Registrar which was commented on in the above judgment was identical in its wording to the letter which I have considered in this case and I agree with respect with the conclusion reached.

I conclude therefore that until such time as a letter of request has been served on an applicant requesting him to file a notice of application in terms of Rule 29(1), he is under no obligation to do so within a certain period or at all. In the circumstances the points taken in limine are dismissed and it is found that the applicant's notice of application was timeously submitted.

G.D. Maytham

ADDITIONAL MEMBER