IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
(HELD at JOHANNESBURG)

CASE NO: JA49/2002

In the matter between:

INFORMATION TRUST CORPORATION **Appellant**

and

H.S.H GOUS **First Respondent**

CCMA **Second Respondent**

M.S. SEEDAT N.O. Third Respondent

JUDGMENT

WILLIS JA:

[1] This is an appeal against a judgment of the Labour Court (*per* Revelas J.) The first respondent (to whom I shall refer as "the employee") brought an application to review and set aside the decision of the third respondent (to whom I shall refer as "the CCMA commissioner") refusing condonation for the late referral of a dispute concerning her alleged unfair dismissal to the Commission for Conciliation, Mediation and Arbitration ("the CCMA") in terms

of section 191 of the Labour Relations Act No 66 of 1995, as amended ("the LRA"). The employee made the following allegation in her founding affidavit: "Ek voer aan dat in hierdie omstandighede die Tweede Respondent se beslissing nie deur die feite geregverdig kan word nie" *Mr Van Jaarsveld*, who appears for the employee, submitted, and *Mr Lagrange*, who appears for the appellant (to which I shall refer as " the employer") fairly conceded that this meant that the employee based her grounds for the review on the fact that the CCMA commissioner's decision was "unjustifiable" as that term is understood in cases such as **Carephone (Pty) Ltd v Marcus N.O & Others** 1999 (3) SA 304 (LAC), (1998) 19 ILJ 1425 (LAC), [1998] 11 BLLR 1093 (LAC) and those which have followed it. Although the section was not expressly invoked by the employee in her founding papers, it is clear that the review was brought in terms of section 158(1)(g) of the LRA. This was accepted as being the position by counsel for both sides. The Court *a quo* reviewed and set aside the decision by the CCMA commissioner. The Court *a quo* granted leave to appeal to this Court.

[2] The employee, who had 13 years of service with the employer, and who was a manager at the time, was notified on 28th August, 2000 that she should attend a disciplinary enquiry on 31st August, 2000. There were a range of charges against her including alleged dishonesty, failure to perform her work properly and nepotism. She was found guilty on all charges and dismissed on

1st September 2000. She was paid until 31st August, 2001 which was regarded as her last day of service. The employee then invoked the employer's internal appeal procedures. She lodged an appeal on 13th September, 2000. The appeal hearing was held on 11th October, 2000. The dismissal was confirmed on 17th October, 2000. The employee referred the dispute concerning here alleged unfair dismissal to the CCMA on 24th October, 2000. Advised that her referral to the CCMA was out of time in terms of the provisions of section 191 of the LRA, the employee filed an application for condonation for the late referral of the dispute to the CCMA on 30th October, 2000. The reason given by her for the late filing of the referral of the dispute was that she had been awaiting the outcome of her internal appeal hearing. The CCMA commissioner who had to consider the application for condonation said:

"The employee lodged her dispute with the CCMA 29days beyond the 30-day period prescribed by section 191(1) of the Labour Relations Act, No.66 of 1995('the Act"). The reason for the late referral is that she was waiting for the outcome of the appeal hearing.
The Labour Appeal Court in **Edgars Stores Ltd v SACCAWU** (1998) 19 ILJ (LAC) held that a dismissal dispute arose on the date when the original dismissal was communicated to the employee. This was again confirmed in **SACCAWU v Shakoane** (2000) 21 ILJ 1963 (LAC). Thus, the finalisation of the appeal hearing does not extend the date of dismissal… The explanation for the delay is not sufficient. The Labour Appeal Court has on many occasions held that, where the reasons given for the delay are unacceptable, this itself would justify the refusal to grant condonation."

[3] The CCMA commissioner gave no other reasons for refusing the

application for condonation. It is plain that the CCMA commissioner based his decision on the fact that he considered that it would be impermissible for him to have regard to the fact that the employee had waited until the completion of her internal appeal hearing before she began processing the referral of her dispute to the CCMA. It is clear that, if the calculation had been made from the date of the finalisation of her internal appeal, the employee would have been within the time period provided for. The CCMA commissioner found, in effect, that the employee should have considered the date when she was first informed of her dismissal (i.e. 1st September, 2000) as the date from which the 30 day period for the referral of the dispute would begin running and that she could not take the date on which she received the outcome of her appeal as the date from which the 30 day period would run. The CCMA commissioner also found that it was not a reasonable explanation for the delay that she was awaiting the outcome of the appeal.

[4] The employee brought an application before the Labour Court to review the CCMA commissioner's decision to refuse condonation. The court *a quo*, as has already been noted, set aside the refusal to grant condonation. The court *a quo* considered the cases of **Edgars Stores Ltd v SACCAWU** (*supra*) and **SACCAWU v Shakoane** (*supra*). The court *a quo* interfered with the decision of the CCMA commissioner on the basis that he had failed to apply his mind to the employee's prospects of success which fairness required he should have done in the circumstances.

[5] The employer has, at various stages in these proceedings, criticised the patchiness and sketchiness of the employee's founding papers. There is merit in these submissions. Some, but not all, of these deficiencies appear in the first paragraph of this judgment. Nevertheless, there is sufficient before us to make a decision which, in my opinion, will do justice to the case.

[6] Subsections 191 (1) and (2) of the LRA at the time when the commissioner considered the matter, read as follows:

" (1) If there is a dispute about the fairness of a dismissal, the dismissed employee may refer the dispute in writing within 30 days of the date of dismissal-

a) to a council, if the parties to the dispute fall within the registered scope of that council; or

b) the Commission, if no council has jurisdiction.

(2) If the employee shows good cause at any time, the council or the Commission may permit the employee to refer the dispute after the 30 day time limit has expired."

It is not without significance that subsections 191 (1) and (2) have been amended by s 46 of Act 12 of 2002 to read as follows:

"(1) (a) If there is a dispute about the fairness of a dismissal, or a dispute about an alleged unfair labour practice, the dismissed employee or the employee alleging the unfair labour practice may refer the dispute in writing –

i) to a council, if the parties to the dispute fall within the registered scope of that council; or

ii) the Commission, if no council has jurisdiction.

(b) A referral in terms of paragraph (a) must be made within-

i) 30 days of the date of dismissal or, if it is a later date, within 30 days of the employer making a final decision to dismiss or uphold the dismissal;

ii) 90 days after the date of the act or omission which allegedly constitutes the unfair labour practice or, if it is a later date, within 90 days of the date on which the employee became aware of the act or occurrence.

(2) If the employee shows good cause at any time, the council or the Commission may permit the employee to refer the dispute after the relevant time limit in subsection (1) has expired."

In **National Health & Allied Workers Union v University of Cape Town & Others** 2003 (3) SA 1 (CC); (2003) 24 ILJ 95 (CC); [2003] 4 BCLR 154 (CC), .the Constitutional Court held that it would be permissible to refer to the amended version of section 197 of the LRA to understand what was meant by the section. This was because the preamble to the amending Act (The Labour Relations Amendment Act, No.12 of 2002) expressly provided that it was enacted, *inter alia*, to provide for "the clarification of the transfer of contracts of employment in the case of transfers of a business, trade or undertaking as a going concern" (See paras. [65] to [69] of that judgment.) The same preamble does not expressly provide for the clarification of the provisions of section 191. Nevertheless, these amendments were presumably designed to avoid the confusion surrounding the true intentions of the legislature in regard to the time limits within which disputes must be referred to the CCMA. This case demonstrates how easily confusion could arise in regard to the interpretation

of subsections 191(1) and (2) in their original form. The recent amendments to s 191 of the LRA should prevent the kind of problem which arose in this case.

[7] In **Edgars Stores Ltd v SACCAWU** (*supra*) the unanimous conclusion of the court at para [20] was as follows:

"Its (i.e. the union's) contention was that the dismissal did not become final until the internal procedure had been exhausted, a submission which the commission and the Labourt Court, correctly, rejected." In **SACCAWU v Shakoane** (*supra*) the majority came to a similar conclusion to that of the court in the **Edgars Stores** case. It is important to note that in both these two cases the court was dealing with the interpretation of items 21 and 22 of Schedule 7 of the LRA. These relate to the transitional provisions which were applicable in moving from the Labour Relations Act, No. 28 of 1956, as amended (which was repealed and replaced by the LRA) to the then new LRA. Not only logic but also fairness to both employers and employees requires that the merits of a dismissal of an employee must be viewed and determined in terms of the law applicable at the time when the decision was taken to dismiss him or her. Moreover, it is important to note that, although in both the **Edgars Stores Ltd v SACCAWU** and **SACCAWU v Shakoane** cases, the court was concerned with the meaning of a dispute concerning an alleged unfair dismissal, it was in each instance really concerned with the meaning of the word "dispute" with regard to the transitional provisions rather than anything else. As Zondo JP said in the case of **SACCAWU v Shakoane** at para [10]:

"In fact logic dictates that the existence of the need to exhaust internal procedures itself suggests that a dispute or something akin to a dispute must exist before such internal procedures can be invoked." The CCMA commissioner understood that the principles applicable in determining whether the 1956 Act or the 1995 Act should apply required him to dismiss the application for condonation which was made because the employee referred the dispute only once she had learned that her appeal was unsuccessful. The context in which both the **Edgars Stores Ltd v SACCAWU** and **SACCAWU v Shakoane** cases were decided was very different from the issue before the CCMA commissioner.

[8] In **Fidelity Guards Holdings (Pty) Ltd v Epstein & Others** (2000) 21 ILJ 2009 (LC) , Pillemer AJ said at para [18]:

" It seems to me to be absurd that an applicant who pursues an internal appeal procedure would be precluded from utilizing the dispute resolution procedure

provided in s 191 of the Act if the decision on his appeal is delivered more than 30 days after the date of dismissal because he believes he was dismissed on the day he is notified that he has lost his appeal. It is also ridiculous in my view for an applicant to have to proceed against his employer in the CCMA while an appeal is pending or the result thereof is awaited, when to do so may well sour the relationship and/or affect the result of the appeal. The Act prescribes the date of the dismissal (s 190). The absurd consequence may be a procedural requisite in cases such as the present one. Condonation in such a case must inevitably be granted and, furthermore, it is perfectly reasonable for the employee to believe that the date the dispute arose is the date he is told finally that his appeal against his dismissal has been refused." On appeal, in the reported case of **Fidelity Guards Holdings (Pty) Ltd v Epstein & Others** (2000) 21 ILJ 2382 (LAC), Zondo JP, delivering the unanimous decision of this Court said the following of Pillemer AJ's judgment at para [21]: " In conclusion I am unable to find that the court *a quo* erred in any way in dismissing the review application. ". I agree with sentiments expressed in this judgment.

[9] The CCMA commissioner based his decision on a misunderstanding of the issues before him. The employee's case was based on an acceptance that she was dismissed on the date taken by the commissioner as the date of her dismissal. She also accepted that because that was the date of her dismissal, her referral was late. The case which she advanced in support of her application for condonation was that because she was awaiting the outcome of the internal appeal, there was good cause for her delay. The commissioner seems to have understood her case to be that the fact that she had lodged an

internal appeal extended the date of her dismissal to the date of the outcome of her appeal.

[10] In **Miladys v Naidoo & Others** (supra), Nicholson JA, delivering the unanimous judgment of the court said at para [30]:

"Gross irregularities have been divided into those that occur patently, where, for example, the right to cross-examination is denied, or latently, where the reasoning is so flawed that one must conclude that there has not been a fair trial of the issues."
In **Goldfields Investment Ltd & Another v City Council of Johannesburg & Another** 1938 TPD 551 at 560 Schreiner J, as he then was, said the following in considering whether a gross irregularity of the latent kind had occurred (it being clear that the arbitrator had committed no patent gross irregularity):
" In matters relating to the merits the magistrate may err by taking a wrong one of several views or he may err by mistaking or misunderstanding the point in issue. In the latter case it may be said that he is in a sense failing to address his mind to the true point to be decided and therefore failing to afford the parties a fair trial. But that is not necessarily the case, it would be straining the language to describe it as a gross irregularity or a denial of a fair trial. One would say that the magistrate has decided the case fairly but has gone wrong on the law. But if the mistake leads to the court's not merely missing or misunderstanding appoint of law on the merits, but to its misconceiving the whole nature of the enquiry, or of its duties in connection therewith, then it is in accordance with the ordinary use of language to say that the losing party has not had a fair trial."
This extract was quoted with approval in the case of **Toyota SA Motors (Pty) Ltd v Radebe & Others** (2000) 21 ILJ 340 (LAC) at para [41] (which was, in turn, referred to with approval in **Miladys v Naidoo & Others** (*supra*) at para [30]) and in a long line of other cases in other courts and has been endorsed by the Supreme Court of Appeal, the most recent case in that court being **Paper Printing Wood & Allied Worlers Union v Pienaar NO & Others** 1993 (4) SA 631(A) at 638G; (1993) 14 ILJ 1187 (A). That the employee had waited for the outcome of the internal appeal before referring her dispute to the CCMA was far from irrelevant. This was the very issue that should have

weighed with the CCMA commissioner and which, in my opinion, should have led to the application for condonation being granted. The CCMA commissioner mistook or misunderstood the point in issue. He misconceived the nature of the enquiry before him as well as his powers. He failed to address his mind to the true point to be decided. His reasoning was so flawed that the decision warrants interference. If these findings would have justified a conclusion that there had been a reviewable irregularity in the nature of a latent "gross irregularity" then they certainly compel the conclusion that a reviewable irregularity had been committed on the basis that the decision was not "justifiable". (See the cases referred to in para [1] of this judgment). It was not a "rational decision directed to a proper purpose" (See para [89] of **Bel Porto School Body v Premier Western Cape** (*supra*)). *Mr Lagrange* conceded, correctly, that if we found that the CCMA commissioner had misunderstood the point in issue or had misunderstood the nature of the enquiry before him or his powers or had failed to address his mind to the true point to be decided, then the review would have to succeed. For reasons which are somewhat different from those of the Court *a quo*, I therefore come to the conclusion that the Court *a quo* was correct in deciding to set aside the commissioner's dismissal of the application for condonation of the late referral.

[11] There is no reason why costs should not follow the result in this case.

[12] The appeal is dismissed with costs.

DATED AT JOHANNESBURG THIS DAY of DECEMBER 2003.

N.P. WILLIS

JUDGE OF THE LABOUR APPEAL COURT

I agree.

R.M. M. ZONDO

JUDGE-PRESIDENT OF THE LABOUR APPEAL COURT

I agree.

C. N. JAFTA

ACTING JUDGE OF THE LABOUR APPEAL COURT

Counsel for Appellant: *R. Lagrange*

Attorneys for Appellant: Horwitz Inc

Counsel for Respondent: *S. R. Van Jaarsveld*

Attorneys for Respondent: Cynthia Du Plessis

Date of hearing: 11th September, 2003

Date of Judgment: 23 December, 2003