

IN THE LABOUR COURT OF SOUTH AFRICA

In the matter between:

CHARLES MOSES Applicant

and

P ROOPA NO First Respondent

SAFIKA HOLDINGS (PTY) LIMITED Second Respondent

THE DIRECTOR OF THE COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION NO Third Respondent

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REASONS FOR JUDGMENT

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JAMMY AJ

1. On 6 October 2000, having heard comprehensive argument from Counsel for the parties in this matter, I made an order in terms of which the application for the review and setting aside of the Ruling in question by the First Respondent was granted with costs, the matter was to revert to the Third Respondent for consideration and determination by another Commissioner and the Second Respondent was ordered to pay the Applicant's costs. I indicated that I would furnish full reasons for that order and they are the following.
2. This is an application which, although not so stated on the papers, is brought implicitly in terms of s158(1)(g) of the Labour Relations Act 1995 ("the Act"), for the review and setting aside of a Ruling by the First Respondent acting in his official capacity as a Commissioner of the Third Respondent, in which the application by the Applicant for the condonation of the late referral for conciliation of his alleged dispute with the Second Respondent, was dismissed.
3. The following aspects of the matter are common cause:
the referral in question was approximately seven days late;

th in the referral Form 7.11 and in his Affidavit supporting his condonation application, the Applicant expressly recorded his submissions that he had been employed by the Second Respondent, that his employment had been terminated and that that termination was substantively and procedurally unfair. He referred further to the denial by the Second Respondent that an employment relationship existed between them.

e Second Respondent opposed the condonation application and filed an Affidavit in which the sole ground of opposition was expressly stated thus -

Respondent opposes the application for condonation filed by the Applicant because the Applicant was never employed by the Respondent. It was therefore impossible for the Respondent to terminate the Applicant's employment."

ertain allegations of fact were then briefly set out in substantiation of this contention and it was on that ground and that ground only, that the application for condonation was contended to be "fatally defective."

4. Section 191(2) of the Act provides that, on good cause shown by the employee, the Commission may permit the referral of a dispute about unfair dismissal after the expiration of the 30-day time limit prescribed in s191(1).

5. The reason submitted by the Applicant for his late filing of the referral was stated in his supporting affidavit as follows:

Attorneys have attempted to settle the matter with the employer but attempts to settle have failed..... I have up until now believed the matter could be settled."

If condonation was not granted, he averred, he would be prejudiced because -

ve a substantial claim against the employer and I believe the merits are good."

6. The Second Respondent, in its Opposing Affidavit, did not challenge that reason as being one which would not justify the default. Its succinct and only response was that -

re is no obligation on the Respondent to settle this matter because the Applicant has never been employed by the Respondent. This has been made clear to the Applicant and his Attorneys of Record. In the circumstances the Applicant was not entitled to refer a dispute to the CCMA and the CCMA does not have jurisdiction herein."

7. By Government Notice No R245 dated 31 March 2000, the Department of Labour promulgated **RULES REGULATING THE PRACTICE AND PROCEDURE FOR**

RESOLVING DISPUTES THROUGH CONCILIATION AND AT ARBITRATION PROCEEDINGS. Adv A Snider, representing the Second Respondent, submitted, correctly in my view, that although promulgated after the events in issue in this matter, those rules encapsulate the guidelines previously published by the Commission and in fact, by Rule 27, they expressly repeal them.

8. Rule 5.3, dealing with applications for condonation of late referrals, defines the factors to be taken into account. They are the following:

of lateness;

for the lateness;

of party's prospects of succeeding with the referral and obtaining the relief sought against the other party; and

of convenience, including any prejudice to the other party."

9. Mr Snider stressed the fact that, although entitled to do so, the Applicant failed to file a sworn reply to the Second Respondent's Opposing Affidavit before the Commissioner. The formal Rules to which I have referred were not, he acknowledged, in force at that time and although the Applicant may have been entitled to do so, there was no obligation on him then, as indeed there is none even now, to have followed that course. In my view he was entitled to assume that the substantive jurisdictional issue raised by the Second Respondent and which was patently in dispute on the papers, was not relevant to the core issue of condonation and should properly be dealt with in due course in the conciliation or arbitration processes which he was seeking to invoke.

10. The First Respondent was, as I have said, confronted with a dispute of basic fact on the papers before him - on the one hand, a sworn statement by the Applicant that he was employed by the Second Respondent and on the other, a sworn statement by the Second Respondent that he was not. The latter was augmented by a recital of alleged facts that had not been responded to at that stage by the Applicant but this notwithstanding, and without any substantiation of the "weighing up" process followed by him or any elaboration of his reasons for reaching it, the First Respondent presented the following conclusion:

"Weighing up the versions of the two parties, I find Mr Moses' explanation in respect of his prospects of success most unsatisfactory when evaluated against the employer's detailed defence, and that Mr Moses has not shown 'good cause' in respect of s191 of the Act and accordingly dismiss this matter."

11. Neither the degree of lateness nor the justification submitted for it are anywhere in that Ruling critically examined. The conclusion reached is, as I have said, conveyed with no further elaboration or explanation.

12. Following the fundamental *dicta* in that regard in the Appellate Division case of -

Melane v Santam Insurance Co Limited 1962(4) SA at 532

the concept of condonation in the context of the Labour Relations Act was comprehensively examined by this Court in -

Northam v UU Net Internet Africa (Pty) Limited & others (1998) 5 BLLR 492.

At 496(G) Pretorius AJ said this -

One is obviously aware of the fact that applications for condonation are not always dealt with in a formal manner. Often, it is not necessary to do so. This is especially so where an application for condonation is not opposed and where the facts are not controversial. But where, as in this case, difficult questions of fact and law are involved both in establishing whether an application for condonation is necessary at all and also in regard to the application itself the parties must be given a proper hearing. No specific, all encompassing tests can be laid down for determining whether a hearing is fair - everything will depend upon the circumstances of the particular case (*See Administrator, Transvaal and others v Theletsane and another* 1991 (2) at 206A-B). In the circumstances of this case, however, what the Third Respondent should have done was to obtain the facts in the presence of both parties and to afford each party a reasonable opportunity to controvert facts given by the other side. This was not done in this matter and accordingly the procedure followed by the third respondent did not comply with the rules of natural justice.

13. Applying that dictum in -

NUMSA & another v Voltex (Pty) Limited t/a Electric Centre & others (2000) 5 BLLR 619, Van der Riet AJ commented -

"In my view the same can be said about the manner in which the third respondent dealt with the condonation application in this matter. He relied on prejudicial allegations made by the first respondent in its opposing letter without giving the applicant any opportunity to deal with it. In the circumstances of the case that amounts to a failure to comply with the rules of natural justice and on its own, forms a basis for the setting aside of the decision of the third respondent in refusing condonation."

14. The Labour Appeal Court, in a line of leading cases relating to reviews in terms of s145 of the Act of arbitration awards made under the auspices of the Commission, has enunciated a set of principles to be applied which, in my view, have equal relevance to reviews under s158(1)(g) relating to matters of this

nature.

See for example -

Carephone (Pty) Limited v Marcus NO & others (1998) 19 ILJ 1425.

15. Cardinal amongst them, is the requirement, inter alia, that what is required to render an award unassailable, is a rational objective basis justifying the connection made by the decision maker between the material properly available to him and the conclusion he or she eventually arrived at.

16. I am left in no doubt that no such rational basis existed in this matter. The conclusion reached by the First Respondent was not justifiable on the papers filed and which comprised the only material to which, at that stage, he had recourse.

17. What the First Respondent was obliged in my view to do when faced with the factual allegations submitted to him by the Second Respondent, was either to convene a meeting of the parties in order to hear the Applicant's response or to call on the Applicant to deal with them by way of a Replying Affidavit. There was no "version" of the Applicant before him which, in relation to the factual averments by the Second Respondent, could, in his terminology, have been "weighed" and with proper regard to the dictates of natural justice and fairness to which I have referred, it was incumbent upon him to procure one.

18. The issues of the degree of lateness, which in any event was insignificant in my opinion, and the reasons given for it, were not, save for a bald reference thereto, examined by the First Respondent as material aspects of his conclusion and Ruling and nor, as I have said, did they constitute any ground of opposition in the Second Respondent's Opposing Affidavit. If, as must therefore be assumed, it was not felt necessary by either Respondent to deal with them in the condonation application, I can find no valid reason to reject them in the context of this review.

19. Finally, with regard to the criteria of balance of convenience and prejudice, there is no doubt in my view that any objective assessment thereof must emphatically favour the Applicant and no material submissions to the contrary have been presented to me.

20. The full terms of the order which, for all of these reasons, I accordingly made on 6 October 2000, were as follows:

...ing by the First Respondent in terms of which he dismissed Applicant's application for condonation of the late referral of his dispute with the Second Respondent for

conciliation in terms of the Labour Relations Act 1995, is reviewed and set aside. Application is to revert to the Third Respondent for consideration and determination by a Commissioner other than the First Respondent and with specific regard to the substance of this judgment.

Second Respondent is to pay the Applicant's costs of this application.

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Date of hearing: 6 October 2000

Date of Judgment: 6 October 2000

Representation:

For the Applicant: Adv F Boda instructed by Dison Ndlovu Attorneys

For the Second Respondent: Adv A Snider instructed by Brian Kahn Inc