IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT DURBAN

CASE NO: D 1110/99 In the matter

between:

Applicant

and

Respondent

Judgment

LYSTER A J :

1.1 In this matter the court heard argument on an *in limine* point relating to the question as to whether the Court had jurisdiction to hear the matter in the absence of an application for condonation by Applicant, who had filed his statement of case 308 days late after the arbitrator had issued an award. Respondents' representative also argued that in any event, condonation should be refused because of this inordinate delay and the weak prospects of success.

1.2 Applicant was unrepresented, and while it is correct to say that he did not file an application for condonation, he did fill an application for condonation for late filing of heads of argument. In these heads, he sets out the chronology of the facts, and requests the court to condone the late filing of his statement of case.

1.3 Taking into account the fact that Applicant's attorneys withdrew as attorney's of record in April 2000, I indicated that in spite of the delays that there had been substantial compliance with the rules, and that I was at least prepared to hear Applicant on the condonation application.

2.1 The relevant facts are as follows:

2.1.1 On 8 October 1998, the Applicant's representative trade union referred this dispute, relating to the Applicant's dismissal, to the Transnet Bargaining Council, a Council having jurisdiction n in respect of such dispute.

2.1.2 The Applicant, who is the employee party, alleged that the reason for his dismissal is automatically unfair.

2.1.3 The dispute remained unresolved.

2.1.4 The dispute was then referred to arbitration but, on 3 December 1998, the arbitrator issued an award, which was faxed to the parties on 4 December 1998, to the effect that since the Applicant had alleged that his dismissal was automatically unfair, he might refer the matter to this court.

2.1.5 On 8 October 1999 i.e some nine months later, the Applicant referred the matter to this court in terms of section 191(5)(b) of the Act.

2.1.6 For reasons that are not clear, on 6/1/99, Applicant referred an application in terms of section 158(1)(c) under case number D6/99, to this court. It was not made clear by Applicant at the hearing of this matter as to exactly what that matter related to , but it seems to have been an application to make the arbitration award an order of court.

2.1.7 This was opposed by Respondent and was never taken any further by Applicant.

3.1 Applicant now seems to contend that that application (in terms of section 158(1)(c) is or should be deemed or considered to be, a referral of his statement of case in this matter in terms of section 191(1)(5)(b) and that it was made within 90 days of date of receipt of the arbitrator's award.

3.2 There is no basis for this submission. A party cannot refer an award to court in terms of section 158(1)(c) to have it made an order of court, and then, when realizing later that one is out of time with a section 195(1)(b) referral, say that the application in terms of section 158(1)(c) is, or should be deemed to be, the section 195(1)(b) referral. Furthermore, it is very difficult to understand why an award was issued, if the matter was to be referred to the Labour Court. In these circumstances,

the jurisdiction of the two bodies are mutually exclusive-the matter either goes to arbitration or to court. Presumably therefore, the "award" was merely an agreement by the parties to refer the matter to the Labour Court.

3.3 That is what the Applicant should have done, and he has no business in making a section 158(1)(c) application, and the fact that he did, does not mean that he has filed the current dispute timeously in terms of section 191(5)(b).

4.1 Section 191(11)(a) only came into effect in February 1999. This subsection requires a dispute to be referred to the court within 90 days after the Bargaining Council has certified the dispute as unresolved.

4.2 Accordingly, the section was not binding on the Applicant in December 1998. Did it become binding on him in February 1999?

4.3 Surprisingly, neither parties, and particularly Respondent, who was competently represented, did not address me on the issue of the retrospectivity of legislation which may effect the prior rights of a party.

4.4 The law regarding retrospection is set out in ***Natal Bottle Store-Keepers and Off Sales Licences Associates v Liquor Licensing Board for Area 31 and Others 1965 (2) SA 11 (D& CLD) at 18G-H.*** See also Halsbury Vol 36, 3rd Edition p426.

"The presumption against retrospectivity does not apply to legislation concerned merely with matters of procedure of evidence. On the contrary "it is presumed that procedural statutes are intended to be fully retrospective in their operation, that is to say, are intended to apply not merely to future actions in respect of existing causes, but equally to proceedings instituted before the commencement."

4.5 It is trite to say that statutes will not be held to take away existing rights retrospectively unless they so provide expressly or by necessary implication.

[Principal Immigration Officer v Purshotam 1928 AD 435 at 450, CW v Commissioner of Taxes

1990 (2)SA 245 ZHC, p252]

4.6 In ***Curits v Johannesburg Municipality 1906 TS 308 at p311,*** Innes CJ said:

"The general rule is that, in the absence of express provision to the contrary, statutes should be considered as affecting future matters only; and more especially that they should if possible be so interpreted as not to take away rights actually vested at the time of their promulgation. The legislature is virtually omnipotent, but the courts will not find that it intended so ineqitable result as the destruction of existing rights unless forced to do so by language so clear as to admit of no other conclusion."

4.7 In ***Lek v Estate Agents Board 1978 (3) SA 160 (C) at 169 F-G*** the court held as follows:

"The presumption against retrospectivity does not apply when it must be inferred from the provisions of the Act that the legislature intended the Act to be retrospective. Such inference can be drawn when the consequence of holding an Act to be non-retrospective would lead to an absurdity or practical injustice."

5.1 The amendment introduced by section 191(11)(a) of the Act is an amendment to procedure . It does not remove any existing substantive rights of a party, in this case the Applicant, but regulates procedure only and is intended to give effect to the main objective of the LRA- the expeditious resolution of disputes, by introducing uniformity by way of statutory time constraints.

5.2 It is useful to look again at the test which Friedman J laid down in Leks case above at paragraph 4.7.

"Such as inference (i.e that the legislature intended the Act to be retrospective) can be drawn when the consequence of holding an Act to be non-retrospective would lead to an absurdity or practical injustice."

5.3 Examining section 191 (11)(a), what is the absurdity or practical injustice that would arise if the Act was held to be non-retrospective? What absurdity or practical injustice was the amending section trying to prevent or cure? Clearly, the absurdity that was contemplated was that, without the 90 day limit, a litigant would be able to refer his or her claim whenever he/she chose to. The decision to refer a matter could be delayed indefinitely, which would be severely prejudicial to the Respondent's interest in achieving finality in this matter. Furthermore, an Applicant might chose to defer a referral for reasons which are inimical to the interests of justice-for example he/she might defer the matter until the Respondents witnesses had disappeared or died.

5.4 The amendment at 191(11)(b), provides for a mechanism whereby the Court can condone, on good cause

shown, the late filing of a referral outside of the 90 days. I hasten to add that had the amendment not included this subsection, then the application of 191(11)(a) on its own would clearly have effected Applicant's right to refer a matter, and would therefore have directly effected his substantive or vested right to have his claim adjudicated.

5.5 Accordingly, I find that the amending section 191(11)(a) and (b) was retrospective, obviously to the date of the promulgation of the section, being 1 February 1999. Applicant accordingly had from 1 February 1999 to refer his dispute to this Court. He did so on 8/10/99.

5.6 Had he not been represented throughout, undoubtedly this court would have allowed Applicant much more leeway in considering his application for condonation. However, Applicant was represented up until a week or so prior to this hearing, not only by an attorney but by a trade union. Applicant was furthermore an obviously educated and intelligent person who was employed at a senior level by Respondent.

5.7 Applicant does not explain the very lengthy delay in this matter satisfactorily, save to say that his union and his attorney caused the delays. It is trite to say that there is a limit to the extent to which a party can rely on the negligence of its attorneys ***(Waverley Blankets v Ndime & Others (1999) 11 BLLR (LAC)).*** In any event, Applicant makes out no discernible case as to how or why he, or his trade union or his attorneys delayed the matter.

5.8 With regard to the prospects of success, he merely states he "has a prima facie case and was automatically unfairly dismissed." In this sense he makes out no case at all.

5.9 These two criteria, explanation for delay and the prospects of success, are generally considered to be the most important criteria for a court to consider when dealing with a condonation application. ***(Melane v Santam Insurance Co Ltd 1962(4) SALR 531 AD).*** In my view, Applicant fails to make out a case on either ground.

6.In the circumstances, the application for condonation must fail. There will be no order as to costs.

LYSTER A J

ant: In person

ndent: Woodhead Bigby & Irving

g: 9 May 2000

ent: 6 June 2000