IN THE LABOUR COURT OF SOUTH AFRICA
(Held at Port Elizabeth)

Before Van der Riet AJ

Case No: P644/99

In the matter between:

Applicants

and

VOLTEX (Pty) Ltd t/a ELECTRIC CENTRE

Respondents

JUDGEMENT

VAN DER RIET AJ:

In this application, the applicants seek to review the decision of the third respondent, a commissioner of the CCMA, made in terms of the provisions of section 191(2) of the Labour Relations Act, No 66 of 1995. The third respondent refused to condone the applicants' failure to refer the dispute between the second applicant and the first respondent within the thirty day period stipulated in section 191(1) of the Act. The dispute between the second applicant and the first respondent, his former employer, concerned the dismissal of the second applicant on 29 April 1998. The dispute was referred to the CCMA on 29 June 1998.

It is useful to briefly set out the events that led to the hearing in this Court. After the dismissal of the second applicant on 29 April 1998, the first applicant, his union, intervened and attempted to assist the second applicant in his appeal against his dismissal. The first respondent did not allow

the local union organiser to assist the second applicant at the appeal hearing and on 18 May 1998, the dismissal was confirmed by the appeal tribunal. In a letter dated 26 May 1998, the first applicant informed the first respondent that the union was in dispute with the company over the unfair dismissal of the second applicant and requested an urgent meeting to try and resolve the matter. On 29 May 1998 the first respondent replied to this letter and informed the union that the company had acted in accordance with the requirements of the law and that its decision was final.

On 29 June 1998 the applicants referred the dispute to the CCMA in terms of section 191. In paragraph 5 of the printed LRA Form 7.11, the applicants stated that the dispute arose on 29 May 1998. A conciliation meeting was arranged by the CCMA for 7 September 1998 and both parties attended the meeting. The parties were however unable to resolve the dispute and at the end of the meeting the presiding commissioner certified that the dispute remained unresolved.

On 10 November 1998 the matter was referred for arbitration and an arbitration hearing was arranged for 10 February 1998. On 10 February 1998, the arbitrator appointed by the CCMA, advised the parties that the applicants had not referred the dispute to the CCMA timeously and that in the circumstances he was not prepared to arbitrate the matter until an application for condonation in terms of section 191 (2) of the Act had been made and finalised.

In a letter dated 6 May 1999 the applicants applied for condonation. This application was supported by affidavits from the union organiser involved, Mr Goni, and the second applicant. On 22 July 1999 the CCMA wrote to the first respondent informing it that the applicants had applied for condonation. It attached a copy of the condonation application to its letter and informed the first respondent that if it wished to reply to the application, its reply must reach the CCMA within 14

calender days from the date of the letter. The CCMA letter also states that the respondent must serve a copy of the reply on the applicants. It further stated that at the end of the fourteen day period the representations received will be considered and a decision will be made whether or not to condone the late referral. The first respondent replied to the application in a letter dated 6 August 1999. The applicants now say that they never received this letter. I will deal with this aspect later in my judgment.

On 18 August 1999 the third respondent informed the parties that the late referral of the dispute is not condoned. His decision was motivated in a four page document under the heading, Award in respect of application for condonation.

On 5 October 1999 the applicants delivered this application. At that stage the applicants intimated that the application was made in terms of section 145 of the Act and it included an application for condonation for its failure to deliver the application within the six weeks period stipulated in section 145 of the Act. On 11 November 1999, after the third respondent had made available the record of the proceedings, the applicants delivered a notice in terms of Rule 7A(8) and a supplementary affidavit. The applicants stated in the supplementary affidavit that they had received advice that the application is brought before this court in terms of section 158(1)(g) of the Act and not in terms of section 145 thereof. They stated further that their advice was that it was not incumbent upon the applicants to make application within the six week period stipulated in section 145(1)(a) of the Act and that they would no longer seek condonation for its failure to bring the application within six weeks.

In essence, the case made out in the founding papers for the review of the third respondent's

decision is that the third respondent failed to apply his mind properly to the condonation application and that his decision to refuse condonation was unreasonable in the circumstances. It was further contended that the arbitrator committed a gross irregularity in the proceedings in that he never afforded the applicants the opportunity to properly present their case to the third respondent. This was based on the fact that the third respondent in his "Award" had regard to the contents of the first respondent's letter dated 6 August 1999 without affording the applicants the opportunity of responding thereto.

The first respondent opposed the review application. In its answering affidavit it raised certain preliminary issues and disputed the applicants' case on the merits of the review. The preliminary issue persisted with by Mr Bleazard, who appeared for the first respondent, is that the applicants by intimating that it now relied on section 158(1)(g) and not section 145, had effectively abandoned its original application and should withdraw the application and tender costs and bring a new application in terms of s. 158(1) (g). In the alternative it was contended that an application to review a decision of the CCMA made in terms of section 191(2) of the Act is also governed by section 145 and that accordingly the six week period is still applicable. I should perhaps add in this regard that the first respondent did not in its answering affidavit deal with the facts in support of the application for condonation as it adopted the view that the applicants had abandoned the application in terms of section 145.

In the applicants' replying affidavit, in reaction to the first respondent's denial that the third respondent committed a gross irregularity (on the basis that the applicants never attempted to respond to the first respondent's letter of opposition), the applicants amplified their case in this regard by asserting that the applicants had never been (presumably before the award was made on

18 August 1999) made aware of the fact that the first respondent had been called upon to make representations or that it in fact did so. The first respondent did not respond to this assertion nor did it apply to have the allegation struck out.

The preliminary points raised by the first respondent

In my view, the first respondent's first preliminary point has no merit. The supplementary affidavit of the applicants makes no mention that any application is abandoned. It simply informs the court that the applicants' view of the legal position is that an application seeking to review the decision of the CCMA commissioner made pursuant to the provisions of section 191(2) of the Act, is not a review application within the contemplation of section 145 but is one within the contemplation of section 158(1)(g). It seems obvious that Rule 7A(8) specially permits an applicant in review proceedings to make such an allegation in its supplementary application. Moreover, it cannot be said that the applicants have by implication abandoned their application by doing so.

The alternative *in limine* submission is equally without merit. Mr Bleazard referred to two decisions in support of his submission, namely *Kruger v Macgregor N.O (1999) 9 BLLR 935 (LC) at 936 H*, and *Mtshali v CCMA (1999) 9 BLLR 961 (LC)*. In the passage referred to in the Kruger case, the learned Judge points out in passing that "although the issues presently under consideration initially arose at the stage of conciliation, the decision in question was properly characterised as an arbitration award". It is difficult to ascertain from the Judgement whether the decision challenged was in fact one made in terms of section 191(2). But in any event, the question which arises in this application, was not considered and the judgement offers no reasoned support for Mr Bleazard's

contention. In the Mtshali case, it was assumed without deciding the matter, that a review application of a decision by a CCMA commissioner in terms of section 144 of the Act (that is, to rescind an award made) falls within the terms of section 145.

Section 145 regulates review applications premised on "*a defect in any arbitration under the auspices of the CCMA*". Mr Wade, who appeared for the applicants, referred me to the decision of Pretorius AJ in *Northam v Uunet Internet Africa (Pty) Ltd(1998) 5 BLLR 492 (LC) at 495 G-I.* The decision is directly in point and in my view should be followed. As Mr Wade pointed out, section 191(2), in contrast to the wording of section 191(5) - which provides that if the pre-conditions are met the "*Commission must arbitrate*" - empowers the commission to "*permit the employee to refer the dispute after the 30-day time limit has expired*." Section 138 of the Act makes it clear that whatever procedure the commissioner adopts in arbitration proceedings in order to shorten the proceedings, arbitration proceedings under the auspices of the CCMA, necessarily implies a hearing where the parties are present and are permitted to participate in the proceedings. When the third respondent exercised his powers in terms of section 191(2) of the Act in this matter, no hearing was arranged where the parties could participate in the proceedings. He disposed of the matter on the written representations received. In my view, it is clear that the procedure adopted, is not arbitration proceedings within the contemplation of section 138. The fact that the third respondent called his reasons for his decision an "award", does not take the matter any further. It follows that in the circumstances, the decision challenged in this review application, was not a decision made within the context of "arbitration proceedings" as contemplated in section 145. The applicants are therefore in my view correct in their view that they did not have to comply with the six week period stipulated in section 145 of the Act. Although Mr Bleazard did not conceed that the review application was made within a reasonable period, he did not advance any submissions why I should

find that it was lodged after an unreasonable delay. In the circumstances I find that the application is properly before me.

The merits of the review application

It is perhaps useful to refer to the material part of the third respondent's "award" before dealing with the third respondent's grounds for review. The third respondent stated as follows in his "award":

"... Condonation of the failure of a party to comply with statutory time limits is not a formality. An applicant for condonation is required by the Act to show good cause. In deciding whether good cause has been shown, it is customary to have regard to a number of factors that have been identified as being relevant to the enquiry. These include the period of the delay, the explanation for the late referral, the referring party's prospect of success and the importance of the case. Another factor to be considered is whether any prejudice has resulted from the delay. Ultimately it is a factor of fairness to both parties. I now consider these factors with reference to the submissions of the parties.

(1) The length of the delay

The referring party claimed that the employee was dismissed on 29 April 1998. The dispute was referred to the CCMA on 29 June 1998 about a month out of time. The dispute proceeded to conciliation and ultimately arbitration, where the presiding commissioner became aware of the fact of the late referral. The employee party was then required to apply for condonation. The degree of lateness in respect of the original referral, namely one month, is not very serious, though it must be said that the ultimate result of the late referral will be that if condonation is granted, the arbitration will take place about eighteen months after the date of dismissal.

(2) The explanation for the late referral

A union organiser, Mr B Goni, deposed to an affidavit in support of the application for condonation. He claimed that the employer had appealed against his dismissal, and he had requested that he be allowed to represent the employee at his appeal enquiry. The employer refused the latter request, and allegedly delayed in scheduling the appeal. Mr Goni said that he had been under the impression that the date from which the thirty day period started to run was the date when the outcome of the appeal enquiry became known. In its letter of opposition to condonation the employer party strongly disputed the claim that it had delayed the appeal enquiry, and offered to supply copies of correspondence in support of the submissions. The explanation for the delay is not a covincing one. Fundamentally, the explanation for delay is a misunderstanding on the part of the union official as to the date from which the time period starts to run. At the same time I must take into account in favour of the employee that the delay was at least partially due to efforts to make use of internal dispute settlement procedures in the form of an appeal enquiry, so that it cannot be said that there was a complete failure on the part of the employee to take action in respect of his dismissal.

(3) The referring parties prospect of success

It was submitted on behalf of the employee that his prospects of success were fair.

It was claimed that the employee had been instructed to prepare an order for the customer. When he discovered that the items required by the customer was out of stock, he informed his superior about this. He was then told "to draw the available goods as per the previous orders. The customers complained thereafter he was dismissed."

The employer contended that the employee had been warned about his poor work performance on several previous occasions. It was submitted that his prospects of success are not favourable. It is difficult to fathom exactly what case the employer is making out in support of the claim of unfair dismissal. No specific basis for the claim of unfair dismissal is identified, though the employers case must perhaps be understood to be that he was merely obeying instructions in acting in the manner that he did. On the somewhat criptic allegations of fact before me I cannot conclude that the basis has been laid for a conclusion that the employer's prospect of success are favourable, certainly not to the extent that it offsets the absence of a proper explanation for the delay.

(4) The importance of the case

There is nothing unusually important about the matter though it is obviously important to the employee.

(5) Prejudice resulting from the delay

The employer party submitted that it would be prejudiced in that two of its witnesses are no longer available to it, the chairperson of the disciplinary enquiry have immigrated to Canada while another material witness has retired due to ill heath and is no longer contactable.

Having considered the above factors I am of the view that the referring party has not shown good cause. The factors favouring condonation, as they have been analysed above, are outweighed by the factors counting against condonation. While the original referral was not very late, the lack of a persuasive explanation for the delay, limited prospect of success, and the potential prejudice to the employer in relation to its witnesses strongly suggest that condonation should be refused. The late referral of the dispute is not condoned."

In my view, the manner in which the CCMA has handled the dispute between the applicants and the first respondent is highly unsatisfactory. One cannot easily overstate the important role that the CCMA fulfils, and must fulfil, in labour relations in South Africa. In a nutshell, the function of the CCMA and its commissioners is to solve labour problems as quickly and effectively as possible. It cannot approach this task in a mechanical and rigid manner. It certainly can never be unimaginative in attempting to solve problems and in disposing of its work for the day in a way that promotes the effective resolution of industrial disputes.

I find it quite unacceptable for the commissioner who was enjoined to arbitrate the dispute on 10

February 1998, to refuse to do so. I am not at all persuaded that compliance with the 30-day is a jurisdictional requirement where the parties have willingly participated in the conciliation process without raising the late referral. See in this regard the remarks of Conradie JA in the case of NUMSA v Driveline Technologies (Pty) Ltd (unreported judgment, case number J324/97) in his minority judgment, paragraph 8. I will however assume for the purpose of my judgment in this matter that non-compliance is a jurisdictional issue. In my view, the very least the arbitrator should have done, was to deal with the condonation aspect there and then. To allow the matter to be postponed for a written condonation application to be made, was not a useful intervention. The unfortunate manner in which the application for condonation was thereafter handled by the CCMA would never have happened if the arbitrator on 10 February 1998 dealt with the matter in an imaginitive and decisive way.

In *Northam v Uunet Internet Africa (Pty) Ltd,* supra at 496 E, Pretorius AJ said the following :

"One is obviously aware of the fact that applications for condonations 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 test 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 & Another 1991 (2) SA 192 (A) at 206 A - 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 the 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."

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.

I am further of the view that the third respondent did not properly apply his mind to the application in the manner required by the Labour Relations Act. It is trite that what constitutes good cause must be decided upon the circumstances of each particular application. (See *Cairns' Executors v Gaarn 1912 AD 181 at 186*). The basic principle is that the court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. (See *Melane v Santam Insurance Company Ltd 1962 (4) SA 531 at 532 C*). The factors usually weighed up by the court include the (a) the degree of non-compliance; (b) the explanation for it; (c) the importance of the case; (d) the prospects of success; (e) whether the fault was that of the client or his legal representatives and their agents; (f) the respondent's interest in the finality of his judgement; (g) the convenience of the court; (h) the nature and the purpose of the remedy sought; and (i) the avoidance of any unnecessary delay in the administration of justice. (See Harms, Civil Procedure in the Supreme Court, p 564 (3) and the cases referred to therein.)

It is important not to lose sight of the second last consideration mentioned by Harms. An important consideration that informs the balancing process is the nature and purpose of the remedy sought. In this regard one must look at the condonation application in its context in the Labour Relations Act. One of the primary objects of the Labour Relations Act is to promote the effective resolution of disputes (see section 1(d)). One of the reasons why employees are given the right to pursue dismissal disputes in terms of the dispute resolution mechanisms of the Labour Relations Act is to avoid unnecessary disruption in the workplace. Where an aggrieved party to a dispute is persisting

with her case, very few labour disputes can be resolved effectively without addressing the substance of the disputants respective claims. Accordingly, if a dismissal dispute is not timeously referred for conciliation in terms of section 191 (1), the dispute can only be resolved effectively if condonation is obtained in terms of section 191(2). It is therefore important that the prejudice the respondent suffers as a result of the delay, should be weighed against the other relevant considerations particularly the length of the delay and the explanation therefore. The prejudice to the respondent is directly linked to his interest in obtaining finality in a dispute. If the respondent has acted to its prejudice because the dispute was not processed with in the stipulated period and it has assumed that the dispute is over, the prejudice suffered, depending on the seriousness thereof, is an important consideration. As was pointed out in the leading case of *Melane v Santam Insurance Company Ltd* supra, if there are no prospects of success there would of course never be a point in granting condonation.. However the prospect of success is not decisive in circumstances where it is not apparent that there are no prospect of success. If the applicant can show that he has some prospect of success and the delay is not excessive, then, within the context of an application for condonation in terms of section 191(2) of the Act, condonation should not easily be refused.

In my view it would be difficult for a respondent to show prejudice if it was prepared, despite the delay, to attend a conciliation meeting without raising its prejudice and protesting against the continuation of the process. (See in this regard *Ppwawu v Dreyer (1997) 9 BLLR 1141 (LAC) at 1144 C)*

If I can turn to the third respondent's decision in this matter. It is difficult to understand why the third respondent found Mr Goni's explanation for the delay unconvincing. If the third respondent had come to the conclusion that Mr Goni was lying in that he in fact knew that the date of dispute is

the date of dismissal, then it is understandable that he could reject the explanation. He did not do that and of course, on what was before him, had no basis for doing that. He accepted the good faith of Mr Goni, but merely remarked that it was unconvincing. If Mr Goni in fact had the wrong understanding of what the date of dispute was, then his explanation for the delay is quite acceptable. Although s.191(1) of the Act makes it quite clear that the 30-day period runs from the date of dismissal, the LRA 7.11 form uses the phrase "date of dispute". It is quite conceivable that a trade union official, particularly against the backdrop of the deadlock provisions in the 1956 Labour Relations Act after the 1988 amendments came into effect and the provisions in the transitional provisions of the 1995 LRA regarding the time when the dispute had arisen, can be confused about what the legal meaning of the phrase "date of the dispute", is.

The third respondent's approach to the prospect of success is also not acceptable. Accepting that the formulation of the applicants' case under the heading, Prospect of Success, in its application for condonation, is not very elegant, it is quite plain what the deponent intended to convey. It is alleged that the employee *"was dismissed for poor work performance. On the day in question, he was informed by a Coopasamy to pull some stock for a customer. He then discovered that the particular goods were not in, he went to inform Coopasamy about this. He was told to draw the available goods as per in the previous orders. The customer complained thereafter he was dismissed*." Moreover there are circumstances mitigating his conduct, *"he is 54 years old, has +- 5 years service, is married with four children."* The third respondent of course understood this. In his award, he states that *"the employee's case must perhaps be understood to be that he was merely obeying instructions in acting in the manner that he did."* What is important is that what the first respondent said in its letter of opposition, confirms that the condonation application cannot be disposed of on the papers on the basis that there is no prospect of success in the dismissal case. In

the two relevant paragraphs the first respondent stated as follows:

"The applicant was dismissed on 29 April 1999 following a disciplinary hearing at which complaints against him of (a) negligence in the performance of his duties and (b) failure to perform to work standards were found to have been proven ;

... In the three months prior to the disciplinary hearing, the applicant had received numerous written warnings for the same offence, and it is respectively suggested that the prospects of the applicant succeeding in this matter are far from good;"

If his failure to perform is due to the fact that he followed a supervisor's instruction (and this is not expressly disputed by the first respondent), he might have a prospect of establishing that he was dismissed unfairly.

The manner in which the third respondent dealt with the prejudiced alleged by the first respondent, amounts to a further misdirection. Nothing stated by the first respondent, suggests that it suffered any prejudice as a result of the delay. As stated above, given that the first respondent participated without protest in the conciliation process (in fact, never raised the issue before the appointed arbitrator raised it), it would be very difficult if not impossible for it to assert it persuasively. Yet the third respondent appeared to have relied on the prejudice alleged, in refusing condonation. In my view, the need to permit the applicant to process the dispute in terms of the dispute resolution mechanisms of the Act and in so doing to promote the effective resolution of disputes so strongly outweighed the fact that the applicant did not do so timeously in the circumstances of this case, that it cannot be said that the third respondent's refusal of condonation are justifiable in the circumstances of this case.

In view of the above, the review application must succeed.

The applicant requested me to decide the question whether or not condonation should be granted

and substitute my decision for that of the CCMA. Given that the application does not fall within section 145 of the Act, I am not empowered by the statute to determine the dispute in the manner I consider appropriate as provided in section 145 (4)(a) of the Act. My power to do so is similar to that of a review court under the common law. It is trite that in terms of the common law, a court would only in exceptional circumstances substitute its decision for that of a functionary entrusted by statute to do so. (See *Johannesburg City Council v Administrator Transvaal 1969 (2) SA 72 (T) at 76*.) In Baxter, Administrative Law, at pp 682-4, the four situations in which our courts have been prepared to substitute their decision for that of the functionary, are set out as follows:

(1) Where the end result is in any event a foregone conclusion and it would merely be a waste of time to order the tribunal or functionary to reconsider the matter.

(2) Where a further delay would cause unjustifiable prejudice to the applicant.

(3) Where the tribunal or functionary has exhibited basis or incompetence to such a degree that it would be unfair to require the applicant to submit to the same jurisdiction again.

(4) Where the court is in as good a position to make the decision itself.

In my view this is not a matter were I should substitute my decision for that of the CCMA. The matter does not have to be referred back to the third respondent, another commissioner can decide the issue once it is referred back. All the information necessary to decide the issue properly, is not before me. In my view it would be necessary for the CCMA to hear the application for condonation on the papers submitted to the third respondent at an oral hearing where the parties are permitted to supplement their respective cases with oral evidence and present oral argument. This will ensure not only that the prospect of success can be canvassed properly but other important issues namely whether Mr Goni is truthful when he says that he believed that the date of the dispute was 29 May and, what the explanation is for the fact that the union only lodged the application for condonation

in May 1999, approximately 3 months after the CCMA had intimated that an application was necessary. It is true that referring the matter back to the CCMA would cause a further delay in the matter but if the condonation application is dealt with at an oral hearing, the same commissioner, if she decides to grant condonation, can possibly dispose of the merits of the dispute on the same day. Since the parties have to deal with the merits of the alleged unfair dismissal in the context of the prospect of success in the condonation application, if the commissioner decides to grant condonation, the merits can be disposed of within a few hours at most.

In my view, this is not a matter where a costs order should be made. My order is accordingly as follows:

(1) The decision of the third respondent dated 19 August 1999 under the second respondent's case number EC 7383 and in respect of an application for condonation in terms of which third respondent determined that the late referral by the applicants could not be condoned, is hereby reviewed and set aside.

(2) The dispute is referred back to the second respondent for an oral hearing in the presence of the parties on the question whether or not condonation in terms of section 191(2) of the Act should be granted.

Acting Judge Van der Riet

ng: 11 February 2000

ment: 25 February 2000

cants: Mr R Wade

For the Respondent: Mr B Bleazard