

IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT CAPE TOWN)

CASE NO: C589/99

DATE: 7-8-2000

In the matter between:

CLARENCE PHILANDER

Applicant

and

COMMISSION FOR CONCILIATION,

First and Second

MEDIATION AND ARBITRATION &

Respondents

OTHER

VAL U FLAVOURS

Third Respondent

J U D G M E N T

WAGLAY, J:

1. The applicant in this matter seeks an order in terms of section 158(1) (g) to review and set aside the determination on applicant's application for condonation to the first respondent made by the second respondent on 1 October 1999, and also that this Court exercise its power to grant condonation to the applicant for the late referral of his dispute to the first respondent.
2. As background, the applicant was summarily dismissed by his employer (third respondent) on or about 12 May 1999 after being accused of selling company stock without his employer's consent or knowledge. The applicant sought legal assistance from a firm of attorneys and the

required 7.11 form of the first respondent (CCMA) was completed to refer the dispute about his alleged unfair dismissal to first respondent. The completed form was forwarded by the applicant's erstwhile attorneys to the third respondent on 1 June 1999. On 15 July 1999 the applicant approached his erstwhile attorneys to enquire about the progress in the matter and the said attorneys immediately despatched a letter to the first respondent enquiring as to why it did not receive any response from first respondent.

3. On 21 July 1999, applicant himself attended the offices of first respondent to enquire about the status of his matter and was informed that first respondent had not received any referral of his dispute. First respondent also told the applicant that since the 30 day period within which a dismissal dispute is required to be referred to the first respondent had expired, he would have to apply for condonation for the late referral. On 22 July, applicant's attorney duly completed the condonation application form, supported by an affidavit, and forwarded the application, together with the referral, to the first respondent. On 13 September, applicant received notice from first respondent that conciliation had been set down for 28 September 1999. On attending the conciliation meeting he was informed by the Commissioner (second respondent) that condonation had only been provisionally granted. The second respondent then suggested that he would first try to conciliate the dispute which would have the effect that if the matter is settled, condonation would be automatic, but if the matter remained unresolved he would then consider the application for condonation.

4. The parties agreed to this process. Conciliation did not resolve the dispute and the Commissioner then decided to consider the application

for condonation. In considering the application he invited applicant and third respondent to present argument. The applicant effectively said he stood with the contents of his written application. Respondent presented oral argument and thereafter the applicant replied thereto. The second respondent thereafter considered the matter and handed down his determination on 1 October 1999, refusing applicant's condonation for the late referral.

5. Applicant seeks to set aside the second respondent's determination on the grounds that the Commissioner (second respondent) had committed a gross irregularity, failed to properly consider the application and/or the determination is not justifiable in relation to the material properly available to him and the conclusion he eventually arrived at.

6. The form issued by the first respondent which a person seeking condonation for late referral are required to complete and which form was completed by the applicant's representatives, records the following:

"1. What are your reasons for the delay? (Supply full details and proof of the whole period).

The applicant approached our offices within the proper timespan to bring an application to the CCMA for unfair dismissal. Our offices faxed the forms to the employer (Val U Flavours) on 1 June 1999 and with the intention to fax the proof together with the application form thereafter. It has come to our attention that such form was not faxed, our offices cannot find proof of such faxes to yourself.

2. Why do you think the dismissal was unfair?

The applicant was fired without a disciplinary hearing. Dismissal was based on false accusations that employee sold company stock without employer's knowledge or

consent. Furthermore, the dismissal was based on falsely manufactured evidence which employee was not given an opportunity to refute. The employee was not informed of the nature of the allegations nor was there a disciplinary hearing.

3. How important is your case?

Only applicant (employee) was affected in this matter. The seriousness for applicant is that he not only lost his employment but also has a criminal charge of theft pending against him. The criminal charge was withdrawn on the basis that the employer had insufficient proof of theft against applicant.

4. Are there any other factors which you would consider to be relevant?

Applicant was in proper time to institute such proceedings. Our offices were under the belief that application had been made. We wrote a letter dated 15 July 1999 to the CCMA requesting a response to the application for conciliation (copy attached)."

7. The third respondent, arguing against the condonation, did not address the lateness of the application, but rather argued that the dismissal was both substantively and procedurally fair, emphasising particularly that the relationship of trust had broken down because of applicant's conduct and the third respondent could therefore not retain applicant in its employ. In reply, applicant denied that the dismissal was both substantively and procedurally fair.

8. Based on the above arguments the second respondent made the following finding:

"1. Degree of lateness

The dismissal took place on 11 May 1999 and the matter was referred to

the CCMA on 22 July 1999. The referral was approximately 41 days late. Condonation was provisionally granted on 13 August 1999.

2. Reasons for the lateness

The employee approached his attorneys on or about 11 May 1999 and instructed them to proceed with an application for conciliation to the CCMA with regards to an alleged unfair dismissal. The employee's attorneys faxed the LRA 7.11 form to the employer on 1 June with the intention of faxing the application, together with proof of service, to the CCMA. I do not consider that there has been any explanation why the application was only brought on 22 July 1999, other than it was the intention of the employee's attorneys to do so. Ignorance of the law is not sufficient reason to grant condonation. In this case the employee was assisted by legal practitioners who are aware of the legal requirements.

3. Prospects of success

The employee was dismissed for selling company stock without his employer's knowledge and consent. The employee argued procedural and substantive unfairness on the

basis that there was no disciplinary hearing and that the allegations were based on false accusations. The employer's business consists of five staff members. The employer argued that he spoke to the employee on 5 May regarding the stock the employee has sold. The employee did not admit to selling stock but admitted that he has given stock to a client, a Mr Van der Westhuizen, and that he has received money for the stock. The parties had agreed to get together again on the accusation to afford the employee the opportunity to rebut what the employer has put to him. The employee came back to the employer on Tuesday 11 May and profusely apologised and asked the employer to forgive him. The employer told him that he has violated the trust

relationship and that he was giving him the option to resign or he will be dismissed. In the employee's reply he stated that he is astounded that the employer could say that he should have admitted that he was a thief.

The Code of Good Practice with regards to disciplinary measures short of dismissal indicates that the size of an employer's business can determine how formal or informal the approach of disciplinary hearings should be. Taking this into consideration I cannot find that the employee was not given an opportunity to state his case in defence of the allegations that was put to him.

Given the limited argument from the employee, together with the employer's argument on the substance of the case, I am not convinced that the dismissal was substantively unfair.

4. The importance of a case

The employee's argument is that the only affected party in the matter was he on the basis that he has lost his employment. The employer argued that they had instituted criminal charges against the employee but have decided to drop the criminal charges for the reason that it is difficult to prove theft in a criminal court and not to tarnish the employee's name. The employee argues that it is because of lack of sufficient evidence that the employer has dropped the charges.

5. Analysis of argument

In the absence of good cause shown with regard to the degree of lateness and the low prospects to prove that the dismissal was procedurally unfair, I find insufficient grounds for granting condonation.

The case is therefore closed."

9. Firstly, with regard to degree of lateness, I find it incomprehensible how the second respondent could arrive at the conclusion that the reason

for the delay was ignorance of the law. This was not the evidence before him. The only evidence before him was that applicant's erstwhile attorneys made an error by failing to fax a copy of the referral to the first respondent. Second respondent was therefore obliged to consider whether the error by the attorneys was such that it could not be excused. In this regard the second respondent had to consider whether there was any fault on the part of the applicant who, at all times, intended to pursue his claim and timeously sought legal assistance. This, the second respondent, failed to do.

10. Secondly, with regard to prospects of success, here the second respondent was not presented with any evidence, all he had was two conflicting arguments, both untested. In the absence of any evidence I fail to see how he could arrive at the conclusion he did. Furthermore, he finds that the third respondent cannot be faulted in respect of the procedure it employed because of the size of its business. In this regard there was no evidence or argument about the size of respondent's business at the hearing of the condonation application. More importantly, second respondent's reliance on Item 3 of Schedule 8 of the Act is totally misguided. Item 3 of the said Schedule, as second respondent properly records, relates to disciplinary measures short of dismissal. It does not relate to procedure to be adopted in case of a dismissal, which is the dispute with which the second respondent was confronted. With regard to the importance of the case, it is not evident what it is that the second respondent intended to convey.

11. Based on the above it is quite clear to me that the second respondent failed to appreciate the evidence before him in arriving at his determination. Thus I have no hesitation in finding that the second

respondent committed a gross irregularity in relation to his responsibilities as a Commissioner to properly consider the application for condonation.

12. Further, I believe second respondent's conduct of the proceedings also to be wanting. I do not believe it is sufficient to ask an applicant for condonation whether or not he wishes to add anything further to any written representations he may have made. It is incumbent on a Commissioner seized with an application for condonation to explain to the applicant what the grounds are which need to be satisfied before condonation will be granted and to ask such applicant, if he (Applicant) so wishes, to lead evidence if such evidence is not placed before him on affidavit and to similarly advise the respondent of its rights. Failure to do this, as has happened in the present matter is, I believe, sufficient grounds to set aside the determination arrived at by the Commissioner.

13. Applicant has also argued that the Commissioner was wrong in attempting to conciliate the dispute before making a determination on the condonation application. I am not certain that there is anything principally wrong in doing so especially where both parties consent to such procedure. However, the danger, as is evident from this matter, is that a Commissioner who attempts to conciliate the dispute should not be the same Commissioner who would then hear the condonation application. This is so because it cannot always be guaranteed that a Commissioner may be able to disabuse himself or herself of information given to him or her at the conciliation stage, which may be given to him/her on a confidential basis. In addition, he or she may always be open to be attacked on the grounds that his or her determination on the

merits is tarnished by the information provided to him or her during conciliation. Furthermore, a party may be reluctant to place all the facts before a Commissioner to attempt resolution of the dispute for fear that it may have some bearing on the condonation application, if the matter is not resolved, it may also affect the resolving of the dispute at conciliation.

14. In any event, having found that the determination should be reviewed and set aside, I have been invited by the applicant to exercise my power to grant condonation to the applicant for the late referral of his dispute to the first respondent. In this respect I have been referred to various authorities. I do not intend dealing with them; suffice it to say that I am not satisfied that this is a matter in which I should substitute my decision for the discretion of the first respondent. I am consequently not prepared to do so.

15. Finally, with regard to costs as the matter is opposed, I am satisfied that this is a matter in which costs should follow the result. In the result I make the following order:

- "1. The decision of the second respondent under first respondent's case number C589/99 is hereby reviewed and set aside.
2. The first respondent is ordered to consider the condonation application afresh and that a Commissioner, other than the second respondent, be allocated this matter.
3. That third respondent pay the costs of this application.