REPUBLIC OF SOUTH AFRICA

Not reportable

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR 373/2011

In the matter between:

PROTEA COIN GROUP **APPLICANT**

and

SATAWU OBO SIMON MABASA **FIRST RESPONDENT**

THULANI AKIN *N.O.* **SECOND RESPONDENT**

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION **THIRD RESPONDENT**

Heard: **6 August 2015**

Delivered: **7 August 2015**

RULING: LEAVETO APPEAL

VAN NIEKERK J

[1] This is an application for leave to appeal against the whole of the judgment delivered by Pillay AJ on 4 December 2013. For convenience, I shall refer to the parties as in the review application.

[2] Two applications served before the court *a quo*. The first was the application to review and set aside the second respondent's ruling that the employee's dismissal was substantively and procedurally unfair; the second was an application to dismiss the application for review on the grounds that the applicant had failed to prosecute the review application with due diligence. In essence, the court *a quo* found that the Rule 11 application should be dismissed as the prospects of success in the review application were overwhelming, and further ordered that the arbitration award be reviewed and set aside. The basis on which the award was specifically set aside was the absence of any jurisdiction on the part of the second respondent to hear the dispute referred to arbitration. The court reasoned that the dispute had been referred for conciliation outside of the statutory 30 day time limit, and that in the absence of any application for condonation, the CCMA had no jurisdiction.

[3] Specifically, the court *a quo* found that the employee had been dismissed on 3 February 2009. While the employee had recorded his date of dismissal as being 20 September 2010, the court found that this was not correct. The factual background to the dispute is that the employee was arrested on 5 December 2008, and released on bail on 29 December 2008, when he reported for work and was told that he would have to wait for his criminal trial to be finalised before

the applicant could make a decision on the resumption of his duties. The applicant's version is that in circumstances where it was not aware how long the employee would be in custody or whether he would receive bail, it decided on 3 February 2009 to terminate his services because it could not keep his position open any longer.

[4] Section 190(1) of the LRA makes clear that the date dismissal is the earlier of the date on which a contract of employment terminated or the date on which the employee left the service of the employer. There is no reference in that section to the date on which the employee acquired knowledge of any termination, or the date on which any termination first came to the employee's attention. If the legislature had intended the date of dismissal to mean the date on which the fact of any termination of employment came to the knowledge of the employee, it would have said so. Any potential injustice to an employee in the circumstances is addressed by the right to apply for condonation.

[5] Insofar as the employee sought to submit that the 30 day period commenced only once the fairness of a dismissal was disputed, that is not what the Act provides. Section 191 (1) specifically provides that a referral must be made within 30 days 'of the date of a dismissal'. As I have indicated, the provisions of s 190 define the date of dismissal.

[6] That being so, in my view, the court *a quo* was correct in holding that the date of dismissal was the date on which the applicant unilaterally terminated the employee's contract (i.e. 3 February 2009). Of course, it was always open to the employee to seek condonation for the late referral of his dispute and in circumstances such as the present, it would be surprising were condonation to be refused. However, the fact that the referral was unaccompanied by any application for condonation has the consequence, as the court correctly found, of an absence of jurisdiction. The review was accordingly correctly upheld and the application to dismiss correctly dismissed.

[7] For the above reasons, I am not persuaded that another court might reasonably come to a different conclusion and the application for leave to appeal stands to be dismissed.

I make the following order:

1. The application for leave to appeal is dismissed.
2. There is no order as to costs.

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ANDRÉ VAN NIEKERK
JUDGE OF THE LABOUR COURT