IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT PORT ELIZABETH **CASE NO.P166/98**

In the matter between:

PORTNET	Applicant
and	
R LA GRANGE	First Respondent
SOUTH AFRICAN RAILWAYS AND HARBOUR WORKERS UNION	Second Respondent
T MOSE	Third Respondent
TRANSNET BARGAINING COUNCIL	Fourth Respondent

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J U D G M E N T

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BASSON, J:

1 This is an application for review in terms of which the applicant prays for an order reviewing and setting aside (or correcting) the award made by the first respondent, an arbitrator appointed by the Transnet Bargaining Council (the fourth respondent) on 30 April 1998 in the arbitration between the second respondent (the South African Railways and Harbour Workers Union) on behalf of the third respondent (Mr T Mose) and the applicant (Portnet - a division of Transnet Limited).

2 The arbitration award related to the granting of an extension of time in terms of the provisions of

clause 13(3)(a) of the constitution of the Transnet Bargaining Council ("the Bargaining Council") which read as follows:" The trade union or member shall within 21 calender days as from the date of the relevant dismissal of the member, declare a dispute by written notification to the secretary and the employer concerned. Requests for condonation for late declarations of disputes must be referred by the secretary to an arbitrator on the panel of arbitrators specifically appointed by the council to determine requests for extensions."

3 This clause of the constitution applies in the case of the third respondent (Mr Mose) who was dismissed for theft, that is, for misconduct, on 6 October 1997.

4 The second respondent ("the union") referred a dispute concerning the third respondent's dismissal to the Bargaining Council on 3 November 1997. The referral was thus a late referral or a late declaration of a dispute in terms of clause 13(3)(a) of the constitution of the Bargaining Council (quoted at paragraph [2] above).

5 The union then requested an extension of time, that is, it asked for condonation for this late referral of a dispute.

6 The first respondent (Mr R La Grange) was appointed to arbitrate the dispute about an extension of time in terms of the above-mentioned clause of the Bargaining Council's constitution

(see paragraph [2] above).

7 In terms of the award handed down on 30 April 1998, the first respondent granted condonation for the late referral of the said dispute. It is this decision that the applicant seeks to review.

8 The Labour Relations Act 66 of 1995 ("the Act") provides for the establishment of bargaining councils (such as the fourth respondent) in terms of the provisions of section 27 of the Act.

9 The powers and functions of a bargaining council are set out in, *interalia*, sections 28(c) and 28(d) of the Act and include the competence to prevent and resolve labour disputes and to perform the dispute resolution functions referred to in section 51 of the Act.

10 In the event, these dispute resolution functions of the Bargaining Council (the fourth respondent) stand to be reviewed in terms of section 158(1)(g) which reads as follows:

11 "Despite section 145, review the performance or purported performance of **any function provided for in this Act** or any act or omission of any person or body in terms of this Act on **any grounds that are permissible in law"** (my underlining).

12 One of the grounds of review that are permissible in law is the so-called constitutional review as it is provided for in terms of section 33 (read

with item 23(2)(b) of schedule 6) of the Constitution of the Republic of South Africa Act 108 of 1996 ("the Constitution").

13 In holding that CCMA arbitration awards can be reviewed also in terms of such constitutional review, the Labour Appeal Court in the matter of **Carephone (Pty) Ltd v Marcus NO and Others** (case number JA 52/98) held that the standard of review on the basis that the administrative action must be "justifiable in relation to the reasons given for it" (section 33 read with item 23(2)(b) of schedule 6 to the Constitution) can be defined as follows (at paragraph [37] of the judgment):

"I see no need to stray from the concept of justifiability itself. To rename it would not make matters any easier. It seems to me that one will never be able to formulate a more specific test other than in one way or another asking the question: **is there a rational objective basis justifying the connection made by the administrative decision-maker between the material properly provided to him and the conclusion he or she eventually arrived at?** In time only judicial precedent will be able to give more specific content to the broad concept of justifiability in the context of the review provisions of the LRA" (my underlining).

14 Also instructive is the approach set out in the unreported judgment of **Metcash Trading (Pty) Limited t/a Trador Cash & Carry Wholesalers v Sithole and Others** (unreported Labour Court judgment case number: J1079/97 dated 11 September

1998):

15 "If this case is to be decided on the basis that the award must be justifiable in relation to the reasons for the award then it is clear that the reasoning must take place in accordance with the law and the logic permitted by law. Put differently ... the material which the commissioner must take into account must not simply be the factual material but must also include the rule of law which is applicable. This must be applied in order to arrive at a conclusion which is justifiable in the light of that material. Where there is an error of reasoning and a misunderstanding of the law then it is highly likely ... that the award will not be a justifiable one."

16

17 I now turn to the arbitration award itself (at page 72 of the papers):

" 8. While the provisions in the council constitution are binding on the parties, they are superseded, in my view, by the provisions of section 191(2) regarding applications of this nature. Also, the mere fact that they are binding on the parties does not necessarily mean that any failure to comply with any of them automatically disqualifies a referral and makes it incompetent in terms of the Act.

9. The referral was one week late if the council constitution applies. I am of the view that the applicant cannot be refused the right to refer his dispute to arbitration when the LRA stipulates that referrals to councils of dismissal disputes must be made within 30 days of the dismissal, even though the

parties have agreed otherwise in a collective agreement in the form of the bargaining council constitution."

18 In an explanatory affidavit by the first respondent (at page 75 of the papers) he explained this decision as follows:

"13. The second respondent's application for condonation was phrased with reference to the 21 day period specified in the Council constitution. To the extent that the aforementioned time period was the one in respect of which condonation was sought, the application was upheld, **on the basis that** it would still be a competent referral **in terms of the Labour Relations Act 66 of 1995**. Accordingly, it would be grossly anomalous in my view if I did not condone the late referral under the Fourth Respondent's constitution, **which the Act deemed competent".**

19 It is clear that the first respondent (the arbitrator) misdirected himself in regard to the law when he came to the conclusion that the Act's provisions, and in particular the provisions of section 191(1) of the Act, apply if there is a dispute about the fairness of a dismissal. This section reads as follows:

"The employee may refer the dispute in writing within **30 days** of the date of dismissal to ... a council if the parties' dispute fall within the registered scope of a council" (my underlining).

20 In fact, the first respondent should have taken note of the provisions of section 51 of the Act which, after all, deal with dispute resolutions

functions of a bargaining council (in which process he himself was now partaking). Section 51(2)(a) of the Act reads as follows:

"(i) the parties to a council must attempt to resolve any dispute between themselves **in accordance with the constitution of the council;** and

(ii) for the purpose of subparagraph (i) a party to a council includes the members of any registered trade union or registered employers organisation that is a party to the council" (my underlining).

21 It is clear that the parties before Court in this application are defined as parties to a bargaining council in terms of these provisions of section 51(2)(a)(ii) of the Act.

22 There was accordingly no basis in law for the first respondent to find that he was not bound by the provisions of the Bargaining Council's constitution which, in itself, also constituted a collective agreement.

23 Collective agreements and the provisions thereof are binding in terms of the Act as the arbitrator himself admits. Further, section 1 of the Act (which deals with the purpose of the Act) identifies as one of the primary objects of the Act the promotion of orderly collective bargaining.

24 The first respondent was accordingly bound to consider condonation in terms of the 21 day requirement that is contained in clause 13(3)(a) of the Bargaining Council's constitution (see paragraph [2] above). The fact that the first respondent misdirected himself in this manner clearly had a marked or a definite influence on the eventual outcome of the arbitration, that is, to condone the lateness (as it clearly appears from the quoted passages in the arbitration award at paragraph [14] above and the first respondent's affidavit quoted at paragraph [15] above).

25 This misunderstanding of the law or error of reasoning was therefore clearly material to the outcome of this arbitration, that is, the outcome of the application for condonation. For this reason such award is not a justifiable one in terms of the test set out in the **Carephone** and **Metcash** judgments discussed above (at paragraphs [12] and [13]).

26 For this reason alone, the decision to condone should be set aside on review.

27 However, if one also considers the merits of the condonation application, given that the first respondent had indeed exercised such judicial discretion, it is trite that the test laid down in **Melane v Santam Insurance Co Limited** 1962 (4) SA 531 (A) at 532C–F is considered to contain the guidelines for the proper exercise of such judicial discretion:

28 "In deciding whether sufficient cause has been shown, 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. Among the facts usually relevant are the degree of lateness, the explanation therefor, prospects of success, and the importance of the case. Ordinarily these facts interrelate: they are **not individually decisive**, for that would be a piecemeal approach **incompatible with a true discretion**, save of course that if there are **no prospects of success** there would be **no point in granting condonation**. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate for **prospects of success** which are not strong. Or the importance of the issue and **strong prospects of success** may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked. I would add that discursiveness should be discouraged in canvassing the prospects of success in the affidavits " (my underlining).

29

30 It is unclear from the arbitration award which of these factors the first respondent took into account. In my view, this must be ascribed to the fact that the first respondent, in fact, did not exercise his discretion to condone but merely

accepted that the referral was within the 30 day time limit period that he had himself considered to be the operative time period (as is explained above at paragraphs [14] to [21]). However, even if I accept, which I do not, that this discretion was exercised, it could not have been properly exercised on the material available to the first respondent at the time.

31 The degree of lateness was known to the first respondent. The arbitrator also knew that the explanation for the lateness was offered in letters before him and concerned the absence of the employee after his dismissal.

32 It is, however, abundantly clear that the prospects of success were never argued before the arbitrator, particularly because the parties never personally appeared before him to allow them a proper hearing in terms of the *audi alteram partem* rule.

33 This omission accordingly means that the arbitrator never considered the prospects of success as is required also in terms of the guidelines laid down in the **Melane v Santam** judgment (quoted above at paragraph [24]). In the event, the exercise of the judicial discretion did not take place on the basis that all the required material factors were being taken into account. There was thus an error in the arbitrator's reasoning, if indeed there was such reasoning, in the exercise of this judicial discretion.

34 In the event, for this reason also, the award stands to be reviewed in terms

of the standard of review set out above (at paragraphs [12] and [13]).

35 In the event, I make the following order:

1. The award made by the first respondent on 30 April 1998 in the arbitration between South African Railways and Harbours Union on behalf of T Mose and Portnet is reviewed and set aside.

2. The matter is referred back to the fourth respondent to be dealt with *ab initio* as if the matter has been lodged for the very first time.

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Basson J

Date of hearing: 6 November 1998
Date of judgment: *ex tempore* (edited version)
On behalf of the applicant: Adv J G Grogan instructed by Pretorius, Herbert and Barnes
On behalf of the respondent: No appearance
This judgment is available on the internet at website: http://www.law.wits.ac.za/labourcrt