IN THE LABOUR COURT OF SOUTH AFRICA

23 September 1999

Case No. J4/99

In the matter between:

DAWOOD GOOLAM HOOSEN MANSOOR Applicant

and

THE COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION First Respondent

MBILENI, CS N.O (cited in his capacity as

Commissioner for the Commission for Conciliation,

Mediation and Arbitration Second Respondent

GALLO (AFRICA) LIMITED Third Respondent

JUDGMENT

REVELAS, J:

[1] The applicant, a former employee of the third respondent, was dismissed on 30 July 1998. The applicant decided to challenge the fairness of his

dismissal and he referred his dispute to the Commission for Conciliation, Mediation and Arbitration ("the CCMA") 78 days after his dismissal.

[2] The respondent raised an objection to the lateness of the referral of the dispute and the second respondent, a Commissioner appointed by the CCMA, heard the matter and refused to grant condonation for the late-referral of the applicant's dispute to the CCMA on 3 December 1998. The applicant seeks to set aside the commissioner's ruling. The application is brought under section 158(1)(g) of the Labour Relations Act, 66 of 1995 ("the Act").

[3] The hearing of the application for condonation took place under the auspices of the Commission for Conciliation, Mediation and Arbitration. The applicant was represented by an official of the South African Commercial Catering and Allied Workers Union and the third respondent by one of its employees.

[4] The applicant was a director of the third respondent at one of its distribution centres.

[5] When the applicant referred his dispute to the

CCMA he simultaneously filed an affidavit in support of an application for condonation of the late referral of his dispute to the CCMA. The main reason for the delay according to the applicant, was that his Union official, Mr F.D. Matshaba of SACCAWU, did not receive any communication or correspondence from the third respondent from the 30th of July 1998. That was the day on which his appeal form was submitted in respect of the arbitration hearing agreed to in the appeal form.

[6] It is common cause that according to the third respondent's disciplinary procedures when an appeal from is completed by implication the parties went to arbitration.

[7] The third respondent disputed that there was no communication or correspondence from them to SACCAWU. In fact, the third respondent referred to four letters wherein it attempted to finalize matters with regards to the arbitration at the Independent Mediation Services of South Africa (IMSSA).

[8] The third respondent also disputes that telephonic conversations took place between itself and the Union

official regarding the identity of the arbitrator who would have presided over the arbitration.

[9] On the 27th of October 1998 Mr Matshaba, on behalf of SACCAWU, wrote to Mr Jeff Bolton of the third respondent:

In his letter he states as follows:

"I am, nor does thee our (sic) office aware that there is any agreement that this matter should be referred to IMSSA or to any independent arbitration outside the CCMA's scope of operation and thus we cannot be held responsible for any delay whatsoever.

This is not the first case which have been dealt with by both parties and the procedure followed was never that the agreement be made with a shop stuart/s.

The matter have been (sic) already referred to CCMA and the date for conciliation has been issued as can be seen on the letter attached hereto. Thus any other issue which need to be discussed will be discussed at the conciliation meeting scheduled by CCMA."

This letter is directly in conflict with the following paragraphs in the applicant's affidavit in support of his application for condonation to the CCMA:

"14. Mr Matshaba thereafter contacted IMSSA and obtained four names of independent arbitrators to choose from to conduct the arbitration process. The names that he obtained were that of Messrs Khalick, Mayet, Vally, Van Reed (sic) and Carol Keith.

15. Towards the third week of September 1998 I was contacted by Mr Matshaba to meet him at his offices because he wanted to discuss the names of the arbitrators with me. I went to meet him and we discussed the same.

16. After our discussion Mr Matshaba telephoned Michael Wright in my presence and suggested to him the names of the arbitrators referred to in paragraph 14 above. Mr Wright indicated to Mr Matshaba that he will have to consult with the employer and come back to Mr Matshaba regarding the choice of the arbitrator."

[10] The aforesaid was denied on affidavit by the third respondent. It is also directly in conflict with Mr Matshaba's letter to the third respondent dated 27 October 1998. Both these documents (the affidavit and the letter) was before the second respondent when deciding the issue of condonation.

[11] When the second respondent considered the question of condonation, only the applicant's affidavit was before him. Insofar as the complaint is raised by the applicant in that regard, such a complaint is unfounded. The applicant had an onus to discharge. He had to convince the Commissioner why a late referral should be condoned. This question was decided on the applicant's own version. He is therefore not prejudiced.

[12] The second respondent gave rather short reasons for his ruling. The submissions advanced on behalf of the applicant which the second respondent took into account were the following:

"1.1 On the 30th of July 1998 the applicant was dismissed and immediately lodged an appeal via the senior shop stuart, Mr Hamfi Malou. The completed appeal form implied a tacit agreement to have the dispute arbitrated by a third party, IMSSA from past practise;

1.2 The applicant, through Mr Freddie Matshaba, made a few telephone contacts with both Mr Ian Franzini and Mr Michael Wright between August and September 1998. The discussion centred around a selection of able IMSSA arbitrators;

1.3 In September 1998 four names were put forward for selection but the parties failed to agree on a choice of the arbitrator;

1.4 The applicant denied that Mr Malou ever received the four letters the respondent alleged to have written to him in regard to dates for arbitration;

1.5 The referral was sent to the CCMA and the company on 16 October 1998. There was a cover letter to the respondent stating an ultimatum as the 19th of October 1998;

1.6 The Union argued that as a result of the parties failing to agree on the choice of the IMSSA arbitrator undue delay was caused and not on the applicant's making .... (sic).

The applicant appeals to the commissioner to rule in his favour and granting condonation."

[13] The second respondent took the following submissions and arguments presented on behalf of the third respondent into account:

"2.1 The respondent wrote four letters requesting Mr Malou, who represented the applicant at the disciplinary hearing, to provide dates for the arbitration by IMSSA. None of those letters were responded to.

2.2 The Union did not refer the dispute to the CCMA within the 30 day period as provided for by section 191(1)(B). The Union referred the dispute to the CCMA on the 16th of October 1998, that is 48 days late, without submitting a request for condonation at the same time.

2.3 The applicant was a director of Gallo Distribution Centre. He was familiar with labour relations practises which was the requirement of his job.

2.4 The applicant was fully aware of the procedures and practises of the company and how labour issues were handled in the past.

2.5 The respondent argued that the applicant had professional advise from the Union who do know (sic) what the current procedures are in terms of the company's disciplinary procedures as well as the provisions of the Labour Relations Act.

The respondent requested the Commissioner not to grant condonation as no good cause were shown for the lateness of the referral as well as the prejudice they will suffer as a result."

[14] Firstly, the second respondent found that the referral date, as being the date when the dispute arose

as 31 August 1998, was incorrect since the applicant was dismissed on 30 July 1998. The second respondent found that this date was given to create the impression that the lateness to refer the dispute to the CCMA was not substantial.

[15] He further found that, because the applicant was a director at the third respondent's distribution centre, he was familiar with and fully aware of the requirements of the Act regarding referrals and dispute settlements through conciliation processes. The second respondent, in addition, emphasized the provisions of section 191(2) of the Act which provides that, if an employee shows good cause at any time, the commission may permit the employee to refer the dispute after the 30 day time limit has expired. The second respondent found that there was no indication on the applicant's version, that there were circumstances which prevented him from referring his dispute to the CCMA within the time limit provided for in section 191(1)(b) of the Act. He consequently refused to grant the condonation.

[16] Section 138(7)(a) of the Act enjoins a Commissioner to give **"brief reasons"**. In this particular matter the second respondent's reasons for

his ruling are rather brief. However, in my view, brief reasons or reasons that do not deal with each and every aspect of the case which was presented before the commissioner does not waive interference per say. This view was also held by De Villiers, AJ in the matter of Kolvenco (Pty) Ltd v Raffee & Others, J772/97, dated 23 July 1999. In paragraph 17 of that judgment De Villiers, AJ stated the following:

"In terms of section 138(7)(a) the Commissioner is by law required to give brief reasons. This he has done in the award and therefore he is not required to do anything further. There are no facts in the affidavit that the Commissioner committed a grouse irregularity in dealing with the evidence before him and therefore the applicants have not made out a case for the Commissioner to meet. Irregularities contained of in the absence of an averment that these were the facts before the Commissioner are made 'in the air' and do not call for a response from the Commissioner."

[17] On the evidence that was available to the second respondent it was possible for the second respondent, to come to his conclusion, which is supported by those facts.

[18] In the well-known judgment of Melane v Santam Insurance Company Ltd, 1962 (4) SA 531(AD) at 532C-F, the following was said about the principles applicable

to condonation:

"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 therefore, the prospect of success and the importance of the case. Ordinarily these facts are inter-related; They are not individually decisive for that would be a peace-meal approach incompatible with the true discretion fade of course, that if there are no prospect 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 slight delay and a good explanation may help to compensate the prospect 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 should not be overlooked. I would add that discursiveness should be discouraged in canvassing the prospects of success in the affidavits. I think that all the aforegoing clearly emerge from decisions of this court and therefore I need not add to the overgrowing burden of annotation by sighting these cases."

[19] On his own papers, the applicant does not make out a case in so far as the reasons for the delay is concerned. There simply is no proper explanation for the delay.

[20] Apart from the creditability finding made against

the applicant, (regarding to the four letters which he denies receipt of), the fact that the third respondent and the applicant took some time to decide on the arbitration proceedings, was not an excuse for him to delay referring the matter to the CCMA, as he said.

[21] In addition, the delay is in the circumstances, excessive. The applicant is not an illiterate person. There was evidence before the second respondent, which he took into account, that the applicant had experience of dealing with these type of matters and knew that a dispute of this nature had to be referred to the CCMA within 30 days as provided for by section 191(1)(b) of the Act.

[22] In so far as the importance of the case is concerned I agree with the submissions, advanced on behalf of the third respondent by his representative, that, if the case was considered to be of great importance, the applicant would not have been as dilatory as was.

[23] Quite clearly, there is no reference by the second respondent to the prospects of success. The Labour Appeal Court has held on numerous occasions that, where

an adjudicator finds that explanation tendered for a delay is unacceptable, this by itself would justify the refusal to grant condonation. In the matter of National Union of Mine Workers v Western Holdings Gold Mining, 1994 (15) ILJ 610(LAC) at 613B-E Myburgh, J held as follows:

"The approach to be adopted in considering the application is well-established. 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 therefore, the prospects of success and the importance of the case. These facts are inter-related. They are not individually decisive. What is needed is an objective conspectus of all the facts. A slight delay and a good explanation may help to compensate for prospects of success which are not strong. The importance of the issue and strong prospects of success may tempt to compensate for a long delay .... an unsatisfactory and unacceptable explanation for the delay remain so, whatever the prospects of success on the merits."

[24] In so far as the merits are concerned, it was pointed out that the applicant did not participate in his disciplinary enquiry which he regarded as a frivolous and vexatious persecution of himself. He asked the chairman to recuse himself and when the latter failed to do so, after advancing a proper explanation in my view, the applicant and his Union

official left the proceedings. The applicant was dismissed for poor performance.

[25] I do not believe it is necessary to decide the question of the prospects of success since I am only required to find whether the second respondent, on the evidence available to him, came to a justifiable conclusion. I have already referred to the evidence which was available to the second respondent and in my view, he came to a reasonable and justifiable decision in that regard.

[26] Consequently the application should not succeed and is dismissed. There is no reason why costs should not follow the result.

[27] The application is dismissed with costs.

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E. REVELAS

For the Applicant: Mr Erasmus of Erasmus Attorneys

For the Respondent:Mr Todd of Bowman Gilfillan Inc