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IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

CASE NO: **J1669/99**

In the matter between:

SOUTH AFRICAN TRANSPORT AND ALLIED WORKERS UNION	Applicant
MOIRELENG, M.S.	
and	
HIEMSTRA, J N.O.	First Respondent
INDEPENDENT MEDIATION SERVICES OF SOUTH AFRICA ("IMSSA")	Second Respondent
SOUTH AFRICAN AIRWAYS CARGO (A DIVISION OF TRANSNET LIMITED)	Third Respondent

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JUDGMENT

STELZNER AJ

1. This is an application in terms of section 33 of the Arbitration Act, 42 of 1965 for the review and setting aside of the arbitration award made by the first respondent sitting as a private arbitrator under the auspices of IMSSA and in accordance with the provisions of the Transnet Bargaining Council. Preliminary to the main application is an application for condonation for the late filing of the review.

2. This matter originally came before my brother, Mpofu, J, on 4 February 2000 on which occasion the issue of the late filing of the application was raised and the parties argued as to the applicability or otherwise of the said section 33 of the Arbitration Act. Mpofu, J ruled that section 33 was applicable and the matter was

postponed to enable the applicant to bring an application for condonation, which was duly done and which has been opposed. When the matter came before me the parties accepted that (pursuant to the ruling of Mpofu, J) condonation was required.

3. I have considered the question of condonation under the well known and accepted principles as set out in *Melane v Santam Insurance Co* 1962 (4) SA 531 (A), which principles have been consistently followed by this court in deciding applications of this nature.

4. Section 33 of the Arbitration Act requires that this application ought to have been brought within six weeks after the publication of the award. The award was received by the applicants on 22 February 1999. The application for review ought to have been brought on or before 5 April 1999. A case number was applied for on 17 May 1999 but the review papers were only served and filed on 26 or 27 May 1999. The review was thus some seven weeks late in the context of an admitted seven-week time limit.

5. Mr Van As, who appeared for the third respondent, argued that the length of the delay was, in the circumstances, considerable (the delay itself being longer than the time period provided for the bringing of the review under the statute). He also argued that even if I accept (and there is no reason not to accept) the attorney's explanation that she was under the misapprehension that section 158(1)(g) of the Labour Relations Act, 66 of 1995 ("the Act") applied (see below), to wait some thirteen weeks before bringing the application was not in itself reasonable. Her assumption was that the matter had to be brought within a reasonable time but she ought to have considered what was reasonable within the context of a statute in which the time limit for bringing reviews under section 145 of the Act was clearly stipulated as six weeks. (See the comment of Seady, J in *Moolman Brothers v J Gaylard NO & others* (1998) 19 ILJ 150 (IC) at 151J).) He submitted further that the issue of what was reasonable in the context of condonation applications has to be considered in the light of the legislature's intentions regarding speedy and final resolutions of disputes, particularly those involving individual dismissals. (See, for instance, *Queenstown Fuel Distributors CC v Labuschagne NO & others* [2000] BLLR 45 (LAC) at 53I-J.)

6. The explanation for the delay came from the attorney whom the applicants consulted subsequent to the handing down of the award and who dealt with the launching of the review proceedings on their behalf. She states in her founding affidavit in the condonation application that she had been under the mistaken impression that the review was to be brought in terms of section 158(1)(g) of the Act. On that basis she assumed that the application needed to be brought within a reasonable time. She was consulted for the first time by the applicants some three weeks after the award had been received by them. (No explanation is tendered for why the applicants took three weeks to consult their attorneys after receipt of the award). She also states that the matter proved to be "*a fairly complex and lengthy one*" and that "*only after several consultations with client was I able to finalise the drafting of the review application.*" She does not state when and with whom those consultations took place.

7. In the event, it is noteworthy that when the review was ultimately launched it was supported by a founding affidavit of no more than eleven pages. The substance of the review, further, consisted of a few crisp points. It is alleged that the first respondent's conclusions in finding the second applicant to have been guilty of two of the charges preferred against him (Charge 2 and Charge 4) were not justified in terms of the reasons given (alternatively, constituted a gross irregularity I the proceedings). Secondly, it is alleged that the first respondent exhibited bias (alternatively, that the applicants had a reasonable suspicion of bias) by virtue of the manner in which he conducted the proceedings. The record filed by the first respondent in these proceedings was also not inordinately lengthy. I am thus unable to agree with the attorney's assessment of the matter as being either extraordinarily lengthy or complex.

8. There is furthermore no explanation for why it took a week after the case number was applied for to serve and file the review papers.

9. In short, and while I accept the bona fides of the attorney involved and that her conduct did not constitute a wilful disregard of the time limits, I am not satisfied that the explanation for the delay which has been furnished is reasonable or sufficient.

10. While the case is undoubtedly of importance to the second applicant himself (and to the first applicant by virtue of the fact that the second applicant, a shop steward, has been dismissed) it is clearly not a case which carries with it any particular significance or matter of general or public interest.

11. In regard to the applicants' prospects of success I am, in any event, not persuaded that those prospects are strong. When the matter was argued before me counsel for both parties addressed me not only in regard to the condonation application but on the merits of the review. If the condonation application were to succeed I would go on to immediately consider the merits of the review. In the circumstances I am in a better than usual position to consider the issue of prospects of success. I can go so far as to say that even if I am wrong on the question of condonation I would not be persuaded to find for the applicants on the merits of the review.

12. In regard to the first line of the review (the first respondent's findings on Charges 2 and 4) counsel for the applicants argued that I was entitled to, and should, follow the so-called wide grounds of review as set out in the decision of *Carephone (Pty) Ltd v Marcus NO & others* (1998) 19 ILJ 1425 (LAC). The question is whether the reasoning of the court in *Carephone* is applicable in the context of private arbitration proceedings. The view taken by my brother Mlambo, J in *Eskom v Hiemstra NO & others* (1999) 20 ILJ 1293 (LC) was that that question ought to be answered in the affirmative and that was the view which counsel for the applicants sought to prevail upon me to follow in this matter. However, subsequent to the decision of Mlambo, J in the *Eskom* matter the same issue was considered by Landman, J who, after specifically applying his mind to the decision of Mlambo, J, decided that that decision was clearly wrong and declined to follow it. (See *Transnet v Hospersa & another* (1999) 20 ILJ 1293 (LC).) In these circumstances I am persuaded that I ought to follow the decision of Landman, J unless or until the matter is decided differently by the Labour Appeal Court. Therefore, in the matter before me, the wider "*Carephone*" grounds of review would not be applicable. In coming to this conclusion I have also had regard to the decision of Gon, AJ in *National Union of Mineworkers v Brand NO & another* (1999) 20 ILJ 1884 (LC). I have noted that the decision of Gon, AJ was handed down before the decision of Landman, J in the

Transnet matter and, moreover, Gon, AJ states at the end of a discourse on the two opposing points of view that she does not need to resolve the issue decisively. Her decision (and the, in her own words, speculative considerations canvassed by her) can thus not be regarded as authoritative in the context of this matter.

13. It follows that I cannot set aside the decision of the first respondent on the basis that his award was not justifiable in terms of the reasons given. Counsel for the applicants argued, nevertheless and in the alternative, that the conduct of the first respondent in finding the second applicant guilty on Charges 2 and 4 amounted to a gross irregularity in the conduct of the proceedings. I am not so satisfied. In the *Eskom* matter, Landman J held "*if the arbitrator made a leap in logic, and I do not need to find whether this is the case or not, the parties have selected him as their judge and cannot complain about his process of reasoning save in those instances such as mala fides, which is not alleged here.*" (At 2369E-F). The thrust of the argument for the applicants under this leg of the review was that the first respondent made a leap of logic in coming to a finding that the second applicant was guilty of the offences under Charges 2 and 4. On the narrower test (there being no allegation of mala fides) that is not a ground for review. I might add in passing that I am not convinced that the applicants would have been successful even applying the wider grounds of review, but I am not required in the circumstances to decide on that point. (It was common cause in this matter that the parties had selected the first respondent as their arbitrator.)

14. That leaves me to consider the applicants' other ground of review, namely alleged bias. Even a reasonable suspicion of bias (as opposed to actual bias on an objective conspectus of the facts) must be grounded on fact. The first respondent and the third respondent filed answering affidavits in this matter and the applicants did not file replying affidavits. Where material disputes of fact exist (and I did not have a verbatim recording of the proceedings in the record before me but simply the arbitrator's notes typed out) therefore, I must prefer the version put up by the first and third respondents. (*Plascon Evans Paints v Van Riebeeck Paints* 1984 (3) SA 623 (A).) What was clear from the papers (and was acknowledged by the first respondent) was that the arbitration proceedings before him were conducted acrimoniously and that some of the applicants' witnesses were belligerent and treated both the first respondent and third respondent's

representative with contempt. So much so that first respondent found it necessary to address them sternly at times in order to ensure that the matter proceeded in an orderly fashion. The allegations of untoward interference and curtailment of witnesses are, however, denied by the first respondent and this denial is supported by third respondent's papers. This Court is also at times called upon to address parties or witnesses in stern terms in order to ensure the orderly conduct of proceedings before it. In my view that cannot in itself be a ground for review. On the version which I am required to accept in these proceedings I am not satisfied that the applicants have laid a factual basis for the allegation of bias or a suspicion of bias.

15. In the result I am of the view not only that applicants' prospects of success are slim, but that if I were required to proceed to deal with the merits I would have found that the applicants should fail.

16. On a proper conspectus of the factors referred to in the *Melane* decision therefore it seems proper that the application for condonation should be refused. Had I been satisfied that applicants' prospects of success were strong I might well have been swayed in favour of the granting of condonation.

17. There seems no reason in law or fairness why costs should not follow the result in this matter.

18. I, accordingly, make the following order.

18.1 The application for condonation for the late filing of the review is refused.

18.2 The application for review is, accordingly, dismissed.

18.3 Applicants are ordered to pay the third respondent's costs, including the costs occasioned by the appearance of 4 February 2000.

S STELZNER

Acting Judge of the Labour Court of South Africa

DATE OF HEARING:	31 August 2000
DATE OF JUDGMENT:	18 September 2000
APPEARANCE FOR APPLICANT:	Mr B M Slon instructed by Cheadle Thompson & Haysom
APPEARANCE FOR THIRD RESPONDENT:	