IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

CASE NO: J3336/99

In the matter between:

ELLERINE HOLDINGS LIMITED Applicant

and

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION First Respondent

SOLLY MATIME Second Respondent

ANNE DHLAMINI Third Respondent

JUDGMENT

WAGLAY J:

[1] The Applicant seeks to review and set aside the arbitration award handed down by the Second Respondent under the auspices of the First Respondent. The Applicant's notice in terms of Rule 7A(8)(b) of this Court was served and filed on 15 December 1999. Prior thereto the First and Second Respondent gave notice that they did not intend opposing the application and would abide by the order of this Court. The said notice in terms of Rule

7A(8)(b) called upon the Third Respondent ("*the Respondent*") to file her answering affidavits within 10 days of receipt of that notice if she intended to oppose the application.

[2] The Respondent was therefore required to file her answering affidavit by 4 January 2000 but only did so on 7 February 2000. The Applicant, in its reply to the answering affidavit, took the point that this Court should not consider the Respondent's answering affidavit because it was out of time.

[3] On 27 March 2000, the Registrar of this Court set the review application down for hearing on the opposed roll for 18 August 2000, advising the parties to file their heads of argument in terms of the rules of this Court. The Respondent failed to file her heads timeously and, on 18 August 2000, JAMMY AJ refused to entertain the matter. He postponed the matter *sine die* and ordered the Respondent to deliver an application for condonation for the late filing of her heads and also ordered that the Respondent pay the Applicant's wasted costs for the day.

[4] Within 7 days of the order of this Court , as recorded above, the Respondent applied for the condonation for the late filing of her heads and also applied for condonation for the late filing of her answering affidavits.

[5] The matter before me therefore concerns firstly the application for the condonation for the late filing of Respondent's heads of argument then the condonation application in respect of the late filing of the answering affidavit and the review itself.

[6] To deal with the issue of the late filing of the heads of argument - the Respondent's application fails to provide any satisfactory explanation for her failure to file the heads of argument timeously. Heads of argument are generally left to the legal representatives to attend to in those instances where parties are legally represented. The purpose of the heads of argument is to allow one's opponent/s and the Court an opportunity to familiarise themselves with the arguments that will be presented at the hearing. The heads themselves do not constitute pleadings but are based on the pleadings filed. It is not unusual for a party who is unrepresented to argue its matter without the filing of heads. The Court can rightly refuse to entertain a matter where parties, having been called to file their heads of argument, fail to do so. It is also not unusual to dismiss an application or strike out an opposition where a party refuses to file its heads of argument: this can be done, but only if the parties are warned of this possibility beforehand. The usual penalty for the failure to file heads of argument timeously or at all is that a costs order is made against the defaulting party and the matter is postponed.

[7] In this matter the Court did postpone the matter and ordered the Respondent to pay the costs. It also required the Respondent to apply for condonation, which the Respondent did. Although I have stated that the Respondent's explanation in the condonation application is not satisfactory, I am not required to follow the principles that are normally applicable for condoning late filing of pleadings for reasons already indicated above. This condonation application which the Court required the Respondent to file must also be seen as a penalty that was imposed by the Court upon the Respondent. Therefore, insofar as

may be required of me to grant the condonation for the late filing of the Respondent's heads of argument, same is granted. I must however add that the Applicant has sought to oppose this application - such opposition is rather inane . If I am to refuse condonation for the late filing of the heads of argument how does it assist the Applicant? I have been tempted to order that the Applicant should pay the costs of the application for opposing it but have decided not to make any order in respect of costs.

[8] Turning then to the application for condonation for the late filing of the answering affidavits, which was launched together, with the application for the condonation for the late filing of its heads of argument, in August 2000, i.e. 6 months after the Respondent filed its answering affidavit. Respondent firstly argued that there was no need for it to apply for condonation and that the application was only made "*as an excess caution*".

[9] According to the Respondent, despite the fact that the Applicant raised the point in its replying affidavit of Respondent's non-compliance with the time limits with regard to its answering affidavits, the fact that it (the Applicant) filed a replying affidavit dealing with all of the issues raised by the Respondent in its answering affidavit it has waived its right to rely on the Respondent's non-compliance.

[10] Respondent's argument is that, once a party responds to a pleading that does not comply with the time limits prescribed by the rules of the Court in which the pleading was filed, the party so responding cannot then object to the pleading which was filed late. In this case the Respondent therefore contends that the Applicant should have applied to this Court to

set aside the answering affidavit and, by failing to do so together with replying, the Applicant has waived its right to rely on Respondent's non-compliance with the rules of this Court.

[11] The above argument is of no merit. There is absolutely nothing to stop a party in the position of the Applicant from following the procedure adopted by it. The procedure adopted by the Applicant in clearly recording that this Court "*should have no regard to the contents of the Third Respondent's answering affidavit until such time as it applies .... for condonation of the late delivery of her answering affidavit and such late delivery has been condoned*" and thereafter replying to the answering affidavit is what should be expected of a party in the position of the Applicant. This would then possibly avoid a separate hearing for condonation and bring the matter to a speedy resolution.

[12] The Respondent had clearly failed to file its answering affidavit timeously and should therefore have ascertained from the Applicant prior to or at least immediately after filing its answer if the Applicant is prepared to condone its non-compliance. If the Applicant was prepared to condone the non-compliance then there would be no need to apply for condonation. In any event, once the Respondent was advised that the Applicant is refusing to condone its non-compliance the Respondent was required to immediately apply to Court for condonation.

[13] I am not suggesting that in every matter the parties can or may between themselves decide upon non-compliance. Where the non-compliance relates to a statutory provision

i.e. as set out in an Act, then failure to comply with those provisions goes to jurisdiction. In such cases (for example where time limits relate to jurisdiction) an application must be made to Court to condone the non-compliance. In circumstances where the time limit is prescribed by the rules, this Court would be prepared to entertain a matter in spite of the fact that the pleadings were not filed within the prescribed time limits, as long as there is no objection thereto by the party who stands in opposition to the party who has failed to comply with the time limits prescribed by the rules of this Court.

[14] As recorded earlier, the Respondent only applied for condonation for the late filing of her answering affidavit 6 months after filing the answering affidavit and after the matter had already been set down for hearing. Where a party becomes aware that it is required to apply for condonation it must do so without delay. In this case, the Respondent was made aware at least by 14 February 2000 that her answering affidavit was out of time and that she should apply for condonation. She failed to do so. The only explanation submitted to this Court for her failure is that her attorney believed that such an application was not necessary the same attorney who then launched the application for condonation 6 months later merely "*as an excess caution*" - why did he not exercise that degree of caution earlier?

[15] If I am to excuse the Respondent's delay in applying for condonation there is still a need for me to decide whether the delay in filing the answering affidavit should be condoned. In deciding this I am required to consider various issues which include the length of the delay, the explanation therefor, the merits of Respondent's opposition, the importance of

the matter and the prejudice it may cause. These are issues which are simply not addressed adequately or at all in the affidavit that supports the application for condonation. The affidavit in support of the application is deposed to by the Respondent's attorney - there is no confirmatory affidavit from the Respondent herself. In the affidavit it is stated that the answering affidavit was filed 10 days late - this is not so - the answering affidavit was filed more than a month out of time. This affidavit does not deal with the reasons for the delay, nor does it make reference to the answering affidavit in respect of the merits of its opposition to the application for review. With regard to prejudice and the importance of the matter, firstly the affidavit boldly asserts that because the Applicant had replied to its answering affidavit it cannot be said to suffer any prejudice. Secondly, because the Third Respondent was reinstated in terms of the arbitration award which Applicant sought to review the matter was of great importance to her.

[16] The papers in this application not only fail to deal with what is required, it is so scanty so as to constitute nothing at all. The affidavit displays on the part of the attorney a lack of knowledge or at worst gross incompetence with regard to what is required to be alleged when applying for condonation. Not only is the affidavit not helpful, the notice of the application which is headed "*Application for Condonation*" does not even indicate that the Respondent is seeking condonation for the late filing of her answering affidavit.

[17] In the circumstances, condonation for the late filing of the answering affidavit is refused. With regard to costs I see no reason why in this respect costs should not be awarded in favour of the Applicant.

[18] Turning then to the application for review itself - which I entertain on an unopposed basis - the Respondent, an employee of the Applicant, was dismissed as a result of poor work performance. She referred her dismissal to the First Respondent for conciliation and later for arbitration. The Second Respondent was the Commissioner who conciliated the dispute as well as the one who conducted the arbitration. At the arbitration he found the dismissal of the Respondent to be unfair and awarded her reinstatement.

[19] The grounds upon which Applicant relies to set aside the award are the following:

(i) that the Second Respondent was not entitled to hear the arbitration because it (the Applicant) had applied for the arbitration to be heard by a commissioner other than the Second Respondent in terms of Section 136(3) of the Labour Relations Act ("*the Act*");

(ii) that the Second Respondent was bias or that he created the perception of being bias against the Applicant;

(iii) that the Second Respondent's award is based on a finding (that the dismissal of the Third Respondent was discriminatory), which finding was not within his jurisdiction to make.

THE SECTION 136(3) APPLICATION

[20] The arbitration proceedings were scheduled to take place on 29 January 1998. At this hearing the Applicant's representative objected to the Second Respondent arbitrating the

dispute because he (the Second Respondent) had conciliated the dispute. The Second Respondent dismissed the Applicant's objection, stating that he would be unbiased.

[21] At the time of the hearing, s136(3) and (4) of the Act provided as follows:

"*(3) Any party to the dispute, who objects to the arbitration being conducted by the same commissioner who conciliated the dispute, may file an objection with the Commission and must satisfy the Commission that a copy of the objection has been served on all the other parties to the dispute.*

(4) When the Commission receives an objection it must appoint another commissioner to resolve the dispute by arbitration."

[22] Although there is no evidence to indicate that the objection was "*filed*", it is evident that the Second Respondent entertained the objection and dismissed it. The Second Respondent dismissed the objection not because of the Applicant's failure to follow the procedure set out in s136(3) but for a reason which for the present purposes is irrelevant . The objection, however, had to be filed with the First Respondent and not the Second Respondent. In effect, the Applicant failed to comply with s136(3) of the Act which gave it a right to veto the commissioner(the second respondent)from arbitrating the dispute . Since it failed to comply with the provisions of s 136(3) it can be held that there was no obligation on the Second Respondent not to arbitrate the dispute.

[23] The arbitration however did not proceed on that day (29 January 1998). It was set down again on various occasions but, for one reason or the other, it was postponed until 1 July 1998. On this date both parties addressed their opening statements to the Second Respondent and Applicant handed to the Second Respondent a bundle of documents which it intended to utilise at the arbitration. The Second Respondent then enquired if a "*pre-arbitration*" meeting was held. On being informed that a pre-arbitration meeting was not held, the Second Respondent adjourned the arbitration and ruled that the parties hold a pre-arbitration meeting with a view to narrowing the issues.

[24] After the adjournment of the hearing on 1 July 1998, the Applicant filed a "*Notice of Objection to Arbitration by Same Commissioner*", i.e. a notice in terms of s136(3) of the Act. The reason given by the Applicant for filing this objection is not the fact that it did not want the Second Respondent to arbitrate the dispute because he had conciliated the dispute, but because the Applicant's representative (Marais) ":*was appalled by the Commissioner's racist remarks and believed that he was biased*".

[25] Whatever the reason may be , the fact is that the Applicant did at this stage comply with s136(3) of the Act.(The notice filed complied with the requirements of the Act) The fact that this application was made after an unreasonable period had expired after the conciliation would have been relevant had the Respondent raised this on receipt of the objection. The Respondent did not react to the objection and the First Respondent, in terms of s136(4), appointed a commissioner other than the Second Respondent to hear the arbitration. The matter was then set down for hearing on 31 August 1998.

[26] On 31 August 1998 the Third Respondent objected to a new Commissioner arbitrating the dispute between the parties and the arbitration was yet again adjourned, this time pending the resolution of the appointment of the arbitrator. The Applicant does not indicate what the nature of Third Respondent's objection was or how this objection was to be resolved. All that I am advised is that after the adjournment, and on 15 January 1999, the First Respondent advised the Applicant that the arbitration was to take place on 11 March 1999 before the Second Respondent and the Applicant could if it so wished apply for the Second Respondent's recusal.

[27] The matter then proceeded and Applicant's request for the Second Respondent to recuse himself on the grounds of its belief that Second Respondent was bias was dismissed.

[28]As recorded earlier, by 1 July 1998 Applicant complied with s136(3) as it then stood and the First Respondent was therefore obliged to appoint a commissioner other than the Second Respondent to arbitrate the dispute - this it did. I have nothing before me to explain why it thereafter simply reversed this decision. The only inference that can be drawn is that the decision was reversed on the basis that the Second Respondent was seized with the matter because opening statements had already been addressed to him. The fact that opening statements had been made did not mean that the Applicant was barred from filing an objection in terms of s136(3) of the Act, as it then stood. While an application in terms of s136(3) should generally not be entertained once the merits of the dispute are placed before the Commissioner - even if the merits are raised to a limited extent by, for instance,

handing in a document setting out common cause facts or advising him / her of the facts that are common cause, where the issues in dispute are still to be crystallised and the minutes of the pre-arbitration meeting are not handed in to the Commissioner it cannot be said that the arbitration proceedings have in fact commenced.

[29] In the circumstances, since there is no evidence before me or any given to the Applicant as to why the First Respondent, having decided to comply with s136(4) of the Act thereafter reversed its own decision , the award of the Second Respondent should be set aside furthermore in hearing the arbitration First and Second Respondents failed to comply with s136(4) of the Act. Insofar as the First Respondent may have relied on its belief that Second Respondent had already commenced with the hearing of the arbitration and therefore it could not change its Commissioner, this belief, if correct, would be enough reason for refusing an objection in terms of s136(3). In this matter, on the facts I am not satisfied that the arbitration proceedings had commenced and therefore the failure by the First Respondent to appoint another Commissioner once served with a notice in terms of s 136(3) as it then stood, constitutes a reviewable irregularity.

[30] Having decided on the above ground that the award should be reviewed and set aside, I see no reason to deal with the other issues raised by the Applicant.

[31] Since the Applicant has alleged that it had not at the arbitration dealt with the matter as it would have liked due to various reasons, most of which are of dubious validity, I have decided that it is only appropriate to refer the matter back to First Respondent to be arbitrated by a Commissioner other than the Second Respondent.

[32] The Applicant also seeks that I make an order that for the purposes of any subsequent award that may be handed down in favour of the Third Respondent, the time between the Second Respondent's award and any such subsequent award must be disregarded. I do not see any reason for me to make such an order, especially since the complaint raised by the Applicant in this review is against the First and Second Respondents and not the Third Respondent.

[33] Finally, with regard to costs, the Applicant seeks an order as against the First and Second Respondents. After considering the matter I am not satisfied that such an order is appropriate in terms of law and equity.

[34] In the result I make the following order:

(i) Condonation for the late filing of Third Respondent's heads of argument is granted.

(ii) Condonation for the late filing of Third Respondent's answering affidavits is refused with costs.

(iii) The arbitration award handed down by the Second Respondent under the auspices of the First Respondent under CCMA Case No. GA 17807 is hereby reviewed and set aside and First Respondent must appoint a Commissioner other than the Second Respondent to arbitrate afresh the dispute between the Third Respondent and the Applicant.

(iv) There is no order as to costs in respect of the review application.

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WAGLAY J

APPEARANCES:

K Fulton of Bowman Gilfillan Inc

t: Adv G Hulley instructed by BM & Associates

26 September 2001