

Sneller Verbatim/DM

IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN

CASE NO: J1824/00

DATE: 2001-12-07

In the matter between

WILLIAM PAUL PRETORIUS

Applicant

and

TONCON CIVIL ENGINEERING (PTY) LTD

Respondent

J U D G M E N T

Delivered on 7 December 2001

REVELAS J:

- 1.This is an application in terms of both section 145(1)(c) of the Labour Relations Act 66 of 1995, "the Act," and section 158(1)(g) thereof.
- 2.The applicant seeks to review an award made by an arbitrator appointed by the Commission for Conciliation, Mediation and Arbitration, ("the CCMA"), on 27 March 2000 in favour of the third respondent. The arbitrator found that the CCMA did not have the necessary jurisdiction to hear the matter since condonation had not been granted for the late referral, i.e. two days after the dispute by the applicant to the CCMA.
- 3.The facts which gave rise to this application are the following. The applicant was dismissed by the third respondent in October 1998. He then instructed an attorney to act on his behalf. The referral of the dispute to the CCMA could only be successfully transmitted to the CCMA on Monday, 23 November 1998. The attorney had attempted to fax the

referral the Friday but was unsuccessful. The CCMA then furnished the parties with a notice advising them to attend a conciliation meeting at the CCMA on 11 May 1999.

4.The commissioner who was appointed for this process was Mr Kgaka. The applicant attended the conciliation at the CCMA offices on 11 May. The third respondent was absent. Mr Kgaka perused the file and pointed out to the applicant that the referral had not been made within the 30 day time limit. Thereafter there was an explanation furnished to Mr Kgaka and condonation was granted for the late referral.

5.On the file Mr Kgaka made the following note -

"GA50497 - Application for condonation

Willem Paul Pretorius - sworn. I am the applicant in this matter. I timeously instructed my consultant in this matter, but now it appears that he referred the matter to the CCMA two days late. The delay is not serious and there is no prejudice on the part of the employer party. I, since the date of the dismissal I am unemployed (sic). No reason for dismissal was given and therefore my prospects are good."

6.Although no specific finding was endorsed on the file as to the fact that condonation is granted, it is undisputed on the papers before me that it was granted and on the probabilities and particularly the note that was made on the file, I have no reason to doubt that condonation was indeed given.

7.The matter was then set down for arbitration. At the arbitration hearing before another commissioner, who is the first respondent (or "the arbitrator"), the third respondent's legal representative raised the point that the referral was referred outside the prescribed time limit of 30 days. The matter was then argued before the first respondent who found that he had no jurisdiction because there was no proof that condonation had indeed been granted.

8. Mr Kgaka was not available to give evidence or to shed light on matters at that time. It is this finding or ruling of the commissioner which is the subject matter of this review.
9. The third respondent has raised as a point *in limine* that the first respondent did not make an award that is subject to review in terms of section 145 of the Act. I do not agree with this contention. He at least made a ruling and that may be subject to review in terms of section 158(1)(g) of the Act.
10. The arbitrator committed misconduct in relation to his duties as an arbitrator. He simply ignored the note on the file which is strongly indicative thereof that condonation had in fact been granted. He simply accepted the word of the third respondent, who was not even present at the condonation application. There was no reason to make a finding that condonation had not been granted. The arbitrator had a duty to postpone the matter to find out from Mr Kgaka what indeed had happened.
11. In the circumstances, the application for review must succeed and the third respondent is to pay the costs in this matter.

E. Revelas