

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

CASE NO:

J1946/99

In the matter between:

Applicant

and

COMMISSION FOR CONCILIATION

1st Respondent

2nd Respondent

3rd Respondent

REASONS FOR JUDGMENT

Granted on 6 February 2001

REVELAS J:

1. This is the second time I give reasons for the order I gave on 6 February 2001. The cassettes containing the first judgment were sent to Snellers Inc. Upon inquiries it transpired that the cassette types containing the judgment had been mislaid by Snellers. A delay occurred in searching for these cassettes, which were thought to be forthcoming. The file in this matter then went missing for some period. I gave 51 reasoned and signed judgments during the first term in which I gave this judgment. I am unable to state what happened to the matter, but accept that the delay was unacceptable as both parties were prejudiced.
2. The third respondent was dismissed by the applicant in *absentia* with effect from 9

December 1998.

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3. On 26 February 1999 the third respondent filed a condonation application for the late referral of his dispute to the first respondent. On 8 April 1999 the condonation application was considered by the second respondent and he granted condonation without stating reasons for his decision , at that time.
4. However, on 24 February 1999, the applicant was notified of the application for condonation of the late referral of the third respondent's dispute to the first respondent. The applicant responded to the notification by writing a letter dated 26 February 1999, to the first respondent, noting its opposition to the application. A copy of the lengthy findings of the disciplinary hearing chairman was attached to the letter. In the same letter, the applicant noted its desire to formally address the CCMA on the question of condonation. The lack of any prospects of success in the application of condonation and the main case was also set out in the same letter. The case management officer of the first respondent, Miss Verna Agatha Simpson confirmed receipt of the letter and filed a confirmatory affidavit to this effect.
5. In the absence of any other explanation to the contrary, it could be assumed that this letter was in the file containing the application for condonation.
6. The applicant was not notified of the date of the hearing of the application, even though it appears that a notice of setdown had been faxed to the applicant. The applicant had at all times shown an interest in the matter. Fax machines are not infallible and, furthermore, the applicant is a relatively large organization where faxed documents may not always reach their destination. In these circumstances I have to accept the applicant's explanation, namely that he did not receive the notice of setdown, and consequently did not attend the condonation hearing.

7. The applicant then brought this application for review of the ruling in question. The application was served on the 3rd of June 1999 and was opposed. The matter was set down for hearing. On 28 February 2000, Basson J postponed the matter. It appears from the file that heads of argument were not filed timeously. However, from a letter written by the third respondent's attorneys to the CCMA, it appears that Basson J, also indicated that the second respondent should give reasons on affidavit for his ruling.

8. The second respondent then filed an affidavit which stated that he granted condonation on the basis of the unopposed application before him. He also stated that **“on the papers before me the respondent** (the applicant in the review application) **did not oppose the application for condonation.”** No reference is made to the applicant's papers that were indeed filed according to the first respondent's case management officer. The affidavit was also signed on 4 September 2000, more than a year and a half after the application was heard. The second respondent simply does not deal with the fact that the applicant had indeed filed papers opposing the condonation application, in circumstances where he should have. I have considered whether this was not a matter where the review application should have been suspended pending an application for rescission of the condonation ruling. However, for the reasons advanced hereinbefore, I came to the conclusion that the matter is reviewable at the time the ruling was made, no reasons therefore were advanced. The applicant was entitled to bring an application for the review of the ruling and on the facts before me and in absence of a proper explanation by the second respondent, it appears that the second respondent did not apply his mind to facts before him when granting condonation. There is also no indication that in circumstances where he should have, he made any inquiries as to the applicant's absence at the condonation application hearing. It is not apparent whether there was an appearance for the third respondent or whether there was any argument heard at the hearing, if one was held. The application only contains a bold statement as to the prospects of success. In the

circumstances, the ruling is set aside. I now turn to the third respondent's prospects of success if the matter was referred back to the CCMA.

9. On 8 October 1998, the applicant charged the third respondent with thirteen counts of misconduct. These charges mainly dealt with misconduct such as not carrying out instructions, delegating instructions to insubordinates where he should not have done so, making false statements and incompetence.
10. The notice indicated that the disciplinary hearing would be held at 29 and 30 October 1998. On 19 October 1998 the third respondent made an application for legal representation, indicating that he would be represented by Mtembu Attorneys. Mnr. Mtembu confirmed that he was instructed in the matter but was unable to attend the hearing on the scheduled dates and requested a postponement to dates between 1 and 4 December 1998. The application for a postponement was formally heard on 29 October 1998 and the matter was postponed to Wednesday, 2 December 1998. A pre-trial conference took place on 26 November 1998. Two days prior thereto, Mr. Mtembu gave notice of his withdrawal as the third respondent's attorney of record and it was recorded at the disciplinary hearing that the applicant would be represented by Mr. R. Bokwa. The hearing was then set down for 2, 3, 4, 8 and 9 December 1998 and the venue was decided upon.
11. On 2 December 1998, Mr. Bokwa raised an objection to Mr. Dell's participation in the case, assisting the prosecutor. The basis of the objection was that Mr. Dell previously acted on behalf of the third respondent in a disciplinary hearing on charges of sexual harassment initiated by the third respondent's secretary. It was argued that there would be a conflict of interest. Before this issue was finalized another problem arose. On 3 December 1998 the third respondent was absent from the disciplinary proceedings. Mr. Bokwa confirmed that his client had contacted him telephonically to previous evening indicating that he was ill and that he would not be able to attend the disciplinary hearing on 3 December 1998. Upon resuming

of the disciplinary hearing on Monday, 7 December 1998, Mr. Bokwa indicated that his mandate had been terminated were after he excused himself. Mr. T J Oksena placed himself on record stating that the third respondent again appointed Mr. Mtembu of Attorneys Mtembu and Mohammed, to act on his behalf but that Mr. Mtembu would not be available until February 1999 due to other commitments. Application was then made on behalf of the third respondent that the matter be postponed to February 1999. The assistant of the prosecutor, Mr. Dell, argued that the third respondent was attempting to frustrate the proceedings.

12. The chairman found that the third respondent could not be prejudiced by the applicant's representation by Mr. Dell. The objection was consequently turned down.
13. As far as the application for postponement is concerned, the chairman found that the third applicant had more than adequate time to instruct an attorney or obtain proper legal advice and refused the application for the postponement. The chairman also pointed out that the respondent had not been truthful about his illness and suggested that he that he be represented by Mr. Bokwa, who was still prepared to undertake his defense or alternatively that he be represented by a co-employee. This reasoning can not be faulted or criticized and does not constitute an unprocedural irregularity. It must also be remembered that the third respondent was the vice-rector of administration of the applicant and not an illiterate man who seriously needed legal representation.
14. The third respondent was found guilty of thirteen charges of misconduct relating, in some instances to incompetence and in other instances a refusal to carry out instructions and making false statements.
15. In my view, the third respondent's prospects of success in succeeding with a condonation application before another commissioner, are very remote. He also

misled the second respondent. In the circumstances, I substituted the ruling given by the commissioner, granting condonation with an order that condonation should not be granted.

16. I have considered whether or not the matter should have rather been referred back to the CCMA and an application for rescission of the ruling should be made before the same commissioner. However, on the evidence before, as set out above, I believe that this was a matter which could be reviewed.
17. However, I am not certain that there is no reasonable prospect that another Court would come to a different conclusion on this issue. In the circumstances, I grant leave to appeal in this matter.

Revelas

17 January 2002

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