REPORTABLE
IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT DURBAN

CASE NO **D1868/2001**

In the matter between:

P MOELLER & COMPANY (PTY) LTD
Applicant

and

AREND LEVENDAL First Respondent

THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION Second Respondent

ECKEHARD SCHUMANN Third Respondent

JUDGMENT

PILLAY D, J

[1] This is an application for condonation for the late delivery of an application for

review. The third respondent employee referred his retrenchment dispute to the second respondent Commission, the Commission for Conciliation Mediation and Arbitration, on 31 May 2001. The conciliation was set down for 25 June 2001. A certificate of outcome was issued in the absence of the applicant.

[2] The applicant alleges that the certificate falls to be set aside, firstly, because the third respondent had not served it with the referral to conciliate. Secondly, the third respondent had referred the dispute for conciliation late, his date of dismissal being 26 April 2001, that is, the date on which he left the applicant's employ. Alternatively, it was submitted that the referral was premature, in that it was made on 31 May 2001, that is, on the very day the notice of dismissal would have expired.

[3] The applicant received the notice of the conciliation hearing on 11 June 2001. It attempted to secure a postponement of the conciliation. It alleges that the Commission had directed it to obtain the consent of the third respondent and that the latter had consented to the postponement. The third respondent denies this, saying that he merely indicated his availability if the matter were to be postponed. Such a dispute of fact requires me to accept the third respondent's version in the circumstances. *Plascon Evans Paints Limited v Van Riebeeck Paints (Pty) Limited 1984 (3) SA 623 A*. Moreover, a conciliation is not postponed until the Commission or a commissioner declares it so. Even if the third respondent had consented, it remained within the discretion of the Commission or the commissioner to refuse a postponement.

[4] The applicant realised that the conciliation had proceeded, despite its belief that it had been postponed, when, on 28 June 2001, it received the certificate.

[5] The third respondent delivered its Statement of Case on 24 July 2001 and the applicant its defence on 3 August 2001.

[6] Only on being called to attend a pre-trial conference did the applicant cause the Commission file to be inspected. It discovered that there was no proof of service of the referral in the file. It also alleges that it became aware on that day, that is 28 September 2001, that the dispute had been referred on 31 May 2001 for conciliation.

[7] The third respondent could not recall what he had done about service of the referral and therefore could not dispute that there had not been service.

[8] On the first ground of review the main thrust of the applicant's argument relating to the absence of service of the referral was that it is a peremptory requirement driven by the principle of *audi alteram partem*.

[9] Section 191(3) of the Labour Relations Act provides:

"The *employee* must satisfy the *council* or the Commission that a copy of the referral has been *served* on the employer."

[See also *Gianfranco Hairstyles v Howard and Others* [2000] 21 ILJ 361[LC] at para.11.]

In *Steynberg v Cosmopolitan National Bank* 1973(3) SA 885 (RA) at 892C MCDONALD ACJ pointed out that:

"It is a cornerstone of our legal system that a person is entitled to notice of legal proceedings instituted against him."

Furthermore, in *Dada v Dada* 1977(2) SA 287(T) at 288C NICHOLAS J held:

"When an action has been begun without due citation of the defendant, the subsequent proceedings are null and void, and any judgment given is of no force or effect whatsoever."

HORN AJ in *First National Bank v Ganyesa Bottle Store* 1998(4) SA 565(N) at 567I had this to say about non-service of a summons:

"I am unable to accept the submission that service of a summons becomes unnecessary for the purpose of applying for summary judgment if a defendant, having acquired 'knowledge' of the fact that a summons has been issued (but not served) citing him as a defendant, has entered an appearance to defend, and then withdraws his appearance. As I understood Mr Botha, mere 'knowledge' would suffice for judgment to be granted. Such a situation could lead to various anomalies."

[10] From the aforegoing the failure to serve the referral may be a material defect in the proceedings. The question is whether in the circumstances of this case non service of the referral was a material defect. The applicant received notice of the conciliation without protesting about not having received the referral or about enduring any prejudice as a result thereof. There is no evidence that the applicant expressed any interest in knowing what the referral contained until after pleadings closed. If the applicant was aggrieved about not being adequately informed via the referral to engage in meaningful conciliation it should have acted sooner. Of note is the fact that the non-service relates to a referral for conciliation, the

outcome of which is entirely voluntary and premised on a genuine desire - even though that may be driven by statute – to resolve the dispute substantively. The applicant's primary purpose of enquiring into the referral at such a late stage was to ferret out technicalities to obstruct the substantive resolution of the dispute. As the purpose of requiring service of the referral for conciliation was not to conciliate or to address the issues in dispute substantively, the non-service was a formal defect in the proceedings.

[11] With regard to the second ground of review it is necessary to determine, firstly, the date of dismissal. In terms of Section 190 the date of dismissal is the earlier of the date on which the contract of employment terminated, or the date on which the employee left the service of the employer. There is a dispute of fact as to whether the last working day was 26 April 2001. I accept for the purposes of this case that the dismissal was on 31 May 2001, that being the third respondent's version.

[12] Advocate Pillay submitted that the referral on 31 May 2001 was premature in that no cause of action existed at that date. Furthermore as the referral was premature it was a nullity that cannot be condoned.

[13] In a number of its decisions the Labour Court has refused to condone the premature referral of a dispute to conciliation

[CWIU v Darmag Industries (Pty) Ltd 1999 (20) ILJ 2037 (LC); USA Housing Trust Ltd and another unreported case No. J561-98, Steel Mining Commercial Workers union & Others v Tiger Plastics (Pty) Ltd 1999 20 ILJ 2112 (LC)]. The trend has been to refer the dispute back for conciliation.

[14] In *Ngani v Mbanje and Another* 1988(2) SA 649 (ZS) KORSAH JA held:

"An objection that an action is premature is not a mere technical point affecting some provision of adjectival law; it strikes to the very root of the action. It is so fundamental as to render the initiating process a nullity. If there is no cause of action, then a judgment pronouncing that a non-existent cause exists, is void and of no effect."

[15] The cause of action in this case is the dismissal of the third respondent on 31 May 2001. The next inquiry is whether the referral on 31 May 2001 was premature. If so, the referral and everything founded on it would be a nullity. [Per LORD DENNING in *Macfoy v United Africa Company Limited* 1961(3) LRA 1169 PC at 1172.] Section 191(1) provides:

"If there is a *dispute* about the fairness of a *dismissal*, the dismissed *employee* may refer the *dispute* in writing within 30 days of the date of *dismissal* to:

(a) a *council…*,

(b) the Commission…."

[16] In *Brown v Regional Director Department of Manpower* 1993(2) SA (W]) at 294 HARTZENBURG J had to determine whether an application for a Conciliation Board had been made prematurely. The Court accepted that section 4 of the Interpretation Act 33 of 1957 applied in that the calculation of the number of days should be reckoned exclusively of the first and inclusively of the last day. The purpose of that section, the Court said, was:

"…to give certainty as to when a period prescribed by law will come to an

end. During periods prescribed in Acts of Parliament, rights and corresponding obligations exist. At the expiry of those periods the rights and obligations fall away. It is important to determine the exact time when such a time period expires. When it commences it is usually subject to something or other happening and upon the occurrence of such an event the rights and obligations come into existence."

And at 295B-C the learned judge continues to state:

"Where it is obvious that the calculation is to be made in accordance with s 4 of the Interpretation Act, an anomalous situation arises if it is contended that both the beginning and the end of the time period are to be determined. A right which clearly has arisen will be suspended for portion of a day. In the abovementioned examples it will entail that the State can object to an application for leave to appeal immediately after conviction and sentence on the ground that it is brought prematurely. Likewise a plaintiff will be able to ask for the setting aside of an appearance to defend entered on the same day when summons was served, also on the ground that it is premature. Those two results, in my view, are absurd. It can be avoided if s 4 of the Interpretation Act is read to mean that the purpose of the calculation is to determine the end of the period and not the beginning. In effect, the period will then be a portion of a day longer than prescribed by the Act, but that is in my view what the Legislature had in mind. The beginning of the period is when the right arises."

[17] On the basis of the *Brown* case the referral on 31 May 2001, being the same day as the date of dismissal, was not premature and, therefore, not a nullity. The jurisdictional prerequisite of a valid referral for conciliation has been established. However, if the referral was made before the date of

dismissal then, on the principles of *Ngani and Macfoy* the referral would be a nullity.

[18] However, even if it were a nullity I do not agree with Advocate Pillay that it is an absolute bar to dealing with the dispute effectively. (See *ABC Telesales v Pasmans* [2001] 4 BLLR 385 [LAC] above.)

[19] In the context of a labour dispute a party who prematurely refers a dispute for conciliation is not without a remedy. Section 158(1)(b) empowers the Labour Court to order compliance with any provisions of the LRA. When exercising its discretion in this regard the Court must also consider that one of the purposes of the LRA is to promote the effective resolution of labour disputes. [Section 1(d)(iv) of the LRA.] Effective means, amongst other things, expeditious. Dispute resolution by consensus should be preferred over adjudication and industrial action. However, if there are no prospects of resolving the dispute by conciliation, then compelling compliance with the requirements of conciliation would be an ineffective way of attempting to resolve the dispute.

[20] Furthermore, crucial to any indulgence that a Court may permit, is the question of prejudice. Whereas both parties may be prejudiced if the pre-dismissal procedures of section 189 of the LRA are not exhausted before a referral, that is not so here. In this case the applicant regarded the third respondent's last working day to be 26 April 2001. Nothing was done to negotiate, consult about or avoid the dismissal from that date until the referral on 31 May 2001. It therefore made no real difference whether the referral was effected that day or a day later.

[21] I am not persuaded that the applicant had a genuine wish to conciliate the dispute. The applicant seemed to have resigned itself to dealing with the matter substantively. I say this because it attempted initially to reconvene the conciliation. Thereafter it pleaded on the merits to the Statement of Case without reserving its rights to challenge whether there had been compliance with the jurisdictional requirements. However, after the labour consultant was engaged, it adopted a technical, formalistic approach. Hence my further reasons for concluding that the applicant is not *bona fide* in launching its application for review. Both parties are legally represented. If either of them saw any prospects of success through conciliation, they would no doubt pursue that even if it means having recourse to private conciliation.

[22] The facts of this case are, therefore, distinguishable from that of *Steel Mining and Commercial Workers Union and Others v Tiger Plastics (Pty) Ltd* 1999 (20) ILJ 2112 (LC) wherein JALI AJ expressed his unhappiness about litigants who do not comply with the conciliation procedures in the LRA as a jurisdictional prequisite.

[23] Advocate Pillay referred me to *Paper Printing Wood and Allied Workers Union and Others v Nason - Vin Afrika, a division of the National Education Group (Pty) Ltd* 1999 (20) ILJ 2101 [LC]. REVELAS J found that the dispute in that case had not been conciliated because it had been prematurely referred. In this case the matter was not conciliated because the applicant had failed to attend the conciliation.

[24] The applicant has suffered no prejudice by the referral of the dispute on the same day as the date on which his dismissal was to take effect. It is also just and equitable that the referral, if it were premature, not be held against the third respondent as he was told by the Commission to return on 31 May 2001 to "open a case".

[25] However, the question is not whether the referral for conciliation was an irregularity. The inquiry is whether the commissioner committed a reviewable irregularity by issuing the certificate when there was no proof of service of the referral and when the referral and the date of dismissal occurred on the same day. There is no evidence before me to prove that the commissioner committed an irregularity. The commissioner could have been satisfied that there was service of the referral from the applicant's silence about not receiving the referral and its seeking instead a postponement of the conciliation. The production of a registered posting slip or a fax transmission print out are some and not the only means of satisfying a commissioner that there was service. Finding, as I have, that the referral was not premature, the issuing of the certificate was not only justifiable but also correct.

[26] A further reason for rejecting both grounds of review is that the applicant lost its substantive right to review by delaying the launch of the review.

[27] In *Lion Match Co. Ltd v Paper Printing Wood and Allied Workers Union and Others* 2001(4) SA 149 (SCA) at 156G-158 it was held:

"It was an established rule in review proceedings that an applicant for review who failed to bring the application within a reasonable time might,

unless a delay could be condoned, lose the right to complain of the irregularity in regard to which the review had been brought."

In *Fidelity Guards Holdings (Pty) Ltd v Epstein N.O. and Others* 2000 (12) BLLR 1389 [LAC] at paragraph 13 the Labour Appeal Court agreed with the judgment of PILLEMER AJ in the Court *a quo* where he stated:

"If the administrative act of certification is invalid, even then it must be challenged timeously because, if not, public policy as expressed in the maxim *omnia praesumuntur rite esse acta*, requires that after a reasonable time has passed for it to be challenged, it should be given all the effects in law of a valid decision."

A similar approach was followed in *JDG Trading (Pty) Ltd (t/a Bradlows Furnishers) v Laka N.O. and Others* [2001] 3 BLLR 294 [LAC].

[28] An issue raised but left unanswered in the *Fidelity Guards* case was whether a party that objects to a certificate should launch review proceedings within a reasonable time after the certificate was issued or within a reasonable time after the entire process has been concluded. In *JDG Trading* DAVIS AJA offered the following guidance on the issue at 295:

"The appellant's approach to the jurisdictional issue appeared to have been determined by the content of the award. It was prepared to abide by the first award. It was only when the second award changed the implications of the first that the appellant decided to launch the review proceedings under appeal more than a year after the appellant had first raised the jurisdictional issue. This was an unreasonable delay, which ran counter to the purposes of the Act."

What is a reasonable time within which review proceedings should be launched must depend, therefore, on all the circumstances and will vary

from one case to the next.

[29] In this case the applicant would have been aware, when it received the certificate, of the two factors that founded its application for review. It would have also been aware that it had not been served with the referral for conciliation. From the certificate itself it would have been apparent that the dispute had been referred on 31 May 2001. That should have prompted the applicant to bring its review application forthwith. If the applicant had not received the referral, then it ought to have anticipated that there might not have been proof of service thereof before the commissioner. The applicant unreasonably delayed its inquiries from 28 June 2001 until 28 September 2001. Settlement discussions conducted thereafter proved unsuccessful. It then sought counsel's opinion. Only in October 2001 did the grounds of review allegedly became apparent to it. The review was launched eventually on 12 December 2001. The reason for the delay between October and December is also not adequately explained. The applicant ought to have been aware that time is of the essence in labour disputes. That events followed at a brisk pace after the dismissal ought to have alerted it to this even if its advisors had not done so. The delay in challenging the issue of the certificate in all circumstances is reasonable.

[30] It is convenient at this stage to also deal with the reasonableness of the time limits for bringing the application for condonation. The application for condonation for non-compliance with procedures in terms of Section 158(1)(g) must be made within a reasonable time. I find that the application was not made within a reasonable time, nor is the explanation

for the delay acceptable. Furthermore, GOLDSTEIN AJA held in *ABC Telesales v Pasmans* (above) at 387F-H:

"However, the referring party's participation in the conciliation process without objection renders the requirement of a signature redundant at that stage. It follows that the rule maker could not have intended the rule to apply once such participation had occurred and with it, the ratification of the referral. This approach, it seems to me, gives effect to a purposive of interpretation of the rule in accordance with the approach approved by this Court in *Business South Africa v Congress of South African Trade Unions and Another* [1997] 18 ILJ 474 [LAC] at 479A-B and in *Ceramic Industries Limited (t/a Betta Sanitary Ware] v National Construction Building and Allied Workers Union* 2 [1997] 18 ILJ 671 [LAC] at 675 G-H.

[31] In this matter the applicant pleaded over without reserving its right to challenge the alleged non-compliance with the jurisdictional requirements.

[32] Sight should not be lost of the test for a reviewable irregularity in terms of section 158(1)(g). Advocate Pillay, for the applicant, suggested that the third respondent might have pulled the wool over the Commissioner's eyes regarding proof of service of the referral. I do not find that to be the case as it was open to the applicant to alert the commissioner that it had not been served. However, even if the commissioner was deceived then the he cannot be faulted. Furthermore, there is no evidence as to how the Commissioner was satisfied that there had been service. In the circumstances I cannot find that the commissioner has committed an irregularity on this ground by issuing the certificate.

[33] These are the reasons for the order that I granted yesterday. Having found that the review application was made after an undue delay, that the explanation for the delay was unacceptable and that there are no prospects of success on the merits of the grounds of review, I dismissed the application for condonation with costs. It follows that the application for review must also be dismissed with costs.

PILLAY D, J

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29 APRIL 2002

30 APRIL 2002

DATE OF EDITING: 3 JUNE 2002

NT ADVOCATE I PILLAY

ON BEHALF OF RESPONDENT ADVOCATE M BINGHAM