IN THE LABOUR OF SOUTH AFRICA

HELD IN JOHANNESBURG

CASE NO. JR 2069/02

In the matter between:

TSW MANUFACTURING (Pty) LIMITED	**APPLICANT**
AND	
COMMISSIONER JCB SCHOEMAN N.O	**1ST RESPONDENT**
CCMA JOHANNESBURG	**2ND RESPONDENT**
ELSIE C. SWANERPOEL	**3RD RESPONDNET**

JUDGMENT

PAKADE .J

[1] In this application the applicant seeks an order setting aside the first respondent's award made in the CCMA.

[2] In his award of the 22 October 2002, the Commissioner granted condonation to the third respondent for her late referral of her dismissal to the CCMA . The Commissioner in his award also dismissed the applicant's *point in limine* that only the Metal and Engineering Industries Bargaining Council (MEIBC) and not the CCMA had the necessary jurisdiction to entertain the dispute.

[3] With regard to condonation award, it was argued by Mr Jackson, Counsel for the applicant that the Commissioner misdirected himself in condoning the third respondent's 28 month's delay in referring her dismissal to the CCMA without having considered her prospects of success on the merits. Mr. Roux Attorney

for the third respondent had some difficulty in presenting argument to the contrary. He submitted though that the 28month's delay was sufficiently explained to the commissioner and that the commissioner had made a finding on prospects of success though he omitted to reflect that fact on the record.

[4] In adjudicating in a condonation application the court must consider two cardinal trite principles, namely good cause for the delay/ reasonable explanation for the delay and prospects of success on the merits.

-CHETTY v LAW SOCIETY, TRANSVAAL

1985(2) SA 756 (A);

-MARATHON EARTHMOVIERS v CCMA & OTHERS

(1999) ILJ 2393 (LC)

[5] In her founding affidavit in the condonation application the third respondent states that the delay was caused by her attorney who had some difficulty in establishing the proper forum which has jurisdiction to entertain the matter. The third respondent's basis for referral of her dismissal to CCMA is constructive dismissal.

[6] This matter has a quear history. She was employed by the applicant as a temporal unit. While still working as such, she was offered permanent employment which she accepted. Within seven days in her permanent employment the applicant unilaterally cancelled the contract of employment with her and once again offered her temporal position in which she would be remunerated on an hourly basis. Once again she accepted the offer. On 10 April 2000 the applicant again breached the contract of employment by offering to pay her at a lower hourly rate. This time she did not accept the offer to be remunerated on reduced rates and preferred to resign.

Having resigned on 10 April 2000, she referred the matter to the Dispute Resolution Council of the Motor Industry Bargaining Council (the Council) on 10 May 2000. There was no response from the Council until her instructing Attorney wrote a letter on 15 August 2000 requesting a date for conciliation. There was again no response. On 04 October 2000, the third respondent's attorney wrote another letter to this council requesting a response as a matter of urgency. There was again no response. Her attorney telephoned the council on 31 January 2001 and was told that the referral could not be traced. A further telephonic conversation with Ms Bridgette Williams of the council failed to elicit a positive response. It was only on the 5th March 2001 that

Ms. Williams communicated with third respondent's attorney and told him that the council had no jurisdiction over the matter and advised him to refer the matter to the CCMA. Indeed the matter was referred to the CCMA. It does not appear from the Commissioner's record when such referral was made. However, on 21 August 2002 the CCMA informed the third respondent that it also has no jurisdiction to entertain the matter and suggested that it should be referred to Metal & Engineering Industries Bargaining Council, 1st Floor Metal Industries, House 42 Anderson Street, Johannesburg
P O Box 3998
Johannesburg
2000.

However, the matter was set down for hearing on 14 October 2002 before Commissioner by JCB Schoeman. According to the commissioner Mr Roux informed him that this court had ordered that the matter be referred to the CCMA but there is no order to this effect on the record.

[7] In his reasons for granting condonation the Commissioner stated that the third respondent cannot be blamed for the delay. Based on the above exposition I agree with him in the course of the judgment.

It is clear from the circumsntances of this case that the third respondent cannot be blamed for the delayed referral of the matter. The blame falls squarely in her attorney, the Dispute Resolution Council of the Motor Industries Bargaining Council and the CCMA. The attorney referred the dispute to a wrong forum instead of referring it to MEIBC. The DRC delayed its response that it had no jurisdiction in the matter. The CCMA conveyed a wrong information to the third respondent in assuming that it had no jurisdiction, ignoring the provisions of Sec 147 (2) (a) (ii) & (5) (a) (ii) which confer jurisdiction on it if the dispute has not been referred to the appropriate council. The third respondent must have been frustrated in being thrown from pillar to post in this respect.

[8] With regard to jurisdiction the Commissioner derived it from section 147 of the Labour Relations Act No. 66 of 1995. Section 147 (2) (a) provides as follows:

"(2) (a) If at any stage after the dispute has been referred to the commission it becomes apparent that the parties to the dispute are parties to a council , the commission may-

i) refer the dispute to the Council for resolution; or

ii) appoint a commissioner or if one has been appointed, confirm the appointment of the commissioner to resolve the dispute in terms of this Act."

The commission has exclusive jurisdiction to resolve the dispute in these circumstances. Section 147(5)(a) further fortifies this view. It reads as follows:

" (5) (a) If at any stage a dispute has been referred to the commission it becomes apparent that the dispute ought to have been referred to an accredited agency , the commission may-

i) refer the dispute to an accredited agency for resolution; or

ii) appoint a commissioner to resolve the dispute in terms of this Act".

It appears from the CCMA's letter dated 21 August 2001 to the third respondent that the second respondent is registered with MEIBC hence the dispute had to be referred to it. However, the CCMA carries the ultimate responsibility over the dispute if it has not been referred to the council. On this basis there is, in my view, no basis for the applicant's contention that the CCMA has no jurisdiction to entertain the dispute.

[9] There is, in my view, no basis to interfere with the commissioner's finding that the third respondent has shown good cause for the delay. The matter does not end there. The second requirement of prospects of success must also be considered. In certain circumstances, when the question of the sufficiency or otherwise of the applicant's explanation for his default is finely balanced the fact that he has a reasonable or good prospects of success on the merits might tip the scale in his favour. But this is not to say that the stronger the prospects of success the more indulgently will the court regard the explanation of the default.

-CHETTY v LAW SOCIETY OF TRANSVAAL (supra at 786.)

In **MELANE v SANTAM INSURANCE Co 1962 (4) SA 531 (A)**, it was held that the presence of good cause is determined upon a consideration of all the facts and is in essence a matter of fairness to both parties. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success on the merits of the case and the importance of the case to the parties and to the community generally.

[10] It is common cause that the commissioner did not deal with the prospects of success in his finding. However the entire case of the third respondent was before him. The dismissal is not automatically unfair. The third respondent resigned from the employment. He was not dismissed. She must prove that she was dismissed –(Section 192(1)). Once the existence of the dismissal has been established, (the employer) the applicant must

show that the dismissal was fair (Section 192 (2)

- **PILATUS MANUFACTURING (Pty) Ltd v MAMABALO (1996) 17 ILJ 120 (LAC)**.

[11] Ordinarily, an employee who has resigned cannot be regarded as having been dismissed. It would be constructive dismissal if the employee has resigned because the employer made continued employment intolerable. In **JOOSTE v TRANSNET (1995) 16 ILJ 629 (LAC)** the court described the form that an inquiry into constructive dismissal must take. There is a two stage inquiry. The court must first decide whether there has been a dismissal which requires the employee to prove that the employer's conduct led him to terminate the employment relationship. This requires an examination of the employee's state of mind when he resigned. If the employee discharges this burden of proof, the onus shifts to the employer to show that the employer's response was unwarranted.

In any view the unilateral alteration of the third respondent's conditions of employment by the applicant and substituting them with terms which were less favourable than those which prevailed before substitution constitute a constructive dismissal. In my view, notwithstanding the omission by the commissioner to show in his reasons that he considered the prospects of success, the facts which were before him established good prospects of success and must not have escaped his mind when he made the award. The finding on condonation is not invalidated by the commissioner's failure to show that he considered the prospects if the evidence before him disclose good prospects of success. The finding is justified by the evidence. It must also be borne in mind that labour disputes must be resolved in a manner that is simple, quick, cheap and non-legalistic and an omission of this kind can readily occur.

[10 In the circumstances the application cannot succeed and is dismissed with costs.

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PAKADE .J

JUDGE OF THE LABOUR COURT

APPEARANCES

FOR THE APPLICANT	:	ADV. B.M. JACKSON
		FULLARD MAYER MORRISON ATTORNEYS
FOR THE RESPONDENT	:	MR. ROUX
		ROUX VAN VUUREN ATTORNEYS
DATE OF HEARING	:	21 JANUARY 2004
DATE OF JUDGMENT	:	30 JANUARY 2004