REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

CASE NO: **JR 1585/01**

In the matter between:

XSTRATA SOUTH AFRICA (PTY) LTD – MINING DIVISION Applicant

and

ZIBA SIBEKO N.O. First Respondent
COMMISSION FOR CONCILIATION MEDIATION
AND ARBITRATION Second Respondent
NATIONAL UNION OF MINEWORKERS obo
JACK PATLA CHUENE Third Respondent

JUDGMENT

NTSEBEZA, AJ:

INTRODUCTION

[1] On the 16th July 2002, I listened to Mr Masher and Mr Vuso taking me through an extremely pacy argument that went backwards and forwards and resulted in the unusual outcomes that led to heads of argument, at my instance, being filed subsequent to that day. They were filed at a time when I was no longer a presiding officer of this Court, having departed for the United States, whence I returned to

this Court only in January and April 2003. The Heads I refer to are those I directed the parties to file at the end of their passionate arguments on the 16th July 2002.

[2] What the parties had come prepared to argue on the 16th July 2002 was a review application, brought by the Applicant (hereinafter referred to for convenience, as "Xstrata"), in which Xstrata had moved this Court to review and set aside, in terms of S 158(1)(g), a condonation ruling made by the First Respondent (Ziba Sibeko). Ziba Sibeko ("Sibeko"), acting as a Commissioner for the Second Respondent ("the CCMA") had made a ruling, condoning the late filing of a rescission application by the National Union of Mineworkers, acting on behalf of its member, Jack Patla Chuene (Third Respondent).

[3] Xstrata had moved this Court to rule that that condonation ruling was reviewable. Xstrata's argument, in a nutshell, was that Sibeko acted grossly irregularly by granting the condonation for the late filing of a rescission application. The intrinsic argument was that Rule 24(2) of the CCMA Rules provided that an application for rescission of a CCMA ruling must be made within ten (10) days of the date on which an applicant became aware of the ruling sought to be rescinded.

SOME PRELIMINARY BACKGROUND

[4] In this case, so argued Xstrata, the Third Respondent (the NUM) had made the application for rescission after the expiry of the ten (10) day time period allowed by the CCMA Rules. Xstrata, in their papers filed in October 2001, deposed through their Human Resources Manager, one Clifford Smith, that the CCMA Rule 24(2) aforesaid, is prescriptive and does **not** provide for the condoning of the late delivery of an application in terms thereof. Neither the Act, nor the CCMA Rules,

so went the submission, grant either the CCMA or Sibeko a general power to hear and/or condone the late filing of any application, hence the approach to this Court for the reliefs indicated hereinabove.

[5] That is, principally, the case I sat to hear on the 16th July 2002. ***En passant***, I may mention that Xstrata's lawyers filed a notice in terms of Rule 7A(6) and Rule 7A(8). These sections of the rules generally require a review applicant to furnish the Registrar and each of the other parties with a copy of the record or a portion thereof, and so on. They also require the applicant to, ***inter alia***, amend, add to or vary the terms of the notice of motion and supplement the supporting affidavit or deliver notice that the Applicant stands by its notice of motion. In this case, in its notice, Xstrata contended that "***the review application is based on a point of law, and therefore no portion of the record of the rescission hearing is relevant. The applicant will not file any portion of the record***." The notice concluded by giving notice that the Applicant "***stands by its notice of motion and founding affidavit in terms of Rule 7A(8)(b)***".

[6] In its affidavit, deposed to by Chuene, the Union dealt with the merits of the application, contending in the main, that there had been a mistake in the parties' understanding as to what the date of arbitration agreed upon by the parties on 25 August 2001 (*sic*!) was. Chuene contended that the hearing was scheduled for the 24th October 2000, and he annexed a CCMA document as Annexure "JPC 1", addressed to NUM obo Jack Chuene – S.O. Serothwane who I presume is Chuene – and to Thom Cliffe Mine-C Smith – who I presume is Xstrata's Human Resources Manager aforesaid. The CCMA document requires the parties to attend an Arbitration on 24 October 2000, 11h00, at the Promenade Hotel, Louis Trichardt, before Commissioner Chris Mbileni.

[7] Chuene, in his affidavit went on to state that the Union was at no stage notified of any date other than the 24th October 2000; that, consequently, he and the Union's legal representative attended the CCMA to note the ruling on whether Xstrata would be allowed legal representation – a matter which had been a contentious issue in the earlier hearing – and, in any event, to proceed with the hearing on the 24th October 2000; that they were informed, on enquiry from the case management officer, that the arbitration hearing had been proceeded with on the previous day, the 23rd October 2000, contrary to the agreed set down date of the 24th October 2000.

[8] The CCMA file had been opened, so deposed Chuene, apparently "*to prove*" to Chuene's legal representative that the Union had been served with a notice of set down advising of a "*new date of the hearing*". On perusal, however, it was found that "*the notice of set-down for hearing on 23 October 2000 that was sent to the [Union] reflected that the transmission was not successful*".

[9] Chuene denied strongly – and demanded proof of – any suggestion that on the 23rd October 2000 any communication was made with the Union to establish if Chuene was aware of the date and/or intended to attend the hearing. He admitted that the application for rescission was brought on 27 December 2000 and that the application for condonation was set down for hearing on 29 August 2001.

[10] Chuene contended that the Union received the Arbitration Award on 6 December 2000; that according to the CCMA rules the rescission application should have been brought on or by 16 December 2001 [I am certain he meant 2000!]; that in terms of Rule 1 of the CCMA Rules, a day is defined as, "***any day including a***

Saturday, Sunday or public holiday but excluding the days in the period 16 December to 7 January, both days inclusive".

[11] Chuene further deposed that the CCMA Rule 1 states that when any particular number of days is prescribed for doing any act, the number of days must be calculated by excluding the first day and including the last day unless the last day falls on a Saturday, Sunday or public holiday or on a day during the period 16 December and 7 January.

[12] Chuene argued, on this formulation, that the rescission application ought to have been served on or before 8 January 2001. In the premises, the rescission application was on time and there was no need for the Union to bring a condonation application. Chuene stated that "*the parties*" – whoever those are – had miscalculated the days, and erroneously believed that there was a need to apply for condonation. Such application was made. The CCMA itself also thought it was a competent application. Sibeko genuinely, though erroneously, granted the condonation application. In effect, Sibeko's ruling was of no legal effect. It should be disregarded and Xstrata's application should be dismissed with costs.

[13] Chuene further deposed that on good cause shown, "*it was an established practice that non-compliance with the rules be [sic!] condonable*"; that the Rule 24(2) provisions were directive, not prescriptive and that since the Labour Relations Act (LRA) and the CCMA rules do not specifically provide for condonations, "*common law guidelines dealing with the time limits should be applicable so as to confer jurisdiction on the CCMA to entertain applications for condonation*".

[14] Chuene further stated that this Court had developed a jurisprudence that where the CCMA rules and/or the LRA would have the effect of hampering justice, they should be construed strictly in order to enhance rather than hamper access to the CCMA and the Courts.

[15] In reply, Xstrata reiterated their contention that the application was out of time; that it was delivered after the 10 day period had expired, and that the Union (and Chuene) were required to apply for condonation. The application for condonation should have been delivered on or before 15 December 2000. According to Xstrata, the award had been faxed to the Union on 1 December 2000. Xstrata effectively denied that the Union only received the award on 6 December 2000.

[16] The matter was duly set down for hearing, and heads of argument, on the issues raised in the papers, were prepared, with copious reference to authority by both parties – for which I was indebted to them – and on the 16h July 2002, the above, in a nutshell, was the case I came to listen being argued, and it is one I insisted should be argued.

[17] I, however, could not legitimately ignore a point ***in limine*** brought by Mr Vuso, for the Union. He had not raised this point ***in limine***, either in the answering affidavits, or by way of notice, not even in the heads. Both the Court and Mr Masher were taken by surprise, particularly because Mr Vuso seemed to have come to Court prepared, authority and all. Mr Masher endeavoured the best he could to meet this onslaught, arguing that nowhere in the papers was this point ***in limine*** ever indicated, not even in the heads of argument. He argued that all the authorities cited on behalf of Chuene were distinguishable on the merits. Mr Masher called for a dismissal of the point ***in limine*** and for a punitive costs order.

[18] Having due regard to the unpreparedness of one of the parties, I ruled that the review application be argued, that both parties should prepare heads of argument on the point ***in limine***, that these be filed on agreed dates, and that I would deal with the issue without hearing further argument. These heads were filed whilst I was in the United States, as aforementioned, and I now deal with both the point ***in limine*** and the review application by Xstrata, to the extent still necessary, depending on how I rule.

POINT *IN LIMINE*

[19] The submission according to the Union's lawyers, is that Xstrata's lawyers were required, in terms of Rule 7A(8), to have served and filed the record of proceedings. They did not do so. The requirement by this rule is stated in peremptory terms that a record obtained from the CCMA should be served and filed. The Rules of Court must be adhered to and that the rule to serve and file the record was a necessary requirement. Xstrata, after all, had, in its notice of motion specifically called upon Sibeko – (the Union's lawyers persist in arguing that Xstrata called upon the CCMA) – to provide a written record of the proceedings of the condonation hearing held on 27 August 2001 within 10 days of delivery of the application. If Xstrata's attitude was that the record was not necessary, it should not have called for it from Sibeko (and the CCMA). It should simply have proceeded without the record, argued Mr Vuso. The record, in response to the notice, was provided and Xstrata was obliged to have served and filed it in line with Rule 7A(8).

[20] For this proposition, Mr Vuso relied on an averment by his Lordship, Froneman DJP (as he then was) in ***Classiclean (Pty) Ltd v CIWU & Others*** [1999] 4 BLLR 291 (LAC) at para. 5 where he noted what he called "*a fairly widespread misconception amongst practitioners that rules of court are somehow unimportant, and that insistence on proper compliance amounts to excessive formalism and is indicative of a "technical" approach, whatever that means*".

[21] Mr Vuso's reliance on this pronouncement is misplaced. It comes from a misreading of Rule 7A(8) to the extent that he reads **only** a portion thereof. That Rule reads as follows:-

> "*7A Reviews*
>
> *(1) …*
>
> *…*
>
> (8) *The applicant must within 10 days after the registrar has made the record available* ***either*** *–*
>
> (a) *by delivery of a notice and accompanying affidavit, amend, add to or vary the terms of the notice of motion and supplement the supporting affidavit;* ***or***
>
> (b) *deliver notice that the applicant stands by its notice of motion.*"

(Emphases are mine.)

[22] Even if I were to hold – and I leave that open – that the terms of this Rule are prescriptive and not directory, I cannot find that Xstrata's lawyers have "*simply ignored*" the rules, as my Brother Froneman held in the ***Classiclean*** case (***supra***).

Since 7A(8) offers an applicant a choice between the provisions of (a) and (b), the applicant made its election by filing a notification in terms of Rule 7A(8)(b).

Cadit quaestio!

[23] Nor do I think that there is merit in the further submissions by Mr Vuso that the record was critical since "*the condonation proceedings consisted of documents such as affidavits and annexures thereto*". Whilst Mr Vuso submits that *"this information is necessary*" for me to determine "*the matter at hand*", nowhere does he say which information in the affidavits is necessary and why. The highest watermark of his justificatory submission hereanent is that the applicant (Xstrata) alleges that there was a ruling on condonation, which ruling is in Xstrata's possession, and that it was never filed by Xstrata.

[24] Once again, I am not told the precise relevance of this subject matter material in order for me to decide a simple law point on whether or not Sibeko had jurisdiction to condone an application filed, on the face of it, out of time. I have not been asked to determine whether Sibeko applied his mind to the merits of condonation, or that his condonation ruling is unsupportable, rationally, in relation to the evidence put before him. All Xstrata is putting before me is a jurisdictional issue, and Mr Vuso does not tell me how all this evidence he finds it is necessary I ought to have had sight of from the record of the condonation proceedings is relevant to the jurisdictional issue I have to decide, notice of which was given by Xstrata in the pleadings.

[25] I am, therefore, not assisted by all the authorities I have been referred to (see: ***JDG Trading (Pty) Ltd t/a Russels v Whitaker N.O. & Others*** (2001) 3 BLLR 300 (LAC) at 302-30; ***Dantex Explosives (Pty) Ltd v Maseko & Others*** (2001) 7

BLLR 842 (LC); ***Ndlovu v CCMA, Commissioner Mullin & Another*** (1999) 3 BLLR 231 (LC)).

[26] I am, in fact, in respectful agreement with the following points made by Mr Masher, namely that:

- Rule 7A(5), read together with Rule 7A(6) enjoin an applicant to serve and file "*such portions of the record as may be necessary for the purpose of the review*," and that, therefore there is no duty on the applicant to file the complete record.

- The authorities relied upon by Mr Vuso are not authority for the proposition that a failure to file a record is ***per se*** fatally defective; rather they are authority for the proposition that in cases where the record is necessary to enable the Court to properly adjudicate the matter, the Court should dismiss the application if the applicant has failed to file the record.

  (See: ***Shoprite Checkers (Pty) Ltd v CCMA & Others*** [2002] 7 BLLR 677 (LC) at 679 D-G.)

[27] I have already stated that I am being asked by the Applicant to review the condonation ruling by Sibeko, not on the basis that he committed a gross irregularity in the manner he conducted the proceedings or that he came to a decision that was irrational and not justifiable on the evidence before him. If that were what I was asked to review, it would have been necessary, as Mr Masher submitted, for me to have had the record either as evidence of Sibeko's conduct, or as evidence of what evidence was before him. For the enquiry I must decide, no case has been made by Mr Vuso that I need the record. That line of argument also fails.

[28] A lot of authority was cited to me by Mr Vuso in support of the contention that a party in motion proceedings may advance legal arguments in support of the relief or defence claimed by it even where such arguments are not specifically in the papers, provided they arise from the facts alleged (see: ***Cabinet for the Territory of South West Africa v Chikane*** 1989 (1) SA 349; ***Vista University v Jones & Another*** (1999) 20 ILJ 939 (LC)).

[29] Mr Masher agrees, but has sought to qualify his agreement on the basis that it is a fair submission provided that the party raising the issue does not, in doing so, become unfair towards the other party. He relies on ***Minister Van Wet en Orde v Matshoba*** 1990 (1) SA 280 (A), ***inter alia***, for that proposition. He, however, did say that he was not challenging Mr Vuso's entitlement to raise the point. In view of the fact that I allowed both parties to argue the point, and to file heads of argument after researching the law, I consider that that is where the matter should be left at. Nothing really now turns on it.

[30] On the question of costs, I have been urged to dismiss the point ***in limine*** with costs ordered on the high scale because the point was frivolous. I was also urged to hold the view that the manner of raising the point amounted to an abuse. It could have been raised earlier so that it could be dealt with in the replying affidavit, to save costs. In any event, the point was patently without merit to a point of being vexatious.

[31] I disagree. The point may not be the best that could have been taken but it does not meet the definition of "*patently without merit*", "*frivolous*" and "*vexatious*". In my short career on the Bench, I have had to listen to points ***in limine*** that could be extremely trying to even the most accommodative of judges. This is not one of

them. In the event, whilst I dismiss the point ***in limine*** with costs, I stop short of awarding those costs on an attorney and client scale as urged upon by me by Mr Masher.

THE MAIN ISSUE

[32] The simple question in this review is whether the CCMA, like this Court, has the sort of residual or inherent reservoir of power that allows it to condone non-compliance with its own rules. Is there anything in the statute, the LRA, or in the CCMA Rules, that can be interpreted to impliedly give the CCMA the power to excuse non-compliance with its rules, in the way in which Conradie JA, found this to be the case about this Court?

[See: ***Queenstown Fuel Distributors CC v Labuschagne N.O. and Others*** (2000) 21 ILJ 166 (LAC).]

[33] Mr Vuso, in addressing this issue, both in argument before me, and in his heads, did not cite a single authority in support of a view that it can. If anything, he accepted that the CCMA does not specifically provide for condonation for non-compliance with its provisions. He qualified that concession, though, by submitting that it is "*an established practice*" that on good cause, non-compliance with the rules is condonable. This is the same Mr Vuso who strongly relied on Froneman DJP's averments in the ***Classiclean*** case (***supra***) about the need for rules to be strictly adhered to.

[34] In any event, there is no support in law for Mr Vuso's empty argument. Certainly none was given to me by him. Seeing that no statutory law can come to his rescue, he sought refuge in what he called "*common law guidelines*" dealing with the time

limits to confer jurisdiction on the CCMA in the absence of such provisions in the statute and in the Rules. Further, without articulating properly this jurisprudence, or citing authority or instances of the jurisprudence he claims to have been "*developed*", Mr Vuso submitted that the LRA and CCMA rules should be strictly construed in order "*to enhance rather hamper access to the CCMA and the courts*".

[35] I have the greatest sympathy for the very lofty and laudable sentiments expressed by Mr Vuso, and I wish I could come to his rescue. Unfortunately, no basis has been laid for me to venture on to the back of the unruly horse of common law in this instance, in the face of a firm statutory provision, and CCMA Rules that seem to define the area, quite categorically, in which I can safely travel in my search for an answer. It seems to me the statute and the Rules make no provision for their own creature, the CCMA, to condone any application brought outside time limits. The legislature, in its wisdom, must have intended to deprive the CCMA Commissioner of that power. The creative interpretation by Conradie JA, in the ***Queenstown Fuel Distribution CC*** case (***supra***) that gives this Court some leeway, cannot, it seems to me, by mere analogy, or by an imaginative appeal to "*common law*", or "*established practice*" and a "*developed jurisprudence*" be used in support of Mr Vuso's contentions with regard to what the CCMA Commissioner can do in a condonation application. None of these sentimental expressions can lawfully visit the Commissioner with a jurisdiction which he statutorily and in terms of the Rules does not have. It is as simple as all that.

[36] Insofar as this argument appeared to be an alternative to the main argument, namely, that the parties miscalculated the days and erroneously believed that there was a need to bring an application for condonation, and that Sibeko's ruling

had no legal effect, the argument seems contrived. Even if for purposes of this debate I accepted that Mr Vuso's calculation of the days is correct, that is not an issue for me now to determine. For example, troubling as it is to me, I cannot deal, at this stage, with the fact that it appears, on the face of it, that an injustice befell Chuene, who seems to have had a basis for coming only on the 24th October 2000 and not on the 23rd October 2000 for the arbitration. That is not the issue before me now. Similarly, the issue before me now is whether the Commissioner, who entertained the condonation application, had the power to do so. If he did not have the power, his ruling, which is a fact of life, should be reviewed and set aside. That is the issue before me today. What Mr Vuso then does in furtherance of his client's search for justice, if anything, falls beyond the purview of this enquiry.

[37] On all the considerations that I have given this matter, Sibeko, with respect, did not have the power and authority to condone the application outside the time limits. He functions within the authority of powers and functions of the CCMA, in itself created by statute. The CCMA has no power or jurisdiction beyond that given to it in terms of the LRA and its Rules. It has no inherent power to condone non-compliance with its Rules. It therefore follows that Sibeko, acting under the auspices of the CCMA, did not have the power to condone the late filing of the rescission application in terms of the CCMA Rules and the LRA.

[38] There was a prayer for costs in the notice of motion in the event of opposition, but that was not pressed in the heads and in argument, nor do I think, all things considered, one is warranted.

I therefore order as follows:

(1) The condonation ruling made by the First Respondent (Sibeko N.O.) under the auspices of the Second Respondent (the CCMA) in case number MP15949 dated 11 September 2001 is hereby reviewed and set aside.

(2) There will be no order as to costs.

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D B NTSEBEZA

Acting Judge of the Labour Court of South Africa

Date of Hearing: …….

Date of Judgment: …….

For the Applicant: **MR D MASHER**
Instructed by: BELL DEWAR & HALL
HOUGHTON

For the Third Respondent: **MR H VUSO**
Instructed by: MASERUMULE INC.
BRAAMFONTEIN