

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER:

C690/2009

5 DATE:

20 APRIL 2010

In the matter between:

T A KHAN

Applicant

and

10 LOCAL TRANS1<sup>st</sup> RespondentCOMMISSIONER2<sup>nd</sup> Respondent

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J U D G M E N T

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CHEADLE, AJ:

This is an unopposed application to review and set aside a ruling of the second respondent, a Commissioner at the CCMA refusing condonation for the late referral of a dismissal dispute to the CCMA. The principal reason for the refusal of condonation appears from the Commissioner's notes, namely that there was no prospect of success. The Commissioner concluded this on the basis that that the applicant had entered into a service agreement with the third respondent in February

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2009 and was accordingly not an employee when he was dismissed in April 2009.

It is clear from the founding affidavit that he entered into the service agreement because, if he did not do so, he would no longer be employed and he could not afford to be without an income. In his testimony, the applicant confirmed what is said in that affidavit.

Although he describes himself as an independent subcontractor in those three months, it is evident from testimony that he gave before me, that what transpired was an offer to accept the so-called service agreement or lose his job. Although the service agreement was described as an owner-driver arrangement, the vehicle belonged to the employer. The employees continued to do exactly what they had done before 31 January 2009. In terms of the service agreement, he was paid R700 per day from which the sum of R500 for rental of the owner's vehicle was deducted, amounting to effective take home pay of R200 per day.

This meant that the applicant earned R4 000 less a month than he did under his employment contract. Under that contract he received R7 500 a month whereas he only took home R3 500 under the service contract. The applicant also testified the 3<sup>rd</sup>

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respondent told him that he did not want to have the responsibility of reporting to the bargaining council and paying various amounts of money to it and that he wanted owner drivers instead. As the applicant stated, the object of this  
5 service agreement was to avoid his labour law responsibilities.

It follows that the second respondent failed to properly apply his mind to whether or not the applicant had in fact terminated his employment on 31 January 2009 and whether that  
10 termination and the new service contract, was a ruse to reduce the applicant's salary and to avoid the obligations of the bargaining council and the employment laws. Having failed to take this into account, it follows that the commissioner committed an irregularity and accordingly should have granted  
15 the condonation ruling based on the applicant's prospects of success.

Moreover if in fact the service contract was simply an attempt to avoid the obligations of the employment laws, the employee  
20 would still be an employee for all intents and purposes when he was dismissed on 29 April, which of course would also mean that the period of delay would be substantially reduced.

For these reasons, the matter is referred back to the CCMA for  
25 it to appoint another commissioner to hear the matter. So I

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make the following order:

1. The condonation ruling award dated 26 August 2009 under CCMA case number WECT 11412/09 is reviewed  
5 and set aside.
2. The first respondent is required to remit the dispute to another commissioner for determination.
3. There shall be no order as to costs, the matter being  
unopposed.

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CHEADLE, AJ