

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG**

OF INTEREST

CASE NO. JR 347/02

In the matter between :

VUSI EPHRAIM MASEKO

APPLICANT

and

CCMA

FIRST RESPONDENT

NKOSINATHI MASEKO

SECOND RESPONDENT

TELKOM S.A. (LTD)

THIRD RESPONDENT

JUDGMENT

P. Zilwa. A.J:

- [1] The applicant, a former employee of the Third Respondent, was dismissed from the Third Respondent's employ after a misconduct enquiry, on 18 June 2001. The charge on which he was convicted and dismissed was for misuse of a Company vehicle on 21 and 22 May 2001 without authorization. At the enquiry the Applicant had pleaded guilty to such charge.
- [2] An aggravating circumstance that was placed before the presiding officer for purposes of assessing the appropriate sanction was that

the Applicant had received a final written warning in September 2000 for a similar offence, which warning was still valid at the time of the transgression in issue. This is one of the factors that led the presiding officer to impose the sanction of dismissal.

- [3] At the enquiry the Applicant was represented by the Regional Secretary of his Union (Communication Workers Union), one Mr Kahishi Mphahlele. After the passing of the sanction the Applicant was apprised of his right to appeal to the Labour Relations Department of the Third Respondent, which right he exercised on 21 June 2001. The appeal or AinBhouse conciliation meeting≡ (as it was termed) was proceeded with on 12 July 2001 under the chairpersonship of one Ms Ursula Dos Santos Nunes, who upheld the dismissal sanction. In dismissing the Applicant=s appeal Ms Nunes further informed the applicant of his right to refer the matter within 30 days of his dismissal to the Commision for Conciliation Mediation and Arbitration (CCMA).

- [4] It was only on 16 November 2001 that the Applicant referred the matter to the CCMA. In referring the matter to the CCMA the Applicant also applied for condonation of his late referral of the matter beyond the prescribed 30 day period.

- [5] In his condonation application to the CCMA the Applicant cited his reasons for such lateness to be *Adue to appeal*≡.

- [6] Having been served with the referral documents and the Applicant=s condonation application the Third Respondent filed with the CCMA a notice to oppose the application and an answering affidavit in response to the condonation application. In such affidavit the Third Respondent=s deponent, a Mr M.M.L. Lesela, in dealing with the lateness of the referral, deposed as follows:

AThe referral form is dated 15 November 2001. The application is 118 days late. The applicant has submitted no reason to explain the late referral. The Applicant was informed of his right to refer the matter within 30 days from date of dismissal at the representation meeting. Furthermore the Applicant was represented by a regional shop steward of Commercial Workers Union (CWU), who is well vest (sic) with the requirements of the Labour Relations Act, at the internal enquiry=

- [7] The applicant never filed any further affidavit in response to the averments of the Third Respondent=s deponent set out above. This, then, was the sum total of the documentation and information put before the CCMA Commissioner, who is the Second Respondent herein, at the time that he had to consider the Applicant=s condonation application.

- [8] On 6 November 2001 the Second Respondent issued his decision on the Applicant=s condonation application in writing. It is appropriate to set out the decision in its entirety. It reads thus:

AThe applicant claims that his referral is ninety (90) days late. He attributes the delay to the appeal process.

Regarding the prospects of success, he claims that his dismissal was unfair.

The respondent on the other hand submits that the dispute was lodged 119 days outside the prescribed time limit. He submits that the applicant was advised of his rights. He was also advised to present his appeal to the Industrial Relations Department. He failed to act as per the advice.

On prospects of success, the respondent contends that prospects of success are poor as the applicant was fairly dismissed.

DISCUSSION.

There seems to be a dispute of facts regarding the degree of lateness. Be that as it may, I find same to be high.

The applicant has failed to give good reasons for the delay, and he does not appear to have good case.

The application must therefore fail.

Per, Commissioner Nkosingithi Maseko

THUS DONE AND SIGNED IN JHB ON 6 NOVEMBER 2001.”

The decision was dispatched to both the Applicant and the Third Respondent on 21 February 2002.

- [9] On 7 March 2002 the Applicant launched the present application. In terms of his Notice of Motion the Applicant seeks an order *A that the arbitration award dated 6 November under Case No. GA 255503 B01 be reviewed and set aside*≡ The Notice of Motion further reflects that the application is in terms of Section 145 of the Labour Relations Act (LRA) No 66 of 1995.
- [10] The First and Second Respondent's filed a notice on 16 April 2002 indicating their intention not to oppose the application, save for the costs aspect, but to abide the decision of the Court. On 25 March 2002 the Third Respondent had filed a notice of intention to oppose the Application and it also filed its Answering Affidavit on the same day.
- [11] In drawing the initial application papers the applicant was unassisted. On 25 October 2002 the Applicant, having obtained some legal assistance, amended his review application . In terms of the amended Notice of Motion the application was no longer in

terms of Section 145 of the Labour Relations Act but in terms of Section 158 (1) (g) of the Labour Relations Act. A further prayer was added for the Court to direct the respondents to appoint another commissioner to conduct fresh condonation application / proceedings in terms of Section 138 of the Act in order to determine the dispute between the Applicant and the Third Respondent arising out the of Applicant=s dismissal. Together with the amended Notice of Motion a new Founding Affidavit was filed by the Respondent.

- [12] In the new founding affidavit the Applicant explains his delay in referring the matter to the CCMA in the following terms:

A5.4.1 DEGREE OF LATENESS

The dispute or matter has been referred to the CCMA about (3) three months from the 12th August 2001 i.e due day for Conciliation referral.

It is my submission that the degree of lateness is not successive (sic) but reasonable.

5.4.2 THE REASON FOR THE DELAY

It is my submission the reason for the delay is, inter alia, due to late convening and outcome of Appeal.

Further delay was attributed by the fact that the Union representative confirm having referred the matter whilst my own investigation revealed otherwise.”

[13] At paragraph 6 of his new Founding Affidavit the Applicant sets out the grounds for the review thus:

A6. GROUNDS OR BASIS FOR THE REVIEW

The grounds or basis for the review of the Arbitrator=s decision are, among other things, that in making condonation ruling the arbitrator:

- 6.1 ignored the condonation application or submissions which were presented by the Applicant, **and /or**
- 6.2 incorrectly made certain factual findings and/ or assumptions against the Applicant when he was not in a position to do so, **and/ or**
- 6.3 took into consideration unfounded allegation and failed to take into account the condonation application by the Application and accordingly misconceived the nature of the discretion conferred upon him and failed to apply his mind properly, fairly and reasonable, **and/or**
- 6.4 under-emphasise (sic) and /or disregarded the Applicant condonation **and/or**

6.5 failed to resolve the dispute between the Applicant and the third Respondent , due to the failure in exercising his function **fairly, properly and reasonably, and /or**

6.6 committed gross irregularity whilst performing his function as an arbitrator and further failed to convene the Condonation hearing thus enabling the Applicant to present full condonation details”.

[14] The Third Respondent also filed a new Answering Affidavit in response to the Applicants new Founding Affidavit.

[15] In argument before me Mr Mphahlani, who appeared for the Applicant, stated that the main thrust of his argument was that the Second Respondent erred in making a ruling on the condonation application without getting proper information before him regarding the reasons for the Applicant’s late referral of his matter to the CCMA. The Applicant=s terse statement explaining the delay in condonation application, *A due to appeal=*, amounted to no explanation at all, so argued Mr Mphahlani. On the information before him the Second Respondent was correct in finding that *A the Applicant has failed to give good reasons for the delay=*, but then it was incumbent upon him to solicit such reasons from the Applicant by convening a hearing of the parties= oral evidence before making his ruling, submitted Mr Mphahlani. Upon being requested to refer the Court to relevant legal authorities in support

of his argument, Mr Mphahlani could not. He only contented himself by seeking refuge in some CCMA document dated 03/12/01. Paragraph 3 of such document provides as follows:

Aln terms of the Labour Relations Act, section 191(2) the applicant is required to apply for condonation to the commission because the matter was referred to us outside the statutory time limit of 30 days. A commissioner will consider the application and make a ruling, or convene a hearing and then make a ruling.

[16] Mr Mphahlane argued that because of the dearth of an explanation for the delay in the Applicant=s condonation application the Second Respondent was obliged to convene a hearing before making his ruling as the document provides. His failure to do so constitutes an irregularity in his actions, argued Mr Mphahlani.

[17] With regard to the issue of the prospects of success on the merits, which the Second Respondent in his ruling had found to be not good, Mr Mphahlani argued that despite the Applicant=s plea of guilty to the charges against him in the hearing , this does not mean that his prospects of success are bad. His plea of guilty could have been meant to save time in the hearing and to indicate remorse on his part, submitted Mr Mphahlani.

- [18] In response to Mr Mphahlani=s argument Mr Basson, who appeared for the Respondent, argued that the onus is on an applicant for condonation to show good cause to merit condonation of a late referral, not on a commissioner to solicit or seek such good cause on his own. He further argued that in the light of the Applicant=s failure to show the requisite good cause and to furnish a tangible explanation for his delay in his condonation application papers, the commissioner had no duty to do anything else but to dismiss the application. I find a lot of merit in this argument.
- [19] Factors that need to be taken into account in condonation applications have been set out in a number of decided cases, one of which is the well-known case of *MELANE v SANTAM INSURANCE* 1962 (4) SA 531 (A). Such factors are, *inter alia*, the degree of lateness, the reasonableness of the explanation given for the lateness, the prospects of success on the merits and the importance of the case. The respondent=s interest in finality must also not be overlooked. See also *MLABA v MASONITE (AFRICA) LIMITED & OTHERS* (1998) 3 BLLR 291 (LC); *PEP STORES (PTY) LTD v LAKA N.O. & OTHERS* (1998) 9 BLLR 952 (LC); *TRANSNET LTD v HOSPERSA & ANOTHER* (1999) ILJ 1293 (LC); *POTGIETESRUS PLATINUM MINE LTD v CCMA & OTHERS* (1999) 20 ILJ 2679 (LC).

- [20] The MELANE test has also been accepted and approved by the Labour Appeal Court in NATIONAL UNION OF MINeworkERS & OTHERS v WESTERN HOLDINGS GOLDMINE (1994) 15 ILJ 610 and FOSTER v STEWART SCOTT INC (1997) 18 ILJ 376 (LAC).
- [21] The Labour Appeal Court has held that condonation in cases of disputes of individual dismissals will not be easily granted. The excuse for non-compliance has to be compelling, the case for attacking a defect in the proceedings has to be cogent and the defect has to be of a kind which would result in the miscarriage of justice if it were allowed to stand. See QUEENSTOWN DISTRIBUTORS CC v LABUSCHAGNE N.O & OTHERS (2000) 21 ILJ 166 (LAC); A. HARDRODT (SA) (PTY) LTD v BEHARDIEN & OTHERS (2002) 23 ILJ 1229 (LAC).
- [22] An analysis of the facts *in casu* and the application of the principles set out in the authorities referred to above leave me unconvinced that there is any merit to this application. As already stated, the Applicant was dismissed on 18 June 2001. His appeal against such dismissal was heard on 12 July 2001. On the same date he was advised of his right to refer the matter to the CCMA within 30 days of his dismissal, yet it was only on 16 November 2001, almost 5 months after his dismissal, that he referred the matter to the CCMA. Even after the finalisation of the internal appeal it took him more than 4 months before referring the matter to the CCMA.

This means that even the terse reason furnished for the delay, *Adue to appeal*, cannot be correct. The contention that the Commissioner had a duty to solicit reasons for the delay from the Applicant by convening a hearing wherein he would solicit such reasons, after the latter had failed to furnish the reasons as required in the condonation application, has no merit in my view. I do not understand the relevant section of the Labour Relations Act to be imposing any such duty on the Commissioner. The onus lies foursquare on the Applicant's shoulders to furnish the reasons, and he fails to do so at his own peril. I can also find no fault with the Commissioner's finding that the Applicant does not appear to have a good case on the merits.

[23] In the result, I make the following order:

- (i) The application is dismissed;
- (ii) There will be no order as to costs.

P. ZILWA

ACTING JUDGE OF THE LABOUR COURT

APPEARANCES

FOR THE APPLICANT : Mr Mphahlani

FOR THE RESPONDENT : Mr Basson

DATE ARGUED : 9 September 2003

DATE OF JUDGMENT : 25 September 2003