

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

CASE NO: DA 22/2002

REPORTABLE

In the matter between:

COATES BROTHERS LIMITED
Appellant

and

RAJENDRA SHANKER
Respondent

First

**COMMISSION FOR CONCILIATION MEDIATION AND
ARBITRATION**
Respondent

Second

**CHEMICAL WORKERS ENERGY PAPER PRINTING
WOOD & ALLIED WORKERS' UNION**
Respondent

Third

RATHILALL DEONARANE SINGH Fourth Respondent

JUDGMENT

WILLIS JA:

[1] The appellant (to whom I shall refer as “the employer”) appeals, with the leave of the court *a quo* (*per* D. Pillay J), against the

following order made by it on 23 October 2002:

“

- i) The ruling is set aside for want of reasons therefor.
- ii) The late referral for conciliation to the CCMA is condoned.
- iii) There is no order as to costs. ”

The ruling referred to was one by a CCMA Commissioner (who is the first respondent but to whom I shall refer as “the commissioner”) condoning the late referral of a dispute by the fourth respondent concerning his alleged unfair dismissal (by the employer) to the CCMA. I shall refer to the fourth respondent as “the employee.”

[2] The employee was dismissed by the employer on 7th May, 2001.

An internal company appeal confirmed the dismissal on 21st May, 2001. The employee purported to refer his dispute concerning his alleged unfair dismissal to the CCMA on 6th June, 2001. The CCMA informed the employer on 14th June, 2001 that the referral was defective in that:

- i) the referral form had not been signed at all; and
- ii) there was no proof that it had been sent to the employer.

For reasons which are not clear, the conciliation was nevertheless set down for hearing on 30th July, 2001. At that hearing, the

employer objected on the basis that there had not been a proper referral. A CCMA commissioner (who is different from the one who made the ruling which has been challenged in this case) made a ruling that the employee should properly refer the dispute to the CCMA. The employer received a copy of the second referral, properly signed on 13th August, 2001. It was apparently filed with the CCMA on 14th August, 2001. It seems the CCMA lost this document and yet another form was submitted to the CCMA on 6th September, 2001. It is clear that, whatever calculation is made, the matter was properly referred to the CCMA well out of time. The only explanation given for the delay was “an oversight.” The application for condonation for the late filing of the referral of the dispute was heard on 24th October, 2001. The commissioner’s ruling was dated on 5th November, 2001 but received by the employer on 12th November, 2001. The entire ruling, including reasons reads as follows:

“ APPLICATION FOR CONDONATION

Reason for ruling:

The applicant has shown good cause in terms of section 191(2) of the Labour Relations Act, 1995, in that:

- **The application is 68 days. (sic)**
- The degree of fault in submitting the referral is low.

- The applicant has provided a reasonable explanation for the delay.
- The prejudice is not significantly different.
- The applicant may (have) prospects of success in the main dispute.

The application for condonation is granted.”

After the application to review his decision had been filed the commissioner filed the following:

“COMMISSIONER’S REASONS

1. I have read through the notice of motion and supporting affidavit in the above mentioned review application.
2. **I have nothing further to add to my condonation ruling dated 5th November 2001.**
3. I abide the decision of the Honourable Court.”

[3] The judgment of the court *a quo* which was given *ex tempore*, is correctly critical of the commissioner’s ruling. *Ex facie* the record, he did not apply his mind to the matter. In **National Union of Metalworkers of SA & Others v Fibre Flair CC** (2000) 21 ILJ 1079 (LAC), this court referred to the relevant principles that apply in determining whether or not a court should interfere with the exercise of discretionary powers. Apart from the fact that it seems, *ex facie* the record, that the commissioner failed to apply his mind

to the matter, it would seem further that he acted for insubstantial reasons, that he did not exercise a judicial discretion and, if he did exercise a discretion at all, he did so improperly or unfairly. The court *a quo* was therefore correct in setting aside the commissioner's ruling granting condonation. *Ms Reddy*, who appeared for the employee, conceded that this was so. The learned judge in the court *a quo* then went further: she decided that she would, herself, condone the late referral to the CCMA for conciliation. The learned judge in the court *a quo* found, "As the evidence is purely circumstantial, there are some prospects of success on the merits." This clearly influenced her decision. She also took into account the fact that the employer's objection on 30th July, 2001 was "technical". Among her reasons, the learned judge also said: "There is no explanation why the applicant insisted on the application being signed or why it did not ask that the defect be remedied when the matter was set down on 30 July 2001 or at any time before that." In this regard she erred. There was an explanation: the employer had been led to believe, by the CCMA itself, that the original referral was fatally defective for want of signature by the employee.

[4] Having regard to the following line of cases: **Premier, Mpumalanga and Another v Executive Committee, Association of State Aided Schools, Eastern Transvaal** 1999 (2) SA 91 (CC) at para [50]; **Commissioner, Competition v**

General Council of the Bar of South Africa and Others 2002

(6) SA 606 (SCA) at paras [14] and [15]; **Johannesburg City**

Council v Administrator Transvaal and Another 1959 (2) SA 72

(T) at 76D-G; **National Union of Metalworkers of SA and**

Others v Voltex (Pty) Ltd t/a Electric Center and Others

(2000) 12 ILJ 1173 (LC) at 1183C-G, *Mr Watt-Pringle*, who appeared

for the employer, accepted that the court *a quo* did indeed have a

discretion, at common law, to decide whether to condone the late

referral, despite the fact that the LRA did not pertinently confer such

a power upon it. *Mr Watt-Pringle* also fairly conceded that as his

client had sought the relief in its Notice of Motion that “condonation

for the late referral of the dispute to the second respondent be

refused”, he could not fairly submit that the employee could not ask

for the converse in the event that the court *a quo* set aside the

commissioner’s decision for want of reasons. *Mr Watt-Pringle*

submitted that the need for expedition and the fact that the court *a*

quo was in as good a position as the commissioner to decide the

issue of condonation justified the exercise of a discretion by the

court *a quo* in this matter. In the **Voltex case** Van der Riet AJ

reviewed and set aside the decision of a commissioner to refuse

condonation but nevertheless referred the matter back to the CCMA

for consideration as “All the information necessary to decide the

issue properly is not before me.” (at 1183H). In this case, the

employer succeeded in its application to have the order of the

commissioner granting condonation set aside but immediately

thereafter had its very success negated by the order of the court *a quo* to decide, itself, to grant condonation. I am a little uncomfortable with this. It offends my sense of logic. I know of no comparable case in which an applicant simultaneously both succeeded and failed on the question of identical relief. I also disagree with the court *a quo*'s evaluation of and, following from that, the weight given to the employee's prospects of success. I furthermore am of the view that the learned judge in the court *a quo* may have erred in so far as she may have suggested that circumstantial evidence is somehow "lesser evidence." In the light of *Mr Watt-Pringle's* concession, which appears to be correct, that the court *a quo* did indeed have a discretion to decide whether or not to grant condonation (and his stance that it would be desirable, in this case, that the issue of condonation be settled without having to refer the matter back to the CCMA), it is unnecessary for me to deal further with the accuracy of the court *a quo*'s evaluation of the prospects of success and the weight given thereto or to dwell on the learned judge's degree of emphasis on the relevance of circumstantial evidence. All that has to be considered is whether or not this court may interfere with the court *a quo*'s discretion to grant condonation on the basis that it was not judicially exercised, according to the tests ordinarily applied. I emphasise that *Mr Watt-Pringle*, despite an invitation to do so, declined to take up the point raised by this court as to whether a court may exercise its power of discretion to negate an order which it is otherwise compelled to

make. In other words, the point raised by this court was not so much whether the court *a quo* has the power, generally and in appropriate circumstances, to make an order granting condonation but whether it could do so fully aware that this would negate and frustrate the very relief sought by an applicant and upon which it succeeded. As both parties seem content not to deal with this issue, I shall take the cue from them. Counsel for both parties are adamant that they did not wish the matter to be referred back to the CCMA for a decision on whether or not condonation should be granted. Practical considerations seem to prevail. It may be that a similar stance was adopted in the court *a quo*. Different legal representatives were involved and therefore we shall never know. If such a stance was adopted, it makes the decision of the court *a quo* very much more easily understandable. It would be desirable that if such situations occur in future, the Labour Court should record the agreed stance taken by legal representatives as to the approach which they considered should be adopted by the court.

[5] I have referred in para [3] above to the case of **National Union of Metalworkers of SA & Others v Fibre Flair CC** in which were summarised the relevant principles with regard to the interference with a discretion which is to be judicially exercised. An appellant must show, in an appeal from a decision in a lower court, that the court *a quo* “acted capriciously, or acted upon a wrong principle, or in a biased manner, or for insubstantial reasons, or committed a

misdirection or an irregularity, or exercised its discretion improperly or unfairly.” *Mr Watt-Pringle* conceded that the only basis upon which he could argue that the discretion of the court *a quo* could be interfered with was that of a misdirection. This was confined to the following: did either (i) the court *a quo*’s error with regard to the lack of explanation by the employer for its stance on the absence of the employee’s signature or (ii) the court *a quo*’s possible error with regard to the evaluation of and weight given to the prospects of success, amount to a misdirection which would warrant interference?

[6] In **S v Pillay 1977** (4) SA 531 (A), the court, albeit in a somewhat different context, had to consider the meaning of a “misdirection” such that it vitiates the decision of the court *a quo*. The Appellate Division referred to **S v Dhlumayo and Others 1948** (2) SA 677 (A) at 702 in which it was said “no judgment can ever be perfect and all-embracing” and said “a mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere” but that the misdirection “must be of such a nature, degree or seriousness that it shows that the Court did not exercise its discretion at all or exercised it improperly or unreasonably”. As I have said earlier, the Court *a quo* erred in its finding in regard to the lack of explanation for its stance on the absence of the employee’s signature and I accept that it may have erred in its findings as to the prospects of success and the weight given thereto. Let it be assumed, in favour

of the employer, that these errors were made by the court *a quo*. They would not, however, constitute misdirections of such a kind that they would warrant interference with the discretion exercised by the court *a quo*. The court *a quo* did not exercise its discretion improperly or unreasonably; such errors as may have been made were not serious within the context of the issues which were before the learned judge.

[7] There is no reason why costs should not follow the result.

[8] The appeal is dismissed with costs.

**DATED AT JOHANNESBURG THIS 29th DAY of
SEPTEMBER, 2003**

N.P. WILLIS

JUDGE OF THE LABOUR APPEAL COURT

I agree.

C.R.NICHOLSON

JUDGE OF THE LABOUR APPEAL COURT

I agree.

C.N. JAFTA

ACTING JUDGE OF THE LABOUR APPEAL COURT

Counsel for Appellant: *C. E. Watt-Pringle SC*

Attorneys for Appellant: Deneys Reitz Inc

Attorney for Respondent: Shanta Reddy

Attorneys the Respondent: Shanta Reddy Attorneys

Date of hearing: 9th September, 2003

Date of Judgment: 29th September, 2003