IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO. JR1158/02

In the matter between:

PATRICK KHUMALO **APPLICANT**

and

BARGAINING COUNCIL FOR THE ENTERTAINMENT INDUSTRY OF SA **FIRST RESPONDENT**

D J C.(Deceased) **SECOND RESPONDENT**

THE MAGIC COMPANY (PTY) LTD **THIRD RESPONDENT**

JUDGMENT

NDLOVU AJ

[1] The Applicant was dismissed by his former employer (the Third Respondent herein) on 4 April 2002 after a misconduct enquiry. He was not satisfied with the dismissal, which he claimed was both substantively and procedurally unfair. Hence, he referred the dismissal dispute to the CCMA for conciliation, on the same date, that is 4 April 2002.

[2] No conciliation process was conducted by the CCMA when it turned out that the dispute ought to have been referred to the First Respondent (the Council) which was, presumably, the accredited council, in terms of Section 127 of the Labour Relations Act No. 66 of 1995 (the Act), to perform conciliation functions and under whose registered scope the Third Respondent's industry fell.

[3] By the time the Applicant finally referred the dispute to the Councils it was already late by 27 days, according to the Applicant's calculation. In his Statement of Claim, he did not specify the exact date on which he referred the dispute to the First Respondent. The Council, however, calculated the lateness as being 24 days, alleging that the dispute was referred to it on 27 May 2002. This was also confirmed by the conciliator (the Second Respondent herein) in his ruling, which is the subject of this review.

[4] In the ensuing application for condonation of the Applicant's late referral of the dispute for conciliation, the Second Respondent gave a ruling whereby he declined the condonation application. It is against this ruling that the Applicant seeks an order reviewing and setting it aside. The Second Respondent has since passed away.

[5] The Applicant contended that he referred the dispute to the CCMA on 10 April 2002, which was within the 30 days' period provided for in the Act. He said he completed the referral forms which he had taken to Ms Debbie Pauw, the Third Respondent's Human Resources Manager, for her attention. He further alleged that at the time that he took the forms to Miss Pauw, the latter was on leave, which resulted to the referral forms lying on her desk for about two weeks.

[6] According to the Applicant, when Ms Pauw eventually attended to the forms she had then pointed out to him that he ought to have referred the forms to the First Respondent and not the CCMA. When he came to the Council's offices he had encountered a further delay which was occasioned by the fact that the Council's agent, Mr Maleka, to whom he had been referred for assistance in terms of filling in the forms, was on sick leave. He claimed that he had prospects of success in the main application.

[7] The Third Respondent opposed the application. Ms Debbie Pauw, referred to above, deposed to the answering affidavit on behalf of the Third Respondent. She admitted, among other things, that the Applicant approached her with the referral forms. She had then referred him to the Council. She denied that the referral papers lay on her desk for two weeks as alleged by the Applicant. However, she did not specifically deny that at some point she was on leave when the Applicant might have initially approached her with the referral forms. She denied that the Applicant had any prospects of success in his main application.

[8] The Court is empowered to entertain this application in terms of Section

158(1)(g) of the Act.

[9] In an application for condonation the Court has a discretion, which it must exercise judiciously. Further, the factors which must be taken into account when considering the application are now settled law. In the well-renown case, **Melane v Santam Insurance Co Ltd 1962(4) SA 531(A),** the Appellate Division held as follows:

> "In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective *conspectus* of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the Respondent's interest in finality must not be overlooked. I would add that discursiveness should be discouraged in canvassing the prospects of success in the affidavits". **(at 532 C - F)**

[10] What purports to be the Second Respondent's Ruling are notes covering some 4½ pages of a Bench pad. The heading of the notes reads: "My reasons for not granting condonation". They are in manuscript form. There is no signature or name appended at the end of the notes. I would

assume that the intention was to have the notes typed and then signed by the Second Respondent. Otherwise there would have been no sense in Second Respondent writing the Ruling and not signing it at the same time. This situation poses a problem for the Court in accepting an unsigned ruling.

[11] In the same way as an arbitration award, it seems to me that where a conciliator has made a Ruling of the nature as in the present case, such Ruling must be transcribed *(See Rule 7(A)(5)-(7))* and be signed by the maker thereof. *(See Section 138(7)(a) of the Act).* However, the Second Respondent is now deceased. Therefore, although the Ruling could be transcribed, it would still remain unsigned. In this regard, the Council submitted a copy of its letter dated 9 July 2002 addressed to the Applicant, whereby the Council sought to amplify the Second Respondent's Ruling and his reasons therefor. In my view, this attempt or effort by the Council is not permissible. To the extent that the letter purports to verify the Second Respondent's reasons for his Ruling, this is inadmissible hearsay evidence.

[12] Although I have no reason to disbelive the averment that the Second Respondent has since passed away, the informtion of this kind should be brought to the Court's attention in a formal manner. For instance, one would have expected that such submission was accompanied by the death certificate of the Second Respondent.

[13] In the light of the circumstances of this case I decided, however, to proceed and deal with the application on the basis of the papers presented before me, which I propose to do presently.

The degree of lateness:

[14] It is common cause that the Applicant was dismissed on 4 April 2002. The 30-day period envisaged in Section 191(1)(b), therefore, expired on 4 May 2002. According to both the Council and the Third Respondent the referral to the Council was made on 27 May 2002. The Applicant did not indicate his version in this regard. The referral forms themselves were not in the Court file.

[15] I am inclined, therefore, to accept the Council's and the Third Respondents' version that the referral to the Council was made on 27 May 2002. However, I find the degree of lateness to be 23 days, and not 24 days, as submitted by the Council and the Third Respondent. The Applicant alleged that the lateness was 27 days, which was way out. In any event, without indicating the date when he delivered the referral to the Council, it is not possible to discern how he came to determine 27 days lateness.

[16] It is not disputed that the Applicant initially delivered, erroneously, the referral forms to the CCMA, instead of the Council. In his Statement of Claim he stated that this was on 10 April 2002. However, in his ruling, the Second Respondent held that the Applicant referred the dispute to the CCMA on 4 April 2002, the date of the dismissal. Further, according to the Second Respondent's ruling, on the same day (that is, 4 April 2002) the Applicant approached Ms Pauw with the referral forms.

[17] The Applicant averred that the factors which contributed to him referring the dispute late to the First Respondent included the following:

17.1 The initial erroneous referral to the CCMA, already mentioned above.

17.2 Ms Pauw being on leave when the Applicant delivered the CCMA referral to her, thus causing a 2 weeks' delay of the referral forms lying on Ms Pauw's desk.

17.3 The Council's agent, Mr Maleka who was to have assisted the Applicant in completing the referral forms and who was reportedly on sick leave when the Applicant went to see him.

17.4 The Applicant had an "ongoing eye infection" which presented an "acute" condition during the relevant period of the referral.

[18] In his ruling, the Second Respondent's appeared to have relied on the information he apparently gathered from Ms Pauw and Mr Maleka. However, the ruling did not reflect whether these two persons testified before him (the Second Respondent) or whether someone told him that such were the versions of Ms Pauw and Mr Maleka. For instance, the Second Respondent stated that:

> "(Ms Pauw) <u>informed</u> him (the Applicant) that there is a Bargaining Council and that this office has jurisdiction to deal with disputes arising in the industry"; and that "Agent Maleka also <u>explained</u> to the Applicant that the application for referral of dispute has to be served on the employer within 30 days .....".

[19] It is not clear, *ex facie* the ruling how Ms Pauw <u>so informed</u> the Second Respondent and how Mr Maleka <u>so explained</u> to the Applicant". The Second Respondent further recorded that Mr Maleka <u>denied</u> the Applicant's allegation that he (the Applicant) tried on at least two occasions to contact Mr Maleka

on his cellphone, but in vain. Again, it is not clear how such denial was obtained from Mr Maleka. In any event, it was not reflected in the Ruling why the Applicant's allegation was rejected and Maleka's denial accepted.

[20] The Applicant's alleged eye infection testimony was also rejected, apparently for the reason that he could not produce "sick notes" from the doctor or hospital. However, there is no suggestion that the Applicant claimed to have gone to hospital or seen a doctor for his eye ailment.

<u>The prospects of success:</u>

[21] The Applicant was charged with 6 counts of misconduct, namely (as cited from the Ruling):

21.1 Disorderly behaviour;

21.2 Inciting arguments and fights at work;

21.3 Insolence/Rudeness to Management;

21.4 Abusive language;

21.5 Undermining the labour relationship;

21.6 Sabotaging of work in that he allegedly copied invoice numbers incorrectly and handed them to the data capture for processing.

[22] According to the Second Respondent's Ruling, the Applicant was convicted on all charges except on the charge relating to "foul language", which was count 4. To the contrary, however, the Third Respondent, in its answering affidavit, alleged that the Applicant was only acquitted on the charge of "Sabotage" (Count 6). Furthermore, the Third Respondent averred that there were in

fact 7 charges with which the Applicant was arraigned, the seventh one being the "Alleged refusal to work co-operatively with his colleagues and management". However, the Ruling was silent about this charge.

[23] With the exception of "Sabotage", there was absolutely no hint whatsoever in the Ruling of how the offences were allegedly committed by the Applicant. What is there are only the names or nature of the so-called misconduct offences. Accordingly, on the basis of the Ruling, it is not possible to know how the issue of prospects of success was determined.

[24] At the end of the Ruling the Second Respondent made what appears to be a conclusive pronouncement:

"The Applicant will not be successful if condonation is granted".

I do not understand on what basis the Second Respondent reached that conclusion. Besides, he was not competent to prejudge the final outcome of the dispute. This fell outside of his domain. He, therefore, acted *ultra vires* his powers in this regard. In my view, what he said did not relate to the issue of prospects of success, but he went beyond and prejudged the final outcome of the matter.

<u>The importance of the case to the parties:</u>

[25] There is no doubt that the case is particularly important to the Applicant, who lost his employment and, therefore, his source of income from which he supported himself and his family.

[26] The fact that the Applicant referred the dispute (albeit erroneously) to the CCMA on 4 April 2002, being the very date of his dismissal and thereafter referring the CCMA referral forms to Ms Pauw on the same day (in terms of the Second Respondent's Ruling) is, to me, a clear indication of how serious and important the Applicant regarded this case.

Perejudice to either party:

[27] Ordinarily, a party to a dispute is entitled to be heard before his or her fate in the dispute is determined. This is the position under common law (the *audi alteri partem* rule) and the Constitution of the Republic of South Africa Act 108 of 1996.

[28] On the contrary, the Third Respondent conceded that it would suffer virtually no prejudice if the condonation application was granted. In this regard, the Third Respondent, in its letter of 9 July 2002 (referred to above) stated:

> "With regard to the prejudice to the other party, Ms Pauw confirmed that her witnesses involved with this particular matter are all still in the employ of the Magic Company (the Third Respondent). The only possible prejudice that the company could experience would be the costs involved should the matter proceed to arbitration or Labour Court". (*the penultimate paragraph*).

[29] The Third Respondent's alleged potential prejudice would only relate to a legal cost factor which, in my view, is not comparable to the prejudice already suffered by the Applicant and further prejudice he stood to sustain if the application was declined.

[30] Having analysed the Second Respondent's Ruling aforegoing, I am of the view that it was not rationally justifiable in relation to the reasons the Second Respondent gave therefor and on the basis of the material presented before him. For instance, *ex facie* the papers before me, he appeared to have considered matters which were hearsay, as alluded to above. *(See: Carephone (Pty) Ltd vs Marcus N.O. and Others. [1998] 19 ILJ 1425 (LAC), at 1435 E-F).*

[31] It is also remarkable that the Third Respondent does not seem to have come to Court with clean hands. The Applicant appears to have filed his Notice in terms of Rule 7A(8)(b) on 2 September 2002, whereby the Applicant stated that he stood by his notice of motion. There is no indication when this notice was served on the Third Respondent by the Applicant. It would, therefore, not be possible to compute the time limit by which the Third Respondent was required to file its answering affidavit, in terms of Rule 7A(9). However, by its even conduct, it is apparent that the Third Respondent filed its answering affidavit out of time too.

[32] With respect to paragraph 4.1 and 4.2, in particular, of the Third Respondent's answering affidavit, I do not think that the Third Respondent was assisting the Court in any way by referring, for instance, to being "a few days late", when it knew, or ought to have known, how many days late it was in its filing of the said answering affidavit. I cannot comprehend why the Third Respondent did not state the precise date it received the Rule 7A(8) Notice, to enable the determination of the degree of its lateness. All that is known is that the Third Respondent filed its answering affidavit on 18 September 2002, which would be 6 days late, if it received the Rule 7A(8) Notice on 2 September 2002,

because in terms of Rule 7A(9) the answering affidavit would have had to be filed within 10 days from 2 September.

[33] I do not know whether the Third Respondent did not regard it as hypocritical and unfair on its part when it saw fit to oppose its opponent's application for condonation of late filing of a court process, which opposition was itself filed late (by the Third Respondent) and no condonation application therefor having been properly made (by itself) before the Court. Indeed, no cogent explanation for its lateness has been submitted, save to say that the *"Third Respondent has had to conduct a search for information relevant to this matter and (that) this exercise has taken a number of days to complete".* To my mind, this was a vague explanation. It was only intended to evade explaining the real reason for the lateness.

[34] Having considered the application, I make the following order:

34.1 The Second Respondent's Ruling in Case No. 0064/02 whereby the Applicant's application for condonation of his late referral of the dispute to the Council, for conciliation, was declined, is hereby reviewed and set aside; and substituted therefor with the following:

"The application for condonation is granted".

34.2 The Applicant is granted leave to refer the dismissal dispute to the Council, for conciliation, within 30 (thirty) days from the date of this Order.

34.3 There is no order as to costs.

NDLOVU AJ

Appearances:

For the Applicant	:	In person
For the Third Respondent	:	Mr F A Ponelis
Date of Hearing	:	26 March 2003
Date of Judgment	:	14 April 2003