

IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

CASE NO: JR 2676/08

In the matter between

C P C DU PLESSIS

Applicant

and

**THE COMMISSION FOR
CONCILIATION, MEDIATION AND
ARBITRATION**

1st Respondent

K S NTSUMELA *N.O.*

2nd Respondent

**MESSINA PLATINUM MINE LTD t/a
LONMIN PLATINUM (LIMPOPO
DIVISION)**

3rd Respondent

JUDGMENT

- 1] The applicant in this matter was employed as a boilermaker by the respondent. He was involved in a motor vehicle accident which resulted in injuries to his neck. The accident did not take place at work. As a result of the accident he suffered a significant degree of physical impairment and an enquiry was scheduled into his incapacity by his employer. The applicant claims that prior to the enquiry the employer had referred to the fact that it would assist him in pursuing a disability claim with his insurers, Metropolitan Life. On 11 December 2007, the employer terminated the applicant's services on the basis that he was medically unfit to continue working as a boilermaker whether he performed his duties underground or on the surface.

- 2] The applicant claims that he did not agree with the employer's finding, but says that while his insurance claim on Metropolitan was being considered he was advised not to refer a dispute over an unfair dismissal claim to the CCMA because that might prejudice the insurance claim. He claims that he was "*under the impression that the third respondent would assist me with this claim, and in the event of my claim not been successful, I would be allowed to continue with my duties, or be it [albeit] in a more protective surroundings.*"
- 3] As matters turned out the insurer rejected his claim for disability benefits and the applicant sought re-employment with the third respondent, but the third respondent would not re-engage him. In consequence, the applicant referred a dispute over his alleged unfair termination for incapacity to the CCMA. By the time the referral was served on 28 August 2008 it was seven months overdue, necessitating an application for condonation.

The condonation ruling

- 4] the second respondent, a CCMA Commissioner, dismissed the condonation application. In his ruling the Commissioner highlighted the following points:
- 4.1] The applicant failed to address him on the question of the degree of lateness.
- 4.2] It was common cause that the applicant was advised to approach the CCMA within 30 days of termination of his services in the event that he was not happy with the outcome of the hearing. However it was only on 8 April 2008 that he first approached lawyers for assistance.
- 4.3] The applicant's explanation for the late referral was "unsustainable and irrational", given that he had the services of his lawyers and a union (Solidarity) at his disposal, and that he was fully aware that he needed to refer the matter to the CCMA within 30 days of the termination. The Commissioner found it was "abundantly clear" that the applicant had been seeking the payment of the lump sum insurance benefit from Metropolitan and showed no interest in pursuing his claim to CCMA until the insurance claim was declined.

4.4] The Commissioner clearly found it incredible that the applicant, who was represented at the time, would have signed a *blank* copy of the respondent's Incapacity Enquiry form as he claims.

4.5] On the question of prejudice, the fact that the company would be unable to locate some of its former employees to come forward and testify, and the delay in the dispute, plus the administrative and financial burden to place on it were factors that had to be considered.

4.6] Not only did the applicant co-operate with the enquiry but the Enquiry form was signed as a confirmation of the procedure followed.

Grounds of review

- 5] Essentially, the applicant only puts forward two grounds of review. The first is that the Commissioner misdirected himself in finding that neither he nor his lawyers addressed the Commissioner on the degree of lateness. Secondly, the applicant submits that the Commissioner over emphasised the degree of lateness and did not attach proper weight to the other factors before him, namely the reasons for the lateness, the applicant's prospects of success and prejudice to the parties. The applicant did not supplement his grounds of review when he filed his notice in terms of rule 7 A.
- 6] On the first ground of review, it must be said that there is little evidence on the record to support the applicant's complaint that the Commissioner misdirected himself on the question of whether or not the applicant addressed the degree of lateness of the referral. Neither the founding affidavit of the applicant nor the transcribed commissioner's notes of the condonation hearing indicate that this matter was addressed by the applicant or his representative. Be that as it may, the degree of lateness is essentially something that is self evident and simply a matter of calculation. It is true that the arbitrator appears to have taken this into account in his ruling, but it does not appear to have been decisive in his evaluation of the application.

- 7] It is also not a fair reflection of the condonation ruling to suggest the Commissioner only considered one issue. He considered both the merits of the applicant's claim, the relative prejudice to the parties if the matter proceeded and the reasons for the delay. If anything weighed heavily with the Commissioner, two issues seem to have featured prominently in his thinking. The first was the fact that he found the applicant must have been aware of the need to refer the matter to the CCMA within 30 days of the outcome of the enquiry. Secondly, he found it implausible that the handwritten record of the enquiry entered on the pro forma enquiry document, which the applicant and his representatives signed, was not a true reflection of what transpired.
- 8] The arbitrator also considered the relevance of a report from the company's doctor dated 6 December 2007 a few days before the enquiry. The form completed by the doctor was entitled "JOB PLACEMENT". It records that the applicant was suitable for "*permanent placement to suitable surface occupation*". The doctor's diagnosis was that the applicant's C 5/C 6 and C 6/C 7 joints of his vertebra had been fused. In the comment section of the form the doctor wrote as follows "*Can be fit for boilermaker surface, 32 kg waist height, 10 kg elbow height, 8 kg above shoulders for simultaneous handling by both arms.*" (sic)
- 9] The handwritten record of the hearing records various responses of the applicant. One of the questions he was asked was if he had any objections based on the nature of the enquiry. He replied that he did not, but wanted to know whether it had anything to do with the fact that he was previously a foreman. Various medical reports were tabled and the employee was asked to address the chairperson on the merits of his case. The recorded response reads: "*I agree with the reports from the medical persons. There is no difference in the physical work of boilermaker whether on surface or underground. I am in agreement that I'm not fit to work.*"
- 10] The form then records the deliberations of the chairman. In summary, he concluded that the applicant could not perform the duties of a boilermaker either on the surface or underground because it could be life-threatening if he were injured again and the work required him to handle heavy materials. Furthermore the applicant's duties could not be adapted. The chairperson also found that if there were other positions that became

available he could apply for them but there were none available at the time of the hearing. The hearing then resumed with the applicant and his representative present and they did not appear to make further material inputs. The chairperson then concluded that the applicant's services should be terminated due to ill-health.

11] Clearly the conclusion of the enquiry appears to be at odds with the medical report of the company doctor. However, it must be noted that the company doctor only suggested that the applicant could perform surface duties as a boilermaker within certain prescribed weight parameters. The enquiry record indicates that the applicant's work could not be adapted, presumably to satisfy these requirements. Moreover, and very tellingly it seems the applicant himself was not interested in alternative employment and was of the view that there was no difference between underground and surface work as a boilermaker. Accordingly, he saw himself as unsuited for either role.

12] It may have been that the applicant had his eye on a possible disability claim at that stage, but there is nothing on the enquiry record to suggest that this was canvassed with him and could have acted as an inducement for him to disavow his ability to do any kind of work. Even on his own version, the question of a lump sum disability claim was only raised after the outcome of the enquiry. Clearly the applicant's most serious difficulty with his case is that there is no reason to believe that he in any way contested his apparent inability to perform the duties of a boilermaker, and he did not ask for his duties to be adapted so that he could perform the tasks within the parameters set out by the company doctor.

13] It appears that when the applicant's insurance claim for disability benefits was rejected, he appealed against the decision with his former employer's assistance, but he was unsuccessful. There is nothing indicating that the applicant took the insurance claim further by referring a complaint to the Short-Term Insurance Ombudsman. Instead, he belatedly brought an unfair dismissal claim.

14] What emerges from the above is that the available evidence strongly suggests that the applicant concurred with the company about his inability to perform any kind of boilermaking work and there is nothing shows, nor did he claim to have made any

representations to adapt his work so that it would still be possible for him to work. The applicant now seeks to hold the company responsible for coming to a conclusion that he agreed with the time. As the arbitrator put it, "*(u)ntil his claim was declined, the Applicant did not demonstrate a willingness to pursue his case to the CCMA.*" The arbitrator found that the applicant had co-operated throughout the enquiry. Obviously this affects the merits of his claim to have been unfairly dismissed and in the circumstances the Commissioner cannot be said to have acted unreasonably in effectively finding no merit in the applicant's claim.

15] In conclusion, I am satisfied that the Commissioner did canvas all the material issues he should have, even though he might not have set these out distinctly in his ruling. The evaluation he made is not one that no reasonable Commissioner could have arrived at. He may have emphasised the failure of the applicant to address the degree of lateness of the referral, but that does not detract from the balance of his reasoning on the other factors he had to consider.

Order

16] In the light of the above analysis, the application to review and set aside the second respondent's condonation ruling is dismissed. No order is made as to costs.



ROBERT LAGRANGE

JUDGE OF THE LABOUR COURT

Date of Hearing: 23 September 2010

Date of Judgment: 15 February 2011

Appearances

For the Applicant: Mr Gerber, (*pro bono*) instructed by OJ Botha Attorneys

For the Respondent: Mr Ramotlou of Maserumule Inc.