

**IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)**

In the matter between

Case No: JS 263/2009

MANDLA ALFRED MDULI

Applicant

And

VODACOM (PTY) Ltd

Respondent

JUDGMENT

SHAIK AJ

Introduction

1. The Applicant seeks leave to appeal against my judgement dated 16 November 2010.
2. In my judgement, I made the following orders:
 - 2.1. The application for condonation is refused.
 - 2.2. There is no order as to costs.

The Test

3. In considering the ruling on condonation the decision not to grant it is a matter that falls within the court's discretion. The decision in this regard is not appealable on the basis that another court could reasonably differ.

In NUMSA v FIBRE FLAIR cc t/a KANGO CANOPIES (2000) 21 ILJ 1079 [LAC] 1081 G-1082A the Labour Appeal Court laid down the applicable test. It is whether or not it can be said that, in exercising its discretion, the court a quo did so "capriciously, or upon a wrong principle, or in a biased manner, or for insubstantial reasons, or committed a misdirection or irregularity, or failed to exercise discretion or exercised it improperly or unfairly."

4. This test was followed by the LAC in Coates Bros Ltd v Shanker and Ors (2003) 24 ILJ 2284 [LAC] where it was also pointed out that a simple misdirection is insufficient- "the misdirection must be of such a nature, degree or seriousness that shows that the court did not exercise its discretion at all, or exercised it improperly or unreasonably"

Grounds of Appeal

5. The Applicant seeks leave to appeal and the application rests on the submission that certain legal and factual errors were made which informed the judgment.

To amplify, it is stated in the Heads of Argument that :

" The main ground of law, which gives rise to all other grounds of appeal, is that, as a matter of law, neither the rules of court nor the provisions of the Labour Relations Act (the LRA) specify the time period within which a matter must be

brought to the Labour Court following a ruling of no-jurisdiction by the CCMA.”

It is submitted that the following error in law was made:

“ The erroneous finding implied by the learned judge is not that the application was not brought within a reasonable time after the CCMA referral to Court, but that it was brought later than the 90 day period prescribed in relation to cases referred in the normal course of events.”

6. I understand this argument to imply that it is not the ninety (90) day period referred to in section 191 (11) (a) which is relevant and applicable in the consideration of the timeframe for the referral of the dispute to the Labour Court.

Instead, the submission is made that there is no prescribed timeframe and in the circumstance, it would suffice if a referral was made within a “reasonable time.”

7. The Applicant was obliged to comply with the provisions of Section 191 (11) (a) but failed to do so. However, and as provided for in section 191 (11) (b), the Court may condone non-observance of that timeframe on good cause shown.
8. An applicant for condonation is required to give a full and satisfactory explanation of whatever delays have occurred. The fact that non-compliance is the result of legal advice, is not a sufficient and satisfactory explanation. In this matter , the applicant persist with the view that legal advice was received and was relied on, and that such advice was correct.
9. The explanation, informed by legal advice, proffered by the Applicant in the application for condonation is that the Act does not provide for a time period – in the particular circumstance- is no explanation at all.

10. The dicta in *Vorster v Rednave Enterprises CC t/a Cash Converters* [2008] 10 BLLR (LC) was pressed into service to support this argument and in particular the comments made by Basson J to be found on page 1114 C paragraph 4:

“ There is no provision in the LRA which prescribes the time period within which a referring party must refer her statement of claim to the Labour Court once the commissioner at arbitration rules that it does not have jurisdiction to adjudicate the dispute and that the dispute must be referred to the Labour Court”

This no more than an observation made. However, this observation, is used to give credence to the submission that “as a matter of law, neither the rules of court nor the provisions of the Labour Relations Act specify the time period within which a matter must be brought to the Labour Court following a ruling of no-jurisdiction by the CCMA.”

11. This submission is the product of muddled reasoning. It betrays a failure to properly analyse the cause of action, appreciate the difference and distinction between adjudication and arbitration, and fails to differentiate between the jurisdiction of the Labour Court and the Commission for Conciliation, Mediation and Arbitration.

This submission simply ignores a good many provisions of the Act and must for that reason be rejected.

The Act

12. The relevant provisions of the Labour Relations Act are the following:

Section 187 (1):

A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5, or if the reason for the dismissal is-

(f) that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility.

Section 191 (5) :

If a council or a commissioner has certified that the dispute remains unresolved, or if 30 days have expired since the council or the Commission received the referral and the dispute remains unresolved-

Section 191 (5) (b):

The employee may refer the dispute to the labour court for adjudication if the employee has alleged that the reason for dismissal is-

i) automatically unfair;

Section 191 (11) (a):

The referral, in terms of subsection (5) (b), of a dispute to the Labour Court for adjudication, must be made within 90 days after the council or (as the case may be) the commissioner has certified that the dispute remains unresolved.

Section 191 (11) (b):

However, the Labour Court may condone non-observance of that timeframe on good cause shown.

Section 191(13):

- a) An employee may refer a dispute concerning an alleged unfair labour practice to the Labour Court for adjudication if the employee has alleged that the employee has been subjected to an occupational detriment by the employer in contravention of section 3 of the Protected disclosures Act 2000, for having made a protected disclosure defined in that Act.
- b) A referral in terms of paragraph (a) is deemed to be made in terms of section subsection (5) (b).

Application of the Act

13. As the Applicant alleged that he suffered unfair discrimination and secondly, occupational detriment, the dispute, ought to have been referred to the Labour Court for adjudication in accordance with section 191 (5) (b). And then too, within 90 days of the dispute having been certified as unresolved, in accordance with section 191 (11) (a).

Rather than refer the dispute to the Labour Court for adjudication, the employee applied for and referred the dispute to the Commission for arbitration. It is this

act, that was to give rise to the comedy of errors to follow.

14. The Applicant contends that the referral to the Labour Court is occasioned by, and “is in accordance with the arbitration ruling dated 9 December 2008, which is not governed by any timeframe as long as it can be done within a reasonable time.”

The arbitration ruling refers to the matter thus:

“ It is apparent from the arguments advanced by the applicant in his opening statement that the Labour court has jurisdiction and that the CCMA cannot proceed to hear the merits in the absence of written consent in writing by all parties in terms of section 133 (2) (b) of the LRA. This being the case, the CCMA does not have jurisdiction to determine the dispute and it is left to the applicant to refer the dispute to the Labour Court” Per Commissioner PJ van der Merwe.

The arbitration ruling, is not the cause of action or cause for the referral to the Labour Court. The referral to the Labour Court is necessitated by the allegations of the employee to the effect that he suffered occupational detriment and unfair discrimination.

These matters, occupational detriment and unfair discrimination, may be the subject of an adjudication and are not matters that may be the subject of an arbitration. The employee, ought not to have applied for or referred the dispute for arbitration. This was a fatal error.

The Commissioner, by this ruling, is not directing or effecting a referral to the Labour Court. The Commissioner is merely stating that the Commission does not have jurisdiction to deal with the matter. The Applicant cannot read into this ruling

a vague and nebulous notion that he refers the matter to Labour Court in simple compliance with the ruling and for that reason fail to acknowledge that firstly, a delay in the referral occurred and secondly, give a full and complete explanation in support of the application for condonation.

15. The referral to the Labour Court ought to have occurred within 90 days of the issue of the certificate of non resolution. At any rate, if the referral was not made within 90 days as stipulated by section 191 (11) (a), the Labour Court may condone non-observance of that timeframe, on good cause shown, in terms of section 191 (11) (b).

The fact that the dispute was referred for arbitration and, erroneously so, is not in and of itself destructive to a referral to the Labour Court. All that which was required of the Applicant was to make an application for condonation at the time the matter was referred to the Labour Court and cite the fact that the matter was referred in error for arbitration which resulted in the delay suffered.

The Applicant refused to make an application for condonation despite the request made by the Respondent and only did so, and then too belatedly, after an order was made to that effect. It was his duty to apply for condonation as soon as possible. The delay, was wilful. The fact that it was informed by bad legal advice is not a good and sufficient explanation.

16. There is no reference to a time limit following on a non-jurisdiction ruling or the most obvious reason: the matter ought not to have been referred for arbitration to the Commission. The Commission has no jurisdiction on these matters.

The Act stipulates in section 191 (5) (b) and 191 (13) (a) that matters arising from an allegations of unfair discrimination and occupational detriment must be the

subject of adjudication by the Labour Court.

17. Indeed, the Act does not provide for a time period - “ once the commissioner at arbitration rules that it does not have jurisdiction to adjudicate the dispute and that the dispute must be referred to the Labour Court ” – and it is absurd to expect such a time period to feature in the Act. Basson J in Vorster did no more than state the obvious.

18. The Act stipulates that matters relating to unfair discrimination and occupational detriment are to be determined by adjudication and by the Labour Court. It is an error made by the employee, to refer such matters, for determination by means of arbitration to the Commission.

19. The employee in his Founding Affidavit at paragraph 16 stated:

“ The arbitration ruling specifically stated that I may refer the dispute to the Labour Court as the CCMA had no jurisdiction to hear the dispute in the absence of written consent from both parties.”

And in paragraph 17 the following allegation is made:

“ I have issued my statement of claim in this Honourable Court on the basis of an arbitration ruling dated 9 December 2008, together with the incorrect legal advices that I received from my previous and current legal representation”

The arbitration ruling, is not, and cannot be, the basis for the referral of the matter to the Labour Court. It is not, so to speak, the cause of action. The cause of action remains the allegations made by the employee that he suffered unfair

discrimination and occupational detriment.

The arbitration ruling merely records the lack of jurisdiction and draws attention to the fact that the allegations ought to be the subject of adjudication by the Labour Court. The ruling is not a directive for the matter to be heard by the Labour Court.

20. In the Heads of Argument for Leave to Appeal, it is said that the comments of Basson J quoted above, formed “the kernel of the legal advice received, and reasonably relied on, by the Applicant. It is respectfully submitted that the advice was not incorrect.”

The advice given was indeed incorrect and patently so. The arbitration ruling and the in- passing comments of Judge Basson are not authorities to be relied on for the non compliance with Section 191 (11) (5).

21. But even so, it was open to the employee, to apply for condonation and show good cause in support of such an application. Apart from plumbing the Vorster dicta, the Applicant did not address the issue of the unreasonableness of the delay or the cogency of the explanation for the different periods that are relevant.

“Provisional Jurisdiction”

22. The argument of “provisional jurisdiction” has no relevance in the consideration of an application for condonation.

Credibility Finding

23. It is contended that I had committed a “major error” by accepting “ without any

evidence having been led, that the (true) reason why the applicant was dismissed was the untested ipse dixit of the employer. It is not proper for the Court to make such a credibility finding merely on the papers”

This is an erroneous interpretation of the judgment. I did not accept the truth of the statement and there is nothing in the judgment to suggest that I did. I merely recorded the stated reason for the dismissal proffered by the employer.

Factual Misdirections

It is submitted that a large number of misdirections of fact are to be found in the judgment. This submission is without merit.

Fact: categorisation of dispute: misconduct

24. The certificate of outcome dated 22nd August 2008, refers and categorises the dispute as one concerning “unfair dismissal” and relates to “misconduct”. See MM 11. This is not an error.

Fact: changing of the basis of the dispute

25. The first time that the Applicant explained the circumstance of his dismissal before a Commissioner is at the Conciliation hearing. And, the second time he did so before a Commissioner was the Arbitration hearing. Arising out of the first explanation at Conciliation, the Commissioner issued the Certificate of Outcome and therein categorised the dispute as “misconduct” on the basis of the explanation given by the employee.

The Applicant did not at conciliation then and there say he suffered “unfair discrimination” and or “occupational detriment” and if he had done so, the Commissioner would have cited that reason and then –by way of advice - mark that the dispute be referred to the Labour Court in the certificate of outcome.

To say that the employee changed the basis of the dispute is not an error; he did indeed change the basis of the dispute at the arbitration hearing.

Fact: racial discrimination raised at arbitration

26. If the allegation of racial discrimination “predated even the referral of the matter to the CCMA” as mentioned in the Heads, it would have featured in the referral of the dispute to the CCMA and again in the certificate of outcome. This allegation does not find expression in the certificate of outcome. There is no allegation made by the Applicant that the certificate of outcome is defective or erroneous in the categorisation of the dispute. Thus, I am obliged to accept the certificate of outcome to be true and correct in every respect.

27. It is submitted in the Heads, that the reason for the dismissal is “unknown”. See paragraph 23. If the reason was “unknown” then the submission that the dismissal was on account of “racial discrimination” or having made a “protected disclosure” cannot be correct. These submissions are mutually destructive.

28. The only reasonable inference to be drawn was that these allegations were not made when the matter served before the Commissioner for Conciliation. Thus, this too, is not an error but the only reasonable inference to be drawn from the facts.

To find otherwise, I must set aside the certificate of outcome.

Fact: Method of computation

29. It is not clear to me what is the error in computation of the dies that was made and, what is the correct fact and where might that fact be found in the papers. At any rate, there is no obvious and apparent error.

Conclusion

30. I am satisfied that I properly considered all the relevant factors in exercising the judicial discretion not to grant condonation. I had regard to the degree of lateness, the cogency of the explanation and the prospects of success.

31. I concluded that the delays were unreasonable, the explanations insufficient and unsatisfactory. The prospects of success were so very weak and it would serve no purpose to grant condonation. I am of the view that there is no reasonable prospect that another court would come to a different finding.

32. The application for leave to appeal is dismissed with costs.

SHAIK AJ

Date:	13 September 2011
For the Applicant:	Adv. DC Mpofu
Instructed by	Mogoboya Dooling & Associates

For the Respondent:

A.I.S Reddings SC

Instructed by

Edward Nathan Sonnenbergs