

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT CAPE TOWN

Not Reportable
Case no: C249/2010

In the matter between:

NATIONAL UNION OF MINE WORKERS

First Applicant

T MTHOMBENI

Second Applicant

and

THE COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION

First Respondent

K KOCK N.O.

Second Respondent

GOOD HOPE BRICKS (PTY) LTD t/a CAPE BRICK

Third Respondent

Date of hearing: 20 April 2011

Date of judgment: 26 May 2011

JUDGMENT

VAN VOORE AJ:

[1] The First Applicant, the National Union of Mineworkers (the union), on behalf of the Second Applicant, Mr T Mthombeni (Mthombeni) referred an alleged unfair dismissal dispute to the First Respondent, Commission for Conciliation, Mediation and Arbitration (the CCMA). The CCMA required the union, on behalf of Mthombeni, to apply for condonation. Notwithstanding its contention that it was not necessary to do so, the union applied for condonation. The Second Respondent (the commissioner) refused condonation. This is an application in terms of section 158(1)(g) of the Labour Relations Act,¹ (the LRA) to review and set aside the commissioner's decision refusing condonation. The Application was unopposed.

[2] The applicants contend that it was not necessary for to apply for condonation, alternatively, that if it was necessary to do so, then condonation ought to have been granted. In the alternative, the applicants seek an order that the condonation application be remitted back to the CCMA for determination by a commissioner other than the Second Respondent.

[3] Mthombeni was employed by the Third Respondent (the company) at its Paarden Island premises. Whilst at work, Mthombeni was required to undergo a breatherlyser test and was found to be under the influence of alcohol. A disciplinary hearing was convened. Mthombeni disputed the test results on the basis of alleged unreliability of the testing device. Following the outcome of the disciplinary hearing,

¹ 66 of 1995.

the company decided to dismiss Mthombeni. The union, on behalf of Mthombeni, referred an alleged unfair dismissal dispute to the CCMA.

[4] The dispute was referred to the CCMA on 20 April 2009. The dispute referral form is dated 15 April 2009. In a letter dated 24 April 2009, the CCMA informed the union that CCMA was “unable to process” the alleged dispute. The stated reason for this was that the CCMA took the view that the referral was two days late and that an application for condonation was necessary.

[5] The union took the view that the matter was referred in the time period prescribed by section 191 the LRA and that accordingly, no condonation application was necessary. The union informed the CCMA of this view in a letter dated 13 May 2009. In its letter dated 13 May 2009 the union records the following:

“The date of dismissal in this matter is 19 March 2009. This means that, as per Rule 3(1) (b) the 19 of March has to be excluded when counting the thirty day period for dismissal referrals. When counting from 20 March 2009, the 30th day is the 18th April 2009. This is a Saturday. Our view is that this has to be excluded, as per Rule 3(2). We submit that the 30th day is now the next working day following the 18th April 2009. Such next day is Monday, 20 April 2009.

The dispute was referred to the Respondent and the CCMA on 20 April 2009. We submit that this was within the thirty day period within which one has to refer a dismissal dispute. Therefore we request you to set this matter down for conciliation.

We trust that you will find the above to be in order.”

[6] The record does not contain any written response to the union’s letter dated 13 May 2009. The union addressed a further letter to the CCMA dated 11 September 2009. That letter refers to “several telephone conversations”. It appears from 11 September 2009 letter and in fact it is contended by the union that there were telephonic conversations between it and the CCMA case management office. The union’s letters and the telephonic conversations did not have the result that the CCMA was moved to schedule conciliation proceedings. The union’s letter dated 11 September 2009 repeated its view that the dispute was referred timeously and that it was not necessary for the union to apply for condonation. The 11 September 2009 letter also records the following:

“You have promised us several times that you will respond to us in writing but never did that to date. Our member is suffering as a result of the delay by yourselves to set the matter down for a hearing.

We therefore humbly request you to set this matter down for conciliation or give us your stance in writing so that we can refer this matter to our legal department for consideration.”

[7] Under section 191 of the LRA the applicants had 30 days to refer the alleged unfair dismissal dispute to the CCMA. In the matter of *Latiff v Donro*² the Court, and in relation to the meaning of ‘day’ as referred to in the LRA, preferred the meaning set out in the Interpretation of Statutes Act.³ This is consistent with other decisions of this Court. It appears that the commissioner also adopted this approach. On this

² [2004] BLLR 1151 (LC).

³ 33 of 1957.

reckoning, the referral was indeed out of time but certainly not by 7 months and 24 days. Mthombeni was dismissed on 17 March 2009. He lodged an appeal and the appeal itself was dismissed on 19 March 2009. Though dated 15 April 2009, the dispute referral form was first served on 20 April 2009. The referral was indeed 2 days late.

[8] On 7 December 2009 the union launched an application for condonation. The application included an affidavit deposed to by Senyatse Desmond Phaladi, a paralegal officer employed by the union. The condonation application included the union's letters to the CCMA dated 13 May 2009 and 11 September 2009. The company, by way of opposition, wrote a letter to the CCMA. That letter is dated 8 December 2009. In the 8 December 2009 letter the company informs the CCMA that it intends to oppose the application for condonation on the following grounds:

- 8.1 Mthombeni was dismissed on 17 March 2009 (not 19 March 2009) and that the referral to the CCMA was out of time.
- 8.2 Mthombeni's claim that the testing apparatus is unreliable is invalid.
- 8.3 That during the disciplinary hearing Mthombeni in fact acknowledged guilt and asked for this to be taken into account.
- 8.4 When the test was carried out it was carried out in the presence of a witness.
- 8.5 The chairman of the disciplinary hearing was not biased.

[9] The CCMA then convened a hearing to consider the condonation application. That hearing took place on 27 January 2009.

[10] The commissioner considered matters ordinarily relevant to a condonation application such as the degree of lateness, the explanation for the delay, the prospects of success and the prejudice to the parties. In relation to the length of delay the commissioner found that the length of delay was “extreme”. This assessment was informed by the commissioner’s view that a “compliant application” (by which the commissioner meant a referral of an alleged unfair dismissal dispute) was first filed with the CCMA on 7 December 2009. In fact at paragraph 7 of the ruling on condonation, the commissioner in relation to the length of the delay determines that “the referral is 07 months and 24 days late”. Further, and at paragraph 27 of the ruling, the commissioner makes the following assessment:

“27 The delay in the matter is extreme considering the fact that Applicant was represented by a union and himself a senior shop steward. It is common cause that the CCMA had from the start informed the union offices, in writing, that condonation was required. The information was relayed four days after the initial referral.

...

29 What is more concerning is that the union took another seven months to actually decide to apply for condonation. I accept that the union made written contact with the CCMA on two occasions but the fact remains that they were informed about the requirement for condonation. The time lapse certainly displays a lack of seriousness in pursuing the matter.”

[11] The commissioner calculated the length of delay from 7 December 2009, being the date on which the condonation application was delivered. This approach resulted in the commissioner concluding that the length of delay was 7 months and 24 days. However, the commissioner’s approach is not the approach adopted by this Court in

the matter of *Weltevrede Kwekery (Pty) Ltd v CCMA and Others*.⁴ In that matter Pillay J held that:

“...section 191(2) allows an employee to apply for condonation at any time. Rule 10(2)(c) read with Rule 9(2) merely directs an employee as to when and how to file an application for condonation.”

[12] In relation to section 191 of the LRA, Pillay J in *Weltevrede Kwekery (Pty) Ltd v CCMA and Others*⁵ held that:

“ Section 191(3) provides:

“The employee must satisfy the Council or the Commission that a copy of the referral has been served on the Employer...

Similar wording is used in section 134(2) of the LRA. The meaning of ‘referral’ that I distill from these sections is that it is the document that initiates the process. In this instance it is the LRA form 7.11.”

[13] An alleged unfair dismissal dispute was referred to the CCMA on 20 April 2009. The referral form received by the CCMA on 20 April 2009 initiated the process. The CCMA on receipt of the dispute referral form took the view that the matter was referred beyond the 30 day period provided for in section 191 of the LRA. The CCMA then required that the applicants apply for condonation. The requirement that the applicants apply for condonation does not undo the fact that an alleged dispute was referred to the CCMA on 20 April 2009. In determining the length of the delay the commissioner did not properly apply the correct test in our law. As a result of the

⁴ [2006] 7 BLLR 706 (LC) para 13..

⁵ Ibid at para 18.

commissioner's erroneous approach the length of delay was determined as being 7 months and 24 days. This period of time was characterised by the commissioner as being "extreme" and "excessive" and in the result the commissioner found that that so "extreme" or "excessive" a delay outweighed the other considerations relevant to a condonation application. In the condonation ruling the commissioner makes the following further findings:

"31 In the matter between *Jayes v Radebe & Others* (2003) 24 ILJ 399 (LC) the Court held that a long delay without adequate reasons or explanation for it, outweighs a consideration of the prospects of success in the circumstances and weighing up all the relevant factors.

32 I find that the Applicant has failed to give an adequate or reasonable explanation for the extreme delay and although this outweighs a consideration of the prospects of success, my opinion is that the Applicant's prospects of success are questionable. The Applicant failed to show good cause for the delay and condonation cannot be granted."

[14] It is abundantly clear that the commissioner's approach to and assessment of the length of the delay was one of the principal grounds, if not the principal ground, that informed her decision to refuse condonation. The commissioner's erroneous approach is inconsistent with the principles of our law and cannot be countenanced by this Court. In the matter of *Pam Golding Properties (Pty) Ltd v Erasmus & Others*⁶

Van Niekerk J held:

"If a commissioner fails to take material evidence into account, or has regard to evidence that irrelevant, or the commissioner commits some other misconduct or gross

⁶ (2010) 31 ILJ 1460 (LC) at para 8.

irregularity during the proceedings under review including for example, a material mistake of law, and a party is likely to be prejudiced as a consequence, the commissioner's decision is liable to be set aside..."

[15] The correct determination of the length of delay was material. The commissioner failed to properly apply her mind to this important and material issue. The erroneous approach adopted by the commissioner had the result that the applicants did not have a fair hearing on the issues to be determined by the commissioner. On that ground alone the commissioner's ruling is reviewable and falls to be set aside.

[16] In the circumstances I make the following order:

1. The ruling by the Second Respondent is reviewed and set aside.
2. The condonation application is referred back to the CCMA for fresh determination before a commissioner other than the Second Respondent.
3. There is no order as to costs.

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VAN VOORE AJ

Appearances

For the applicants: Ms T Ralehoko, Cheadle Thompson & Haysom

LABOUR COURT