



**REPUBLIC OF SOUTH AFRICA
THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

JUDGMENT

Reportable

JR3248/10

In the matter between:

LINDA PENDORA OOSTHUIZEN

Applicant

and

IMPERIAL LOGISTICS CC

First Respondent

COMMISSIONER BERNARD VAN ECK

Second Respondent

THE NATIONAL BARGAINING COUNCIL

FOR THE ROAD FREIGHT INDUSTRY

Third Respondent

Heard: 27 June 2012

Delivered: 25 July 2012

Summary: Review application; Employee failing to sign referral form, effect of; Ratification of referral not established by subsequent conduct; Commissioner correctly refusing to grant condonation where no reasonable explanation for the length delay in filing complaint referral

JUDGMENT

WHYTE AJ

Introduction

- 1] In this matter, the Applicant seeks to review and set aside the condonation ruling made against her by the Second Respondent acting in his capacity as panelist of the Third Respondent bargaining council. The application is opposed by the first Respondent.
- 2] I am also faced with two interlocutory condonation applications in these proceedings, one brought by the Applicant and the other by first Respondent. I have decided to grant these two applications.

Background

- 3] On 1 October 2009, the Applicant was subjected to a disciplinary hearing and found guilty of various charges relating to, *inter alia*, gross negligence. The chairperson of the hearing found that she should be dismissed.
- 4] The Applicant lodged an internal appeal, but effectively abandoned it on 9 October 2009 by referring an alleged unfair dismissal dispute to the CCMA.
- 5] The Applicant completed CCMA Form 7.11 with the assistance of a certain Gerald Nkoana who is employed by Legalwise, a legal insurer. Neither the Applicant nor Mr Koana signed the referral form. In all other respects, the form was filled in appropriately for a claim of alleged unfair dismissal.
- 6] It transpired that the CCMA lacked jurisdiction to consider the referral on the basis that same ought to have been referred to the

Third Respondent. It is however not clear how the Applicant and/or Legalwise were informed of this development.

- 7] In her founding affidavit, the Applicant alleges that she was initially under the impression that the referral had been 're-referred' by Legalwise to the Third Respondent (that is, on the same papers), but was subsequently "informed" that it was "transferred" by the CCMA to the Third Respondent. Annexure "FR 3" to the Applicant's founding affidavit simply indicates that the referral was sent by a "Gary" to the telefax number of the Third Respondent on 5 November 2012.
- 8] On 10 November 2009, the third Respondent's case management officer wrote to Legalwise and informed it that the referral had not been signed by the Applicant as required by the Council's Dispute Collective Agreement and thus needed to be referred afresh to the Council together with an application for condonation. The Applicant appears to accept that she was advised of this development on 10 November 2009 and that she was told by Legalwise that she should consult with an attorney on their panel and subsequently did so on 16 November 2009, less than a week later.
- 9] The Applicant's attorneys advised the Applicant that they could only assist her once they had obtained "cover" from Legalwise. It appears from the record that cover to take instructions and complete a referral to the CCMA was granted by Legalwise to Applicant's attorneys on 27 November 2009. The attorneys in turn adopted the view that this only constituted cover for the completion of a new referral to conciliation and thus would need to obtain additional cover from Legalwise to cover the costs of the condonation application. They did not however perform the referral as an interim step and this remains unexplained. The Applicant's attorneys do not appear to have sought cover from the Applicant herself or to have advised her in terms that her prospects of

obtaining condonation could be prejudiced as a result of further delays.

- 10] On 18 March 2010, the attorneys were advised by Legalwise that they had cover and that they could proceed. Quite fortuitously, the Applicant had attended the offices of her attorneys on that exact date.
- 11] Notwithstanding the above, the condonation application was only filed on 30 September 2010, more than six months after cover had been granted. The condonation was accompanied by a signed referral form which appears to have simply been a copy of the existing Form 7.11 to which the Applicant's signature had now been appended.
- 12] The condonation application was opposed by the First Respondent which filed substantive opposing papers setting out why it was of the view that the Applicant should not be granted condonation.
- 13] On 22 October 2010, Second Respondent found that the Applicant had not provided an acceptable explanation for her delay in referring her dispute and thus that condonation should be refused.

Was the first referral defective?

- 14] In a line of decisions starting with *Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA and Others*,¹ this Court (and following it the CCMA) has found that the failure by the referring party to personally sign a referral to conciliation constitutes a material defect which deprives the CCMA (and a bargaining council) of the jurisdiction to hear the dispute. The personal signature of a referral form is thus a jurisdictional fact which must

¹ [1997] 11 BLLR 1475 (LC). See also *Etschmaier v CCMA and Others* (1999) 20 ILJ 144 (LC); *Silver v Jaguar Brynston* (1999) 20 ILJ 1988 (CCMA); *Msibi v SA Post Office* (1999) 20 ILJ 2760 (CCMA); *Morale v Consol Glass* (1999) 20 ILJ 2753 (CCMA); and *Esterhuizen v Assupol Life* (2005) 26 ILJ 1523 (CCMA).

be established before the CCMA or a bargaining council can exercise its jurisdiction over the dispute.

- 15] I am thus of the view that the first referral, in its original form, was defective and thus could not have formed the basis of lawful jurisdiction without some further act.

Was the first referral capable of ratification and was it ratified?

- 16] The Applicant now relies on the decision of the appeal court in *ABC Telesales v Pasmans*.² That court was faced with the situation where a candidate attorney in the employ of an employee's attorneys of record had signed the referral form. The referral was thus defective for want of compliance with what was then Rule 5.1 of the CCMA Rules.

- 17] The court found that in order to give effect to the intention of the lawmaker, it must be held that the purpose of Rule 5.1 was to allow the CCMA to reject the referral form, thereby avoiding an unauthorised referral. The court went on to find:

‘However, the referring party’s participation in the conciliation process without objection renders the requirement of her signature redundant at that stage. It follows that the rule-maker could not have intended the rule to apply once such participation had occurred and with it, the ratification of the referral.’³ (my emphasis)

- 18] The appeal court thus concluded that this court was incorrect in finding, as it did in *Rustenburg Platinum Mines Ltd* (supra) that the referral remained invalid beyond the stage of conciliation where neither the CCMA nor the opposing party had objected.

- 19] The difficulty that this argument holds for the Applicant is that there

² (2001) 22 ILJ 624 (LAC).

³ Id at para 6.

was no attempt on her part to ratify the first referral. There was no tacit acceptance of the referral by the CCMA and it is quite clear that the Third Respondent made its view clear immediately on the receipt of the referral. In this regard, I point out that it makes no difference to my mind how the referral was directed to the Third Respondent as it, and only it, was entitled to take a view on whether the requisite jurisdictional facts were present before it.

- 20] Once the Applicant was advised in terms that the referral was defective, she took belated steps almost a year later to lodge a second referral with the Third Respondent. Thus contrary to what was submitted on the Applicant's behalf, she had not ratified her first referral, but had rather withdrawn it in favour of the second.
- 21] It was this second referral, together with its attendant condonation application, that served before the Second Respondent and to which he had to apply his mind. The first referral thus fell by the wayside and became completely irrelevant save as part of the factual matrix going to the explanation for the delay.
- 22] Even if I am wrong and the Applicant did seek to ratify the first referral on 30 September 2010, the First Respondent was entitled to object. The effect of this objection was to require the Applicant to file a compliant referral (or at the very least an amended one) together with a condonation application. To hold otherwise would be to allow the Applicant to proceed with a defective referral where one of the prerequisite jurisdictional facts was missing and where the opposing party had refused to give its consent to the non-compliance. In this regard, the law now seems to be settled that the absence of a jurisdictional fact (such as a signed referral form) vitiates the arbitrator's jurisdiction whether the point it is raised or not – jurisdiction being a question of objective fact.⁴

⁴ See *CUSA v Tao Ying Metal Industries and Others* (2008) 29 ILJ 2461 (CC); *Wardlaw v Supreme Moulding (Pty) Ltd* [2007] 6 BLLR 487 (LAC); *Bombardier Transportation (Pty) Ltd v Mtiya NO and Others* [2010] 8 BLLR 840 (LC).

- 23] I have also been unable to find any authority for the general proposition that uncondoned and unilateral ratification may take place in the face of objection from an opposing party.

Second Respondent's Ruling on Condonation

- 24] The Second Respondent found that on the face of the application that was before him, the explanation for the delay, coupled with the extent thereof, was not acceptable. The Applicant had thus not shown good cause and hence her application for condonation ought to be refused.
- 25] The Applicant's grounds of review in these proceedings are in essence that the Second Respondent failed to properly consider her condonation application, in particular that he failed to have due regard to the explanation for the Applicant's delay and secondly that he simply ignored the Applicant's prospects of success.
- 26] In my view, it is incomprehensible that the Applicant and her attorneys did not appreciate the urgency of the situation before them. They were advised in terms by the third Respondent that the application was defective and yet chose to litigate at their leisure. It appears that, at times, the Applicant's attorneys had themselves ceased to believe that the Applicant intended to proceed with her dispute as they received no word from her. The law is clear that a litigant is required to apply for condonation as soon as she becomes aware of the defect involved.⁵
- 27] Whilst the Applicant has detailed some of her travails during this period, there are glaring gaps and inconsistencies. Put simply, her actions were not those of a concerned litigant who wished the expeditious resolution of her dispute. In particular there is no evidence to suggest that the Applicant was incapable of taking

⁵ See *CWIU and Another v Ryan and Others* [2001] 3 BLLR 337 (LC) at para 20.

reasonable steps to instruct her attorneys. I am thus of the view that this matter differs markedly from that in *Liberty Life Association of Africa Ltd v Hiemstra and Others*,⁶ where the applicant employee took active steps himself to rectify a defective referral.

- 28] The Applicant's attorneys also appear to have attached little urgency to the matter. The manner in which they dealt with the service and filing of the condonation application once completed was lackadaisical in the extreme and not befitting what was pointedly an urgent situation. Regrettably, the Applicant must be saddled with these consequences as well.
- 29] I am of the view that the Second Respondent considered the various factors raised before him as I have detailed above and found that the Applicant had not provided an acceptable explanation for her delay in referring her dispute properly to the Third Respondent.
- 30] The law is clear that an applicant for condonation must demonstrate that she has both an acceptable explanation for her delay as well as reasonable prospects of success. Where there is no reasonable explanation for the delay, then the prospects of success, irrespective of their strength, can not warrant the granting of condonation.
- 31] In *Moila v Shai and Others*,⁷ the Labour Appeal Court confirmed that a decision maker does not need to consider the prospects of success at all where the applicant for condonation has failed to provide an acceptable explanation for his or her default. That decision also stressed that where there is a lengthy delay, the explanation must be compelling. The 'test' was stated in the reverse by the then Appellate Division in *Chetty v Law Society, Transvaal*.⁸

6 (2001) 6 BLLR 620 (LC).

7 [2007] 5 BLLR 432 (LAC).

8 1985 (2) SA 756 (AD) at 765A-F.

- 32] Whilst there is authority for the proposition that strong prospects of success might outweigh a less convincing explanation for the delay,⁹ it is clear that an applicant for condonation must establish some *prima facie* explanation detailing all aspects of the delay before the prospects of success will become relevant to the enquiry.
- 33] The Second Respondent can thus not be criticised for failing to deal in terms with the Applicant's prospects of success. I do however point out that on the application, as it stood before the Second Respondent, there was little if anything to persuade him that the Applicant was likely to succeed in her case on the merits. The content of the Applicant's founding affidavit in the condonation application does not deal in any substantive way with the charges of which she was found guilty, despite detailed findings having been made by the chairperson of the disciplinary hearing. The allegations of procedural unfairness are extremely vague and in any event rebutted in the First Respondent's answering affidavit. This matter is thus far removed from the 'egregious' unfairness found by the LAC in *NEHAWU obo Mofokeng and Others (supra)*.
- 34] In the premises, I do not believe that there is any basis to interfere with the Second Respondent's Ruling and accordingly that the application for review should be dismissed.
- 35] Both parties were in agreement that costs should follow the result, and I see no reason why this should not be the case.
- 36] I thus make the following order:

36.1 The Applicant's application for review is dismissed;

36.2 The Applicant is ordered to pay the First

⁹ See *NEHAWU obo Mofokeng and Others v Charlotte Theron Children's Home* (2004) 25 ILJ 2195 (LAC).

Respondent's costs.

WHYTE, AJ

Acting Judge of the Labour Court

Appearances:

For the Applicant: H E Mary instructed by Roets & Du Plessis

For the First Respondent: C Roodt instructed by Postma Attorneys