

VIC & DUP/JOHANNESBURG/LKS

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: J 3001/98

In the matter between:

KOTZE, E

Applicant

and

MATLHABA,S.S

First Respondent

THE DIRECTOR,CCMA

Second Respondent

ROBERTSONS SPECIALIST

Third Respondent

INSURANCE BROKERS (PTY) LIMITED

JUDGMENT

BASSON, J

- [1] The unfair dismissal dispute in the present matter was referred to the Commission for Conciliation, Mediation and Arbitration (“the CCMA”), cited through its director as the second respondent, by the applicant in terms of the provisions of section 191(1) of the Labour Relations Act, 66 of 1995 ("the Act") on 21 July

1998.

- [2] The referral was some 112 days outside of the prescribed time limit.
- [3] This brought into operation the provisions of section 191(2) of the Act which read as follows:

"If the employee shows good cause at any time the Council or the Commission (the CCMA) may permit the employee to refer the dispute after the 30 time limit has expired" (emphasis supplied).
- [4] In other words, the commissioner concerned (the first respondent) in deciding the issue of whether to condone the late referral, should have exercised this discretion in terms of section 191(2), the basis being whether good cause was shown for the late referral.
- [5] The applicable principles in an application for condonation is set out in the *locus classicus* decision of Melane v Santam Insurance Co Ltd 1962 (4) SA 531 (A) at 532C-F.
- [6] In essence, in granting condonation, the degree of the lateness, the reason or explanation therefor and the prospects of success as well as the importance of the issue or the case must be weighed up, the one against the other.

[7] Of all these considerations or factors it is the prospects of success which is the most important.

[8] This view is correct as condonation should not be granted in an instance where there are no prospects of success.

[9] The importance of prospects of success was also recently reiterated by the Supreme Court of Appeals in the judgment of Moodley v Umzinto North Town Board 1998 (2) SA 188 (SCA) at 192B-F per Mahomed CJ.

[10] It appears from the arbitration award that the arbitrator did not consider the prospects of success at all when he refused to grant condonation to the applicant.

[11] Paragraph 6 of the arbitration award (attached at page 27 of the papers) reads as follows:

"Prospects of success: Both parties did not address me on the question relating to the prospects of success in the event where I was to grant condonation for late referral."

[12] It also appears from paragraph 7 that only the reason for the 112 day delay is taken into account and nothing at all is said about the prospects of success in the arbitration award.

[13] The applicant (at paragraphs 25 and 26 at page 12 of the papers as well as paragraph 33.1 at page 15 of the papers) stated clearly that the merits of the case

was debated, in other words, the prospects of success was laid before the arbitrator by both parties. In the absence of any contradictory averments, or even of any answering affidavit, I accept that this had happened during the arbitration proceedings.

[14] The exercise of the discretion not to grant condonation can therefore clearly not be justified in the absence of taking into account the most important factor, that is, the prospects of success.

[15] The decision not to grant condonation therefore falls to be set aside on review.

[16] This is not a matter where I can substitute my own discretion for that of the CCMA to be exercised in terms of section 191(2) of the Act (discussed above). There is no record of these proceedings and it is accordingly not a foregone conclusion whether the discretion should be exercised in favour of the applicant or not.

[17] The appropriate remedy in this review is accordingly to refer the matter back to the CCMA for a consideration anew of a condonation application in terms of section 191(2) of the Act.

[18] In the event, I make the following order:

1. The decision of the first respondent dated 30 September 1998 under CCMA Case No. GA39249 is reviewed and set aside in terms of section 158(1)(g) of the Act.

2. The matter is remitted back to the CCMA for the application for condonation by the applicant to be considered anew by a different commissioner.
3. No order is made as to costs.

BASSON J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

APPLICANT : ADV ROSSOUW

: Jaco Scholtz Attorneys

RESPONDENT : NO APPEARANCE

: 21 JANUARY 1999

AT : *EX TEMPORE* (EDITED VERSION)