

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

CASE NO. J 1879/99

In the matter between:

**NATIONAL CONSTRUCTION BUILDING AND
ALLIED WORKERS UNION**

Applicant

and

VUSI MASINGA AND OTHERS

Respondents

JUDGMENT

SUTHERLAND, AJ:

- [1] The applicant seeks to review the decision of a commissioner of the CCMA. A hearing was conducted by the commissioner as to whether or not the dismissal of a shop steward who was employed by the third respondent was fair.
- [2] At the conclusion of the hearing the parties awaited an award. They waited some considerable time before the award was furnished. It became necessary to launch proceedings to compel the commissioner to furnish the award.

[3] Once the award had been received the applicants were aggrieved at the outcome and thereupon launched review proceedings. The notice of motion seeks to have the award of the commissioner set aside. Prayer 2 of the notice of motion reads as follows:

"That the first respondent [the commissioner] erred in finding that the third respondent [employer] followed a [fair] procedure despite the fact that schedule 8 was not followed. The first respondent misdirected himself in finding that schedule 8 is not part of the law but merely guidelines of good practice."

[4] It is clear, not only from that prayer but from the supporting affidavit, that it was on this single issue that the review of the decision of the commissioner was sought.

[5] The application for review was launched in an unorthodox manner. The notice of motion was filed within the six week period provided for in section 145(1)(b) of the Labour Relations Act but no supporting affidavits were attached. Therefore the application was deficient for want of a supporting affidavit (Rule of Court 7(2) and 7(3)). An affidavit which was signed by Lawrence Nare, a union co-ordinator of the region was filed at a much later time after the expiry of the six week period.

[6] It seems to me self-evident that the filing of a mere notice of motion within the six weeks period is not compliance with the requirement to bring an application within that time period. A notice of motion unaccompanied by any supporting affidavit cannot be regarded as an application and must be regarded as fundamentally defective.

[7] The filing of an affidavit later outside of the six week period, is equally not a procedure sanctioned by the Act or by the rules. Condonation is required in respect of the late application. I do not enter into at this time the debate about

whether or not the six week period provided for in section 145 of the Labour Relations Act is susceptible to condonation or not, I simply assume for the purposes of this judgment that it is so (however see now *Queenstown Fuel Distributors CC v J Labuscagne N.O. & others* PA 3/99 (LAC) 3/11/99 (unreported) in which the court held that condonation is permissible).

[8] The court file was indexed and paginated by someone in the office of the applicant trade Union. No application for condonation is to be found amongst those papers. The first intimation to me of an application for condonation was after the court had convened and it was disclosed from the bar by Mr Kekana, who appears for the applicant, that he had the previous day faxed an application for condonation. This is certainly correct in as much as the respondent received a faxed copy of that application at 11h00. Nevertheless, no copy has found its way into the court file.

[9] I shall assume for the purposes of evaluating these circumstances that it may well be (although there is absolutely nothing to indicate that it is so) that a copy of the condonation application was delivered or faxed to the registrar of this court and for some reason, perhaps negligence in the registrar's office the condonation application papers have not found their way into the court file.

[10] I make that assumption because it is irrelevant to the duty which rests upon an applicant to see to it that the papers which are placed before a judge for a hearing are in proper order. There is an obvious danger that supplementary papers, and especially a supplementary application in regard to a matter which is already set down may not find their way, in time, into the court file. It is therefore, in my view, incumbent upon an applicant to ensure, prior to the hearing, that a person is despatched to the registrar's office in order to verify that the file which will be placed before the judge is in proper order and that any supplementary papers, affidavits, or applications are indexed and paginated together with the other papers to which the judge is required to have regard. Failure to do so means that the

applicant's duty to ensure that the business of this court is not disrupted has not been complied with. It is appropriate, in my view, that an applicant's failure to do so should be marked with displeasure in an appropriate case.

[11] In this particular case, however, I propose to overlook this failure. I do so because of the simplicity of the other issues to which I must have regard which will enable the matter to be disposed of finally rather than to remove the matter from the roll and have the applicant bring the matter *de novo*. I do, however, want to make it clear that this is an indulgence to the applicant and there ought not to be imagined that such a practice in this court can be founded upon this indulgence.

[12] The condonation application is scant. It refers to the delay in furnishing the affidavit together with the notice of motion but the only reason of substance which is offered is that Mr Nare, the regional organiser, had a busy schedule and it was not possible to obtain his input for the purposes of drawing the affidavit timeously. This is a patently inadequate explanation. Any delay in regard to placing a matter before the court must be explained in sufficient detail so that the judge who is called upon to hear the matter may evaluate whether or not the delay is excusable. That practitioners or trade union officials are busy can never be a sufficient reason. It is therefore quite clear that on this ground alone no case for condonation has been made out.

[13] An application for condonation also is required to traverse in detail the merits of the application for relief and to put up a case as to the prospect of success. In this condonation application there is similarly scant mention of the merits of the applicant's cause of action. All that is really said is that schedule 8 to the Labour Relations Act, i.e. the code of good practice in regard to dismissal, provides in clause 4(2) that before disciplining a shop steward notice should be given to the union beforehand, that in this particular case that was not done and the commissioner, in having regard thereto, excused the employer from complying with that provision, without, as is contemplated in terms of clause 8(2) of the

schedule requiring an explanation and reasons for justification for a departure. No mention is made of the merits of the case articulated in prayer 2, quoted above. It is therefore evident that the application for condonation addresses the merits or demerits of a case different from that which is put up and different from the relief which is sought in this review application.

- [14] I may add that in regard to the grounds for review there are no merits whatsoever. The award of the commissioner states, in regard to the challenge to the fairness of the disciplinary enquiry held by the employer for want of notice being given to the trade union in terms of clause 4(2) of schedule 8, as follows:

"The other contention raised by him is the issue of procedural defects in the disciplinary hearing in that the applicant being a shop steward, the union was not informed of the disciplinary hearing as required in the code of good practice (schedule 8, section 4(2)). Schedule 8 is not part of the law but merely guidelines of good practice. The fact that the employer did not advise the union prior to the disciplinary enquiry does not make the process defective. The applicant was given a fair hearing."

- [15] It is quite clear that the commissioner applied his mind to the injunction in the guidelines and it is quite clear that he came to the conclusion that the mere absence of such notice did not result in an unfair result. In doing so, whether consciously or unconsciously, he had the support of this court. In *Moropane v Gilbeys Distillers & Vintners and Another* (1997) 10 BLLR 1320, Landman J dealt with the force of codes of practice and *inter alia* had the following to say, quoting from certain remarks in an English text, I T Smith and J C Wood *Industrial Law*, 4th ed. (B) at 266:

"Compliance with the codes' provisions on matters of discipline and dismissal will therefore be most material to an employer's claim that he acted reasonably and fairly although, as the code does not have the force of law, failure to comply with

it will not make the action in question automatically unfair for there may be good reasons for not complying with the facts of a particular case."

In addition, Landman J made the following observation:

"I am of the opinion that the observations by Wood and Smith apply to the code of good practice set out in schedule 8 to the Act. These guidelines do not give rise to rights, they are incapable of supporting an independent action, at least not in this court. Only when their exercise or non-exercise lead to an unfair dismissal are they recognised and can the results of a failure to abide by them be remedied."

[16] One of the signal features of the applicant's affidavit is that it is bereft of any allegations, not to mention supporting facts, which demonstrate that the failure to comply with the injunction to notify the union before the disciplinary enquiry, led to an unfair dismissal.

[17] The upshot of these considerations is that the principal enquiry in a review under section 145, which is to enquire whether or not the commissioner committed an irregularity, must be answered in the negative. Even if it is to be supposed that the decision by Landman J in the *Moropane* decision was wrong in law, it can hardly be said that a commissioner, who is vested with no discretion to overrule a decision of this court, was acting in an irregular manner by following that decision and applying it in the decision which he himself made. It is quite evident, therefore, that the review application in the terms brought is wholly without merit, and on that ground no case for condonation could be made out.

[18] Accordingly condonation must be refused.

[19] There are, however, other features of this matter which call for comment. These

relate to the conduct of the CCMA, and more particularly the first respondent, a commissioner of the CCMA. Mention has already been made of the fact that he unduly delayed the furnishing of his award to such an extent that the applicant was compelled to bring proceedings in order to obtain such award. Such conduct of itself is deplorable. What is equally dismaying is the so-called record which has been filed in response to a notice in terms of Rule 7A of the rules of this court. It is evident that what has been placed before the court in this particular matter is not the record contemplated in 7A but simply the contents of the commissioner's file. That is not good enough. Rule 7A(2)(b) which deals with the procedure for reviews says that a party who seeks to review a decision or proceedings of *inter alia* the CCMA must call upon the CCMA:

"to despatch within 10 days after receipt of the notice of motion, to the registrar, the record of the proceedings sought to be corrected or set aside together with such reasons as are required by law or desirable to provide and to notify the applicant that this has been done".

A record is not simply the commissioner's file. This is not the first time that a cavalier attitude has been taken by commissioners of the CCMA to complying with this rule. It has been the subject matter of at least one previous decision in this court. I refer here to *Ndlovu v Mullins NO and Another* (1999) 20 ILJ 177 (LC). On that occasion I had reason to deal with the failure of a commissioner to provide any record at all. The judgment is at pains to point out what are the obligations of commissioners of the CCMA in regard to complying with the rules of this court which oblige them to provide a record of what they have done. At page 183A the following was stated:

"In my view commissioners should respond to the requirements of the rule by providing the court with an indexed set of documents which were placed before the proceedings and a note, albeit informal, of any evidence adduced in the court

of the proceedings together with a copy of the award handed down".

It seems to me to be axiomatic that a commissioner called upon to provide a record is required to provide some form of report of the proceedings. If evidence is adduced it is inconceivable that there can be no note of that evidence, however truncated or abbreviated it might be. A minute of the proceedings is a central part of the record and must be provided together with all the other documents which were available to the commissioner when he considered the matter. It is not appropriate for commissioners of the CCMA to have no regard to the remarks of this court in respect of how records are to be presented. Perhaps the time has come for litigants to seek costs orders against the commissioners of the CCMA and the CCMA itself in order to encourage the appropriate degree of responsible behaviour.

[20] Lastly, I want to deal with the matter of costs. In this particular case it is evident that the review was from inception ill-founded. There was no viable cause of action. It can only be assumed that when the papers were framed they were framed in ignorance of the decision in *Moropane*. The earliest time when the applicant was pertinently notified of the defect in its case was when the respondent filed its answering affidavit. The applicant then had an opportunity to reconsider its position and to withdraw the application. If the question upon which the applicant's case depended, was arguable, no criticism of the failure to withdraw the application could follow. But as the sole issue in the case was whether or not a commissioner committed an irregularity by holding that the guidelines in schedule 8 do not have the force of law and are merely guidelines, and there is the clearest authority for that proposition, it seems to me that to raise the issue was not the result of an appropriate degree of diligence.

[21] In addition the applicant has notwithstanding the irregular launch of the proceedings, waited until the very last minute to bring a condonation application

which was itself inadequate and has persisted therewith to the very hearing itself. There is, in my view, no reason which could be put up to suggest that a costs order in favour of the respondent would be inappropriate. Accordingly I propose to make such an order.

[22] In the circumstances the application is dismissed together with an order for costs in favour of the Respondent.

SUTHERLAND AJ

PLICANT : MR L S KEKANA
: National Construction Building and Allied Workers
Union.

PONDENT : MR C ORR
: Deneys Reitz Attorneys

: 19 NOVEMBER 1999

TT : *EX TEMPORE*