VIC & DUP/JOHANNESBURG/LKS

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

DATE: 19 June 2000 CASE NO. J3104/99

In the matter between:

SACCAWU AND OTHERS Applicants

and

CASH PAYMASTER SERVICES (PTY) LTD Respondent

J U D G M E N T

LANDMAN, J:

[1] Cashmaster Services (Pty) Ltd dismissed 18 employees on 3 April 1998 for embarking on an unprotected strike. The employees were members of SACCAWU. The union referred a dispute concerning their dismissal to the CCMA on 12 May 1998. The CCMA provided a certificate that the dispute remained unresolved. Thereafter the union referred the dispute for arbitration. The employer objected to this as it alleged that the CCMA lacked jurisdiction.

[2] The commissioner, who apparently provided the certificate of 12 May, was also the commissioner who was to hear the arbitration. He purported to

issue a replacement certificate on 13 November 1998. This certificate indicated that the dispute was still unresolved.

[3] The union office at Nelspruit decided to institute proceedings in the Labour Court. A copy of Form 1 was faxed to the registrar of this court on 23 March 1999. The registrar did not respond to this request. The responsibility for this matter was subsequently passed to the Johannesburg office of the union. A fresh application for a case number was made on 12 August 1999. A statement of case was thereafter filed on 23 August.

[4] On 24 January 2000 the union filed an application for the condonation of the late filing of the statement of claim "within the period of time reasonably expected of them to do though the Labour Relations Act applicable before the amendment did not prescribe the period of time within which a referral must be done".

[5] Mr Zibi, who appeared for the union, however stressed that the application was made ex abuntanti cautela because, he contended, the application was in fact launched timeously. The employer opposes the application.

[6] The union was obliged to refer the dispute to this court within a reasonable period of the failure of the CCMA to resolve the dispute on 12 May 1998. The dispute was, however, referred on 23 August 1999.

[7] I should mention that in terms of the amendment to section 191(11) of the Labour Relations Act 66 of 1995, which came into effect on 2 February 1999, any outstanding dispute was required, at the best for the

union, to be referred within 90 days of that date.There is no merit in the contention that this amendment did not apply to disputes which had arisen prior to it coming into operation.

[8] If, however, I were to assume that the certificate of 13 November 1998 is a valid one, then a reasonable time within which to refer the dispute would have been about three months but possibly longer. In any event the union thought that by 23 March 1999 it was reasonable to refer the dispute to the Labour Court. This is why the union applied for a case number.

[9] The result, on the premise supposed above, is that the union must explain the delay between 23 March 1999 and 23 August of the same year, a period of some five months. The explanation which is tendered does not deal satisfactorily with the period. The Nelspruit office made telephonic enquiries and referred the matter to its Johannesburg office on 29 May. This office began to attend to the matter at the beginning of July and applied for a case number to refer the dispute on 23 August. The delay is, however, even greater and less acceptable if the validity of the certificate of 13 November 1998 and the circumstances surrounding and the union's conduct regarding these proceedings is taken into account.

[10] The certificate which was issued on 13 November 1998 is, in my opinion, invalid. Once a commissioner issues a certificate the commissioner is functus officio unless possibly both parties request an amendment. See Ruijgrok v Foschini (1999) 20 ILJ 635 (LC). There is no reason to believe that the union itself believed that the certificate was properly issued. If, however, there was such a belief it was utterly

unreasonable. The union was negligent in referring this dispute for arbitration when it was clearly a matter which should have been referred to the Labour Court. It ought to have referred the matter to the Labour Court by 13 November at the very latest. Because it was not referred by this date, or indeed earlier, it was incumbent on the union to explain honestly and openly why this was not done. The union was obliged to explain its mistake and the circumstances surrounding the issue of the replacement certificate. This has not been done.

[11] The affidavits which have been filed in support of the application had not been approached with the requisite care and diligence. The union has not seen fit to explain the position prior to 13 November fully as it was obliged to do so. It should at least have confessed its mistake and explain how it came about.

[12] The union submits that it has good prospects of success. Its case is stated very simply and blandly. It says the employees were engaged in an essential service, they were dismissed for striking without being given an ample and sufficient ultimatum and without any explanation in their vernacular of the ultimatum. They say the employer failed to inform the union of their decision to dismiss the employees, claiming that it did not recognise the union.

[13] The employer in its answering affidavit has set out in great detail the factual circumstances surrounding the decision to dismiss the employees. This clearly leaves bold allegations of the union in doubt. I am of the opinion that the union's prospects of success, when weighed up against the case which is made out by the respondents, and particularly when viewed against the briefs which were issued and the warning that

unlawful strike action could lead to dismissal, do not assist the union.

[14] The employer stated that it will suffer prejudice if this dispute were to be referred. That must clearly be the case because a long time has elapsed between the date of dismissal and the date that this matter will come to trial.

[15] This is, in my opinion, a case where the application for condonation should be refused. It is refused and the applicants are ordered to pay the respondent's costs of the main application and this application, jointly and severally, the one paying the other to be absolved.

DATED AT JOHANNESBURG ON THIS 21st DAY OF JUNE 2000

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A A LANDMAN

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

: 15 June 2000

t: 19 June 2000

nt: Mr Zibi union representative

ent: Adv T. C. Tiedemann instructed by Webber Wentzel Bowens