

REPORTABLE

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

Case no: J 295/00

In the matter between:

PROSPECT ENGINEERING

Applicant

and

CCMA AND OTHERS

Respondents

J U D G M E N T

BASSON, J:

- [1] This is an application for condonation for the late filing of a review application.
- [2] The applicant seeks to review the arbitration award in an unfair dismissal dispute in terms of which the commissioner, the second respondent, who acted under the auspices of the first respondent, the Commission for Conciliation, Mediation and Arbitration ("the CCMA"), held that the employee party, the third respondent, had proven in terms of his *onus* in this regard that he was dismissed by the applicant, that is, the employer party before the arbitration, and also held that the dismissal was unfair, both procedurally and substantively, and awarded compensation.
- [3] In approaching condonation applications of this kind it is of the utmost importance to note that section 145(1)(a) of the Labour Relations Act, 66 of 1995 ("the LRA") contains a prescription period of six weeks: "Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the commission may apply to the Labour Court for an order setting aside the arbitration award - (a) within six weeks of the day that the award was served on the applicant...".
- [4] It is common cause in this matter that the applicant brought the review application one week outside of the prescribed six week period.
- [5] The important consideration is the fact that the Labour Court is given no express power at all by the LRA to condone such lateness.

- [6] This fact has resulted in a debate in the Labour Court as to whether the Court is empowered at all to grant condonation for such lateness.
- [7] The Labour Appeal Court has delivered a decisive judgment in this regard in the matter of Queenstown Fuel Distributors CC v Labuschagne NO and Others [2000] 21 ILJ 166 (LAC) per Conradie JA (with Nicholson JA and Mogoheng AJA concurring).
- [8] In the facts before the Labour Appeal Court in this case the period of lateness was also one week.
- [9] The Labour Appeal Court was at pains to point out that this did not mean that there was substantive compliance with the provisions of section 145(1)(a) of the LRA (*supra* at paragraph [3]) and considered all the arguments that were raised in favour of the Labour Court having the power to condone, despite the LRA not giving such express power to the Labour Court.
- [10] After deciding that the prescriptive provisions contained in section 145(1)(a) of the LRA were merely directory, the Labour Appeal Court came to the conclusion that the Labour Court did have such power or discretion. However, such discretion can only be exercised within very narrow parameters.
- [11] I quote from paragraph 24 of the judgment (at page 147F-H):
"In principle, therefore, it is possible to condone non-compliance with the time limit. It follows, however, from what I have said above, that condonation in the case of disputes over individual dismissals will not readily be granted. The excuse for non-compliance would have to be compelling, the case for attacking a defect in the proceedings would have to be cogent and the defect would have to be of a kind which would result in a miscarriage of justice if it were allowed to stand".
- [12] The Labour Appeal Court continued as follows at paragraph 25:
"By adopting a policy of strict scrutiny of condonation applications in individual dismissal cases I think that the Labour Court would give effect to the intention of the legislature to swiftly resolve individual dismissal disputes by means of a restricted procedure, and to the desirable goal of making a successful contender, after a lapse of six weeks, feel secure in his award".
- [13] The successful contender in the present matter is, of course, the third respondent, Mr P J Weber.
- [14] The test laid down by the Labour Appeal Court is in keeping with the objects of the LRA to provide for the efficient adjudication of unfair dismissal disputes. The legislature saw fit to prescribe a prescriptive period of six weeks and also saw fit not to grant the Labour Court any express power to condone any lateness.
- [15] It is then in terms of this principle of very strict scrutiny of condonation applications that I proceed in

this matter.

- [16] I turn first to the excuse for non-compliance. In this regard I believe that the following is important.
- [17] When the application for review was eventually filed one week late on 2 February 2000 it was not accompanied by any application for condonation. When the third respondent delivered an answering affidavit in the application for review, it was the third respondent who pointed out that an application for condonation was required.
- [18] In terms of the replying affidavit some excuse was then proffered by the applicant. However, a proper application for condonation was only filed much later, that is, on 21 September 2000.
- [19] One would have expected, in view of the urgency to review arbitration awards swiftly, in keeping with the principles laid down by the Labour Appeal Court, for the application to have been accompanied by a proper application for condonation already on 2 February 2000.
- [20] I now turn to the explanation offered for the lateness.
- [21] The explanation offered was, as I pointed out, dealt with in the replying affidavit which, in my view, was not really a regular step in that a substantive application for condonation was called for.
- [22] However, I will nevertheless take into account the explanation offered:
"The application was thus made one week outside of the six-week period which is not an unreasonable delay, taking into account that the offices of the applicant and its representatives were closed from 16.12.99 until 12.01.2000".
- [23] It is important to note that, between 12 January 2000 and 2 February 2000, a substantial period of time elapsed.
- [24] Moreover, given the urgency of such applications, it is strange that this delay remains completely unexplained.
- [25] Turning to the substantive application for condonation, the matter is dealt with in even a more dismissive fashion in that the only explanation that is offered for the length of delay is, more or less, the same allegation that the offices of the applicants and its representatives were closed as from 16 December 1999 until 12 January 2000. It is then stated at paragraph 5:
"The applicant was not in wilful default of the time period set out for the review application as it could not file earlier due to the constraints of the season".
- [26] Again, the period between 12 January 2000 and 2 February 2000 is left completely unexplained, although the

festive season, had of course, come to an end before the papers were filed, namely, according to these allegations, the offices opened already on 12 January 2000.

- [27] What concerns me most is that there is nothing in the application for condonation (which has been filed very late) that shows any urgency on the part of the applicant. In fact, in my view, it shows indifference to the fact that there are good policy considerations in terms of which applications of this nature must be brought within the prescribed six-week period as identified by the Labour Appeal Court (see paragraph [12] above). This is especially so because there is no express power to grant such condonation application vested in the Labour Court by the provisions of the LRA.
- [28] In the event, in evaluating the excuse for non-compliance *in casu*, it certainly cannot be said that such excuse is compelling.
- [29] In terms of the test enunciated above (at paragraph [11]), the excuse for non-compliance would have to be compelling for me to grant the application for condonation.
- [30] There was, however, a somewhat lackadaisical attitude on the part of the applicant in bringing this application for condonation.
- [31] I believe that this would already be fatal to the application for condonation as this requirement is set by the Labour Appeal Court in clear and concise terms as a separate requirement in terms of the test of strict scrutiny of condonation applications (see paragraph [11] above).
- [32] However, in terms of the judgment in Melane v Santam Insurance Co. Ltd 1962 (4) SA 531 (AD) a basket approach was indicated, in terms of which a court deciding a condonation application weighs up the different factors such as the degree of lateness, the explanation therefor and the prospects of success. If I am wrong to hold that the absence of the one factor, that is, the existence of an excuse for the non-compliance which is compelling, is fatal to the applicant's case, I will also weigh the other relevant factors. However, I will do so still in terms of a policy of strict scrutiny as required by the Labour Appeal Court in the above decision (at paragraph [11]).
- [33] In other words, when it comes to an evaluation of the other two factors, especially the prospects of success, the following test must be adopted. The case for attacking a defect in the proceedings would have to be cogent and the defect would have to be of a kind that would result in a miscarriage of justice if it were allowed to stand.
- [34] I believe that what the Labour Appeal Court had in mind, in postulating this test, was whether the defect was of a serious nature. Such defect would, of course, be a defect where the commissioner is guilty of misconduct, or a gross irregularity, or where the commissioner exceeded his or her powers.

- [35] A less serious defect would be, in terms of the wide test of review, as enunciated in the case of Carephone (Pty) Ltd v Marcus NO & others (1998) 19 ILJ 1425 (LAC), that the award is simply not justifiable in terms of the reasons given for it.
- [36] The applicant does contend that the second respondent, the commissioner, committed a gross irregularity.
- [37] In assessing these arguments of the applicant and the counter-arguments of the respondent I am mindful of the caution expressed by Holmes JA in the case of Melane v Santam Insurance Co. Ltd (above at paragraph [32]) that a discussion on the prospects of success should not be discursive. Nevertheless, I have properly considered the arguments by the applicant in regard to the alleged gross irregularity.
- [38] The applicant's arguments were based on the provisions of section 141(a) of the LRA, which reads as follows:
"If the dispute being arbitrated is about the fairness of a dismissal and a party has alleged that the reason for the dismissal relates to the employee's conduct or capacity, the parties, despite section 138(4), are not entitled to be represented by a legal practitioner in the arbitration proceedings unless -
(a) the commissioner and all the other parties consent".
- [39] This ground of review was not identified in the founding affidavit. It is only after having received the record that the applicant, in filing its Rule 7(A)(8) notice, set out, this ground of review as a so-called point *in limine* and alleged that the second respondent did not perform his duty in determining the right to legal representation of the third respondent before continuing with the arbitration in terms of section 141(a) of the LRA. The applicant also did not raise this "point *in limine*" at the arbitration.
- [40] This contention was further described in the replying affidavit by the applicant (at paragraph 6):
"As regards agreement to legal representation before the arbitration, the second respondent never made a ruling about this issue as per 141(a) of the LRA 66/1995; therefore the applicant prays that the honourable court uphold this point" (emphasis supplied).
- [41] It appears that what the applicant had in mind was that the second respondent (the commissioner) was obliged in terms of section 141(a) of the LRA (*supra* at paragraph [38]) to make an express ruling in regard to legal representation. The record is completely silent on whether this was done.
- [42] In this regard the following must be noted (at paragraph 9.1 of the answering affidavit):
"The applicant and the third respondent agreed to legal representation before the arbitration process, also being the reason why the applicant never raised this point *in limine* at the arbitration" (emphasis supplied).
- [43] This allegation was not denied. In other words, the situation that existed at arbitration was that the two

parties had agreed to legal representation as is envisaged in terms of section 141(a) of the LRA (quoted above at paragraph [38]), and it was now up to the commissioner to also add his “consent”.

- [44] The objection or the ground of review that is relied upon by the applicant in this regard is apparently that the commissioner made no “express ruling” (as it is phrased by the applicant).
- [45] I was also referred by the applicant to the case of Ndlovu v Mullins and Another (1999) 20 ILJ 177 (LC) *per* Sutherland AJ.
- [46] However, this case is clearly distinguishable as on the facts. In the facts before the Court in this case the employer was represented at the arbitration proceedings by a person who styled himself as a legal representative. The employee stated at the time that he believed the person to be a director of the company. The commissioner informed the Court that she had been aware that the person was a legal practitioner and that she had knowingly allowed him to represent the employer.
- [47] In these circumstances, the Court held that the commissioner was not entitled to infer that the employee or his representative was aware that the person who represented the employer was a legal representative.
- [48] It was further held that constructive knowledge, by virtue of the possibility that his representative knew, was not sufficient where the applicant was ignorant of the facts. There was namely no reason to apply the notion of tacit consent in the interpretation of section 141(a) of the LRA.
- [49] The facts *in casu* are markedly and principally different. Both parties had namely agreed to legal representation and both parties also knew that the other was legally represented.
- [50] Clearly, the commissioner also knew this as it was not stated anywhere that the commissioner was unaware of the real facts.
- [51] I am of the view that, even if it can be said that the commissioner did not exercise his discretion in this regard, in other words, that the commissioner did not add his consent in an explicit manner at the commencement of the arbitration proceedings, and only “tacitly” agreed to the legal representation that was agreed to between the parties, such irregularity in the proceedings would not constitute a gross irregularity or an irregularity of the kind that renders the award reviewable.
- [52] A party suffers no prejudice where a party appears before the arbitration and agrees to legal representation both for itself and for the opposing party, and then proceeds with arbitration on that basis.
- [53] In fact, it would seem rather opportunistic to later turn around and allege that there was a gross defect in the

proceedings because of the fact that legal representatives represented the parties - something, of course, that both parties had agreed to in the first place.

[54] In the event, it would appear that the prospects of success in regard to an alleged “gross irregularity” are not strong *in casu*.

[55] In regard to the prospects of success on the wider basis of review, that is, whether the award was justifiable in relation to the reasons given for it, the founding affidavit was not very clear. I quote from page 5:

"Therefore it is the applicant's contention that the commissioner did not apply his mind to the employer's version and subsequently an unfair finding was made".

[56] In this regard reliance is also placed on the finding of the commissioner (the second respondent) at page 7 (paragraph 4, line 1) of the record:

"I reject the employer's version and accept that of the employee".

[57] In terms of the heads of argument, it also appears that the decision is attacked especially on the basis that the commissioner allegedly wrongly decided the probabilities and that the commissioner wrongly rejected the credibility of the three witnesses who testified on behalf of the applicant. As was stated above, the finding of the commissioner that is being attacked, is that the third respondent had proven, in terms of his *onus* in this regard, that he was dismissed at a meeting on 22 February 1999. It was the applicant's version that it merely suspended the third respondent with pay.

[58] I am again alerting myself to the fact that I am now entering the merits to such an extent that it may become discursive. The findings of the commissioner was also criticised in regard to his discussion of the question whether the applicant was dismissed or suspended:

"I reject the employer's version and accept that of the employee. Mr Putter, the main witness for the employer, stated that the applicant was suspended without any notice. The employer has, however, indicated that he had resigned in the notice to the medical aid. The assertion that the applicant has been suspended is an afterthought and is not consistent with the probabilities."

[59] The commissioner, however, did not appear to have discussed the issue of why he rejected the employer's version and why he felt that the probabilities favoured the employee's version.

[60] I was alerted to aspects of the applicant's witnesses' testimony that indeed were contradictory. In this regard the most important contradiction was that between Mr Putter and another witness of the applicant (at pages 116 and 137 of the record respectively). In regard to the most crucial question whether the applicant was suspended, the employer sought to rely on a letter dated 22 February 1999 (at page 200 of the papers) in terms

of which it was made clear that the employee was being suspended.

[61] However, the evidence in regard to this letter was not satisfactory in that Mr Putter (at page 116 of the record) indicated that a letter was written and that such letter was given to the applicant. I quote from page 117:

"Julle het persoonlik daardie dokument persoonlik vir mnr Weber in sy hand gegee. -- Ja".

This appears to be in direct contradiction of the evidence (on page 136 of the record) where the other witness for the applicant was cross-examined and stated:

"No, the date on which, his last day in your employment, the day when, did you hand him a copy of that suspension letter? -- No."

And a little bit later he was questioned on this:

"But were you in the meeting with them or...-- Yes, yes.

The day of the suspension? -- Yes, yes that day."

[62] It appears from this contradiction that there was at least some basis on the material available to the commissioner at the time to have doubted the credibility of these witnesses.

[63] There were also some other probabilities in favour of the third respondent's case to which I was alerted to (see pages 20 and 21 of the bundle). There were letters written by the representatives of the applicant to the third respondent in terms of which, on 2 and 8 March 1999, it was indicated that the third respondent was suspended with pay.

[64] Further, it was also indicated that the third respondent was only paid for February 1999. This appears to be in contradiction of the allegation that he was suspended with pay.

[65] There are also other probabilities which favoured the applicant's case and other probabilities which favoured the respondent's case.

[66] My reason for entering into the merits of the dispute was merely to show that there was at least some material available to the commissioner which could have justified his decision to reject the evidence of the witnesses of the applicant and to accept, on the probabilities, the version of the third respondent.

[67] In the event, the conclusion is that the prospects of success, even when applying the so-called wide test of justifiability, are not very strong.

[68] In fact, weighing this up against the test enunciated by the Labour Appeal Court (at paragraph [11] above), namely that the case for attacking the defect in the proceedings would have to be cogent and that the defect would have to be a kind which would result in a miscarriage of justice if it were allowed to stand, it is clear that

no such defect presented itself *in casu*.

[69] In the event, after having carefully weighed up the different factors in deciding the application for condonation, it is clear that, first, the applicant has failed to provide an excuse for the non-compliance which is compelling.

[70] Second, this was also clearly not a case where the defect that was attacked was “cogent” and was of the kind which would result in a “miscarriage of justice” if it were allowed to stand.

[71] In exercising my discretion whether to grant condonation or not, which is, I reiterate, a discretion of strict scrutiny of the condonation application on the basis of good policy considerations, the application for condonation is refused.

[72] In the event, the application for review of the arbitration award must fail.

[73] As this matter has been placed together with the application to make the said arbitration award an order of court in terms of section 158(1)(c) of the LRA, such application must succeed.

[74] I make the following order.

1. The application for review is dismissed with costs.
2. The arbitration award is made an order of court in terms of section 158(1)(c) of the LRA.

Basson, J

: 20 October 2000 (*ex tempore*)

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