

REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA

CASE NO: C483/2000

In the matter between:

SAFIYA DE VRIES

APPLICANT

and

LIONEL MURRAY SCHWORMSTEDT & LOUW

RESPONDENT

JUDGMENT

WAGLAY J:

28 This matter was set down for the hearing of the condonation application brought by the Applicant as well as for the holding of the pre-trial conference. Both parties agreed that the holding of the pre-trial conference be postponed pending the decision of the Court on the condonation application.

28 Briefly, the background to the application is that the Applicant was dismissed by the Respondent on 31 May 1999 allegedly on the basis of its operational requirements. The Applicant contending her dismissal to be unfair referred the matter to the CCMA for

conciliation, the referral was made on 8 June 1999.

28 On 6 August 1999, more than 30 days after the referral, the CCMA wrote to the Applicant and the Respondent apologising for the delay in processing the referral and advised the parties that it would schedule the hearing of the conciliation notwithstanding the expiry of the time period for it to do so unless the parties revert to it within 3 days, ie. it will assume that the parties have consented to the extension of the 30 day period within which the CCMA was required to conciliate the dispute if neither party reverted to the CCMA within 3 days of 6 August 1999.

28 On the very date as the CCMA addressed the letter to the parties the Respondent by letter informed the CCMA that it was not consenting to the extension of the 30 day period. Notwithstanding Respondent's refusal to consent to the extension the CCMA proceeded to schedule a conciliation meeting for 18 August 1999. Respondent did not attend such a conciliation meeting, Applicant did, and the matter of course remained unresolved. The CCMA however failed to issue a certificate on 18 August 1999 certifying the non-resolution of the dispute.

28 On 12 September 1999 Applicant's then attorneys of record by letter requested the CCMA to issue a certificate indicating that the dispute between the Applicant and the Respondent remained unresolved. To this letter the CCMA failed to respond. The Applicant's said attorneys between the period 22 September and 13 October 1999 contacted the CCMA telephonically on various occasions effectively pleading for the certificate of non-resolution of the dispute - despite various promises made by the CCMA no certificate was

forthcoming.

28 From the period 13 October 1999 to 6 May 2000 Applicant, according to the papers before me, did nothing at all in respect of this matter. On 9 May 2000 and 8 June 2000 Applicant's new attorneys of record addressed letters to the CCMA enquiring about the certificate referred to above and on 14 June 2000 a certificate was, at last, forwarded to Applicant's attorneys. The certificate forwarded wrongly reflected the date of the referral of the dispute by the Applicant as 8 June 2000 instead of 8 June 1999. An amended certificate was then issued to the Applicant's representatives on 21 June 2000 and on 5 July 2000 Applicant referred the dispute to this Court for adjudication.

28 In its Statement of Case Applicant sought condonation for its late referral and Respondent raised the point that the manner in which condonation was sought was irregular and defective as it did not comply with the rules of this Court. Applicant then and on 11 September 2000 launched an application for condonation which is before me. Although Respondent opposes the application it has not filed any opposing papers as it opposes the matter on Applicant's papers.

28 The argument raised by the Applicant is that there is no need for her to apply for condonation as the referral of this matter for adjudication is in compliance with s191(11)(a) of the Act. As an alternative, and if this Court finds that the referral was out of time, Applicant argues, there is good cause to grant the condonation which she then seeks.

28 Applicant's argument is that in terms of s191(11)(a) an applicant party has 90 days after

the Commissioner has issued a certificate to the effect that the dispute is unresolved to refer its matter to this Court. This section, so she argues, presupposes that there has to be a certificate issued before the 90 day period can be said to commence. Since the certificate was only issued on 21 June 2000 or at the earliest 14 June 2000 and the referral made on 5 July 2000, she has complied with the provisions of s 191(11)(a) of the Act. There is consequently no need to apply for condonation.

28 Respondent on the other hand argues that the applicable sub-section is 191(5) which provides that if the CCMA fails to resolve the dispute within 30 days from the date on which the dispute is referred to it then the Applicant has to refer the matter to this Court within 90 days after the expiry of the 30 day period. Since the Applicant failed to do so, the Applicant has failed to comply with the prescribed time period. Alternatively, Respondent argues, that once the 30 day period has expired after the referral for conciliation the Applicant is obliged to launch its application for adjudication within a reasonable time which it contends the Applicant failed to do.

28 Before dealing with the merits of the arguments presented, it is appropriate to record the sections which I consider to be relevant to the resolution of this matter.

28.3 Section 191 which deals with disputes about unfair dismissals provides as follows:

“(1) *If there is a dispute about the fairness of a dismissal, the dismissed employee may refer the dispute in writing within 30 days of the date of dismissal to -*

- (a) *a council, if the parties to the dispute fall within the registered scope of that council; or*
 - (b) *the Commission, if no council has jurisdiction.*
- (2) *If the employee shows good cause at any time, the council or the Commission may permit the employee to refer the dispute after the 30-day time limit has expired.*
- (3) *The employee must satisfy the council or the Commission that a copy of the referral has been served on the employer.*
- (4) *The council or the Commission must attempt to resolve the dispute through conciliation.*
- (5) *If a council or a commissioner has certified that the dispute remains unresolved, of it 30 days have expired since the council or the Commission received the referral and the dispute remains unresolved -*
 - (a) *The council or the Commission must arbitrate the dispute at the request of the employee if*
 -
 - (i) *the employee has alleged that the reason for dismissal is related to the employee's conduct or capacity, unless paragraph (b)(iii) applies;*
 - (ii) *the employee has alleged that the reason for the dismissal is that the employer made*

continued employment intolerable; or

(iii) the employee does not know the reason for the dismissal; or

(b) the employee may refer the dispute to the Labour Court for adjudication if the employee has alleged that the reason for dismissal is -

(i) automatically unfair;

(ii) Based on the employer's operational requirements;

(iii) The employee's participation in a strike that does not comply with the provisions of Chapter IV; or

(iv) Because the employee refused to join, was refused membership of or was expelled from a trade union party to a closed shop agreement.

(6) Despite subsection (5)(a), the director must refer the dispute to the Labour Court, if the director decides, on application by any party to the dispute, that to be appropriate after considering-

(a) the reason for the dismissal;

- (b) *whether there are questions of law raised by the dispute;*
 - (c) *the complexity of the dispute;*
 - (d) *whether there are conflicting arbitration awards that need to be resolved;*
 - (e) *the public interest.*
- (7) *When considering whether the dispute should be referred to the Labour Court, the director must give the parties to the dispute and the commissioner who attempted to conciliate the dispute, an opportunity to make representations.*
- (8) *The director must notify the parties of the decision and refer the dispute -*
- (a) *to the Commission for arbitration; or*
 - (b) *to the Labour Court for adjudication.*
- (9) *The director's decision is final and binding.*
- (10) *No person may apply to any court of law to review the director's decision until the dispute has been arbitrated or adjudicated, as the case may be.*

(a) The referral, in terms of subsection 5(b), of a dispute to the Labour Court for adjudication, must be made within 90 days after the council or (as the case may be) the commissioner has certified that the dispute remains unresolved.

(b) However, the Labour Court may condone non-observance of that time frame on good cause shown.”

28.3 Section 135 which is also of relevance, provides:

“(1) When a dispute has been referred to the Commission, the Commission must appoint a commissioner to attempt to resolve it through conciliation.

(2) The appointed commissioner must attempt to resolve the dispute within 30 days of the date the Commission received the referral: However the parties may agree to extend the 30 day period.

(3) ...

(3A) ...

(4) ...

(5) When conciliation has failed, or the end of the 30 day period or any further period agreed

on by the parties -

- (a) the commissioner must issue a certificate stating whether or not the dispute has been resolved;*
 - (b) the Commission must serve a copy of that certificate on each party to the dispute or the person who represented a party in the conciliation proceedings; and*
 - (c) the Commission must file the original of the certificate with the Commission.*
- (6) ...”*

28 Having regard to s 135, the process that is followed is thus: Once a party refers a dispute to the CCMA by completing the necessary forms, the CCMA must appoint a commissioner whose function it will be to attempt to resolve the dispute through conciliation. This the commissioner must do within 30 days from the date the referring party has delivered the referral form duly completed and with proof that a copy thereof was served on the opposite party.

28 Where the commissioner has convened, no doubt with the assistance of the administrative functionaries of the CCMA, a conciliation before the expiry of the 30 day period depending on whether or not a settlement was arrived at between the parties a certificate is issued by the commissioner certifying the result of the conciliation.

28 On the other hand where the commissioner, for whatever reason has failed to convene a

conciliation meeting within 30 days from the date on which the CCMA received the referral, he may enquire from the parties involved whether or not they are agreeable to extend the 30 day period, alternatively the parties themselves without being asked to do so may request that the commissioner convene a conciliation meeting and thereby extend the 30 day period. Where the parties consent to the extension the commissioner must then convene a conciliation meeting and thereafter issue the necessary certificate indicating whether or not the dispute was resolved.

28 Once the 30 day period after the referral to the CCMA for conciliation has expired and there is no agreement between the parties to extend the 30 day period, then the commissioner seized with the dispute has no choice but to issue a certificate to the effect that the dispute referred to the CCMA has remained unresolved.

28 The commissioner must therefore always issue a certificate once a dispute has been referred to the CCMA for conciliation. The original of which is filed with the CCMA and copies served on each of the parties to the dispute.

28 In summary therefore in terms of s 135 of the Act once the CCMA receives a referral of a dispute for conciliation, it must appoint a commissioner to conciliate the dispute, this conciliation must take place within 30 days of the date of referral or any further period that the parties may by agreement consent to, and issue a certificate immediately once the conciliation process has come to an end. Alternatively, when no conciliation meeting has been held within the 30 days period from the date of referral and either of the parties refuse to extend the 30 day period from the date of referral of the dispute to the CCMA, the commissioner is obliged to issue a certificate immediately after the expiry of the 30 day

period.

28 Turning then to s 191 of the Act, this section deals with disputes concerning unfair dismissals and sets out the procedural steps that must be followed by an employee who alleges that his dismissal was unfair.

28.1 Sub-sections 1 to 4 thereof provide that an employee, who disputes the fairness of his dismissal, must refer his/her dispute to conciliation, the time period within which he/she must do so, the body to whom the referral must be made, the manner in which it must be done and what the body to who the referral is made must do.

28.3 Sub-section 5 then sets out when the conciliation stage comes to an end and provides for the employee to either request arbitration or to refer the matter for adjudication. The circumstances in which an employee may either request arbitration or refer the matter for adjudication are then set out in sub-sections 5(a) and 5(b) respectively.

28.3 Sub-sections 6 to 10 then deal with the procedure that must be followed to refer a matter, which should be referred to arbitration, to adjudication and sub-section 11 deals with the time frame within which a matter must be referred for adjudication as provided for in sub-section 5(b).

28 This section does not, however, provide any time frame within which an employee must request arbitration in terms of sub-section 5(a) or where the director of the CCMA decides to refer the matter for adjudication in terms of sub-section 8(b). Where no time frame is

provided action must be taken within a reasonable time. What is reasonable will of course depend on the facts of each case.

28 Based on the what I say in paragraph 18, Respondent is quite correct when it argues that s 191(5) provides that an employee who claims to be the victim of an unfair dismissal must either be possessed of a certificate issued by the body to whom the employee referred his/her dispute for conciliation, to proceed with the next stage towards resolving the dispute or 30 days must have elapsed from the date on which such employee referred the matter for conciliation and the body to whom the referral was made failed to convene a conciliation meeting to resolve the dispute, ie. if conciliation did take place then the employee must have a certificate or if no conciliation was convened within 30 days proceed directly to the next stage.

28 This is so because the phrase commencing with the words "*or if 30 days expired ...*" means that the employee wishing to pursue its alleged unfair dismissal dispute to the next stage of resolution does not have to be in possession of a certificate of non-resolution of the dispute from the "*commissioner*". Had the possession of a certificate been a *sine qua non* for an employee to proceed to the next stage, there would have been no need to include the phrase referred to above.

28 In the circumstances, and notwithstanding s 135 of the Act which obliges a commissioner to issue a certificate, the absence of a certificate (in circumstances where the period of 30 days has expired since the referral was made to the CCMA or Council without a conciliation meeting being convened) is not a bar to an employee to proceed to the next

stage to have his/her dispute resolved, ie. to refer his/her dispute to either arbitration or adjudication as set out in sub-sections 5(a) or 5 (b) of s 191. In fact, the employee's right to proceed to the next stage of having his/her dispute determined vests as soon as one of the events listed above occurs.

28 The Applicant therefore having referred her dispute for conciliation to the CCMA on 8 June 1999 was entitled to refer her dispute to this Court, as her dispute was one which had to be referred for adjudication in terms of sub-section 5(b), as and from 8 July 1999 not only because the CCMA failed to convene a conciliation meeting by 7 July 1999 but also because the Respondent expressly refused to extend the 30 day time period. The Applicant only launched her referral on 5 July 2000, ie. nearly a year later. Is the referral by the Applicant then out of time?

28 The Applicant's argument is that sub-section 5 does no more than provide an entitlement to an employee to proceed to the next stage to resolving its unfair dismissal dispute. That although she was entitled to proceed against the Respondent as and from 8 July 1999 this entitlement was subject to the provisions of sub-section 11(a) of the Act. In terms of this sub-section, before she could proceed with referring her matter to this Court, she had to be in possession of a certificate from the CCMA. Sub-section 11(a) read literally provides that disputes about unfair dismissals which are required to be referred to this Court as provided for in sub-section 5(b) must comply with two requirements:

28.1 That the employee referring the matter must be in possession of a certificate of non-resolution from the body to whom the matter was referred for conciliation;

28.3 That the matter must be referred to this Court within 90 days of the date of the certificate.

Following upon this literal interpretation of sub-section 11(a), Applicant's referral of her dispute to this Court in July 2000 is timeous.

28 I cannot however accept Applicant's argument. As stated earlier, the purpose of sub-section 11, I am satisfied, is no more than setting a time limit to institute proceedings in this Court. While it is correct that this sub-section states that the proceedings must be instituted "*within 90 days after the council or (as the case may be) the commissioner has certified that the dispute remains unresolved*", the reference to the certificate is no more than a reference to sub-section 5. If this sub-section is to be interpreted to imply that in the absence of a certificate an employee may not proceed to the next stage to resolving his/her dispute then firstly the right granted to him/her in terms of sub-section 5 would be meaningless, more importantly it will make a commissioner seized with a dispute concerning an unfair dismissal dispute the gatekeeper of this Court. This cannot be tenable. The argument that the commissioner does not have a discretion to issue a certificate (s 135 above) means that the issue of a certificate in respect of a dispute properly referred for conciliation is inevitable. This does not, however, make the issue of the certificate a condition precedent for an employee to proceed with his/her dispute. The further argument that the issue of a certificate can be compelled by application to this Court is simply an unnecessary exercise which I am satisfied is futile having regard to the nature and the purpose of s 191 of the Act.

28 In the circumstances I am satisfied that in disputes concerning unfair dismissal, s191(5) sets out as to exactly when the conciliation stage comes to an end and therefore the date from which the employee is entitled to refer its dispute, if it concerns one as set out in subparagraph (b) of sub-section 5, to this Court and s 191(11) deals with the time period within which the referral must be made.

28 For the reasons stated above I am satisfied that Applicant failed to refer her dispute within the time period prescribed by the Act, as her dispute should have been referred to the Court within 90 days of 8 July 1999.

28 Turning then to the application to condone the late referral of her dispute, I do not intend setting out all the requirements which I must necessarily consider before granting condonation. These requirements or factors are set out in numerous other judgments of this Court. In exercising my discretion I have considered the fact that I only have the Applicant's version before me, which is unchallenged. While I take a dim view of the fact that for a period of 6 months Applicant failed to take any steps to pursue her matter, having regard to the fact that Applicant:

28.1 Genuinely believed that without the certificate she could not refer her dispute to this Court and the fact that she had, from soon after the failed conciliation, made numerous attempts to obtain the certificate and did so again in May and June 2000 and on receipt thereof immediately referred her dispute to this Court;

28.3 I am satisfied having regard to the papers filed of record that her prospects of success are

not altogether unreasonable; and

28.3 Since nothing has been raised by the Respondent with regard to the prejudice it will suffer if condonation is granted.

I have decided to exercise my discretion in favour of the Applicant and to grant the condonation.

29 I may also add that in instances where there is /or appears to be ambiguity in respect of when a right vests to institute proceedings, where it is evident that a party's interpretation of that right was erroneous because of the actual or perceived ambiguity then if the error was genuine this court should, as in the present matter, lean in favour of granting the party access to the court, because not to do so would be to go against the spirit of the Act which seeks not only a legal but also an equitable resolution of disputes between parties.

30 Finally with regard to costs, I believe this is not a matter in which costs should follow the result.

31 In the result I make the following order:

Applicant is granted condonation for the late filing of her Statement of Case.

WAGLAY J

APPEARANCE

Adv EA de Villiers Jansen

KG Druker & Associates

Adv P R Hathorn

Lionel Murray Schwormstedt & Louw