

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT PORT ELIZABETH**

CASE NO: P 496/00

IN THE MATTER BETWEEN

ANDRIES KEKANA

APPLICANT

AND

W.F.BENTZ-COMMISSIONER MEIBC FIRST RESPONDENT

**METAL AND ENGINEERING
INDUSTRIES BARGAINING
COUNCIL (MIDLAND REGION) SECOND RESPONDENT**

**GUESTO AUTOMOTIVE
PRODUCTS THIRD RESPONDENT**

JUDGEMENT

NGCAMU AJ:

- 1) This is an application for the review of the award made by the first respondent in refusing an application for condonation for the late referral of the dispute. The application is made under section 158 (1) (g) of the Labour Relations Act.
- 2) The applicant was employed by the third respondent and was dismissed on or about 15th September 1999 due to the alleged theft. An appeal against the decision for the Disciplinary Committee was unsuccessful. Criminal proceedings were instituted against the applicant about the time of his dismissal. The charge against the applicant was withdrawn on 16th May 2000.
- 3) On 30th May 2000 an unfair labour practice dispute was referred to the second respondent. The referral form was accompanied by an affidavit for an application for condonation for late referral. On 20th June 2000 he was informed by the first respondent his late referral could not be condoned. This advice was contained in a letter.
- 4) The applicant now seeks to review the decision made by the first respondent. The letter advising the applicant of the result of the application for condonation reads:
“Application for Condonation A.Kekana v Guestro Forge-Dorbyl
 With reference to the dispute referral together with application for condonation dated the 30th April 2000 the Council wishes to advice that after careful consideration of all the facts it was unable to find good cause for the condonation of the late referral.”
 Apart from the incorrect date of referral recorded as 30th April 2000 instead of 30th May 2000, the letter is complete.
- 5) The grounds of review can be summarized as follows:

5.1. The first respondent advanced no reasons for refusing the late referral.

5.2. There was no adherence to the audi alteram partem rule.

5.3. The first respondent failed to have any or adequate regard to the facts.

It was therefore submitted that the award was irregular and not consistent with the true facts. It was further submitted that the first respondent committed gross irregularity and acted unreasonable.

- 6) On being served with a notice of application for review the first respondent filed an affidavit which is contained on page 21 to 24 of the indexed papers. In the said affidavit, the first respondent sought to give reasons for his decision as invited to do so in the notice of application. The following reasons were advanced:
 - 6.1. At the time of his dismissal the applicant was represented by NUMSA.
 - 6.2. Labour disputes and subsequent criminal action that might flow therefrom are two distinctly separate issues which are neither related nor dependent on each other for either's continuance or finalisation.
 - 6.3. As the applicant was represented by NUMSA at the time of his dismissal and as NUMSA should have had knowledge of the 30 day requirement I was not persuaded that the applicant should be successful in his application for the late referral.
 - 6.4. It further struck me as odd that the applicant consulted an attorney, upon the advices of his legal representative in the criminal matter, and not NUMSA for assistance in referring his dispute and applying for condonation.
 - 6.5. Accordingly I held that the late referral could not be condoned as the applicant had not shown good cause as required by section 191 (2) of the Labour Relations Act No. 66 of 1995.
- 7) In deciding whether the commissioner should have condoned the late referral the court has to only look at the material or information brought before the commissioner and cannot consider any information not brought to the attention of the commissioner.
- 8) The applicant in a condonation application has to meet certain requirements. The well known legal principles were set out in *Melane v Santam Insurance Co. Ltd* 1962 (4) SA 531 (A) and also referred to in *Kortze v Matlhaba & Others* (1999) 6 BLLR 552 (LC). These are the degree of lateness, explanation given therefore, prospects of success, importance of the issue and prejudice to be suffered.
- 9) The referral of the dispute to the second respondent was 8 months late. It was submitted quite correctly by Mr. Grobler for the applicant that the lateness is substantial. The reason for the lateness contained in applicant's affidavit for condonation is that he was under the impression that the criminal proceedings pending against him had to be finalized before he could refer the unfair labour practice committed by the third respondent. Another reason advanced by the applicant is that he was not aware that the unfair labour practice had to be referred within 30 days.
- 10) The commissioner considered the degree of lateness and reasons advanced and came to the conclusion that there was no just cause. The question is whether the award can be disturbed on the grounds raised by the applicant. It was submitted by Mr. Grobler that there was no document indicating that the applicant was assisted by NUMSA. It was therefore submitted that the commissioner should have called the parties to investigate this. In support of this proposition I was referred to the judgment of Pretorius AJ in the case of *Northan v Uunet Internet Africa (Pty) LTD and Others* (1998) 5 BLLR 492 (LC) and the unreported judgment of Jammy AJ in *Charles Moses v P.Roopo NO and Others* case no.J1808/00. In the former case the judge expressed the view that the parties must be given a proper hearing. The judge went further to elaborate on this and mentioned that this must be done where there are difficult questions of law and fact and that everything depends upon the circumstances of the case. I am not convinced that there were any difficult questions of fact or law before the commissioner. I therefore cannot criticize the Commissioner for not summoning the parties to give oral evidence. Whether the applicant was represented by the Union or not, I do not think that would have made any difference in the

commissioner's mind.

- 11) It was submitted that the question of representation was an error as this was not a factor before the Commissioner. I do not consider this as the final nail in the refusal of the condonation and the award cannot be reviewed on this. I will revert to this issue.
- 12) The onus is on the applicant to provide a reasonable and acceptable explanation for the delay. The prospects of success are immaterial and without prospects of success, no matter how good the explanation for the delay, the application should fail. The applicant has advanced the reason that he was not aware that he had to refer the dispute within 30 days. This cannot assist the applicant as it has been accepted that the ignorance of the law is no excuse. I will also revert to this.
- 13) The applicant was obliged to set out facts in a clear and logical manner so as to explain why he was of the view that he had to wait for the criminal proceedings before referring the dispute. He failed to do this in his affidavit. The commissioner was accordingly unable to understand how it came about that he had this belief.
- 14) It was submitted that the commissioner did not consider the prospects of success and prejudice to the applicant. This argument is based on the fact that there is no reference to these two principles in the affidavit of the first respondent. Is this fatal to the award? The first answer to this can be found in the applicant's founding affidavit. The commissioner's award was not attacked on this ground. When the commissioner filed his affidavit, he answered the issues raised in the applicant's affidavit. I am of the view that if this was raised as one of the grounds of attacking the award, a response would have been filed.
- 15) It was not necessary for the commissioner to consider the question of prospects of success and prejudice if there is no good explanation of the long delay. If the commissioner or the court were to ignore the unexplained long period of lateness simply because there are good prospects of success, this would defeat the need for speedy determination of labour matters. A party could approach the court at any time as long as there are good prospects of success. The prospects of success become relevant only when the applicant has been able to give a good reason for the delay and the period and lateness is not long.
- 16) The applicant has submitted that the prospects of success should have been considered by the commissioner. It was submitted that if the commissioner had regard to the applicant's version he would have found there were good prospects. In support of this the applicant in his heads of argument referred to the judgment of Landman J in *Juggath v Shanker and Another* (1999) 2 BLLR 141 LC. This case does not support the applicant's proposition. The referral was only 20 days late and the review was dismissed by the Court.
- 17) I was also referred to the case of *Daniel v Wynford & Another* (1999) 3 BLLR 218 (LC). This case also does not support the applicant's proposition. The employee had not dealt with the prospects of success in his application but the employer did. The commissioner refused the condonation and the court did not interfere with the award.
- 18) Mr. Wade in opposing the application submitted that the prospects of success do not matter if the explanation per se is not satisfactory. In support of this proposition he referred to several cases. In *Chetty v Law Society, Transvaal* 1985 (2) 756 AD at 768 par B the court stated:

“ But this is not to say that the stronger the prospects of success the more indulgently will the court regard the explanation of default. An unsatisfactory and unacceptable explanation remains so, whatever the

prospects of success on the merits. In the light of the finding that appellant's explanation is unsatisfactory and unacceptable it is therefore strictly speaking, unnecessary to make findings or to consider the arguments relating to the appellant's prospects of success" (my underlining).

- 19) In *Glansbeek v JDG Trading (Pty) LTD* (1998) 3 BLLR 223 (LAC) par 12, the court considered an application for condonation for late noting of an appeal. After finding that there was no explanation the court proceeded to say it was unnecessary to deal with the merits of the case. The same sentiments were expressed in the case of *Mkhize v First National Bank and Another* (1998) 11 BLLR 1141 (LC) p1145 par 24:
 "As there was a substantial delay for which no reasonable and acceptable explanation has been advanced, it is unnecessary for me to consider the prospects of success. Without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial". (See also the following: *NUM v Council for Mineral Technology* (1999) 3 BLLR 209 LAC par 18, *Mziya v PUTCO LTD* (1999) 2 BLLR 103 LAC par 8; *Waverley Blankets LTD v Ndima & Others*, *Waverley Blankets v Sithukuza & Others* (1999) 20 IJ 2564 (LAC) par 11; *Allround Tooling(Pty) LTD v NUMSA & Others* (1998) 8 BLLR 847 (LAC) at 850 E-F).
- 20) It is clear from the authorities referred to herein that the court cannot criticize the commissioner for not considering the prospects of success if the applicant has failed to advance an acceptable reason for the delay.
- 21) In *Queenstown Fuel Distributors CC v Labuschagne NO and Others* (2000) 1 BLLR 45 (LAC) the court stated:
 "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."
- 22) It will be noted from the above case that the applicant in individual dismissals has a very heavy load to carry. A party in a condonation application cannot come to court and say he did not know he had to comply with a particular rule of procedure or that he forgot. That would not be a compelling reason. The grounds for attacking the defect must be strong and properly set out. If the defect is not a serious one, the court cannot come to the assistance of the applicant because it must be a defect that would result in a miscarriage of justice if allowed to stand.
- 23) It was submitted that the applicant was not aware of the rules. I have indicated that ignorance of the law is not an excuse and cannot in this case be regarded as a compelling reason for the review. The applicant in the present case had a legal representative an advocate of the High Court before the charge was withdrawn. There is no explanation tendered to explain if he sought advice from his legal representative. The advocate who represented the applicant in the criminal proceedings must have been briefed by an attorney unless he acted on Legal Aid instructions. Applicant had an opportunity to seek advice. I will therefore assume that his decision whether to refer the unfair labour practice depended on his success on the criminal trial. This would have meant, if he was found guilty, he would not have referred any dispute for conciliation. I was referred to the judgment of Koon JA in the matter of *Gilbey Distillers & Vintners (Pty) LTD v Mandla Shinga* case no. DA 14/98 (LAC) (unreported). I do not see how this case assists the applicant.
- 24) The reference by the Commissioner to the representation of the applicant by a trade union is not a defect which if left to stand would result in the miscarriage of justice. The commissioner pointed out that the explanation for the delay could not be accepted.

- 25) There was no request for oral evidence before the commissioner. The commissioner is entitled to decide the application for condonation by reference to the documents before him. He cannot be criticized for not calling the parties. It therefore follows that there is no merit in criticizing the commissioner for failing to have regard to the audi alteram partem rule.
- 26) In the result I find that the commissioner filed sufficient grounds for refusing the condonation. His reasoning cannot be attacked as it was based on the evidence before him. The applicant failed to demonstrate good reason for his delay. Those limited reasons given to the commissioner were found to be inadequate. I have had sight of the documents given to the commissioner by the applicant and cannot find anything which can convince me to interfere with the award. The award was reasonable and based on the material before the commissioner. In the circumstances, the application must fail. The order I make is as follows:
- (a) The application for review is dismissed.
 - (b) The applicant to pay the third respondent's costs.

Ngcamu AJ
Judge of the Labour Court

16th May 2001
Date of hearing

Date of judgment

Advocate Globler instructed by Baard, Lessing & Co.
Legal Representative for the Applicant

Advocate Wade instructed by Chris Baker & Associates.
Legal Representative for the Respondent