RICA "Revised/Interest"

(HELD AT CAPE TOWN)

CASE NO: C504/00

DATE:17-5-2001

In the matter between:

First Applicant

Second Applicant

and

COMMISSION FOR CONCILIATION, MEDIATION FirstRespondent

AND ARBITRATION

Second respondent

Third Respondent

J U D G M E N T

PILLAY, J:

1. This is an application for condonation of the late filing of the review of the award of the second respondent. Initially , the applicants had filed their review application on 17 July 2000. That was timeous, the award having been issued on 5 June 2000. The applicants withdrew the application on 12 September 2000 because they believed: "*The law as it stood at the time did not guarantee an adequate probability of success. Recently published case law, however, now strongly support our view that the award in question falls to be reviewed and set aside.*"

On 26 September 2000, the applicants applied to have the matter re-enrolled. They were advised on 2 October 2000 that the tape recording of the arbitration was available. On 9 September 2000 the applicants were advised that the transcripts were ready. The transcripts were received by the first applicant on 10 November 2000. On 21 November the applicants filed an amended review application. Compliance with Rule

7A occurred only 19 December 2000.

2. The first point that the Court raised *mero motu* is whether the applicants were entitled to have the matter re-enrolled after it had been withdrawn. Mr C Adam, the labour relations officer of the first applicant, conceded that the withdrawal had been unequivocal. Mr MacRobert, for the third respondent, pointed out that abandonment of a cause of action did not necessarily follow a withdrawal of the application. A withdrawal without a tender for costs implied that the withdrawal was not final until the issue of costs had been disposed of. Furthermore, a withdrawal could be for any number of reasons, for example the unavailability of witnesses. A withdrawal in these circumstances did not imply that the claim or cause of action was abandoned . Unlike in the Magistrate's Court where provision is made for abandonment of claims, no similar provision exists in the Rules of the Labour Court. However, Mr MacRobert was reluctant to have the matter disposed of on this basis.

3. In withdrawing this matter in the manner in which the applicants did, they clearly signalled an intention to abandon their cause of action. The withdrawal was a clear and unequivocal admission that they had no case. In the circumstances , the Court finds that the withdrawal of the application on 12 September amounted to an abandonment of the applicants' cause of action and did not entitle it to resurrect it by a further amended application.

4. However, if I am wrong about dismissing the application on this ground, I turn to consider the application for condonation. The period of delay, whether it be the 17 weeks for the filing of the amended application, or the 21 weeks for proper compliance with Rule 7A is considerable. Even if the Court were to accept that the applicants were entitled to change their minds about the merits of the matter, the

reasons for the delay thereafter are inexcusable. There is no explanation as to what steps were taken to expedite the preparation of the transcripts. Furthermore, the ground of the review did not require the transcript, as will become evident below. Even if the transcript was necessary the applicants' ground of review does not demonstrate that it would have taken all of 10 days from 10 November to prepare the application.

5. Turning to the merits of the review, the only ground on which the award is challenged is that the award:

"*is not rationally justifiable in relation to the facts and the law in that there is no rational objective basis justifying the connection made by the second respondent between the material properly before her and the conclusion she eventually arrived at. Applicants contend that accordingly the second respondent committed a gross irregularity in relation to the arbitration process.*"

6. In a nutshell what was being challenged was the Commissioner's decision to admit the evidence of the disciplinary enquiry as evidence in the arbitration without re-hearing the entire matter. The Commissioner had commenced the arbitration by enquiring from the parties what facts were in dispute. The following are extracts from the transcript which resulted in the Commissioner accepting a record of the disciplinary enquiry as evidence in the arbitration (page 573):

"*MR KANNEMEYER: There was misconduct.*

ARBITRATOR: There was misconduct.

MR KANNEMEYER: That's right.

ARBITRATOR: And you say it wasn't intentional?

MR KANNEMEYER: That's correct.

"

MR KANNEMEYER: They say it was.

ARBITRATOR: So now we have got to run the trial all over again?

MR KANNEMEYER: Well I'm arguing mostly on the sanction of dismissal which was in my opinion...

ARBITRATOR: What I am very reluctant to do is to allow a union to raise the plan of inconsistency and then kind of (indistinct) and say actually it wasn't misconduct, it was negligence. Really it's because I want to know what are the issues that are in dispute. There is a dispute of the fact as to what was the nature of the misconduct was it negligence or was it...(intervention)...

MR KANNEMEYER: That's right."

Page 574:

ARBITRATOR: Now do you want me to run another trial?

MR KANNEMEYER: No I don't want you, well all I'm saying is based on the documentation that we, well I don't know if Ms Madden agrees but all the relevant documentation is here, I'm not asking you to bring in all the witnesses again because the trial took us three days and..."

Page 575:

MR KANNEMEYER: More than three days.

ARBITRATOR: I must review this evidence.

MR KANNEMEYER: That is what I am asking from the union side is that you take the documentation, submit it and...(intervention)...

ARBITRATOR: Why should I do that, why should I do that? I'm trying to ask to you, say to you why should I make a fresh finding of fact and it doesn't make a difference doesn't it whether it's negligence or dishonesty."

Page 576:

ARBITRATOR: But I don't want to have a trial-within-a-trial on the facts if I can avoid it. How many hearings do you think a worker is entitled to?

MR KANNEMEYER: Well obviously he is entitled to two hearings and so what I mean...(intervention)...

ARBITRATOR: Should the government sponsor this, is what the CCMA is, it's a government department in terms of many(?). You've already had a three day trial, you've already had an appeal, why should you have another trial in the CCMA on the same facts. Think about that."

Page 586:

"*ARBITRATOR: As I understand I, it, you're saying I can't*

ignore the record I have to go through the record.

MR KANNEMEYER: That is, that would be my submission because...(intervention)...

ARBITRATOR: And make a finding on the record?

MR KANNEMEYER: That is what I'm requesting yes."

7.Mr Kannemeyer had anticipated that the Commissioner might adopt such a procedure. At page 36 of the pleadings at paragraph 12 of the amended application, he said:

"*I further stated that I assumed that the decision as to what form the proceedings should take would really lie within the discretion of the Commissioner and that I would, during the proceedings, seek the latter's assistance to advise the parties thereon.*"

In the extracts quoted above, Mr Kannemeyer in fact acquiesced in the procedure being adopted. It was submitted that Mr Kannemeyer was a lay person and inexperienced in procedures followed by the CCMA. There is a difference between a lay person who represents himself and one who acts as a representative of a litigant. As a representative, the lay person has the same responsibilities and duty of care as any other representative. If the representative does not feel competent to represent the litigant then it should not accept the responsibility. There was no duty on the Commissioner to treat the representatives in anything but an even-handed manner.

vent, the kind of enquiry that the Commissioner made in this case did not relate to questions of law . It related to how best to elicit the facts which were not in dispute.

The Commissioner had a duty to adopt a procedure that was expeditious as well as fair. To this end she was entitled to adopt a robust approach. The suggestion that costs might be awarded was not an idle threat but a real possibility in such proceedings. Furthermore, in view of Mr Kannemeyer's acquiescence, I find that the Commissioner did not pressure the applicants into abiding by her format of the process.

9. At no stage have the applicants indicated what further oral evidence should have been led but which was excluded by the format that the Commissioner adopted. As it transpires, the Commissioner did consider evidence tendered by the parties during the arbitration which was additional to the record of the enquiry. The criticism is purely about the form of the proceedings adopted by the Commissioner, not the substance of the award. The Commissioner had chartered a clever and careful course through the evidence, and avoided making findings on any issue where the facts were in dispute.

10. Finally, I consider whether justice has been done by disposing of this review on a technicality. The second applicant was dismissed for dishonesty for misappropriating R800,00 in July and October 1998. It was common cause that the applicant was responsible for surpluses and shortages of cash and that he was aware that he should report these to the supervisor. It is also common cause that there were surpluses which the second applicant did not report to the supervisor. The Second applicant's explanation for what happened to the surpluses was entirely speculative and uncorroborated.

11. In the circumstances the application for condonation is dismissed. Insofar as costs are concerned the Court awards costs in favour of the third respondent, such costs to be paid by the first and second applicants jointly and severally, the one paying, the other to be absolved. These costs include the costs of the entire proceedings under case number C504/2000, including the costs of the initial application.

PILLAY, J