

(REPORTABLE)

IN THE LABOUR COURT OF SOUTH AFRICA
SITTING IN DURBAN

CASE NO **D1368/02**

DATE 2003/08/06

In the matter between:

JUSTIN N NYAMOMBO Applicant

and

Mondi Kraft First Respondent

PIET VAN HEERDEN Second Respondent

BEFORE THE HONOURABLE MR ACTING JUSTICE GERING

ON BEHALF OF APPLICANT:
IN PERSON

ON BEHALF OF RESPONDENTS:
MR CHADWICK

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SNELLER RECORDINGS (PROPRIETARY) LTD - DURBAN

CASE NO D1368/02

DATE 6 AUGUST 2003

In the matter between

J N NYAMOMBO

and

MONDI KRAFT AND ANOTHER

GERING AJ I don't want to look at any other papers because it's a very simple issue at this stage. The simple issue is the certificate of outcome, that's common cause. The certificate of outcome is dated the 24th January. The 90-day period ended on the 24th April. You didn't even serve it on the other side, but I am accepting that the other side got it in the end, so I'm not making a point of that, but the earliest that you can be said to have made the referral is the 5th November. What I propose to do is this, I don't want to give a final order against you without giving you an opportunity, as you've got legal advisers, to file papers within 21 days of today - within 21 days

of today to file papers in which you apply for condonation for the late referral and if you got some advice at the CCMA you'd better set out who advised you and why you didn't realise that the matter had to come to the Labour Court and why, when you read this document at page 84, you didn't apply earlier for condonation. It may be that another Judge hearing the matter will say that you haven't made out a sufficient case, but I am not going to close the door completely today to you. So Mr Chadwick, what I propose to do is this, and I'm going to order that your costs - today's costs - you're entitled to today's costs.

MR CHADWICK As the Court pleases.

GERING AJ In the exercise of a discretion, it's not easy to do this but I am going to order today that you are given 21 days from today to file and to serve on the other side an application for condonation, explaining why the 90-day period was not complied with, what advice you got from the CCMA, why it is that you waited for so long to file the papers on the 5th November. I'm going to order because they've come to court quite justifiably. They've incurred costs. I'm going to order that you are responsible for the wasted costs of today. It doesn't mean you have to pay them before the matter is heard but you are responsible for the costs of today and in your papers you can deal with the matter but I tell you right now, within the 21 days you must do this and there must be a proper application for condonation. The heads of argument you filed, the 42 pages, they are not heads of argument at all. You must deal specifically and clearly, and you'd better get advice from your legal advisers, specifically and clearly with the question of condonation, why you delayed, why you waited until the 13th August, why when you read these papers, you didn't file an application for condonation earlier. You must set out the papers clearly, in such a way that a Court will be sympathetic and you'd better show that you have reasonable prospects on the merits. I must tell you - I don't know who your legal advisers are and I don't know whether they gave you some assistance in this 42-page document but this 42-page

document is not going to take you anywhere. It's not heads of argument at all. You're going into the evidence that you might want to lead at the trial but before you come to the trial you've got to show that you're entitled to get condonation for the late referral.

MR NYAMOMBO Yes, M'Lord.

GERING AJ I am going to hand back these papers that you handed in. I don't think they are in any way relevant and I don't really like to take papers handed in, so they can go back to you. If there are any papers that you want to refer to, you must annexe them to your condonation application.

ORDER 6 AUGUST 2003

GERING AJ

[1] Within 21 days you must file and serve on the respondents a proper application for condonation for the non-compliance with the 90-day limit, and you must make it clear also what your prospects are on the main action, to show you have got prospects of success.

[2] I order that you are liable for today's wasted costs.

MR CHADWICK I am not quite clear, M'Lord, as to whether what you said earlier has to be part of the order, what has to be dealt with in the application.

GERING AJ That's really more advice. Maybe what I said should be typed out. What I intended to do is to just give him some advice, that he must file a proper application for condonation but I'm telling him now that he must make it very clear why it is that he delayed for so long, why it is that he did not, once he read page 84, why he didn't make an application, and he must deal adequately with the

prospects of success on the merits. It's more advice from the Court.

MR CHADWICK No, I just wasn't clear whether that was to be part of the order or not.

GERING AJ It shouldn't be part of the order. The order itself is simply that within 21 days of today you must file with the Court and serve on the other side a proper application for condonation for the point *in limine* raised on page 84 of the papers, but I'm advising you that when you get your legal advisers to draft the document you must deal fully with who it is from the CCMA who gave you advice that the matter should go to arbitration and not come to the Court and what steps you took and why you didn't deal with the matter expeditiously once you read page 84. That's just some advice. It doesn't bind you or anybody else. It's just I feel that when somebody who is not a lawyer comes to this court and it's quite obvious that he's got a grievance he'd like the matter to be heard by the Court. He's got a grievance. The respondents have behaved completely properly and that's why they're entitled to today's costs. I feel as a matter of justice I don't want to close the door finally, but Mr Chadwick has made out a sufficient case which would justify dismissal and I can assure you that if the matter comes to court and another Judge hears the matter he or she will want to see a very well-drafted application for condonation, otherwise the case will be dismissed at that stage.

MR NYAMOMBE I am sorry. I understand about, Your Worship, the part where you say why I was late. I ...[indistinct]... go back to CCMA and say that, but there is a part I don't understand where you say why did I serve the documents with their client because I have proof ...[intervention]

GERING AJ I don't know whether you did serve or you didn't but if you look at page 84, and I'm simply going on page 84, on the basis that in the end the company has got the papers and what we really need to deal with is the point *in limine*, as such, and the point *in limine* is on page 83 to 84 and then, having set out the times, it states:

"... The referral to this Honourable Court, a
copy of which has never been served upon
the respondent ..."

That's stated on affidavit. Now, whether you did serve or you didn't serve, we're not making a point of that now. It took place, at the earliest, on the 5th November 2002 when the statement of claim was filed in this court. So you have to explain the delay from the 24th April, when the 90 days expired, until the 5th November, and you also have to explain why you did not apply for condonation earlier because it was pointed out to you in paragraph 8 that the referral is accordingly more than six months late and the applicant has failed to make condonation - that should really read, "The applicant has failed to apply for condonation". Even experienced lawyers and counsel sometimes don't get the language quite right. The language is, "And the applicant has failed to make condonation for non-observance of the timeframe prescribed in terms of the Act". I read that as meaning, "And the applicant has failed to make an application for condonation for non-observance of the timeframe prescribed in terms of the Act". And you'd better make - and I order that you are liable for today's costs, the wasted costs caused by this hearing because you did not file papers - you didn't file an application for condonation and your heads of argument are not proper heads at all. So I'm giving you this advice from the Bench just to assist you. By the time it comes to another Judge who will hear the matter, he or she will have to be satisfied that in terms of

the law relating to condonations for late referrals, and this is a very late referral, six months is very late, that you've made out a case.

MR NYAMOMBE In my condonation letter ...[intervention]

GERING AJ It's not a letter, it's an application for condonation. You'd better get your lawyers or your legal advisers to assist you. I don't think you yourself can do this adequately.

MR NYAMOMBE Very well. But I just wanted to make it clear, can I put answers like, "Here is proof I filed it in time. Here is proof"?

GERING AJ I'm not here to give you advice as to how you should draft. I gave you from the Bench a few words of advice, so you won't be able to say at the end you didn't know what to do but I can't tell you how to draft papers. What I'm saying to you is it must be a proper application for condonation. Lawyers know the sort of things that need to be put out in an application for condonation, so if you've got legal advisers they should be able to help you. The point is that you've got to deal with the point *in limine* on pages 83 and 84 of the papers and you have to both have a condonation application for the delay beyond the 90 days and, secondly, you have to have some explanation as to why you didn't file an application for condonation before today. You should have filed an application for condonation as soon as it was drawn to your attention that the matter was late. So that's what your application for condonation must include. I would suggest that ...[intervention]

MR NYAMOMBE M'Lord, I also wrote a letter to them for ...
[intervention]

GERING AJ No, I'm not going to get into a discussion with you. What you did or what you didn't do must appear on affidavit. It must be a properly-drafted affidavit. Understand? I will direct that my remarks in this matter could be transcribed. It may assist both parties. The 21 days starts running from today but you can, if you want, get from the Court a copy of what my remarks are but even without that it should now be sufficiently clear - I've emphasised it sufficiently clearly to you what you must do. It must be a proper application for condonation for the reason why you did not comply with the 90-day period and why you did not apply for condonation when you read pages 83 and 84 of the papers. That's what your application must deal with. Mr Chadwick ...[inaudible] ...
[intervention]

MR NYAMOMBE Yes, I was just going to say ...[intervention]

MR CHADWICK Yes, I think so, M'Lord.

MR NYAMOMBE I was just going to say I also wrote to them but

they were late by six months.

GERING AJ That's got nothing to do with the issue. The issue is you must apply for condonation. You can put whatever you want into your document but what you've got to deal with is a proper application for condonation of your late referral. It may be that the Court might be sympathetic when it hears certain things but they must be put in your affidavit and if you're going to say that you got advice from the CCMA, then you'd better state clearly who gave you the advice and what the advice was. Understand?

MR NYAMOMBE Only that?

GERING AJ Not only that. It must be a proper application for condonation and I'm not going to spell it out more clearly than that. It's not for the Court to advise litigants what to do. I'm just giving you some advice to make it easier for you to deal with the matter because you appear to have great difficulties in handling this matter. It's not a question of tactics. You've come to the court late. You've got to get the Court's permission for proceeding further with the case and unless your condonation application is approved by the Court that'll be the end of the matter and you are responsible for today's wasted costs. Thank you, Mr Chadwick for your assistance.
