

BEGIN DEUR 'N "HEADER" TE MAAK
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IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN CASE NO: JR371/02

2004-06-04

Reportable

In the matter between

QUINTON ROBINSON Applicant

and

ESKOM HOLDINGS Respondents

J U D G M E N T

PILLAY, J: This is an application to review and set aside the ruling of the first respondent commissioner. The facts were that the applicant referred a dispute late for conciliation to the third respondent, the Commission for Conciliation, Mediation and Arbitration ("the CCMA"). He applied for condonation. A conciliation was held on 21 August 2001. The dispute was unresolved and a certificate was issued to that effect. The condonation application was not adjudicated.

When the matter was referred for arbitration, the second respondent employer, ESKOM, raised *in limine* that the commissioner had no jurisdiction to arbitrate as the condonation application had not been adjudicated. The commissioner decided as follows:

"*In limine* point re condonation not having been considered in this matter upheld. Condonation not granted, 8 months late. Reason bad service from consultant unacceptable."

This is a review of that ruling.

It was submitted for the applicant on the issue of jurisdiction, that the commissioner did not apply his mind to the facts and the law and that he erred in upholding the point *in limine*. On the condonation application itself he failed to apply his mind in that the outcome was unsustainable on the facts and the law. Ms Kathree, for the applicant, relied on *Fidelity Guards Holdings (Pty) Ltd v*

Epstein N.O. and Others 2000 21 ILJ 2382 LAC.

For the respondent it was submitted that it validly raised the point *in limine* which obliged the commissioner to consider jurisdiction and the condonation of the late referral. In addition to *Fidelity Guards*, Mr Mokoena for Eskom relied on *Etschmaier v CCMA and Others* 1998 12 BLLR 12 77 (LC); *NOSA and Another v Voltex (Pty) Ltd t/a Electronic Centre and Others* 2000 5 BLLR 619 (LC) and *Van Rooy v Nedcor Bank Ltd* 1998 5 BLLR 540 (LC).

In my view a certificate of outcome is "sufficient proof" that an attempt has been made to resolve that dispute. It says as much at section 157(4)(b) of the Labour Relations Act No. 66 of 1995. That is the jurisdiction conferring instrument that triggers arbitration. It was not open to the commissioner to look beyond the certificate. (*Fidelity Guards* at paras 12 and 14). The issuing of a certificate by a commissioner on behalf of the CCMA is an administrative act. It is a formal decision. To consider its validity is to review that decision. Commissioners may not review each other's decisions. Quite simply, the CCMA may not be a judge in its own cause.

In this regard I am in respectful disagreement with Oosthuizen AJ in *Etschmaier* at para 47 where he takes the view that the commissioner was not performing a review function in such circumstances but enquiring about his jurisdiction. In so far as Van der Riet AJ takes a similar view in *Voltex* above at page 625E-F, I am also in respectful disagreement. However, it seems to me that the focus of the learned judge in this instance was to suggest a pragmatic way to overcome a jurisdictional obstacle at the lowest tier of dispute resolution. One way of overcoming such a difficulty is for the parties to agree that the certificate is invalid. This would be possible where the facts are common cause and the parties wish to avoid the delay, cost and inconvenience of the review by the Labour Court of an administrative act by the Commission, the outcome of which is certain predictable, and the process a mere formality.

Another pragmatic option is for a party who challenges the validity of a certificate to reserve its rights to do so after arbitration when the certificate and, if necessary, the arbitration may be reviewed by the Labour Court unless some

arrangements are made about the timing of such a review, it may have to be accompanied by an application for condonation. The timing of a review application was discussed but not decided by the LAC in *Fidelity Guards*.

However, if the validity of the certificate is challenged because it was fraudulently obtained, the commissioner may consider its validity. In that case there is no decision of the CCMA. There is no administrative act to review. In that instance the commissioner conducts an investigation into a potentially illegal document.

I accordingly find that the commissioner in this case acted *ultra vires* by reviewing the validity of the certificate when he had no jurisdiction to do so. Furthermore, the commissioner failed to apply his mind to the law and facts pertaining to the evidentiary status of the certificate.

In view of this conclusion, it is not necessary for me to consider any of the other submissions by the parties. However, I record that the parties were urged to seriously consider whether the applicant has the capacity to continue his employment with Eskom and to engage each other in a concerted effort at resolving the entire dispute substantively without subjecting it to further formal processes.

The order I therefore grant is in terms of paragraphs 1, 2, 3 and 4 of the Notice of Motion.

JUDGE PILLAY D, J

Edited : 15 June 2004