

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT PORT ELIZABETH

CASE NO. P169/98

In the matter between:

E RUIJGROK

Applicant

and

FOSHINI (PTY) LTD

First respondent

THE COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION FOR

THE EASTERN CAPE

Second respondent

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J U D G M E N T

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BASSON, J:

- 1 This is an application for review in terms of section 145(1), alternatively section 158(1)(g), of the Labour Relations Act 66 of 1995 (“the Act”) in terms of which the applicant (Ms E Ruijgrok) prays for an order reviewing, rescinding, correcting and/or setting aside the arbitration award in case no. EC1417 (dated 27 October 1997).
- 2 The arbitration award that the applicant seeks to review is an arbitration award issued by Commissioner Finnemore under the auspices of the second respondent, the Commission for Conciliation, Mediation and Arbitration for the Eastern Cape (“the CCMA”). The commissioner refused to grant condonation for the late filing of the applicant’s unfair dismissal dispute in terms of the judicial discretion to be exercised under section 191(2) of the Act.

3 Section 191(2) reads as follows:

"If the employee shows **good cause** at any time ... the Commission [the CCMA] may permit the employee to refer the dispute after the 30 day time limit has expired" (my underlining).

4 The time limit referred to here is the 30 day period following the date of the dismissal within which the dispute about the fairness of the dismissal must be referred to the CCMA for conciliation in terms of section 191(1) of the Act.

5 The dispute was referred by the applicant to the CCMA some five months late. At the conciliation on 18 July 1997 Ms Bonthuys, another commissioner of the CCMA, presided over the conciliation proceedings.

6 There is a dispute between the applicant and the first respondent in regard to whether Ms Bonthuys granted so-called final condonation or whether she granted provisional condonation on the basis that the final decision rested with Commissioner Parfith, the Chief Commissioner of the CCMA in the Eastern Cape.

7 In this regard a letter dated 5 September 1997 written by the first respondent to the CCMA (at page 142 of the papers) stated that:

"We wish to bring to your attention a **condonation of late referral** which we believe to be **totally irregular**. The situation arose as a result of the inexperience of Commissioner Bonthuys who permitted

the presence of an attorney in private caucus during conciliation. At the end of the conciliation meeting she quite categorically stated that the condonation was **provisional** and that the final decision rested with Commissioner Parfith and if we wanted to we could submit our case in writing to the commissioner. Subsequently, Ms Bonthuys claimed that her decision was final and binding" (my underlining).

8 This letter was answered as follows by Ms Albertyn, the Acting Director of the CCMA:

" I have investigated the allegations made in your telefax and I am satisfied that the proper procedures were followed in respect of the application for condonation. The CCMA is confident that the procedures followed in **granting condonation** for the late referral of the case at the conciliation hearing allowed both parties an opportunity to state their case whereafter the Commissioner **determined the issue**" (my underlining).

She then proceeded to state:

" In terms of the provisions of the Labour Relations Act, your company is entitled to argue at the arbitration hearing scheduled to take place on Friday, 26 September that condonation should not have been granted in this matter."

9 Eventually the said arbitration proceedings did take place under the auspices of the CCMA where Ms Finnemore, the commissioner in question, presided. This award is dated 27 October 1997 and is attached as Annexure "S" (at page 171 *et seq* of the papers).

10 Commissioner Finnemore assumed jurisdiction, apparently on the basis of the letter written by Ms Albertyn (referred to above at paragraph [8]) stating that the granting of condonation can be reconsidered at the arbitration hearing. The Commissioner set out the following facts on which she assumed jurisdiction (at page 172 *et seq* of the papers):

"The conciliation hearing was conducted on the 18th July 1997. At this hearing Commissioner Bonthuys **condoned the late referral of the dispute**. The employee's representative understood this to be a final decision regarding condonation. The employer's representative, on the other hand, indicated at this conciliation hearing that the employer would lodge objections to the **condonation** at the arbitration to follow. In addition, they contacted Ms S Albertyn, Acting Director of the CCMA, who informed the company by fax on 16 September 1997 that, while she had investigated the allegations made by the employer and was confident that the procedures followed **in granting condonation** for the late referral of the case at the conciliation hearing allowed for both parties to state their case 'in terms of the provisions of the Labour Relations Act, your company is entitled to argue at the arbitration scheduled to take place on Friday 26 September that condonation should not be granted in this matter' " (my underlining).

11 On this basis, Commissioner Finnemore then proceeded to exercise a discretion in terms of section 191(2) of the Act (see the award at page 172 *et seq* of the papers).

12 After the arbitration hearing (where only the condonation issue was pursued) Ms Finnemore returned to the CCMA regional office for confirmation on instructions as to procedure. After discussion concerning the circumstances surrounding the case, the arbitrator was instructed by Senior Convening Commissioner Parfith of the Eastern Cape office to make a decision regarding the matter of condonation which **"may or may not uphold the previous decision of Commissioner Bonthuys"** (the award at page 172 et seq of the papers - my underlining).

13 Clearly, Commissioner Finnemore accepted the fact that Commissioner Bonthuys had made a decision in regard to the granting of condonation and therefore that she had already exercised a discretion in terms of section 191(2) of the Act. Commissioner Finnemore proceeded on the basis that she was entitled to decide whether to uphold the decision of Commissioner Bonthuys, or not.

14 Nowhere in the facts as found by Commissioner Finnemore is it indicated that such decision taken by Commissioner Bonthuys was merely a provisional decision and therefore could be ignored on such basis. In fact, Commissioner Finnemore made it quite clear that what she was entitled to do was to decide whether to uphold or set aside the previous decision of Commissioner Bonthuys.

15 Eventually, Commissioner Finnemore decided to set aside the said decision and to replace it with a

decision of her own not to grant condonation.

16 In my view, this is a review in terms of section 145(1) of the Act as Commissioner Finnemore was clearly conducting arbitration proceedings. In this regard, the Labour Appeal Court in the matter of **Carephone (Pty) Ltd v Marcus N.O. and Others** (case number JA52/98) held that the review of arbitration awards are to take place in terms of section 145 of the Act and not in terms of section 158(1)(g) as it had been held in terms of some conflicting judgments of the Labour Court.

17 In my view, it would not make a difference in the present matter if the decision stands to be reviewed in terms of section 158(1)(g) of the Act. Section 158(1)(g) allows for review "on any grounds that are permissible in law". One of these grounds is the constitutional ground which was found to be a permissible ground for review in terms also of section 145(2)(a)(iii) of the Act.

18 In assessing this so-called constitutional review which finds its basis in section 33 (read with item 23(2)(b) of schedule 6) of the Constitution of the Republic of South Africa Act 108 of 1996 ("the Constitution") on the basis of administrative action which must be "justifiable in relation to the reasons given" for it (the judgment in the **Carephone** case at paragraphs [16] and [24]), the Labour Appeal Court expounded the standard of review that is applicable (at paragraph [37] of the judgment):

"It seems to be that one will never be able

to formulate a more specific test other than in one way or another asking the question: is there a rational objective basis to justify the connection made by the administrative decision maker between the

material properly available to him and the conclusion he or she eventually arrived at? In time only judicial precedent will be able to give more specific content to the broad concept of justifiability in the context of the review provisions of the LRA".

19 Applying this principle or standard of review in the present matter, I believe that there was no rational objective basis to justify the decision that the arbitrator (Commissioner Finnemore) could proceed to either uphold or set aside the judicial discretion already exercised by Commissioner Bonthuys.

20 Commissioner Finnemore clearly accepted the fact that such decision was already taken. The CCMA has no competence to set aside decisions taken by its commissioners. Such decision could only be reviewed by the Labour Court in terms of the provisions of section 158(1)(g) of the Act (as these were conciliation proceedings). This section reads:

"Despite section 145, review the performance or purported performance of any function provided for this Act or any act or omission of any person or body in terms of this Act on any grounds that are permissible in law".

21 It was therefore not possible for the CCMA to usurp these (exclusive) functions of the Labour Court. Accordingly, the basis on which Commissioner Finnemore proceeded to decide whether she may or may

not uphold the decision taken by Commissioner Bonthuys was not justifiable.

22 In the event, the arbitration award, that is, the decision to refuse condonation, falls to be set aside on review in terms of section 145(2)(a)(iii) of the Act.

23 The Court is given a wide discretion to make an order as to costs in terms of section 162(1) of the Act in that the Labour Court may make an order for the payment of costs according to the requirements of the law and fairness.

24 The principle that costs are to follow the result is, in my view, a sound one but should be tempered by the equally important considerations of fairness.

25 In the present matter it would appear that the second respondent played an important part in misleading the first respondent into believing that it could oppose the condonation decision at the arbitration proceedings, that is, that the application for condonation which was already granted by Commissioner Bonthuys could be overturned.

26 I therefore consider it fair to make no order as to costs against the first respondent.

27 In the event, I make the following order:

1. The arbitration award in case no. EC1416 dated 27 October 1997 and issued under the auspices of the

second respondent is reviewed and set aside.

2. No order is made as to costs.

28 In the view of what I have said during argument in regard to the absence of an application for condonation in the counter-application for review, I am of the view that the six months' period of delay is, in itself, unreasonable. An application for condonation by the applicant in the counter-application was thus called for. No such application was brought.

29 In the event, the counter-application for review (in terms of which relief was sought to review the decision of Commissioner Bonthuys) is dismissed with costs in that application.

Basson J

Date of hearing: 6 November 1998

Date of judgment: *ex tempore* (edited version)

Appearing on behalf of the applicant: Adv B Pretorius
instructed by Peter Cooper & Co

Appearing on behalf of the respondent: Mr P Kroon of
Chris Bater & Associates

This judgment is available on the internet at website:
<http://www.law.wits.ac.za/labourcrt>