

**IN THE LABOUR COURT OF SOUTH AFRICA**  
**DURBAN**

**HELD AT**

**Case Number: D324/98**

In the matter between

**Polymat Plastics**

Applicant

and

**N Thami NO**

1<sup>st</sup> Respondent

**The Commission for Conciliation, Mediation  
and Arbitration**

2<sup>nd</sup> Respondent

**Steel Mining & Commercial Workers Union**

3<sup>rd</sup> Respondent

**B Zulu**

4<sup>th</sup> Respondent

**JUDGMENT**

**LANDMAN J**

[1] The Commission for Conciliation, Mediation and Arbitration (“the CCMA”) does not have jurisdiction to entertain the referral of a dispute for conciliation and, if conciliation fails, eventual arbitration or for onward referral to the Labour Court, if the dispute is referred out of time. See section 191(1) of the Labour Relations Act 66 of 1995.

[2] However, if the party referring the dispute, in this case the employee, shows good cause at any time, the CCMA may permit the employee to refer the dispute after the 30-day period has elapsed. See section 191(2) of the Act.

[3] Good cause has a well-known meaning. That meaning has been set out in the leading case of **Melane v Santam Insurance Co. Ltd** 1962 (4) SA 531 (A) at 532C-D, where it is said:

In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion.

[4] When this matter came before the commissioner, who is the first respondent in this application, he did not allow a legal representative to appear on behalf of Polymat Plastics (Pty)

Ltd, the employer, to argue the point of jurisdiction. The commissioner seemed to have been of the opinion that he was dealing with conciliation and that consequently legal representation was not permitted.

[5] To my mind it is clear that the commissioner was of the opinion that the point relating to jurisdiction should be dealt with during the course of conciliation. That, of course, is not correct. A commissioner cannot enter into the conciliation of a dispute until he or she has satisfied himself or herself that, subject to review by a higher Court, he or she has the jurisdiction to entertain the dispute and to attempt to conciliate it.

[6] However, that is not the point on which the employer relies at this particular moment. The employer's attack is based upon the merits of the matter.

[1] [7] The commissioner appears to have recorded the facts which were placed before him which were relevant to the question of condonation. They have been transcribed by the employer and I read from that transcription.

The commissioner then compiled the [following] details relating to the late referral of the application;

- That the dismissal took place on 25/2/97
- That on or about 15/3/97 the application [for] conciliation was made;
- That on or about 23/3/97 the Applicant received the letter from the employer to report at work at 06h00 on 21/7/97 (letter given by Mr J Joshua);
- That on the 21/7/97 when the Applicant report (sic) for work Mr Joshua is alleged to have

refused him work because he did not testify against his former colleague with whom they were dismissed on 25/2/97 (see file KN6705 for more details)

- That on or about 22/7/97 the Union filed an application with CCMA for "failure to reinstate the employee". The matter was heard on 4/9/97 where there was a dispute of interpretation on whether the employer had said "come to work" or "come for work." (See KN6705);

- On about 5/9/97 the Union, on behalf of the Applicant lodged a fresh application of "Unfair dismissal" which was set for today (15/10/97), which now proceeds to arbitration.

[8] There was some dispute as to whether or not the commissioner then made a ruling as regards the condonation, but it appears that he did so. The document in which he seems to have done so is before court, dated 10 June 1998 and headed "Reasons for the Granting of Condonation (to be read in conjunction with the Findings)". It reads as follows:

It is not established anywhere in all the submissions and from the chronology of events, that it was a deliberate and wilful act by the applicant to lodge the application long after the expiry (sic) of the 30 days time frame. The applicant cannot be held solely responsible and a cause for late filing of the dispute.

The prospect of finding solution at conciliation hearing are (sic) limited. In view of the lengthy time it has taken to arrive at a decision on the matter, it is prudent for both parties to be given opportunity to state their case at the arbitration as it has been stated that conciliation hearing is not accepted.

Based on the findings and reasons provided, the condonation was granted.

[Signed]

Thami Ntuli

CCMA COMMISSIONER

[9] It is quite clear from a perusal of the evidence which served before the commissioner, and from his reasons, that he paid no attention to the proper considerations to be used in weighing up applications for condonation. In particular, he did not apply his mind to the question of prospects of success, even though there was some reference to the prospects in the referral documents which were before him. His overlooking these considerations amounts to a misdirection. It is a gross irregularity. The question then is what is to be done.

[10] In the first place, it seems to me that his finding that condonation should be granted should be set aside. I have been asked to simply leave it at that, but I do not think that justice will be satisfied by merely doing that. It is necessary to remit the question of condonation to the CCMA to be decided afresh by a commissioner other than the first respondent.

[11] In the circumstances, the decision of the commissioner to grant condonation is hereby reviewed and set aside and remitted to the CCMA to be decided afresh by a commissioner other than the first respondent.

[1]

[12] This is not a case where costs should be ordered and each party shall pay their own costs.

**A A LANDMAN**

Judge of the Labour Court

DATE OF HEARING: 12 November 1998

DATE OF JUDGMENT: 13 November 1998

For the Applicant: Mr Alexander of Deneys Reitz

For the Respondent: Mr Hlatshwayo of Steel Mining Commercial Worers  
Union