IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT PORT ELIZABETH

Case Number: P277/98

In the matter between

Daluxolo Dlala Applicant

and

Commissioner for Conciliation, Mediation

and Arbitration 1st Respondent

Darmag Industries (Pty) Ltd 2nd Respondent

JUDGMENT

VAN NIEKERK AJ

[1] This is an application to review and set aside an award made by Commissioner Mias of the Commission for Conciliation, Mediation and Arbitration ("the CCMA"). The Commissioner found the dismissal of the Applicant to have been procedurally unfair, and in terms of section 194(1) of the Labour Relations Act, 66 of 1995 ("the LRA"), the Second Respondent was ordered to pay the Applicant an amount of R22 461.30, being the wages he would have earned between the date of his dismissal

and the date of the award.

[2] The review was sought in terms of the provisions of section 145 of the LRA. The Applicant alleged that the award was improper and irregular in that the Commissioner failed properly to apply his mind to the matter, first, because he failed to consider whether the dismissal should be confirmed, and second, because he failed to give proper consideration to the primacy of reinstatement as the primary remedy. I understood Mr Tshiki, who appeared for the Applicant, to mean by this that he was not contesting the substantive fairness of the Applicant's dismissal except to the extent that he submitted that dismissal was not the appropriate penalty for the Applicant's uncontested misdemeanors and that some lesser penalty should have been imposed. His primary complaint, however, was that the Commissioner's award ought not to have been limited to one of compensation, and that the Applicant ought to have been reinstated in the Second Respondent's employ.

[3] The application was brought outside the statutory time limit of six weeks prescribed by s145(1), and was accompanied by an application for condonation. There have been conflicting decisions in this Court as to the jurisdiction of this Court to condone the late filing of a review application brought in terms of s145. In **Queenstown Fuel Distributors CC v Labushagne NO & Others** (unreported decision of the Labour Court, Case No. P270/98), Landman J held that the Court did not have authority to grant condonation if the application was not filed within the six week period. By contrast, Mlambo J, in **Mabombo v Shoprite Checkers Holdings (Pty) Ltd & Others** [1998] 12 BLLR 1307 (LC), held that the Labour Court had jurisdiction to grant condonation, provided that good and sufficient cause for the delay was established. I express no opinion on the merits of these competing approaches. I have come to the conclusion on the facts of this case that even were I to adopt the approach of Mlambo J and consider the application for condonation, condonation should not be granted. The reasons for that conclusion are set out hereunder.

[4] The approach commonly applied in this Court to determine the existence or otherwise of good or sufficient grounds for condonation is that established in the case of **Melane v Santam Insurance Co Ltd** 1962 (4)

SA 531 (A). The Court is required to exercise a discretion, in a judicial manner, on a consideration of all the facts and what is fair to both parties. This approach involves a four-pronged enquiry into the degree of lateness; the explanation for the delay; the importance of the matter; and the prospects of success. It is convenient to deal with each of these considerations in turn although, of course, they are not generally individually decisive.

[5] The Commissioner's award is dated 9 April 1998. The application for review was served on the Respondent on 21 September 1998, more than 5 months later.

[6] In explanation of this delay, the Applicant submitted that the fault lies entirely in the negligence of the union officials responsible for the handling of his case. The Applicant states that after the arbitration proceedings, he instructed the union to review the award. The official dealing with the matter, Mr. Mkalipi, failed to keep appointments and, during May 1998, the Applicant lost confidence in the ability of the union to devote the necessary degree of attention to his matter. On 29 May 1998, documentation relevant to the case was handed to his attorney. A consultation was held on 2 June 1998. Thereafter, the Applicant had further discussions with union officials who advised him that the union had its own attorneys and, as the Applicant put it, that he should hold his instructions to his attorneys at bay. On 5 August 1998, the Applicant was advised by the union that the application was out of time and that nothing could be done. At some undisclosed point thereafter he again consulted his attorney, and on 21 September 1998 the application for review was served and filed.

[7] It was submitted that the tardiness of the union officials should be excused on the grounds that they are lay persons, rather than legal professionals. I disagree. Union officials have rights of representation in terms of the LRA. They enjoy right of audience in this Court. When they act on behalf of a union member, there is no reason to apply a standard less exacting than that which applies to other persons to whom the right of representation is extended. There is no explanation before the Court from either the union or its officials as to the failure to assist the Applicant timeously. Had there been some reasonable explanation for the union's

inability to bring the application in time, that explanation should have been placed before the Court.

[8] In any event, the Applicant has failed to explain satisfactorily the delays that cannot be attributed to officials of the union. Nowhere on the papers before me is it alleged that the Applicant was ignorant of the applicable time limit. At the time he first lost faith in the union's ability to assist him and consulted his own attorney on 2 June 1998, an application could have been brought within the required time limit. The Applicant elected not to utilise the services of his attorney at that point, but to invoke the assistance of the union once more. He offers no explanation as to why he regained faith in Mr. Mkalipi's ability to assist him, or what he did between 2 June 1998 and 5 August 1998 to expedite matters. Even after the union had advised him on 5 August 1998 that it did not intend to make an application for review on his behalf, it was more than 6 weeks before the present application was served and filed.

[9] The Applicant's explanation for the delay in bringing this application is not sufficiently adequate to establish good cause for condonation.

[10] An evaluation of the prospects of success requires me to consider the merits of the application. As I have noted, the application is founded on the allegation that the Commissioner did not properly apply his mind to the matter before him when considering whether or not to confirm the dismissal, and in particular, that he gave inadequate consideration to whether the Applicant should be reinstated or not. In terms of s193 of the LRA, reinstatement or re-employment is the preferred remedy for unfair dismissal, unless one or more of the grounds set out in s193 (2) are established. One of those grounds is a finding that a dismissal is unfair only because the employer did not follow a fair procedure.

[11] I fail to appreciate how the Commissioner can be said to have failed to confirm the dismissal. In paragraph 5.9 of the award the Commissioner states "In the premises I therefore find that the termination of employment was procedurally unfair." Paragraph 5.10 of the Commissioner's award concludes that:

The applicant's conduct in absenting himself for work for a week without permission might in itself not have warranted dismissal. However, the situation is seriously compounded by a trail of dishonest conduct both during and after his absence from work. I therefore do not think that in the circumstances the dismissal was unfair.

[12] The use of the negative formulation to express the conclusion to the arbitration award may be discouraged by proponents of the use of plain language, but there is no question that the Commissioner made a clear and unambiguous finding that the dismissal was substantively fair, but procedurally unfair. I fail to appreciate on what basis it can be alleged that in this respect the award is reviewable.

[13] The applicant further suggested that the sanction of dismissal was too harsh in relation to the offence proved, and that in this respect the award was not justifiable in relation to the reasons given for it, and thus reviewable (see **Carephone (Pty) Ltd v Marcus NO & Others** [1998] 11 BLLR 1093 (LAC)).

[14] There is no evidence before me to support such a contention. It is clear from the award that the Commissioner applied his mind to the appropriateness of dismissal as a sanction. He held that the offence of absenteeism was compounded by dishonesty, and that as such the appropriate penalty was dismissal. The Commissioner has set out the reasons for this element of his award, and his conclusion is justifiable in relation to the undisputed factual circumstances on which Mr. Tshiki's contention was based.

[15] The Applicant's principal complaint appears to be the Commissioner's failure to reinstate him into the Second Respondent's employ. As I have noted, s193 requires this Court or a Commissioner, as the case may be, to exercise a discretion in relation to the remedy for an unfair dismissal. The starting point is a requirement that an unfairly dismissed employee be reinstated or re-employed, unless one or more of the four grounds specified in s193(2) are present. One of these is a finding that the dismissal was unfair only for want of a fair procedure. The present case falls into this category. The Commissioner was entitled to limit the remedy to one of compensation. Employees who have been found to have committed acts of misconduct are generally limited to recovering what amounts to a *solatium* for the lack of fair procedure prior to dismissal. I might add that this case is one of those where, in terms of **Johnson & Johnson v Chemical Workers Industrial Union** 1998 (12) BLLR 1209 (LAC), an award of no compensation would have been appropriate.

[16] The Applicant has effectively been awarded the equivalent of almost 10 months pay for a procedural irregularity that amounts to, and I quote from the award, "the manner in which the chairperson of the enquiry threw himself with great zeal into the process of disproving the allegations of the respondent". This conclusion overlooks the approach to procedural fairness adopted by the "Code of Good Practice: Dismissal" in Schedule 8 to the LRA. What the Code requires on the part of an employer is an investigation into allegations of misconduct, not the dispassionate court-like hearing by a notionally independent person that was a requirement of the jurisprudence developed by the industrial court. An investigation, by definition, requires the active participation of the employer to establish the substance of any allegation of misconduct by the employee concerned. Since the Second Respondent has not challenged this aspect of the award, I need say no more than that the award of compensation in these circumstances is a generous one.

[17] No real argument was addressed to me on the importance of the matter; save for the contention in the Applicant's Heads of Argument that the granting of condonation would not prejudice the Respondent. The Respondent merely noted in its Heads that no evidence had been placed

before Court by the Applicant in this regard. From the papers before me, I am unable to discern any importance to be attached to this matter that would incline me toward leniency in considering the Applicant's explanation of the delay.

[18] Taking into account all of the above factors, I am of the view that condonation should not be granted in this case. The delay has been lengthy, with scant explanation, and that insufficient, while the prospects for success in the matter are slim. No argument was put forward to suggest that the matter was of such importance that this consideration should outweigh the others (see **NUM & Others v Western Holdings Gold Mine** (1994) 15 ILJ 610 (LAC)).

[19] Finally, the respondent also raised the issue of non-joinder of the CCMA and the union that represented the Applicant at the CCMA. In the light of my findings on condonation, I do not find it necessary to deal with this issue, save to say that it is clear from Mr. Tshiki's submissions that the reference in the citation to the First Respondent is a reference to the Commissioner himself (presumably in his capacity as such) and that the CCMA as an institution has not been cited as a party in these proceedings. This in itself is fatal to the application. The CCMA has a direct interest in the matter and should have been cited (See **Mabombo v Shoprite Checkers**, **supra**). The improper citation of the Commissioner and the failure to cite the CCMA is presumably the reason why no record of the arbitration proceedings was filed in this application. This application was brought under Rule 7(A). That Rule requires the Applicant to ensure that a record is obtained and lodged. This he failed to do, but Mr. Tshiki was content to argue the matter on the basis of the affidavits filed by the parties and the award itself. Mr. Jessup, who appeared for the Second Respondent, was equally amenable to this arrangement. In view of the limited nature of the attack on the arbitrator's award, and in the interests of bringing this matter to finality, I was satisfied that the matter should continue on that basis.

[20] In the circumstances, I make the following order:

20.1 The application for condonation is dismissed.

20.2 The Applicant is to pay the Respondent's costs.

VAN NIEKERK AJ

Judge of the Labour Court

OF HEARING: 11 February 1999

DATE OF JUDGMENT: 15 February 1999

e Applicant: Mr. Tshiki of Gwele Ndengezi Tshiki & Associates

For the Respondent: Mr. Jessup of Linde Dorrington & Kirchmann